ERIE COUNTY
LEGAL JOURNAL

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

— — — — — — — —

Reports of Cases Decided in the Several Courts of
Erie County for the Year
2005

— — — — — — — —

LXXXVIII

— — — — — — — —

ERIE, PA

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

COURTS OF COMMON PLEAS

HONORABLE ELIZABETH K. KELLY ---------- President Judge
HONORABLE JESS S. JIULIANTE ---------- Senior Judge
HONORABLE FRED P. ANTHONY ---------- Judge
HONORABLE SHAD CONNELLY ---------- Judge
HONORABLE STEPHANIE DOMITROVICH ---------- Judge
HONORABLE JOHN A. BOZZA ---------- Judge
HONORABLE WILLIAM R. CUNNINGHAM ---------- Judge
HONORABLE ERNEST J. DISANTIS, JR. ---------- Judge
HONORABLE MICHAEL E. DUNLAVEY ---------- Judge
HONORABLE JOHN J. TRUCILLA ---------- Judge

Volume 88

TABLE OF CASES

Volume 88

SUBJECT MATTER INDEX

JOYCE SHIPLEY, an incapacitated person, by and through her guardian,
TAMMY MINGOY, Plaintiff
v.
PLEASANT RIDGE MANOR; COMMONWEALTH of PENNSYLVANIA; COUNTY of ERIE; SERVICEMASTER DIVERSIFIED HEALTH SERVICES, L.P. t/d/b/a and a/k/a DIVERSIFIED HEALTH SERVICES; CT CORPORATION; DIVERSIFIED HEALTH SERVICES CORPORATION; DIVERSIFIED HEALTH SERVICES of MARYLAND, INC.; SERVICEMASTER DIVERSIFIED HEALTH SERVICES, L.P.; DHS/DIVERSIFIED HEALTH SERVICES; BEP SERVICES, L.P. a/k/a BEP, LLC; ARAMARK SERVICE MASTER FACILITY SERVICES a/k/a SERVICEMASTER INDUSTRIES; LTCS, L.P.; FOREST HILL HOLDINGS, LLC a/k/a FOREST HILL HOLDINGS, L.P.; FOREST HILL INVESTORS, LLC; PREMIER HEALTHCARE RESOURCES, INC.; and JEFFREY PENCILLE, Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

The well settled standard allows summary judgment to be entered only where it is clear that the moving party has met its burden of proving that no genuine issues of material fact exist and that judgment is proper as a matter of law. All doubts are to be resolved against the moving party.

The nonmoving party may not simply rest upon pleadings but must respond to a motion for summary judgment by producing evidence of the facts essential to its cause of action.

POLITICAL SUBDIVISIONS / GOVERNMENTAL IMMUNITY / SUMMARY JUDGMENT

Where plaintiff concedes that governmental bodies are entitled to immunity pursuant to the Political Subdivision Tort Claims Act, summary judgment with respect to claims for general negligence and violation of applicable Department of Health regulations is granted. The Political Subdivision Tort Claims Act does not bar claims for breach of contract and summary judgment on the basis of the Political Subdivision Tort Claims Act with respect to contract claims is denied.

POLITICAL SUBDIVISIONS / CONTRACTS / GIST OF THE ACTION

Tort actions lie for breaches of duty imposed by law while contract actions lie for breaches of duty imposed by agreement between parties. The gist of the action doctrine is intended to maintain this distinction.

Where a claim is asserted against the operators of a nursing home for damages arising from a sexual assault upon a patient, the gist of the action lies in tort and not in contract. Summary judgment will therefore be granted on the claim for breach of contract.

POLITICAL SUBDIVISIONS / GOVERNMENTAL IMMUNITY / FEDERAL REGULATIONS

A claim of negligence per se remains a state law claim even where the plaintiff alleges that the negligence per se is premised upon violation of

federal regulations. Governmental immunity attaches to a claim asserting negligence per se based upon violation of federal regulations and summary judgment will be granted.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL ACTION No. 12858 - 2002

Appearances: Dallas W. Hartman, Esq. for the Plaintiff
Mark E. Mioduszewski, Esq., for Defendant, Pleasant Ridge Manor
Gene P. Placidi, Esq. for Defendant, Jeffrey Pencille
Alan S. Baum, Esq. for Defendants, ServiceMaster Diversified Health Services; Diversified Health Services Corp; Diversified Health Services of Maryland Inc; ServiceMaster Diversified Health Services LP; DHS-Diversified Health Services; Aramark ServiceMaster Facility Services; and LTCS Limited Partnership

OPINION

Anthony, J., November 15, 2004

This matter comes before the Court on a Motion for Summary Judgment filed on behalf of Defendants Pleasant Ridge Manor and the County of Erie. After a review of the record and considering the arguments of counsel, the Court will grant the motion. The factual and procedural history is as follows.

Plaintiff Joyce Shipley was a resident at Defendant Pleasant Ridge Manor (hereinafter "Pleasant Ridge"), a county-owned nursing home in Erie, Pennsylvania. While she was there, Plaintiff was allegedly sexually assaulted by Defendant Jeffrey Pencille, an employee at Pleasant Ridge. Plaintiff filed a suit in the instant action alleging, inter alia, that Defendants Pleasant Ridge and the County of Erie (hereinafter "County") were liable in tort for violations of Sections 315 and 317 of the Restatement (Second) of Torts, for breach of contract, for negligence, and for negligence per se.

Defendants Pleasant Ridge and the County filed the instant motion for summary judgment arguing that they were immune from suit pursuant to the Political Subdivision Tort Claims Act. Plaintiff filed a response wherein she conceded that Pleasant Ridge and the County are local agencies that are entitled to immunity under the Tort Claims Act. However, she contends that this immunity does not extend to shield Pleasant Ridge and the County from liability for the alleged breach of contract or from the claim that they are liable for negligence per se for violation of a federal statute. Argument was held in chambers at which time all interested parties were represented. Additionally, both Pleasant Ridge and the County and Plaintiff provided the Court with additional information.

The standard for summary judgment is well-settled. Summary judgment

may be granted only in those cases in which the record clearly shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Ertel v. Patriot-News*, 544 Pa. 93, 674 A.2d 1038 (1996). The moving party has the burden of proving that no genuine issues of material fact exist. In determining whether to grant summary judgment, the court must view the record in the light most favorable to the non- moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. *See id.* However, the non-moving party may not simply 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. Only when the facts are so clear that reasonable minds cannot differ, may a court properly enter summary judgment.

In light of Plaintiff's concession that Pleasant Ridge and the County are entitled to immunity pursuant to the Political Subdivision Tort Claims Act, Defendants' motion for summary judgment on the claims for relief for violations of Sections 315 and 317 of the Restatement (Second) of Torts, the claim for general negligence, and for violation of Pennsylvania Department of Health regulations is granted.

Plaintiff first contends that the Political Subdivision Tort Claims Act does not bar her claim for breach of contract. The Court agrees. The Tort Claims Act, 42 Pa.C.S.A. § 8541 et seq., operates to shield government entities from liability for tort and negligence claims except in certain limited exceptions. The Act speaks in terms of negligent acts, and the limitations on damages specifically refers to damages in tort and negligence claims. *See Gordon v. Redevelopment Authority of the County of Washington*, 13 Pa. D. & C. 4th 300 (Washington Cty. 1992). Nowhere does the Act reference claims for breach of contract. *See id.* Thus, the Court finds that the Political Subdivision Tort Claims Act does not provide Defendants Pleasant Ridge and the County with immunity from Plaintiff's claim for breach of contract. Accordingly, Defendants' motion for summary judgment on the breach of contract claim based upon the operation of the Tort Claims Act is denied.

Defendants also contend, however, that Plaintiff's claim for breach of contract is actually a negligence action and that the gist of the action doctrine compels the dismissal of the breach of contract claim. The Court agrees.

The gist of the action doctrine is designed to maintain the conceptual distinction between breach of contract claims and tort claims. *See Bash v. Bell Tel. Co.*, 601 A.2d 825 (Pa. Super. 1992).

> As a practical matter, the doctrine precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims. The *Bash* Court explained the difference between contract claims and tort claims as follows:

> although they derive from a common origin, distinct differences between civil actions for tort and contract breach have developed at common law. Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals. . . . To permit a promisee to sue his promisor in tort for breaches of contract inter se would erode the usual rules of contractual recovery and inject confusion into our well-settled forms of actions.

Etoll, Inc. v. Elias/Savion Adver., 811 A.2d 10 (Pa. Super. 2002).

> To be construed as in tort, however, the wrong ascribed to defendant must be the gist of the action, the contract being collateral. The important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus. In other words, a claim should be limited to a contract claim when the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts.

Id. (citations omitted).

In the instant case, Plaintiff and Pleasant Ridge entered into a Basic Services Agreement when Plaintiff was admitted to Pleasant Ridge. *See* Def.s' Memo. in Reply to Pl.'s Br. in Opp'n to Summ. J., Ex. A. Plaintiff contends that Defendants breached the following portions of the Agreement:

> It is the purpose of Pleasant Ridge Manor, its Administration and staff, ... to provide for the health, safety and general welfare of the resident being admitted for care, pursuant to the Provisions of the Commonwealth's Department of Health, Department of Public Welfare, Federal, State and Local laws and regulations currently in effect or as amended. ...
>
> The following services are included in the Daily Service Rate.
>
> 1. Lodging in a clean, healthful and sheltered environment.
>
> 2. A suitable room...that provides security...
>
> 3. Nursing care on a continuous twenty-four (24) hour basis, under the direction of a licensed physician.

Id.

Here, Defendants contend that the actions giving rise to the instant lawsuit are really a crime and/or negligent acts, not acts which can be construed as a breach of contract. The Court agrees that this is, really a negligence action; the Court cannot conceive of any factual situation which would be more appropriately characterized as a tort.

Plaintiff argues that the case of *Zaborowski v. Hospitality Care Center*

of Hermitage, Inc., 60 Pa. D. & C. 4th 474 (Mercer Cty. 2002), requires that her breach of contract claim be presented to a jury. In *Zaborowski*, the plaintiff was admitted to a skilled nursing facility for care. The plaintiff signed an admissions agreement wherein the nursing facility agreed to provide her "with safe and reasonable care in a safe environment, as well as services which would help or attain or maintain the highest practicable, physical, mental and psychological well being, in accordance with a written care plan." *Id.* Despite this promise, the nursing facility failed to provide the plaintiff with a quality of care. "As a result of the inadequate care provided by Hospitality, plaintiff decedent suffered various conditions and injuries, including but not limited to bleeding around the areas of the G-tube and lungs, significant weight loss, choking, dehydration, seizures, labored respiration, stage I pressure sores and death." *Id.*

The plaintiff filed suit against the nursing facility claiming, in part, that it had breached its agreement to provide her with safe and reasonable care. The nursing facility filed preliminary objections contending that the plaintiff's claim sounded in tort rather than in contract. The *Zaborowski* court noted that Pennsylvania courts have yet to issue an opinion as to whether a nursing home can be liable to a resident for breach of contract. *See id.* The court also pointed out that other jurisdictions have permitted nursing home residents to maintain such actions. *See id.* The *Zaborowski* court then denied the preliminary objections stating that the plaintiff had pleaded the existence of a contract that required the nursing facility to provide "safe and reasonable care in a safe environment" and "services which would... maintain the highest practicable, physical, mental and psychological well being." *Id.*

This Court finds *Zaborowski* to be distinguishable from the instant case. First, the language of the contract at issue here is rather different than the language that was before the *Zaborowski* court; and second, the acts which gave rise to the lawsuits are also decidedly different. In *Zaborowski*, the contract provided that the plaintiff was to receive safe and reasonable care that would maintain her physical well being. However, the plaintiff in *Zaborowski* did not receive this type of care. Rather, she received inadequate medical care from the nursing facility's staff and that substandard care led to various medical conditions and injuries.

Here, Defendant Pleasant Ridge was to provide for Plaintiff's health, safety and general welfare by providing, in part:

1. Lodging in a clean, healthful and sheltered environment.

2. A suitable room with appropriate furniture and closet space that provides security and privacy for clothing and personal belongings.

5. Nursing care on a continuous twenty-four (24) hour basis, under the direction of a licensed physician.

Def.s' Memo. in Reply to Pl.'s Br. in Opp'n to Summ. J., Ex. A. Plaintiff here alleges that she was the victim of a sexual assault at the hands of an employee of Defendant Pleasant Ridge. This is a very different situation from *Zaborowski* where the plaintiff contracted to receive medical care and services and instead suffered because she received inadequate care. In that case, it was arguable that the plaintiff had not received the services for which she had contracted.

Here, however, Plaintiff is not arguing that she contracted for medical services and did not receive them. She argues, essentially, that Pleasant Ridge promised to provide her with a safe and secure environment and that Pleasant Ridge breached that portion of the agreement when it permitted its employee to assault her. The alleged assault clearly gives rise to a tort claim and is the true gist of the action. The idea that Pleasant Ridge had a duty to protect its residents from assaults by members of the staff arises out of a social duty, not a contractual one. The alleged breach of the Basic Service Agreement is, at best, collateral.

Thus, the Court finds that Plaintiff's action arises in tort and not in contract. Accordingly, Defendants' motion for summary judgment on the breach of contract claim is granted.

Finally, Defendants contend that the Political Subdivision Tort Claims Act grants them immunity from Plaintiff's claim for negligence per se for alleged violations of federal law. The Court agrees. Plaintiff bases her claim for negligence per se upon alleged violations of the Nursing Home Reform Act and associated Federal Regulations, 42 C.F.R. §§ 483.1-483.75 et seq.

Plaintiff contends that because the supremacy clause of the United States Constitution prevents a state from immunizing its entities from violations of federal law the Tort Claims Act does not act as a bar to claim for negligence per se. *See Jackson v. East Hempfield Township Police Dept*., 37 Pa. D. & C. 4th 360 (Lancaster Cty. 1997). The Tort Claims Act protects officials from state law claims; it affords no protection from liability on federal claims. *See Phillips v. Heydt,* 197 F. Supp. 2d 207 (D. Pa. 2002).

Here, Plaintiff is seeking to recover on a state law claim of negligence per se; she has not presented a federal claim. The fact that she alleges Defendants have violated a federal statute does not turn her claim into a federal one. "[A] complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.'" *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* 478 U.S. 804; 106 S. Ct. 3229; 92 L. Ed. 2d 650 (1986). "The concept of negligence per se establishes both duty and the required breach of duty where an individual violates an applicable statute, ordinance or regulation

designed to prevent a public harm." *Cabiroy v. Scipione*, 767 A.2d 1078 (Pa. Super. 2001). "The doctrine of negligence per se does no more than satisfy a plaintiff's burden of establishing a defendant's negligence." *Id.* "The doctrine of per se liability does not create an independent basis of tort liability but rather establishes, by reference to a statutory scheme, the standard of care appropriate to the underlying tort." *Id.*

Thus, the Court finds that Plaintiff's claim for negligence per se is a state law claim despite the fact that it is premised upon an alleged violation of a federal statute. Because it is a state law claim, Defendants are entitled to immunity pursuant to the Tort Claims Act. Accordingly, Defendants' motion for summary judgment on the claim for negligence per se is granted.

For all the foregoing reasons, Defendants' motion for summary judgment is granted.

ORDER

AND NOW, to-wit, this 15 day of November 2004, it is hereby ORDERED and DECREED that the Motion for Summary Judgment filed on behalf of Defendants Pleasant Ridge Manor and the County of Erie is GRANTED.

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

JAMES FLYNN, Plaintiff
v.
DANIELLE BIMBER, Defendant

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY DIVISION NO. 15061-2003

DANIELLE BIMBER, Plaintiff
v.
JAMES FLYNN, Defendants

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY DIVISION PACSES NO.: 26010604 DOCKET NO.: NS200302848

EVIDENCE / OPINIONS / EXPERT

Uncontradicted expert testimony may be accepted or denied by the court as long as the court's conclusions are supported by the record.

CONTRACTS

A contract pertaining to the custody of a minor child is subject to being set aside in the best interest of the child.

CIVIL PROCEDURE / JURISDICTION / CONSTITUTIONAL ISSUES

Where a sister state relinquishes jurisdiction, Pennsylvania courts are bound to address jurisdictional challenges before addressing other issues.

"First in time" rule requires that a court refrain from exercising its jurisdiction in custody matters if another state already has jurisdiction.

The Parental Kidnapping Prevention Act requires that full faith and credit be given to the child custody determinations of another state.

The Parental Kidnapping Prevention Act provides that a child's home state is the state where, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months.

Failure to join an indispensable party divests the court of jurisdiction.

Legal parents have automatic standing in custody matters, as do those acting *in loco parentis.*

CIVIL PROCEDURE

A court of common pleas may order the change of the name of any person who resides in the county.

FAMILY LAW / ADOPTION

The purpose of a home study is to approve a family for adoption or foster care.

FAMILY LAW / CHILD CUSTODY

Jurisdiction in a custody matter is determined when the best interest of the child is involved, at least one parent or litigant has connections to the

state, and substantial evidence about the child's present or future care, protection, training and personal relationships is present.

The primary focus of child custody jurisdiction is the location and the welfare of the child.

The requirements of child custody in Pennsylvania require that (1)(a) the Commonwealth is the home state of the child at the time of commencement of the proceedings or has been the home state within six months of the time of commencement of the proceedings and (b) the child is removed by one claiming custody and (2), it is in the best interest of the child that the Commonwealth assume jurisdiction because (a) the child and his parents have significant contact with the Commonwealth and (b) evidence is available in the Commonwealth concerning the present or future care, protection, training, and personal relationships of the child. 23 Pa. C.S. § 5344.

A party opposing involuntary termination of parental rights must show that he or she tried to create or maintain a relationship with the child.

The "best interest" standard requires that the court consider all factors that legitimately have an impact upon the child's physical, intellectual, moral and spiritual well-being.

Biological parenthood is not the only source of custody rights.

A third party seeking custody does not have to prove that the biological parent is unfit.

The role of the primary caretaker is a substantial factor that the trial court must weigh when adjudicating a custody matter where the child is of tender years.

The policy of the Commonwealth is to raise siblings together.

Unless the income of one party is so inadequate as to raise a child in a decent manner, the matter of relative incomes is irrelevant in custody matters.

Testimony from those having frequent contact with the child may be considered by the court when determining the best interest of the child.

A court is required to consider which parent is more likely to encourage, permit and allow the other party frequent, continuing contact and access to the child.

CHILD CUSTODY / STANDING

Court's determination that surrogate mother was legal mother of child conferred standing on her to pursue termination of another parent's rights.

Appearances: Melissa H. Shirey, Esq., Attorney for Plaintiff
Joseph P. Martone, Esq., Attorney for Defendant

OPINION

Connelly, J., January 7, 2005

Procedural History

The parties are the parents of triplets, born November 19, 2003 in Erie, Pennsylvania. Plaintiff filed for primary custody of the triplets on December 11, 2003 and Defendant counter filed for primary custody on December 16, 2003. Defendant filed for child support on February 2, 2004, and a support conference was held on May 4, 2004. A custody conciliation conference was held on May 6, 2004. Both parties appealed the support and custody determinations.

A combined support and custody *de novo* trial was held before this Court on July 9 and July 29, 2004. Plaintiff is requesting that sole custody of the children be awarded to him. Defendant is seeking shared custody, but is also requesting reduced partial custody time with the Plaintiff because of the children's tender age.

This Court has previously determined that Defendant has standing to pursue custody as legal mother of the triplets under the doctrine of *in loco parentis*, in an Opinion and Order dated April 2, 2004. That Opinion and Order (hereinafter April 2nd Opinion) are incorporated in this Decision as if set forth in full.[1]

Upon stipulation of the parties, the records of all prior proceedings, including the hearings on standing, shall be incorporated with the records for these custody proceedings. The deposition of Amy Hokaj has also been submitted by stipulation of the parties. The Court will enter a support order concurrent with its custody decision per agreement of the parties for the convenience of appellate review.

Findings of Fact

Plaintiff, James Flynn, a resident of Kirtland, Ohio, is the biological father of the triplets. Defendant, Danielle Bimber, a resident of Corry, Pennsylvania, is a gestational surrogate who carried the triplet embryos formed by sperm donated by Flynn and eggs donated by Jennifer Rice, a resident of Texas.

Since their discharge from the hospital, the triplets have been primarily raised by Defendant, a stay-at-home mother with three other children. At this time, the triplets appear to be happy, healthy, and growing normally despite their premature birth.

Defendant and her husband, Douglas Bimber, own a three-bedroom ranch home in Corry. At the time of trial, they were finishing an addition to the home in order to accommodate the triplets. Douglas Bimber is self-employed as a home appliance repairman and supports the family, making approximately $9,600 a year.

Since the children's birth, Defendant has been responsible for most of the important decisions made in their lives, including healthcare. They are currently seen by Dr. Kurt Lund, M.D., the same doctor who sees Defendant's other three children. Dr. Lund is a general family practitioner

[1] The April 2nd Opinion is also available at 66 Pa. D. & C. 4th 1 (2004).

with 35-40% of his practice in pediatrics. (Custody Trial Transcript, Day 1, pp. 180-181). He also has experience dealing with multiple births, including quadruplets and several sets of twins in Corry. (Custody Trial Transcript, Day 1, pp. 191-192). Dr. Lund testified that the Defendant was "a very dedicated mother" who followed through with the medical treatments he suggested. (Custody Trial Transcript, Day 1, p. 181, line 22).

Defendant testified that she has obtained medical insurance cards and other types of assistance to help care for the children. Plaintiff offered no financial assistance to Defendant for the triplets' care from the time they were born until Defendant filed for child support, almost three months later. Plaintiff also contributed no diapers, formula, or other necessities toward the triplets' care. As previously noted by the Court, Plaintiff's claim that he could not find the children despite mailing checks to Defendant's home address is incredible. (April 2nd Opinion, p. 24).

Plaintiff is employed as a math professor and department chair at Cleveland State University. He earns $106,000 a year as professor and $136,000 a year as both department chair and professor. Despite having sufficient financial resources to provide for the children, Plaintiff did not voluntarily contribute to their financial support until a wage attachment was issued against him.

Defendant's financial history is not outstanding. It appears from her testimony that she may have been naive and careless in her financial affairs. (Custody Trial Transcript, Day 1, pp. 274-275, and Day 2, pp. 32-35). She incurred much debt in her first marriage, which carried over to her marriage to Douglas Bimber. Defendant filed for bankruptcy on July 2, 2003. There was some question whether Defendant reported the money she received from the surrogacy contract to the bankruptcy court. (Custody Trial Transcript, Day 2, p. 28). As a result of the custody trial, Defendant's bankruptcy case has been reopened for further investigation. (Custody Trial Transcript, Day 2, pp. 29-32). However, those proceedings are not under the purview of this Court.

Before becoming a full-time stay at home mother. Defendant held a few part-time, minimum wage jobs. Currently, Defendant is responsible for the daily care of her three other children, Ryan, Brendan, and Julia, as well as the triplets. Defendant testified that they regard the triplets as siblings.

Throughout the custody trial, Plaintiff alternated between complaining about the amount of money he has spent in legal costs and boasting about the affluent neighborhood and schools of his alleged home in Kirtland, Ohio.[2]

Plaintiff complained that he "spent a tremendous amount of money on

[2] It remains unclear to the Court where Plaintiff truly resides. He testified that he lived with his paramour, Eileen Donich, in her home located in Kirtland, Ohio. However, Plaintiff's tax returns and legal pleadings filed in Ohio list his address as an apartment in Copley, Ohio. (See Plaintiff's Brief, pp. 4-5 and Brief Exhibit B).

this", that the triplets' hospital bill was "exorbitant", and that he took a job he did not want for an extra $30,000 to "pay for this thing." (Custody Trial Transcript, Day 1, pp. 58-60). Plaintiff further testified that that no marriage date has been set by him and his fiancee due to legal expenses, and that they could not give up the death benefits pension received by his fiancee because "we really need the money." (Custody Trial Transcript, Day 1, p.14).[3]

Plaintiff boasted that Kirtland, Ohio was an affluent suburb of Cleveland close to good schools, hospitals, and cultural events such as theater and opera. He described Defendant's home in Corry, Pennsylvania as "economically depressed" and "poor," observations based on his few visits there.

Plaintiff was also very concerned with where the children should attend school, despite the fact that they are only a year old. While Plaintiff testified that the Kirtland public school was superior to the Corry public school, he claimed that he could not "afford" to send the triplets to private school as an alternative means of education in Pennsylvania. (Custody Trial Transcript, Day 1, pp. 109-110). Defendant testified that she believes it is too early to decide where the triplets should attend school. However, two of her children attend Corry's public school and receive good grades. (Custody Trial Transcript, Day 2, pp. 4-5).

As chair of his academic department, Plaintiff continues to work during the summer months in that capacity. Contrary to Plaintiff's stated intentions at trial and previous hearings, he has not adjusted his work schedule to become actively involved in the lives of the children. During his twelve (12) day vacation in July with the children, Plaintiff testified that he did not take even one (1) full day off. Rather, he testified that he "got home a little early" every day (Custody Trial Transcript, Day 1, pp. 65-75).

Defendant testified that she repeatedly attempts to communicate with Plaintiff regarding the welfare of the children, but Plaintiff has refused to communicate more than the bare minimum. Plaintiff rarely speaks to her in person and even e-mail communication is limited to no more than a few sentences. (Custody Trial Transcript, Day 1, pp. 225-226; Day 2, pp. 17-18 and Defendant's Exhibit 11). Due to the lack of information about the children from the Plaintiff, Defendant requested that a logbook accompany the children. (Custody Trial Transcript, Day 1, p. 225).

Further, Plaintiff is often unavailable when Defendant calls to speak with him about the children. (Custody Trial Transcript, Day 1, p. 230). His paramour often speaks for him, inserting herself into conversations with Defendant and asking Defendant to address concerns about the children only to her. It is clear from trial testimony that the paramour alone spends most of Plaintiff's custody time with the triplets.

[3] Eileen Donich's husband died in December 1973, nearly 21 years ago. She has received and continues to receive a yearly death benefit.

Eileen Donich (hereinafter Dr. Donich) is Plaintiff's paramour or fiancee, but not his wife. For these proceedings, she has no legal standing. (April 2nd Opinion, pp. 15, 18). Throughout Defendant's pregnancy, it was Dr. Donich, not Plaintiff, who communicated with Defendant. This pattern has continued until the present.

During her testimony, Dr. Donich made frequent references to the triplets as "my babies." She indicated that she intends to make "superstars" of the triplets while in her care. (Custody Trial Transcript, Day 1, p. 144).

While Plaintiff is at work, Dr. Donich testified that she takes care of the triplets and sometimes her four grandchildren as well. (Custody Trial Transcript, Day 1. p. 143, 151). When Plaintiff is home, they frequently take the children out to lunch or dinner "even if they don't eat". (Custody Trial Transcript, Day 1, p. 150). They also take them "to the store" and "to the track" to "socialize" them. (Custody Trial Transcript, Day 1, pp.149-151).

Dr. Donich is the sole owner of the house in Kirtland, Ohio. While Plaintiff contends that he resides with Dr. Donich in her home, trial testimony and exhibits revealed that Plaintiff also rents an apartment. (Custody Trial Transcript, Day 1, pp. 14, 31-33. Plaintiff's Brief Exhibit B). The Kirtland house is 6,000 square feet with four (4) bedrooms and bathrooms, a finished basement, and large front and back yards. (Plaintiff's Exhibit A). It is within walking distance of Dr. Donich's daughter's home, another large house where Dr. Donich often baby-sits her grandchildren (Plaintiff's Exhibit F).

Dawn Donich, Eileen Donich's daughter, testified that she has no reservations about her mother's ability to care for her four children as well as the triplets. Dawn also observed Plaintiff's interactions with the triplets and testified that they appeared to be normal and loving. (Custody Trial Transcript, Day 1, pp. 123-124). Dawn's children attend public school in Kirtland, which she is greatly pleased with.

Amy Hokaj, a licensed independent social worker in Ohio, testified by deposition as an expert witness on behalf of the Plaintiff. Ms. Hokaj is also qualified as an "adoption assessor" in Ohio and is employed by Adoption Circle, a private agency. (Deposition of Amy Hokaj, pp. 9-10). In that capacity, she conducts post-placement visits and home studies with potential adoptive parents.

Ms. Hokaj testified that she has done over a hundred home studies. She described the home study process as follows:

> "A home study is a process that a family goes through who is going to either foster or adopt... It involves collecting information, paperwork, from the families, as well as interviewing all family members who reside in the home, gathering that data and then putting it together..."

(Deposition of Amy Hokaj, p. 12, lines 14-21).

The purpose of a home study is "to approve a family for adoption or foster care". *Id.* at line 24. Families submit an application and fill out an information packet sent by the agency. (Deposition of Amy Hokaj, pp. 13-14). The agency then conducts the home study.

Ms. Hokaj testified that her services were initially requested "for court purposes" by Eileen Donich. (Deposition of Amy Hokaj, p. 18, lines 8-14, and p. 37, lines 5-7). She conducted two home studies, each approximately one and one-half (1 1/2) hours long. (Deposition of Amy Hokaj, p. 46). Both were arranged with the Plaintiff and Dr. Donich ahead of time. The triplets were present for both visits.

The first home study was on January 17, 2004, with Dr. Donich and the second was May 22, 2004, with Plaintiff. The second home study was done at the request of Plaintiff's attorney. (Deposition of Amy Hokaj, pp. 17-18, lines 25, 1-7 and p. 79, lines 19-25). Reports including family history, medical history, tax returns, criminal background checks, home fire and safety audits, and personal references were prepared by Ms. Hokaj after the home studies. (Deposition of Amy Hokaj, p. 13-17).

During the January visit, Ms. Hokaj noted that there were no cribs for the children (Deposition of Amy Hokaj, p. 22). She did observe other baby items such as bottles, diapers, spit-up or burp rags, and toys, mostly for older children. (Deposition of Amy Hokaj, pp. 48-49). At that time, the triplets were approximately two (2) months old.

At the May visit, there were cribs and other accessories for the children. Ms. Hokaj noted that the triplets' development seemed "on target" and that they appeared to be "happy babies" with minor medical problems. (Deposition Exhibit C). The triplets were approximately six months old then.

Ms. Hokaj testified that Plaintiff and Dr. Donich shared some information with her about the triplets' custody situation. (Deposition of Amy Hokaj, p. 35, lines 17-19). She testified that she was aware that legal proceedings were pending in Pennsylvania. (Deposition of Amy Hokaj, p. 43). However, she admitted that she was not made aware of the involvement of the Defendant, Danielle Bimber, by either the Plaintiff or Dr. Donich in January. (Deposition of Amy Hokaj, p. 39). Dr. Donich referred to Defendant only as "the surrogate". (Deposition of Amy Hokaj, p. 64, lines 20-24). The Plaintiff indicated that he was angry about the custody situation. (Deposition of Amy Hokaj, p. 80). To date, Ms. Hokaj has never contacted Defendant regarding the triplets.

Ms. Hokaj did not learn the legal names of the children until May. Even when pressed, the Plaintiff and Dr. Donich refused to give her the legal names. (Deposition of Amy Hokaj, p. 42). Ms. Hokaj was also unaware that Hamot Medical Center had called the Erie County (Pennsylvania) Office of Children and Youth about the Plaintiff and Dr. Donich in late

November 2003. (Deposition of Amy Hokaj, p. 73, lines 6-10).[4] As a way of explanation, she testified, "I only know what they told me". (Deposition of Amy Hokaj, p. 45. line 14).

Adoption Circle did not conduct any independent examinations or audits of the information provided by the Plaintiff and Dr. Donich. Copies of the children's birth certificates were not obtained by the agency either.

Ms. Hokaj testified that she only checked the six (6) references supplied by the Plaintiff and Dr. Donich, most of whom were family members. Each reference was one (1) page long with three (3) questions. Most of the answers were no more than a few sentences long. Plaintiff and Dr. Donich both received references from Dr. Donich's children, Dawn and Dane, and their respective spouses, Jim and Lisa. Except for one, none of the references had known the Plaintiff or Dr. Donich for more than eight (8) years.

Ms. Hokaj found the Kirtland home to be adequate for raising the children. In her report, she wrote that there was "no contraindication" for placing the children with Plaintiff and Dr. Donich. (Deposition Exhibit C). An Adoption Consent and Approval form, issued by Adoption Circle, was signed on July 6, 2004.

Under cross-examination, Ms. Hokaj admitted that the home studies she conducted did not compare the parenting abilities of the Plaintiff and Defendant. She also admitted that a home study is typically done before children are placed in the adoptive parents' home. (Deposition of Amy Hokaj, p. 37, lines 22-25). Ms. Hokaj testified that it was her understanding that an adoption cannot take place until the rights of the legal parents are disposed of first. (Deposition of Amy Hokaj, p. 46, lines 1-8). However, the triplets were already in Dr. Donich's home when Adoption Circle was called to do a home study. Further, the custody situation in Pennsylvania had not been resolved.

Several inconsistencies also arose between the testimony of the Plaintiff and Dr. Donich and information contained in Ms. Hokaj's reports.

Dr. Donich stated that she was being treated for osteoporosis on the Medical Statement of Foster Care/Adoptive Applicant section of Ms. Hokaj's report. At trial, she denied that she had osteoporosis. (Custody Trial Transcript, Day 1, p.162, lines 9-13).

Plaintiff told Ms. Hokaj that he was "an only child" but it was revealed that he has a sister eleven (11) years younger than he. (Custody Trial Transcript at pp.11 and 62-63, Deposition of Amy Hokaj, pp. 80-81). Plaintiff also claimed that he would use vacation time and/or reduce his teaching workload to spend time with the triplets. It was clear from his

[4] Ms. Hokaj was aware of a visit to Eileen's home by the Lake County (Ohio) Office of Children and Youth in May 2004, but she did not recall who told her about that visit.

trial testimony that he has done neither. Plaintiff testified at trial and told Ms. Hokaj that he lived with Dr. Donich at the Kirtland home, However, both of his 2002 and 2003 tax returns listed his apartment address as his residence.

Both parties also disagree as to what names the triplets should have and be addressed by. Six days passed after the triplets' birth without contact from Plaintiff before Defendant decided to name them Matthew, Mark, and Micah Bimber. Those are the names listed on their birth certificates and are their legal names. Plaintiff and Dr. Donich chose the names Easton, Lance, and Shane Flynn. They refer to the children by these names only.

Plaintiff and those associated with him have refused to address the children by their legal names. Dr. Donich testified that she had not made up her mind whether to use the triplets' legal names or the names chosen by her and Plaintiff. (Custody Trial Transcript, Day 1, p. 161). Dawn Donich even admitted that, "we don't use those names". (Custody Trial Transcript, Day 1, p. 134).

At trial, Plaintiff himself did not use any names, his or the ones chosen by Defendant, when describing his interactions with the triplets. (Custody Trial Transcript, Day 1, pp. 48-49). He often referred to one child or another as "that one", "this one", "one of them", and at one point, "the biggest". (Custody Trial Transcript, Day 1, pp. 48- 49, 253; Day 2, pp. 6-7). Compared to the father, Defendant/mother described each triplet by name and personality, as well as their eating and sleeping habits. (Custody Trial Transcript, Day 1, pp. 223-225).

Conclusions of Law

I. Jurisdictional Issues

Since legal action was brought in two states, Pennsylvania, where Defendant and the triplets reside, and Ohio, where Plaintiff resides, and the egg donor, Jennifer Rice (hereinafter Rice), resides in Texas, the Court must address the issue of jurisdiction before all other issues.

On April 22, 2004, Rice filed a Verified Complaint to Establish Parent/Child Relationship (hereinafter Complaint) in Summit County, Ohio, against Plaintiff, Defendant, and Defendant's husband, Douglas Bimber. Domestic Relations Court Judge John P. Quinn heard legal arguments on July 6, 2004 and issued a final order on October 29, 2004 (hereinafter Ohio Order).

Judge Quinn ruled that the Erie County Court of Common Pleas (this Court) "has exclusive jurisdiction over the parenting determination with respect to the triplets". (Ohio Order p. 5). He further held that the Summit County Court "does not have jurisdiction to rule on the existence of a parent-child relationship between [Defendant] and the triplets because this issue is subject to the continuing exclusive jurisdiction of the Pennsylvania Court" (Ohio Order, p. 6).

Summary judgment was granted as to the existence of a parent-child relationship between Rice and Plaintiff and the triplets. Defendant filed a petition for involuntary termination of parental rights (hereinafter IVT petition) against Rice on August 26, 2004. Rice subsequently withdrew her preliminary objections to jurisdiction and her petition to dismiss the IVT hearing on November 19, 2004.

A) Priority

While the Ohio Order clearly relinquishes jurisdiction to Pennsylvania, this Court is bound by law to address jurisdictional challenges before turning to other matters such as support and custody. 23 Pa.C.S. § 5347 (2004). *See also Goodman v. Goodman*, 383 Pa. Super. 374, 556 A.2d 1379 (1989) where the trial court could refuse to acknowledge the custody order of a West German court because jurisdiction of custody matters is governed by the Uniform Child Custody Jurisdiction Act (UCCJA), the Commonwealth of Pennsylvania qualified as the "home state" under the UCCJA, and its custody proceedings were "first in time," under former 42 Pa. Cons. Stat. § 5347 (now 23 Pa. Cons. Stat. § 5347).

B) "First in Time"

Pennsylvania's "first in time" rule requires that a court refrain from exercising its jurisdiction over custody matters if another state's court already has jurisdiction. 23 Pa.C.S. § 5347(a) (2004). If the court has reason to believe that there is another proceeding happening in a sister state, it must inquire about it and continue to communicate with the sister state's court. The proceeding will be stayed if the matter was pending in another state before Pennsylvania assumed jurisdiction or it is determined that Pennsylvania is the more appropriate forum.

In the present case, custody proceedings were initiated in Pennsylvania by Plaintiff. Rice did not file her Complaint in Ohio until twenty (20) days after this Court's declined involvement in the standing and custody proceedings at that time.

Rice's pleading was not a complaint for custody, but rather a complaint to determine parentage of the triplets. An inquiry to Summit County by this Court discovered Judge Quinn's order, which held Pennsylvania to be the more appropriate forum to determine the parent-child relationships between all three parties and the triplets.

Upon review of Pennsylvania and federal statutory law, it can also be concluded that this Court does have jurisdiction over this matter in all its parts, including standing, custody, support, and the eventual IVT hearing.[5]

[5] The issue of Defendant's legal standing has already been decided by this Court. While Plaintiff may have raised it again for purposes of making an appellate record, the matter for this Court is *res judicata.* Jurisdiction over the custody and support issues flows from the standing decision.

C) Sufficient Contacts and Home State Jurisdiction

According to *Black's Law Dictionary,* sufficient connection jurisdiction in a child custody matter is determined when the best interest of the child/children is involved, at least one parent or litigant has connections to the state, and substantial evidence about child's present or future care, protection, training, and personal relationships is present. (8th) ed., 2004, p. 870). In general, the home state of the child or children is a state with sufficient connection jurisdiction. *Black's* also defines home state jurisdiction as jurisdiction based on the child having been a resident of the state for at least six (6) consecutive months immediately before commencement of an intrastate child custody suit governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). *See Scheafnocker v. Scheafnocker,* 356 Pa. Super. 118, 514 A.2d 172, (1986), where court found Pennsylvania had jurisdiction under the substantial contacts doctrine, despite the fact that the children (living in Texas) had not been residents for at least six (6) consecutive months prior thereto so as to consider Pennsylvania the "home state".

The best interest of the children is most definitely involved here as it is the primary standard for child custody in this Commonwealth. Defendant, whom this Court has recognized as the legal mother of the triplets, has connections to the state in that she has resided here most of her life. This is also the home state of the triplets, where they were born and where they have primarily resided for the first year of their lives. At issue in the custody, support, and IVT proceedings is the triplets' present and future care, where and by whom.

Rice and Plaintiff are not residents of Pennsylvania, but their lack of contacts with this state is not the sole requirement for determining whether this Court has jurisdiction over them. The statute does not require that *all* parties have sufficient contacts with this state. Thus, this Court finds enough contacts with Pennsylvania through Defendant and the triplets to exercise jurisdiction.

D) Subject Matter Jurisdiction

Black's defines subject matter jurisdiction as "jurisdiction over the nature of the case and the type of relief sought to the extent which a court can rule on the conduct of the person or the status of things". (8th ed., 2004, p. 870). *See also Favacchia v. Favacchia,* 2001 Pa. Super. 58, 769 A.2d 531 (2001), where the court retained subject matter jurisdiction over a mother and her children after they moved to Delaware because they still had minimum contacts with Pennsylvania.

Here, the two pending cases do not involve the same legal issues (custody and support in Pennsylvania versus determining parentage in Ohio). While the issues and facts may intersect, they are not the same proceedings. See *Commonwealth ex rel. Graham v. Graham,* 367 Pa. 553, 80 A.2d 829 (1951), where an Ohio order awarding custody to a mother

was not binding on Pennsylvania courts because the child's domicile was in Pennsylvania when the order was entered, therefore Ohio lacked both personal and subject matter jurisdiction. Further, the Court finds this argument to be moot since Ohio has relinquished jurisdiction.

E) Inconvenient Forum

Although not specifically argued by either Rice or Plaintiff, subject matter jurisdiction may also be challenged on the ground of inconvenient forum. Rice and Plaintiff could reasonably argue that appearing before this Court in Pennsylvania would be inconvenient for her because she is a resident of Texas and he is a resident of Ohio. However, the primary focus of child custody jurisdiction is the location and welfare of the children. *See Commonwealth Ex Rel. Octaviano v. Dombrowski*, 290 Pa. Super. 322, 434 A.2d 774 (1981), where the trial court's order dismissing father's custody action on grounds of inconvenient forum was reversed because Pennsylvania was found to be the proper forum for the custody dispute since it was the child's home state pursuant to the UCCJEA; *Boudwin v. Boudwin*, 419 Pa. Super. 570, 615 A.2d 785 (1992), where the court held that Virginia was not an inconvenient forum for the mother because it was the home state of the children and no "live" custody proceeding was pending in Pennsylvania when she received the Virginia custody order from father; and *Levinson Ex Rel. Levinson v. Levinson*, 354 Pa. Super. 407, 512 A.2d 14 (1986), where determination of the convenience of a forum under the UCCJA is a possible step in an action and properly constitutes juridical business, thus, a motion to declare a forum inconvenient is a proceeding in custody within the meaning of the UCCJA Pennsylvania trial court properly stayed its proceedings on a father's petition to stay an existing custody order issued by a Minnesota court, where the father was presently appealing the decision by the Minnesota court denying the father's motion to have the Minnesota court declare itself an inconvenient forum in the custody matter.

F) Intrastate Child Custody Jurisdiction

Rice also argued that this Court should decline jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA) 23 Pa. C.S. §§ 5341-5366, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), 23 Pa. C.S. § 5343, and the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.S. §1738A.

The requirements for child custody jurisdiction in Pennsylvania are set forth by 23 Pa. C.S. §5344. It reads 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. § 5344 (a) 1 and (a) 2.

In this case, (a) 1 (i) and (ii) are applicable because the triplets were born here, continue to live here, and were present at least six months prior to the IVT petition. Section (a) 2 (i) and (ii) is applicable as well because Defendant has significant connections here and there is substantial evidence before this Court to assess the best interests of the triplets.

The PKPA requires that full faith and credit be given to the child custody determinations of another state:

> The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

28 U.S.C.S. §1738A(a)

Sections (f) and (h) of the PKPA provide that a court may modify only if it has jurisdiction or if another state has declined jurisdiction. Section (g) provides that a court may not exercise jurisdiction if the matter is pending before another court. Again, the Ohio matter is no longer pending and that court has declined to exercise jurisdiction.

Under PKPA, this Court has jurisdiction over the custody matter because there was "custody determination" (custody conciliation order) made in the triplets' home state (Pennsylvania) granting partial physical custody of a child to a "person acting as a parent" (Defendant). 28 U.S.C.S. §1738A (b) 3. 4, 6. *See also Kriebel v. Kriebel,* 571 Pa. 356, 812 A.2d 579 (2002). PKPA provides that a child's home state is the state in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and this is

consistent with the definition of the home state provided in 23 Pa. Cons. Stat. § 5343 of the Pennsylvania Uniform Child Custody Jurisdiction Act.

G) Involuntary Termination of Parental Rights

Plaintiff argues that Defendant has in part acknowledged Rice's interests by filing the IVT petition. According to 23 Pa. C.S. §2512 (a) (3), Defendant may file her petition because she is an "individual having custody or standing in loco parentis to the child[ren]." Since this Court held her to be the legal mother of the triplets, she may also file under §5212 (a) (1) as a parent seeking to terminate another parent's rights. Defendant asserts three reasons in filing her petition, one being this Court's decision on standing. The other two are grounds for termination of parental rights under 23 Pa.C.S §2511.

> (a) GENERAL RULE-- The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:
>
> > (1) The parent by conduct continuing for a period of at least six months immediately preceding the filing of the petition either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties.
> >
> > (6) In the case of a newborn child, the parent knows or has reason to know of the child's birth, does not reside with the child, has not married the child's other parent, has failed for a period of four months immediately preceding the filing of the petition to make reasonable efforts to maintain substantial and continuing contact with the child and has failed during the same four-month period to provide substantial financial support for the child.

23 Pa. C.S. §2511 (a) (1) and (a) (6), emphasis added

Given Defendant's unique status as a gestational surrogate with legal parental rights trying to terminate the rights of Rice, the genetically related egg donor, a brief review of the relevant case law is necessary.

The filing of an IVT petition prior to the legal expiration period does not affect the Court's subject matter jurisdiction over the case *In re Adoption of Infant Male M.*, 485 Pa. 77, 401 A.2d 301 (1979). Based on §2511 (a) (6), this is of little consequence since Rice's entry into this matter in Ohio did not occur until more than five months had passed since the triplets' birth.

If the petitioning party is not a legal parent, he/she must have standing *in loco parentis* instead. *See Silfies v. Webster,* 713 A.2d 639 (1998), where court gave prospective parents *in loco parentis* status to pursue custody of minor child they had cared for since birth, and *In re Adoption of W.C.K.*, 2000 Pa. Super. 68, 748 A.2d 223 (2000), where court found no standing or jurisdiction for IVT petitioners because they did not stand *in loco parentis.* Rice has not alleged *in loco parentis* status nor was she

declared the legal mother. Defendant has been adjudged both.

Those defending against an IVT petition must show that they tried to create and/or maintain a relationship with the children. *See Appeal of L.S. and B.S.*, 1999 Pa. Super. 312, 745 A.2d 620 where the court awarded custody of children to foster parents because it could not "in good conscience" turn the children over to a stranger, their father, who only saw them once in their entire lives, and *In re B.*, 2004 Pa. Super. 311, 856 A.2d 847 where the court involuntary terminated father's parental rights due to his failure to assert them from jail, allowing two years to pass without any attempts to contact child or mother, and discontinuing cards and gifts he sent early in the child's life.

To date, the Court has seen no evidence that Rice contacted or attempted to contact anyone for information about the triplets.[6] She has sent no cards, letters, gifts, etc. to the triplets or their caretakers.[7] Further, there is no evidence that she has even left the state of Texas to travel to either Ohio or Pennsylvania to exercise her alleged rights. She has, to date, offered no explanations for her absence from their lives.

H) Indispensable Party

In his custody brief, Plaintiff argues that this Court lacked jurisdiction to decide standing because it did not join Rice as an "indispensable party" or hear testimony from her regarding her parental interests. (Plaintiff's Brief, pp. 17-19). According to *Barren v. Dubas*, 295 Pa. Super. 443, 441 A.2d 1315 (1982):

> Failure to join an indispensable party goes absolutely to the court's jurisdiction and the issue should be raised *sua sponte*... In Pennsylvania, an indispensable party is one whose rights are so directly connected with and affected by litigation that he must be a party of record to protect such rights. and his absence renders any order or decree of court null and void for want of jurisdiction. A person is a necessary and indispensable party only when his rights are so connected with the claims of the litigants that no decree can be made without impairing his rights.

[6] The possible list of contacts includes James Flynn, the biological father; Eileen Donich, Plaintiff's paramour; Danielle Bimber, the legal mother; Douglas Bimber, Danielle's husband; Hamot Medical Center, the hospital where the triplets were born; the Erie Times-News and other news organizations that have covered this case; or even this Court.

[7] But, Rice somehow learned about the custody dispute in Pennsylvania and chose to file legal papers in Ohio. The Court is concerned about the possible conflicts of interest and the appearance of collusion between Rice and Plaintiff against Defendant. Upon review of copies of the Ohio pleadings submitted as Exhibits B and C to Plaintiff's Brief, it seems that Plaintiff and Rice were represented by the same Ohio law firm.

At 444, 1316, citations omitted.

This Court acknowledged Rice in a footnote in the April 2nd Opinion with the understanding that she was originally an anonymous egg donor who signed her rights away by contract, much like anonymous sperm donors. From the Court's research, there appears to be no corresponding case law for egg donors as there is for sperm donors. See *Ferguson v. McKiernan*, 2004 Pa. Super. 289, 855 A.2d 121 and *Kesler v. Weniger,* 2000 Pa. Super. 2, 744 A.2d 794, where informal agreements between mother and father not to seek child support are void because the right of support is the child's, not the parents.

At the time of the April 2nd Opinion, the Court decided to treat Rice as any other anonymous biological donor. (April 2nd Opinion, p. 2, n. 4). The problem now is that Rice is no longer anonymous and the surrogacy contract she signed has been declared void. However, Rice and the sperm donor fathers in *Ferguson* and *Kesler* are exceptions to the norm.

Rice did not make any claims until after this Court issued its standing decision in April, almost five months after the triplets were born. She did not file anything regarding her rights to the children in Pennsylvania, such as a motion to reconsider, a petition to intervene, or similar protest until Defendant filed her IVT petition in August. Ordinarily, the Court believes a hearing would give Rice an opportunity to be heard on her alleged parental rights. However, Rice chose to withdraw her jurisdictional objections as well as the petition to dismiss the IVT petition, thus there is some question whether she will appear at the IVT hearing.

Until then, the custody of the children needs to be decided in a timely fashion. Thus far, there have been only two interested parties -- the Plaintiff, James Flynn, and the Defendant, Danielle Bimber. If Rice truly wants to become involved, the Court can amend its custody order and join her as a party at a later date.

I) Standing

Plaintiff's argument against standing this time is that the Court should not have raised the surrogacy contract and public policy issues *sua sponte* without giving counsel the chance to brief and argue them first. (Plaintiff's Brief, p. 20-21).

Plaintiff also argues that no contractual relief was requested by either party. The Court would point out that the surrogacy contract was presented as supporting evidence by Plaintiff that Defendant lacked standing. (Plaintiff's Brief, p. 20, emphasis added). His contention that the validity of the contract was not necessary to determine the issue of standing does not follow when he was the one who presented it to the Court. By law, all evidence must be relevant or it is inadmissible. Pa.R.E. 402 (2004). The Court determined at the first standing hearing that the surrogacy contract was admissible. Plaintiff cannot take it back now because he does not agree with the Court's determination.

The Court believes it was well within its authoriy to address the surrogacy contract and any legal issues related to it. A contract pertaining to the custody of a minor child is always subject to being set aside in the best interest of the child. *Walker v. Walker,* 308 Pa.Super. 280, 283, 454 A.2d 130, 132 (1982). *See also Grom v. Burgoon*, 448 Pa. Super. 616, 672 A.2d 823 (1996), which held that a court may raise standing and related issues *sua sponte* if there is a cause of action.

In the case at bar, the cause of action is a determination of legal custody of the triplets. Deciding custody requires a determination of who the legal parents are. The surrogacy contract between the parties did not provide for a legal mother. This Court found the contract to be void as against state public policy because it did not provide for a mother and also allowed the parties to sign away the children's rights (which is not in their best interests). Thus, the Court found Defendant to be the children's legal mother and that she acted and continues to act *in loco parentis* to the triplets.

By law, legal parents have automatic standing for custody, as do those who stand *in loco parentis*. *See also Vicki N. v. Josephine N.*, 437 Pa. Super. 166, 649 A.2d 709 (1994), where child's aunt stood *in loco parentis*, and natural mother showed no desire to parent until several years later, and the court ruled that her objection to aunt's standing was raised too late. With Plaintiff's primary evidence (the contract) being ruled void, the Court turned to Defendant's *in loco parentis* argument and found it to be credible in addition to deciding that she was the legal mother. (April 2nd Opinion, pp. 19-23).

Further, Plaintiff's contention that the contract requires that it shall be governed by and enforced only by the state of Ohio is not persuasive. Plaintiff filed his initial pleadings here in Pennsylvania and continues to avail himself of the Pennsylvania courts. Hearings on standing, custody, and support have all been held here. Only after this Court issued its ruling on standing, did Plaintiff, and later Rice, file pleadings in Ohio. Until then, there was no "live" custody proceeding in Ohio. See *Boudwin v. Boudwin*, 419 Pa. Super. 570, 615 A.2d 785 (1992). Since the Ohio Court has relinquished jurisdiction to Pennsylvania, there will be no "live" custody proceedings in Ohio.

The Court finds that Plaintiff has more than submitted to the jurisdiction of Pennsylvania, by appearing in person, or by counsel, at hearings held here and by bringing the issue of custody here, seeking relief from the Pennsylvania courts. In addition, since Defendant and the triplets are Pennsylvania residents, the Court has jurisdiction over them because Pennsylvania has been their home state for more than six months.

This opinion will be continued in next week's edition, Vol. 88 No. 5.

JAMES FLYNN, Plaintiff
v.
DANIELLE BIMBER, Defendant

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY DIVISION NO. 15061-2003

DANIELLE BIMBER, Plaintiff
v.
JAMES FLYNN, Defendants

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA FAMILY DIVISION PACSES NO.: 26010604 DOCKET NO.: NS200302848

Appearances: Melissa H. Shirey, Esq., Attorney for Plaintiff
Joseph P. Martone, Esq., Attorney for Defendant

OPINION

This opinion is continued from last week's issue - January 28, 2005, Vol. 88, No. 4

II. Custody Issues

"In any custody determination, the paramount consideration is the best interest of the child." *Jackson v. Beck*, 2004 Pa. Super. 357, 858 A.2d 1250, citing *Myers v. DiDomenico*, 441 Pa. Super. 341, 657 A.2d 956 (Pa. Super. 1995) and *Moore v. Moore*, 535 Pa. 18, 634 A.2d 163 (1993). "The 'best interests' standard, employed on a case-by-case basis, compels consideration of all factors which legitimately have an effect upon the child's physical, intellectual, moral and spiritual well-being". *Jackson*, *supra*, quoting *Sawko v. Sawko*, 425 Pa. Super. 450, 625 A.2d 692 (1993). The good qualities of both parents in a custody dispute must be taken into account as well *Rowles v. Rowles*, 542 Pa. 443, 668 A.2d 126, 128 (1995). In determining the best interests of the triplets, the Court has considered numerous factors and case law below.

A) Biological Father vs. Third-Party Surrogate

Plaintiff again raises the argument that the Defendant is a third party seeking custody of the triplets in defiance of his wishes as a biological parent. He relies on *Seder v. Seder,* 2004 Pa. Super. 14, 841 A.2d 1074. However, that reliance is misplaced because the mother defied a court order prohibiting her from taking the children to another country. While the father in *Seder* obviously disagreed with the mother's actions, he was ultimately not the one she wrongly defied. Here, the Defendant is not in violation of any court order.

In fact, this Court has previously determined that she has *in loco parentis* status and can pursue custody. See *S.A. v. C.G.R.*. 2004 Pa. Super. 323; 856

A.2d 1248 (Trial court properly denied the father's preliminary objections because the mother had standing to pursue her custody action by virtue of her *in loco parentis* status to the child where the mother had lived with and parented the child since birth.)

Biological parenthood is not the only source of custody rights. *McDonel v. Sohn*, 2000 Pa. Super. 342, 762 A.2d 1101. Nor, does a third party seeking custody have to prove that the biological parent is unfit. *Charles v. Stehlik*, 560 Pa. 334, 744 A.2d 1255 (2000). In *Charles*, custody of the minor child was awarded to the stepfather over the biological father based on the evidence and testimony of several witnesses. *See also Short v. Finagle*, 36 Pa. D. & C. 4th 115 (1997), where the court gave former guardians liberal visitation with the three-year-old child over biological mother's objections because the child had grown to love them and had resided with guardians since the age of one.

The *Charles* court also relied on the Pennsylvania Supreme Court's decision in *Albright v. Commonwealth ex rel. Fetters* in determining the parties' right to custody:

> In *Albright v. Commonwealth ex rel. Fetters*, 491 Pa. 320, 421 A.2d 157, 161 (Pa. 1980), we stressed that the biological parent's prima facie right to custody is not to be construed as precluding a custody award to a non-parent, absent a demonstration of the parent's dereliction. ...[O]ther factors which have significant impact on the well being of the child can justify a finding in favor of the non-parent, even though the parent has not been shown to have been unfit... While this Commonwealth places great importance on biological ties, it does not do so to the extent that the biological parent's right to custody will trump the best interests of the child. In all custody matters, our primary concern is, and must continue to be, the well being of the most fragile human participant - that of the minor child.

Charles at 342, 1259, citations omitted.

Although Plaintiff objects to Defendant having any custody time with the children, his protests must come second to the overall rights of the children. What Plaintiff wants does not trump what his children deserve, a caretaker acting in their best interests. As the courts have held, a biological connection to the children is not an absolute or even preferential requirement. Therefore, Defendant should be considered as a potential custodial parent, whether Plaintiff approves or not.

B) Children's Tender Years and Stability

While Pennsylvania no longer follows the "tender years" doctrine, a court may consider the children's age(s) and which parent is their primary caretaker. The role of the primary caretaker is a substantial factor which the trial judge must weigh in adjudicating a custody matter where the child is of tender years. *R.A.R. v. T.M.*, 434 Pa. Super. 592, 644 A.2d 767, 769

(1994). As the court in *Commonwealth ex rel. Jordan v. Jordan,* 302 Pa. Super. 421, 448 A.2d 1113 (1982) held:

> ...[W]here two natural parents are both fit, and the child is of tender years, the trial court must give positive consideration to the parent who has been the primary caretaker. Not to do so ignores the benefits likely to flow to the child from maintaining day to day contact with the parent on whom the child has depended for satisfying his basic physical and psychological needs.

At 1115.

Based on all of the testimony presented, Defendant is the better caretaker by far, and primary custody should remain with her. Defendant was able to comprehensively describe the children's daily routines, their individual personalities, the medical care they received, and more. Unlike Plaintiff, she used actual names and terms of affection for each child.

Moreover, Defendant has assumed all parental responsibilities, though she initially did not intend to, from the time the triplets were only days old and still in the hospital. She has made certain that the children have received their vaccinations on time and that one triplet (Micah/Shane) with neck problems received physical therapy. Defendant has followed through with all recommended medical treatments and the children have flourished in her care, as Dr. Lund testified. To remove them now would disrupt their stable and beneficial daily routines with her. *See Gerber v. Gerber,* 337 Pa. Super. 580, 586, 487 A.2d 413 (1985). (Mother's care of minor child since birth was better for child's stability, thus, primary custody remained with her); and *Bresnock v. Bresnock.* 346 Pa. Super. 563, 500 A.2d 91 (1985). (Primary custody of child returned to mother once her life stabilized, rather than grandparents who tried to turn child against her); and *Wiseman v. Wall,* 718 A.2d 844, 849-850 (Pa. Super. 1998). (Court rejected alternating week custody schedule for 15-month-old child as too disruptive and destabilizing to child who was too young to voice his discomfort with it).

Defendant also spends the majority of her time at home with the triplets and her other children. Plaintiff and his paramour testified that they take the children out to many places, mostly to show them off in public. While the Court does not condemn occasional outings, it does recognize the children's need for a stable home environment surrounded by loving family, not curious strangers.

It is the policy of this Commonwealth to raise siblings together, if possible. *Hockenberry v. Thompson,* 428 Pa. Super. 403, 632 A.2d 204 1993). Siblings should be separated only when there are "compelling" reasons to do so. *Pilon v. Pilon,* 342 Pa. Super. 52, 492 A.2d 59 (1985). This applies to stepsiblings too. *Ferdinand v. Ferdinand,* 200 Pa. Super. 314, 763 A.2d 820 (2000). While Defendant's children, Ryan, Brendan, and Julia, are not technically siblings to the triplets, they are part of the family

environment the triplets are growing up in. Testimony showed that the Bimber children already regard the triplets as their three little brothers. To separate the children now merely because they are not genetically related to each other would do more harm than good to their family environment. There is no compelling reason for this Court to do such harm.

Further, given testimony that Plaintiff and Dr. Donich openly argued with Defendant over the triplets in the presence of the Bimber children, the Court finds that behavior not to be in the best interests of the triplets. As they grow and develop a relationship with the Bimber children as quasi-siblings, any negative actions by Plaintiff and Dr. Donich toward the Bimbers will undoubtedly have a detrimental effect on the children. It is strongly recommended by the Court that all parties involved conduct themselves as civilly as possible while in the presence of any of the children.

C) Standards of Living

Plaintiff and his paramour repeatedly emphasized their higher income, larger house, and better-rated schools over what Defendant can provide, and has already provided, for the children. As *Kessler v. Gregory,* 271 Pa. Super. 121, 412 A.2d 605 (1979) held:

> Among the factors to be considered in determining the best interests of the child are the character and fitness of the parties seeking custody, their respective homes, their ability to adequately care for the child, and their ability to financially provide for the child. *Shoemaker Appeal*, 396 Pa. Super. 225, 230, 363 A.2d 1242, 1244 (1976). However, '[u]nless the income of one party is so inadequate as to preclude raising the [child] in a decent manner, the matter of relative incomes is irrelevant.'" *Custody of Myers*, 242 Pa. Super. 225, 230, 363 A.2d 1242, 1244 (1976) (quoting *Commonwealth ex. rel. Grillo v. Shuster,* 226 Pa. Super. 229, 239, 312 A.2d 58, 64 (1973).

At 124-125, 606-607

While a court may take into account the economic status of a party, it cannot ignore all other aspects of a child's well being and best interests. *McAnallen v. McAnallen,* 300 Pa. Super. 406, 466 A.2d 918, 915 (1982). (Trial court failed to consider best interests of the child when it granted custody to the higher wage earner despite the fact child thrived in lower wage earner's care). A court is not obligated to award custody of a child to one party over another based solely on a bigger house or a better standard of living either. *Roadcap v. Roadcap,* 2001 Pa. Super. 167, 778 A.2d 687, 690. In *Roadcap,* the Superior Court agreed with the trial court's finding that the parties were "both fit, but imperfect" to parent. But, the Court found fault with the trial court's decision "largely based on the parties' financial inequality" despite its finding that the mother was the better, more available parent for the children. The Superior Court awarded custody to the mother.

This Court does not dispute that Plaintiff and his paramour have more

than enough financial resources and space in their home to provide for the children. But, as *McAnallen* held, the Court cannot ignore other factors affecting their welfare. Defendant is better able, at this time, to provide daily, hands-on care for the children. Plaintiff has shown that he is not. He has not altered his work schedule to make himself available to care for the children. It is difficult for the Court to comprehend why Plaintiff, as the person in charge of his academic department, cannot take even one day off to spend time with his children. Plaintiff testified that he received several personal and sick days per year. The Court would presume that taking time off during the summer months would be even easier since most universities have fewer students and classes at that time.

Further, Defendant's financial past, including her bankruptcy case, is irrelevant to her performance as primary caretaker of the children. In spite of her financial troubles, Defendant has demonstrated that she is able to provide for the children in every way. It seems hypocritical for Plaintiff to ask this Court to scrutinize Defendant's past and hold it against her while at the same time ask the Court to disregard the six days when Plaintiff did not visit the children in the hospital.

Plaintiff, his paramour, and her family seem more concerned with their relative wealth and upscale community than the welfare of the children. Right now, the triplets are not old enough to appreciate how big their house is or how much money their parents make or where they will go to school. They are only aware of who cares for them, feeds them, bathes them, clothes them, changes their diapers, etc. The party that is better able to provide that kind of care should be the primary custodian of the children. That party here is the Defendant.

D) Houses

Plaintiff's paramour, Eileen Donich, is the sole owner of the house in Kirtland, Ohio. While Plaintiff contends that he resides with Dr. Donich in her home, he also rents his own apartment. Defendant and her husband own a modest ranch home, to which they are putting on an addition. As stated previously in *Kessler,* the parties' respective homes may be one factor in consideration of the best interests of the children.

The Court is not completely convinced of the permanence of Plaintiff and his paramour's living arrangement. While both testified that they've been living together for several years, they have not purchased or rented a home together. If their relationship should unlikely fail, Dr. Donich will remain the sole owner of the Kirtland house. Plaintiff will have no claim to the sizeable home he touts as part of the children's best interests.[8]

[8] The Court points to another case of first impression, decided after the April 2nd Opinion, from Tennessee as a cautionary tale for Plaintiff and his paramour. *In re: C.K.G., C.A.G., C.L.G.,* 2004 Tenn. App. LEXIS 394 (2004), where an unmarried couple (who held themselves out as married on the fertility clinic contracts) broke up after "wife" was implanted with donated eggs and gave birth to triplets. "Husband"

E) Education

Plaintiff seems very concerned about the triplets' schooling long before they are even preschool age. *See Jackson v. Beck*, 2004 Pa. Super. 357, 858 A.2d 1250 (Father's request to modify custody arrangement for child's education was denied because child was not old enough to be enrolled in school yet.)

Over and over again, Plaintiff and the witnesses on his behalf touted the benefits of the Kirtland schools. Plaintiff refused to consider the possibility that the triplets might attend school in Corry. Further, he denied being able to pay for private school in Pennsylvania, even though it might provide just as good an education as the Kirtland schools.

If Plaintiff is truly so concerned with the children's education this early, then he should start saving or planning for it now. With all the financial resources Plaintiff claims to have in Kirtland, investing in his children's future education should not be too burdensome.

While it remains too early to decide the children's education, the Court would strongly suggest that both parties keep an open dialogue about the subject. Neither party should attempt to enroll the children in any educational program at any age without first consulting with the other. When the time for school comes, they will hopefully be able to make a sound, informed decision together for their children.

F) Involvement of Eileen Donich

Testimony from those who have frequent contacts with the children, including paramours, must be heard for a court to determine what is in the children's best interests. *Haller v. Haller*, 377 Pa. Super. 330, 547 A.2d 393 (1988). A court should also take into account whether such contact would interfere with the parent/child relationship. *Douglas v. Wright*, 2002 Pa. Super. 181, 801 A.2d 586. See *also Fausey v. Hiller*, 2004 Pa. Super. 186; 851 A.2d 193. (Burden is on grandparents with partial custody of grandchild to show they will not interfere with parent-child relationship.)

If a party/parent allows others to perform parental duties during the majority of his/her designated partial custody time, the Court may consider that as well. *See Roadcap, supra*, at 690 where court expressed some concern over father's delegation of some of his parental duties to his mother, and *Wiseman, supra*, at 850, where child spent more of his waking hours in daycare than with father during father's partial custody time.

Plaintiff has consciously chosen not to play an active role in the care and decision-making for his children. Instead, he has deferred the majority of his responsibilities to his paramour, Eileen Donich. Indeed, it is she,

---

[8] continued
withheld financial support and tried to argue that the triplets had no mother because the egg donor gave up her rights and "wife" had no genetic tie to them. The Tennessee Court found "husband's" argument to be erroneous and awarded primary custody to "wife" based on the children's tender age. The couple's ownership of a house as tenants in common was evidence of their intent to parent the children together.

not Plaintiff, who spends the majority of the partial custody time with the triplets.

The Court has grave concerns over the participation of Eileen Donich in the lives of the children. Her testimony, in addition to being inconsistent on several occasions, indicates that she is far too involved in the children's lives, to the point of attempting to exclude both father and mother from their parental duties. Her repeated references to "my babies" reveal an unusual amount of possessiveness toward the children

In her testimony, both at trial and at the standing hearings, Dr. Donich showed an overly intense desire to keep the triplets in the care of her and the Plaintiff. It seems that she will do or say just about anything to appear sympathetic. While an attempt to impress the Court is normal in a custody trial, Dr. Donich far exceeded presenting herself in the best possible light. She also attempted to portray the Defendant in the worst possible light. For example, her story at trial about seeing cats in the triplets' cribs and scratches on their faces was found to be unbelievable when the Defendant testified that the cats were de-clawed and the cribs were in plain sight in the living room.

Dr. Donich's tendency to exaggerate, overreact, and undercut the actions of others, including the parents, clearly demonstrates to this Court that she might not act appropriately regarding the best interests of the children. She has not shown how her conduct does not interfere with the parent-child relationship between Plaintiff, Defendant, and the triplets.

It is also very apparent from their testimony that Plaintiff, and Dr. Donich especially, like showing off the children, almost as if they were objects. The Court cannot emphasize enough that this is not in the children's best interests. They are human beings to be cared for, not shown off like shiny new toys.

G) Expert Testimony of Amy Hokaj

Amy Hokaj, a licensed independent social worker and "adoption assessor" in Ohio, testified by deposition as an expert witness on behalf of the Plaintiff. Her testimony shall be considered only in conjunction with all the other evidence presented before the Court. *Watters v. Watters,* 2000 Pa. Super. 224, 757 A.2d 966, at 968-969 citing *Smith v. Shaffer,* 511 Pa. 421, 426, 515 A.2d 527, 529 (1986). Uncontradicted expert testimony may be accepted or denied by the court as long as the court's conclusions are founded in the record. *Nomland v. Nomland,* 2002 Pa. Super. 386, 813 A.2d 850. As the Court in *Jackson v. Beck,* 2004 Pa. Super. 357, 858 A.2d 1250 held:

> ...[T]he discretion that a trial court employs in custody matters should be accorded the utmost respect, given the special nature of the proceeding and the lasting impact the result will have on the lives on the parties concerned... Accordingly, the fact-finder is free to believe all, part, or none of the evidence...

At 1254, citing *B.S. v. T. M.*, 782 A.2d 1077 (Pa. Super. 2001), emphasis added.

The deposition testimony of Amy Hokaj did little to alleviate this Court's concerns about Plaintiff and his paramour. While Ms. Hokaj was presented as an expert witness, the Court found her expertise in adoption placement to be severely lacking in this case.

Defendant argues that the Court should afford only "minimal weight" to Ms. Hokaj's home study conclusions. The Court is inclined to agree, especially in light of the inconsistent answers given to Ms. Hokaj by Plaintiff and Dr. Donich and their testimony presented to this Court.

Further, upon a brief review of Ohio adoption law, it appears to the Court that the Plaintiff and Dr. Donich did not even attempt to comply therewith. Adoptions in Ohio are governed by statute under Ohio Revised Code 3107.01-3107.99 (2001). Only an agency or an attorney may arrange an adoption O.R.C.3107.011.[9] An adoption petition may be filed in the county of residence of either the minor child or the adoptive parent. O.R.C. 3107.04 Such a petition may be stayed or dismissed if another forum has jurisdiction. *Id.* Timely petitions should be filed within 90 days after a child is placed in the home. O.R.C. 3107.051 Both mother and father must consent to the adoption before it is granted. O.R.C. 3107.06 An unmarried potential adoptive parent, such as Dr. Donich, is eligible to adopt a child. However, the right to adopt a child is still governed by the best interest of the child. *See In re Adoption of Charles B.*, 552 N.E.2d 884 (Ohio, 1992).

Plaintiff and Dr. Donich hired Adoption Circle to arrange adoption of the triplets in their county of residence. However, the adoption petition, if one exists, must be stayed because Pennsylvania, not Ohio, has jurisdiction. The consent of the legal mother of the triplets has clearly not been given. There is no evidence that the egg donor consented to the adoption either. Plaintiff and Dr. Donich pursued adoption without following the required legal procedures in Ohio to do so. Certainly Adoption Circle, as an

---

[9] See *Decker (Lowd) v. Decker,* 2001 Ohio 2279, 2001 Ohio App. LEXIS 4389 where the Ohio Court of Appeals decided that a sister/surrogate (Lowd) was the legal parent of child and awarded primary custody to her over the objections of her brother (Decker and his boyfriend (Pope), who also fraudulently claimed paternity instead of anonymous sperm donor. The Court was deeply concerned that all parties failed to go through proper Ohio adoption procedures.

> "Appellees [Decker and Pope]... rely on the merits of an agreement made prior to [the child's] birth. Specifically, Appellees insist that Lowd agreed to "have a baby for Decker." Again, while that may be true, "one cannot claim the status of an adoptive parent merely through an oral agreement [with a surrogate mother]". *Seymour v. Stotski*, 82 Ohio App. 3d 87; 611 N.E.2d 454 (1992) ... It has long been recognized that, as a matter of public policy, the state will not enforce or encourage private agreements or contracts to give up parental rights. *Belsito v. Clark*, 67 Ohio Misc. 2d 54, 644 N.E.2d 760 (1994)."

adoption agency licensed in Ohio, should have recognized that.

The Court is greatly troubled by Adoption Circle and Ms. Hokaj's failure to follow up when questions about the Plaintiff and Dr. Donich arose. In the course of a more thorough investigation, she should have discovered the identity of the Defendant, the actual legal names of the triplets, the legal pleadings filed by the egg donor in Ohio and by the Defendant in Pennsylvania asking to be declared legal mother, and the two separate calls to child welfare agencies in Ohio and Pennsylvania.

Merely relying on the information supplied by the Plaintiff and Dr. Donich is not enough to safely place three young children in their care. While this Court has had the benefit of seeing and hearing more information than Ms. Hokaj, what she lacked could have been easily remedied with a few pertinent questions and deeper investigation.

The Court further notes the Adoption Consent and Approval form was signed by Adoption Circle, not the State of Ohio or a court of law. It is merely a recommendation and has no legal weight. The form was also completed only three days before the custody trial. Again, the Court wonders why the Plaintiff and Dr. Donich waited so long if they truly intended to be parents to the triplets.

H) The Children's Names

This is not a typical name change case. Defendant named the triplets six days after they were born. Those names are on the birth certificate, and Plaintiff has not specifically petitioned to change them. But, by his actions, and those around him, the children have two sets of names: Matthew, Mark, and Micah Bimber and Easton, Lance, and Shane Flynn. Therefore, it is for the Court to decide which names are in the best interests of the children. Under 54 Pa C.S. § 702, a court of common pleas may order the change of the name of any person who resides in the county.

The best interest of the child is the overall standard for name changes. *In re Change of Name of Zachary Thomas Andrew Grimes to Zachary Thomas Andrew Grimes-Palaia*, 530 Pa. 388, 609 A.2d 158 (1992). A court may also consider the natural bonds between parent and child, the social stigma or respect afforded a particular name within the community, and where the child is of sufficient age, whether the child understands the significance of changing his name. *Id.*

All relevant factual circumstances must be evaluated to determine if a name change is in the child's best interest. No presumption exists in favor of either parent in contested name change proceedings. *In re Petition of Schidlmeier,* 344 Pa. Super. 562, 394 A.2d 1249 (1985). One parent's hostile opposition to a name proposed by the other parent is not grounds for denying a name change petition. *See In re Brzostowski,* 42 Pa. D. & C. 4th 454 (Northumberland County Court of Common Pleas, 1999). Father petitioned the court to change the child's surname from mother's maiden name to his when the child was two and one-half (2 1/2) years

old. Mother's sole reason for opposing name change was her animosity towards father.

A name change should be granted in absence of an objection to it, if such change will not be harmful to the rights of others or prejudicial to the public good. *In re Romm*, 77 Pa. D. & C. 481 (1951). However, any child has the right to change his or her name when he or she reaches the age of majority. *Id.*

The petitioning party must show why their name is better and in the best interests of the child. *See In re: Name Change of C.R.C.*, 2003 Pa. Super. 91, 819 A.2d 558 where Father's petition to change child's surname was denied. The court considered the fact that Father stayed away from mother and child for a month after the child's birth and failed to arrange regular visitation thereafter.

In the present case, Plaintiff had more than ample opportunity to provide names for the children before or immediately after their birth. He chose not to do so. In his absence and failure to act, the Defendant named the children. The only alternative was to continue calling them Baby A, B, and C.

The Court specifically finds the use of non-legal names for the triplets by the Plaintiff and those associated with him to be contrary to the best interests of the children. Using two sets of names will only lead to confusion and uncertainty for the children. By choosing to delay, Plaintiff must now accept the names Matthew, Mark, and Micah as the names of the children, and that they be addressed by those names. Plaintiff is also responsible for making sure that those around him address the children by their proper legal names

As to the bond between Plaintiff and his children, the Court was alarmed at how Plaintiff did not, and perhaps could not, refer to any child by any name. Given two sets of names, Plaintiff did not even use one set to regularly refer to his children. This is unmistakable evidence that Plaintiff has not bonded with or been involved with his children as much as he claims.

The Court does recognize that Plaintiff is partly responsible for the existence of the triplets and thus, his paternity should be acknowledged. Plaintiff indicated that he was dismayed at the Defendant giving the children her last name. (Custody Trial Transcript, Day 1, p. 51). Defendant testified that she was agreeable to such a change. In order for the triplets to share some identity with their father, the Court will order that the children's surname be changed from Bimber to Flynn.

The legal names of the triplets from now on will be Matthew, Mark, and Micah Flynn. The birth certificates shall be amended accordingly. When they reach the age of majority, it will be up to the children alone to decide which names they wish to have. *See Romm, supra.*

I) Cooperation between parents

By law, a court is required to consider which parent is more likely to encourage, permit, and allow the other party frequent, continuing contact and access to the child. 23 Pa. C. S. § 5303 (2). Each parent's conduct in the presence of the child(ren) during custody exchanges is also a factor in determining whether the parent-child relationship is being encouraged or discouraged. *See Larrison v. Larrison*, 750 A.2d 895 (2000), where the Court considered recording of mother swearing at father during a custody exchange as evidence against her fostering a positive relationship between the child and father.

Plaintiff has shown no ability or desire to cooperate with Defendant in the long-term raising of these children. Rather, his intention is to deprive the children from contact with the Defendant, gain sole custody, and have "complete control" over the children and their care. (Custody Trial Transcript, Day 1, p. 57). "A modification of custody is not warranted merely because one parent is unhappy with the existing arrangement". *Jackson, supra*, at 1252.

Plaintiff and Dr. Donich have assumed the worst about the Defendant despite obvious evidence that the triplets have been well cared for by her. They were repeatedly described by witnesses at trial as happy, healthy, normal babies. (See testimony of Dawn Donich, Dr. Kurt Lund, and Amy Hokaj). Plaintiff and Dr. Donich's complaints regarding Defendant's care of the children are trivial, at best, and insignificant in light of Defendant's overall performance as a custodial parent.

Plaintiff testified that he sends no clothes, no toys, no gifts on special occasions, or other necessities to the children while they are in Defendant's care. Conversely, Defendant has provided Plaintiff with food, clothing, medication, and instructions for caring for the children. She has consistently provided an overnight bag on each of the children's visits, which returns unopened. (Custody Trial Transcript, Day 1, pp. 235-236).

Defendant has attempted to communicate with Plaintiff in several ways and is often met with minimal response. Due to the lack of information she received about the children during their time with the Plaintiff, Defendant requested that a logbook be kept of their activities. She has also tried to instruct Plaintiff and his paramour on how to install and use the children's car seats properly, how to administer a nebulizer medication for one, and given them an opportunity to learn the physical therapy exercises for another. (Custody Trial Transcript, Day 1, pp. 225-238).

Defendant and her husband have shown the ability to cooperate with Plaintiff and to foster in the children respect and concern for him. As Douglas Bimber wisely testified. "Everybody needs to think about these boys, not themselves" (Custody Trial Transcript, Day 2, p. 81, lines 5-6). The Court could not agree more.

J) Media Attention

There is no doubt that this case will continue to attract media attention for some time. As the triplets grow older, they will very likely become aware of the statements their parents have made about each other, both in litigation and in the press. The Court must address this issue now in light of the children's best and future interests.

It is apparent from statements they have made that Plaintiff and Dr. Donich cling to the belief that Defendant's involvement with the children is motivated solely by child support. (Custody Trial Transcript, Day 1, p. 69, and Day 2, pp. 36-37). As Plaintiff himself testified on direct examination, "We believe that if we do not give Danielle child support, she will give up the children". (Custody Trial Transcript, Day 1, p. 69).

Defendant has testified that she has been offered money from the national media to tell her story but she has refused. (Custody Trial Transcript, Day 2. pp. 9-10). In light of Defendant's financial troubles, the Court believes her refusal was both a difficult and admirable thing to do. This, as opposed to Plaintiff's interview with a Cleveland-area newspaper, *The Plain Dealer,* in which he called the Defendant "an opportunist" and was quoted as saying, "I have found a new level of hate." (John Horton, "Legal fight leaves triplets in limbo," *The Plain Dealer,* July 18, 2004). Plaintiff admitted in his trial testimony that he made these statements. (Custody Trial Transcript, Day 2, pp. 60-62).

Defendant is not entirely without fault here in that she has also made statements to the press about the Plaintiff and Dr. Donich. In particular she has been quoted as saying, "Something is wrong with these people". On cross-examination, Defendant admitted that the statement "wasn't very nice". (Custody Trial Transcript, Day 2, p. 10). Plaintiff, on the other hand, refused to back down from his statement that the Defendant was an opportunist. (Custody Trial Transcript, Day 2, p. 63).

As to the issue of when the triplets will become aware of the media attention they have received, Plaintiff and Defendant were, not surprisingly, of two different minds. Defendant testified that she is "not going to hide this [the media coverage] from them while Plaintiff countered with "who is going to show it [the newspaper article] to them?" (Custody Trial Transcript, Day 2, p. 9 and Day 2, pp. 61-62). Defendant's answer goes more toward the best interests of the children because it shows that she is willing to address any questions the triplets might have someday. Plaintiff's answer demonstrates that he would rather hide that information. With the advent of the Internet and technologically savvy generations of children, it is highly unlikely that the triplets will not uncover the media stories about them and their family. Plaintiff needs to be prepared to share that information with his children before they discover it for themselves.

While this Court cannot order the parties to refrain from speaking with the press, it suggests that the parties keep in mind the best interests of

their children when they do make public statements. One day the triplets will be able to read and see the news articles, which may in turn affect the way they see their parents.

Conclusion

The Court finds that the Defendant should have primary custody of the triplets with liberal visitation by Plaintiff. Defendant has shown that she is able, despite her economic status and smaller home, to care for the children and provide for all of their needs. Plaintiff has shown that he needs to work on his relationship with the children, fostering a stronger connection to them, being able to confidently identify each child by name, and care for their needs, preferably without interference from his paramour. His request for sole custody because he is the biological father is denied at this time.

Given the unique circumstances of this case, the Court finds the holding in *Commonwealth ex rel. Coburn v. Coburn,* 384 Pa. Super. 295, 558 A.2d 548 (1989) to be on point and very persuasive:

> "...[I]t cannot be in the best interests of the child to have this relationship cut off simply because there is no biological tie between them. Therefore, we find partial custody and visitation to be appropriate. In this era of artificial insemination, surrogate parenting and in-vitro fertilization, legal rights of a non-biological parent may become fixed by virtue of the parties' actions and the developmental relationship of the child with the parent. To permit one parent to revoke the parentage of the other parent, once those rights have been legally determined, in the absence of fraud, by invoking a blood test, invites chaos to the child's emotional well-being and legal status."

At 304-305, 552-553.

Further, since the court has explicitly denied Plaintiff's request for sole custody of the triplets, Plaintiff is obligated to pay child support to Defendant. An Order for child support, based on the parties' stipulations at trial, was previously issued on September 17, 2004.

In the interest of judicial economy, this Court granted Plaintiff's Motion for Reconsideration on October 5, 2004 to allow the support and custody matters to be appealed at the same time per the requirements of Pa. R.C.P 1930.2. Thus, the September 17, 2004 Order for child support is hereby incorporated as part of this Opinion and Order.

The best interests of Matthew, Mark, and Micah Flynn require that the following Order of Court regarding custody be entered consistent with the findings of the foregoing Opinion.

ORDER OF COURT

AND NOW, TO-WIT, this 7th day of January, 2005, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the following Order shall be in effect until further Order of Court:

1. The legal parents, James Flynn and Danielle Bimber, shall share legal and physical custody of their children. The names and birth dates are as follows:

Matthew Flynn, born November 19, 2003
Mark Flynn, born November 19, 2003
Micah Flynn, born November 19, 2003

2. The children are to be addressed at all times by their legal names, Matthew, Mark, and Micah Flynn. Father shall refer to the children by these names, and shall direct all those coming into contact with the children when in his partial custody to refer to the children by their legal names. Either parent's refusal to enforce this requirement will be considered as evidence of his lack of consideration of the best interests of the children and will be viewed as a violation of this provision.

3. The children shall reside with their mother except that father shall have partial custody with their children as follows:

a) Every Friday from 5:00 p.m. until Sunday at 5:00 p.m.

b) Each parent is entitled to one (1), seven (7) day period of uninterrupted vacation upon fourteen (14) days notice to each other.

c) Father shall have additional partial custody rights in Erie County, Pennsylvania, upon 48 hours notice to mother, upon mutual agreement.

d) For Easter, 2005, the children shall be in the custody of their father. In even-numbered years, the children shall be in the custody of their mother.

e) For Thanksgiving, 2005, custody shall be shared by the parties. The children shall be with their father from 12:00 Noon Tuesday before the holiday until 12:00 Noon Friday after the holiday. This will reverse in even-numbered years where mother shall have partial custody from 12:00 Noon on Tuesday to 12:00 Noon on Friday.

f) For Christmas, 2005, custody shall be shared by the parties so that the children are with their mother on December 23rd at 12:00 Noon through December 25th at 12:00 Noon, and with their father from December 25th at 12:00 Noon through December 27th at 12:00 Noon. This shall reverse in odd-numbered years.

g) For all other holidays, upon mutual agreement, arrangements may be made for the non-custodial parent to visit in the hometown of the custodial parent, for a partial custody period of six (6) hours.

h) Each parent shall plan and celebrate the children's birthdays during their time of partial custody.

i) The parent receiving the children shall provide transportation. Both parents shall provide age and weight appropriate car seats for the children.

j) The children shall sleep independently in their own cribs.

k) Each parent shall keep a log that shall be transferred with the children outlining each child's sleeping, eating, and toilet habits while in their care. Each parent shall also record in the log any medical treatment or appointment that occurs while the children are in their care.

l) The parents shall follow all doctors' recommendations and consult with each other about any and all medical concerns regarding the children. Each parent shall inform the other of any medical treatment or appointment within 48-hours of its occurrence and then document said appointment or treatment in the log.

m) The parents shall communicate directly with each other by e-mail regarding the children. If e-mail is unavailable, the parties may use other means to communicate. Communication through third parties should only be used as a last resort.

4. ALL HOLIDAY SCHEDULES SHALL SUPERCEDE ANY OTHER PARTIAL CUSTODY OR VISITATION SCHEDULE UNLESS THE PARTIES MUTUALLY AGREE TO DO OTHERWISE.

5. Each parent shall keep the other informed of the children's health, progress in school, and general welfare and shall consult the other parent concerning major decisions affecting the children.

6. Each parent is entitled to receive directly from schools, health care providers, or other relevant sources, information concerning their children.

7. Neither parent shall engage in any conduct that presents to the children a negative or hostile view of the other.

8. The parents shall refrain from arguing and name-calling during custody exchanges and in the presence of <u>any</u> children. This provision extends to third parties accompanying the parents on custody exchanges.

9. Each parent shall encourage their children to comply with the custody arrangement and foster in their children a positive view of the other.

11. If they have not already done so, the parents agree to attend the "Children Cope With Divorce" seminar.

12. Jurisdiction of this matter shall remain in the Court of Common Pleas of Erie County, Pennsylvania, unless and until jurisdiction would change under the Uniform Child Custody Jurisdiction Act.

13. VIOLATION OF THIS ORDER BY ANY PERSON MAY RESULT IN CIVIL AND CRIMINAL PENALTIES, INCLUDING PROSECUTION, PURSUANT TO SECTION 2904 OF THE PENNSYLVANIA CRIMES CODE, INTERFERENCE WITH CUSTODY OF CHILDREN.

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

JANICE MANUCCI, Administratrix of the Estate of Jeannette Manucci, Deceased, Plaintiff

v.

HEALTH SOUTH OF ERIE, INC., and HEALTHSOUTH REHABILITATION HOSPITAL OF ERIE, Defendants

CIVIL PROCEDURE / PRETRIAL PROCEDURE

When a trial judge determines that "unfair prejudice" results from noncompliance with the requirement to file a Pretrial Statement that includes proper identification, witnesses and an expert report, the court may grant "appropriate relief." Pa. R.C.P. 212.2(c).

CIVIL PROCEDURE / PRETRIAL PROCEDURE

While the alternatives available to the trial judge in circumstances of noncompliance with the requirement to file a Pretrial Statement include preclusion or limitation of expert testimony, such action is an extreme measure to be imposed only in the most limited circumstances.

CIVIL PROCEDURE / PRETRIAL PROCEDURE

Where plaintiff's counsel did not timely provide discovery responses, such responses were filed only following defendants' threats to seek sanctions, and an order for sanctions was imposed after plaintiff's counsel did not appear to represent his client's interest at motion court and the defendants learned of plaintiff's intentions to introduce expert testimony only when plaintiff's counsel refused to certify the case for trial and indicated at that time that he did not have an expert report and that he intended to conduct discovery, the court would exercise its discretion not to preclude testimony and dismiss the case but would rather enter an order awarding attorney's fees and costs, barring any discovery by the plaintiff following the close of discovery, and providing that trial in this matter shall be set at the convenience of the defendants.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY. PENNSYLVANIA CIVIL ACTION - LAW NO. 13394 - 2002

Appearances: John G. Wall, Esq. for the Defendant, Healthsouth
Andrew Sisinni, Esq. for the Plaintiff, Manucci

OPINION

Bozza, John A. Judge

Janice Manucci entered Healthsouth Rehabilitation Hospital on September 29, 2000. Early the following morning she was found on the floor of her room approximately five minutes after having been checked by an employee of the facility. Apparently, she had fallen from the bed, though there were no witnesses to the fall. She was taken to Metro Health Center where it was determined that she had fractured her hip and she underwent surgery to repair it. On October 9, 2000, she was transferred to the Beverly

Healthcare Western Reserve Nursing Home. The following day she was returned to Metro Health where she remained until her untimely death on October 22, 2000 from complications unrelated to her fall.

Approximately two years after her death, a Praecipe for the Issuance of a Writ of Summons was filed pro se. John Wall, Esquire entered his appearance for the defendants on Nov. 4, 2002, and filed a Notice of Service of Interrogatories along with a Rule to File a Complaint. On January 2, 2003, a Complaint was filed by Andrew Sisinni, Esquire on behalf of the plaintiff, with an Amended Complaint filed four days later. The Amended Complaint did not include a claim for wrongful death. The defendants filed necessary responsive pleadings and on November 7, 2003 the Court entered a Case Management Order requiring that discovery be completed by March 29, 2004, with plaintiff's Pre-Trial Statement due by April 29, 2004, and defendants' Pre-Trial Statement due one month thereafter. The recommended trial term was June of 2004.

From the time of filing the Amended Complaint in January of 2003, the plaintiff took no steps to move the case forward. The plaintiff conducted no discovery and failed to respond to defendant's discovery requests in a timely fashion. The defendants were required to file a Motion to Compel that the Court granted on March 3, 2004, directing the plaintiff to respond to the discovery requests within twenty days. The plaintiff did not comply within the specified time period but did ultimately provide discovery responses following defendants' threat to seek sanctions. It took the plaintiff approximately seventeen (17) months to respond to the defendant's initial request for discovery. The plaintiff filed her Pre-Trial Narrative in a timely fashion on April 29, 2004 but did not designate an expert witness or provide an expert report. In response thereto, the defendants filed a Pre-Trial Narrative Statement in a timely fashion on May 28, 2004.

In June of 2004, the defendants requested the plaintiff to join in the filing of a Certification I (certification of readiness for trial). The plaintiff refused, with Attorney Sisinni indicating, among other things, that he now wished to conduct discovery (discovery had been closed since March 29, 2004) and further indicating that he still did not have an expert report. Thereafter, the defendants filed a Motion for Sanctions, or in the alternative a Motion in Limine, asserting that the plaintiff failed to include an expert report with her Pre-Trial Narrative as required by Pa. R.C.P. 212.2. This motion was presented to the Court at its regularly scheduled weekly Motion Court on July 14, 2004, where non-dispositive motions are resolved. A Notice of Presentation of the motion was provided to plaintiff's counsel, Attorney Sisinni, consistent with the requirements of the Local Rules of the Court of Common Pleas of Erie County. Attorney Sisinni received the notice but maintains that he became aware of it only two days before the time set for presentation.

At the time of presentation, Attorney Sisinni did not appear to represent his client's interest. Moreover, he did not contact opposing counsel. Based on the assertions of the defendants' attorney, the facts set forth in the motion, and plaintiff's failure to appear, the Court accepted the defendants' position and issued an order precluding the presentation of expert testimony, and as a result thereof entered an order dismissing the suit with prejudice. Attorney Sisinni filed a timely Motion for Reconsideration and oral argument was conducted, at which time he indicated that, although he was aware of the presentation of the Motion for Sanctions, he did not attend because he was not aware of the time and that he was involved in another matter at the courthouse at the time it was scheduled. He did not respond in any manner to the Motion for Sanctions until after the Court's order was entered. It is now plaintiff's position that the entry of an order precluding the introduction of expert testimony and therefore effectively terminating his case was too severe a sanction under the circumstances. While this Court now concludes that its order dismissing the plaintiff's case with prejudice was too severe a sanction, the facts of this case nonetheless present a very troubling set of circumstances that require a response more precisely calculated to address plaintiff's egregious violation of the Rules of Civil Procedure. *See Stewart v. Rossi*, 452 Pa. Super. 120, 681 A.2d 214 (1996).

The Rules of Civil Procedure provide that when a trial judge determines that "unfair prejudice" results from noncompliance with the requirement to file a Pre-Trial Statement that includes proper identification of witnesses and an expert report, the Court may grant "appropriate relief". Pa. R.C.P. 212.2(c). While the alternatives available to the trial judge in these circumstances include preclusion or limitation of expert testimony, taking such an action is an extreme measure to be imposed only in the most limited circumstances. *See Estate of Ghaner v. Bindi*, 2001 Pa. Super. 195, 779 A.2d 585 (2001). Here, although the actions of plaintiff's counsel are egregious, a remedy short of preclusion and dismissal is sufficient to address the unfair prejudice caused to the defendants.

It is the intention of the Rules of Civil Procedure to facilitate the resolution of disputes in an expedient and fair manner and to allow the parties to proceed through the litigation process with a degree of predictability. Here the plaintiff ignored the Court's Case Management Order and failed to respond to discovery in a timely fashion. The defendants were required to file a Motion to Compel in order to obtain responses to requests for discovery that had been filed some 17 months earlier. The defendants had exercised great patience in awaiting discovery. Attorney Wall wrote three letters to Attorney Sisinni requesting compliance before filing a Motion to Compel. Indeed, Attorney Wall was required to threaten the filing of a Motion for Sanctions when no discovery was forthcoming even within the time prescribed in the Court's order compelling compliance.

Although the plaintiff filed a Pre-Trial Statement in a timely fashion, no expert witness was identified and no expert report was included. At that point, the defendants had every right to proceed on the assumption that the plaintiff did not intend to call an expert at trial. Defendants' Pre-Trial Statement was formulated on that basis, and a month or so later defendants requested that the matter be certified for trial. The defendants only learned of plaintiff's intention to introduce expert testimony when the plaintiff's lawyer refused to certify the case for trial indicating that he did not have an expert report and that he intended to conduct discovery. By then, the period for discovery had been closed for more than two months.

It was entirely reasonable for the defendants to seek sanctions for what at the very least could be characterized as a cavalier approach to rule compliance. The matters raised in the defendants' motion were serious. While it was not the reason that the plaintiff's lawsuit was dismissed, Attorney Sisinni's failure to appear in Motion Court at the designated time was a clear indication of an indifferent attitude towards the litigation process. Attorney Sisinni's justification for not attending was anything but convincing. By his own admission, he had notice of the proceeding, was at the courthouse at the time of the presentation, and he simply chose not to appear or to contact opposing counsel or the Court. It was reasonable for the Court to conclude that the defendant's motion was unopposed.

Having noted that the plaintiff engaged in absolutely no discovery and designated no person to testify as an expert, it would have been reasonable for the defendants to conclude that it was likely that they would prevail and proceed accordingly. Following argument on the Motion for Reconsideration the plaintiff produced an expert report from a licensed practical nurse and so now it will be necessary for the defendants to change direction and to secure expert testimony. This not only has cost the defendants great inconvenience, but it also has undermined the goals of the Rules of Civil Procedure and prevented the expedient resolution of this cause of action. While plaintiff's conduct may not require preclusion and dismissal, sanctions are certainly in order. At a minimum the plaintiff must be responsible for the costs directly and indirectly associated with plaintiff's dilatory approach. An order shall be entered awarding attorney's fees and costs, barring any discovery by the plaintiff following the close of discovery in March 2004, and providing that trial in this matter shall be set at the convenience of the defendants.

ORDER

And now this 22 day of November, 2004 it is hereby **ORDERED**, **ADJUDGED**, **and DECREED** that the Motion for Reconsideration is **GRANTED in part** and **DENIED in part** as follows:

1. This Court's Order of July 14, 2004 dismissing this action with prejudiced is vacated;

2. The plaintiffs are barred from conducting any further discovery and the defendants shall not be required to respond to any discovery initiated by the plaintiff after March 29, 2004.

3. The defendants shall proceed to certify this case for trial during a trial term of their choosing with in a reasonable period of time;

4. The plaintiff shall pay to the defendants all attorneys fees and costs incurred as a result of the following:

a. Attempting to arrange the certification of the case for trial;

b. The preparation, filing and presentation of the Motion for Sanctions or in the alternative Motion in Limine;

c. Responding to the Motion for Reconsideration.

5. Payment of amounts required by this order shall be made within fourteen (14) days of the receipt of the defendants' invoice;

6. The attorneys shall provide a copy of the Opinion and Order to their clients and notify the Court in writing that this has been accomplished.

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

COMMONWEALTH OF PENNSYLVANIA

v.

DIANE D. ONCEA

CRIMINAL PROCEDURE / ARREST / PROBABLE CAUSE

When the testimony establishes that a suspect operating a motor vehicle makes a "rough turn", touches the center line multiple times without crossing over that line, and crosses the center line once while going around a turn in the road without the presence of oncoming traffic or pedestrians, the testimony amounts to suspicious circumstances, but does not individually nor collectively amount to probable cause of a violation of a provision of the motor vehicle code. Without probable cause defendant's omnibus pre-trial motion for relief was granted.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 2293 OF 2004

Appearances: Robert A. Sambroak, Esq. for the Commonwealth
John B. Carlson, Esq. for the Defendant

OPINION AND ORDER

This matter comes before the court on Defendant's Omnibus Pre-trial Motion for Relief.

I. HISTORY OF THE CASE[1]

On May 9, 2004 at approximately 2:45 a.m., Trooper James Bablak observed a truck driven by the Defendant, Diane Oncea, while on routine patrol in Waterford Township. The truck traveled "extremely slowly" in an area with a speed limit of 45 mph. The truck's exact speed is unknown. Trooper Bablak followed the truck as it traveled on Route 97 E, a two-lane highway. The truck turned roughly onto Flatts Rd.[2] Bablak continued to follow the truck on Flatts Rd. for approximately three-quarters of a mile. During that time, he observed the truck touch the centerline four times with the driver's side wheel. He also observed that the truck traveled into the oncoming lane of traffic one time for about 100 feet while rounding a slight turn before returning to the proper lane. As a result of these observations, Bablak turned on his lights. When there was no immediate response, he activated his siren. After traveling 50-75 yards, the truck pulled over. During the relevant times, there was no other traffic on Flatts Road. Defendant's truck was not involved with any type of accident. After the stop, the Defendant who was the sole occupant, agreed to take a Blood Alcohol Concentration (BAC) Test. The results of the BAC test were not admitted into evidence.

As a result, the Defendant was arrested and cited for five offenses:

[1] The facts come from the uncontradicted testimony of Trooper Bablak.
[2] Flatts Rd. is a rural country road.

(1) DUI: General Impairment, 75 Pa.C.S.A. §3802 (a)(1); (2) DUI: Highest Rate of Alcohol, 75 Pa.C.S.A. §3802 (c); (3) Driving on Roadway Laned for Traffic, 75 Pa.C.S.A. §3309 (1); (4) Operate Vehicle without Official Certificates of Inspection, 75 Pa.C.S.A §4703 (a); and (5) Careless Driving. 75 Pa.C.S.A. §3714. The complaint/citations were filed on May 24, 2004. At the preliminary arraignment on June 10, 2004, before District Justice James J. Dwyer, III, charges (3) and (4) were dismissed. Defendant waived her preliminary hearings scheduled for June 18, 2004 and July 26, 2004. An Omnibus Pre-Trial Motion for Relief was filed on October 27, 2004 and the court held a hearing on December 6, 2004. Trooper Bablak was the sole witness.

II. LEGAL ANALYSIS

The Fourth Amendment of the United States Constitution states that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. 4 (1791). The Pennsylvania Constitution, likewise, provides a similar protection against state or municipal agencies. It states that:

> 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.

Pa. Const. Art. § 8 (1968).

Three levels of interaction between citizens and the police are recognized by the Pennsylvania Supreme Court:

> The first is a "mere encounter" (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. See, *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319 (1983); *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382 (1991). The second, an "investigative detention" must be supported by reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. See, *Berkemer v. McCarthy*, 468 U.S. 420, 104 S.Ct. 3138 (1984); *Terry v. Ohio*, 391 U.S. 1, 88 S.Ct. 1868 (1968). Finally, an arrest or "custodial detention" must be supported by probably cause. See, *Dunaway v. New York*, 442, U.S. 200, 99 S.Ct. 2248 (1979); *Commonwealth v. Rodriguez*, 614 A.2d 1378 (Pa. 1992).

Commonwealth v. Ellis, 662 A.2d 1043, 1047-48 (Pa. 1995) (footnote omitted). Relative to vehicle stops, the Pennsylvania Supreme Court defined the issue as:

> whether the facts articulated by the arresting officer were sufficient to establish probable cause warranting the traffic stop. If probable cause was established, then all observations by the police officer upon stopping appellant, as well as the evidence regarding the appellant's performance in the field sobriety tests, were admissible to establish his guilt. If probable cause was not established, then all of the fruits of the unlawful stop should have been suppressed. Plainly, if suppression was warranted, appellant's conviction cannot stand.

Commonwealth v. Garcia, 859 A.2d 820, 822 (Pa.Super. 2004) (citing *Commonwealth v. Gleason*, 785 A.2d 983 (Pa. 2001); See *Commonwealth v. Whitmyer*, 668 A.2d 1113, 1116 (Pa. 1995); *Commonwealth v. Swanger*, 307 A.2d 875, 879 (Pa. 1973).

Gleason reiterated the *Whitmyer* standard. In *Whitmyer* the Defendant was cited for driving at an unsafe speed. However, the police failed to time the Defendant for the requisite three-tenths of a mile required by the statute. The Court granted the motion to suppress because the police lacked the probable cause. *Commonwealth v. Whitmyer*, 668 A.2d 1113, 1114-1115 (Pa. 1995). The Defendant in *Gleason* was observed "crossing the berm line by six to eight inches on two occasions for a period of a second or two over a distance of approximately a quarter-mile." This occurred in the early morning and no other cars on the road. The Court held that the evidence failed to establish that police had probable cause. *Commonwealth v. Gleason*, 785 A.2d 983 (Pa. 2001).[3] In *Commonwealth v. Battaglia*, 802 A.2d 652 (Pa.Super. 2002), the Defendant was observed weaving inside his lane of travel, but not crossing either line. Furthermore, he was traveling five to ten miles slower than the posted speed limit and made some awkward turns. The Superior Court stated that: "perceived 'erratic driving' in and of itself is not a violation of the [Vehicle] Code, and, without more, does not provide probable cause to execute a traffic stop." *Id.* at 657. Likewise, probable cause did not exist when an officer followed a Defendant for two blocks and observed his car cross the right fog line twice in response to oncoming traffic. (Nearly half of the Defendant's vehicle was outside of the proper lane.) *Commonwealth v. Garcia*, 859 A.2d 820, 822 (Pa.Super. 2004).

The Defendant is currently charged with careless driving. That offense is defined as "[a]ny person who drives a vehicle in careless disregard for the safety of persons or property is guilty of careless driving, a summary

[3] The Defendant in *Gleason* was charged with Driving within a single lane, 75 Pa.C.S.A. § 3309(1).

offense." See, 75 Pa.C.S.A. §3714. The *mens rea* for careless driving "is a careless disregard of the rights and safety of others." *Commonwealth v. Huggins*, 790 A.2d 1042, 1047 (Pa.Super. 2002) (quoting *Commonwealth v. Wood*, 475 A.2d 834, 836 (Pa.Super. 1984).[4]

Driving in the middle of the road is an example of careless driving. *Commonwealth v. McGrady*, 685 A.2d 1008, 1010 (Pa.Super. 1996). There the Defendant was:

> traveling slower than normal for the type of road and the speed limit. [citation omitted]. In addition, 'the vehicle was in the middle of the lane, seemed to be hesitant with its driving, going a little quicker, a little slower, vice-versa.' [citation omitted]. The car was driving right on the center line, in the middle of the lane, veering in and out over the road. [citation omitted]. ... and, as he [Officer] followed the car, the erratic driving became more pronounced. [citation omitted].

Id. The Court found that probable cause existed to stop the defendant for Careless Driving.

The case at bar is more similar to *Whitmyer, Battaglia* and *Gleason* than it is to *McGrady*. At the time of the stop of Ms. Oncea's vehicle, Trooper Bablak had made the following observations: (1) she had made a rough turn onto Flatts Road; (2) her vehicle touched the center line multiple times without crossing over; and (3) she crossed the centerline once while going around a turn in the road without the presence of oncoming traffic or pedestrians. Although Trooper Bablak was confronted with suspicious circumstances, the facts neither individually nor collectively amounted to probable cause of a violation of the motor vehicle code.

III. Conclusion

Based on the above analysis, Defendant's Omnibus Pre-trial Motion for Relief will be granted.

ORDER

AND NOW, this 23rd day of December, 2004, for the reasons set forth in the accompanying opinion, Defendant's Omnibus Pre-trial Motion for Relief GRANTED.

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

[4] The Language "careless disregard," as used in this statute, set the level of culpability of the statutory offense at less than willful and wanton conduct, but more than ordinary negligence or the mere absence of care under the circumstances. See, *Commonwealth v. Cathey*, 645 A.2d 250 (Pa.Super. 1993). See also, *Commonwealth v. Podrasky*, 378 A.2d 450 (Pa.Super. 1977).

CITY OF ERIE, Plaintiffs

vs.

PAT CAPPABIANCA, JAMES T. CASEY, IAN MURRAY, JOSEPH SINNOTT, JAMES N. THOMPSON, Defendants

DISCOVERY / SUBPOENA

Absent express statutory authority, non-judicial body or official has no subpoena power.

POLITICAL SUBDIVISIONS / MUNICIPAL CORPORATIONS / POWERS & FUNCTIONS

City Council has power to conduct investigations under 53 P.S. 41409, including the power to secure oral or written statements from city employees or officials.

POLITICAL SUBDIVISIONS / MUNICIPAL CORPORATIONS / POWERS & FUNCTIONS

City Council, while having the power to conduct investigations, does not have the authority to issue subpoenas.

POLITICAL SUBDIVISIONS / MUNICIPAL CORPORATIONS

The Third Class City Charter Law, governing the City of Erie, replaces the Third Class City Code in all matters addressed by the former.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
NO. 90094-2004

Appearances: Anthony Logue, Esq. for City Council
Paul Curry, Esq. for City of Erie
Kenneth Zak, Esq. for City of Erie

OPINION

This case arose when the City of Erie, through its Solicitor, filed a petition to quash subpoenas issued by the Defendants as members of Erie City Council. The Defendants responded with a cross motion to enforce subpoenas and/or compel attendance at a councilmanic hearing. At issue is whether the Defendants have legal authority to issue subpoenas for a councilmanic hearing. Because there is no statutory authority for the Defendants' actions, the Petition to Quash Subpoenas is GRANTED and the Motion to Enforce Subpoenas is DENIED.

PROCEDURAL/FACTUAL HISTORY

Intent on investigating a variety of administrative/personnel matters, the Defendants have served three sets of subpoenas on fourteen different city employees and officials. The subpoenas seek to compel testimony at a councilmanic hearing and/or production of documents. In response, the City Solicitor filed the present action seeking to quash the subpoenas, contending that the Defendants do no have the power to issue subpoenas. Thereafter, the Defendants filed a motion seeking enforcement of their

subpoenas. The parties have now had the benefit of oral argument and the opportunity to submit briefs.

DISCUSSION

The Defendants actions do not involve formal litigation in a judicial proceeding. Hence the threshold inquiry is whether subpoena power is available to a non-judicial body such as City Council. It has long been the law that subpoena power does not exist absent express statutory authority:

> The essence of a subpoenas function is to aid the Court in the resolution of litigation, so if there is no formal proceeding pending before the Court there could be no legitimate reasons to issue a subpoena. *Commonwealth vs. Polka* 438 Pa 67, 69, 263 A2nd 354, 356 (1970). In the absence of a statute granting subpoena power to non-judicial bodies of officials, the power to issue subpoenas is limited to the judiciary. *Commonwealth ex rel Margiotti vs. Orsini*, 368 Pa. 259, 263, 81 A 2nd 891, 893 (1851).

As quoted in *Cohen vs. Pelagatti*, 493 A 2nd 767, 770 (Pa Super 1985).

It is at this juncture where the parties take polar positions. The City of Erie argues that the City's present form of government, Plan A of the Optional Third Class City Charter, does not grant City Council subpoena power. The Defendants counter that Plan A is supplemented by its preceding statute, the Third Class City Code. Specifically, the Defendants contend that 53 P.S. § 36015 of the Third Class City Code provides City Council with subpoena power. While the Defendants are correct that under the Third Class City Code Subpoena power existed, that power was eliminated when the City of Erie adopted the Third Class City Charter.

A brief history of the evolution of government in the City of Erie is helpful. The Third Class City Code was enacted in 1931. In sum, it provided for a parliamentary form of government because both the legislative and executive power were combined in one entity, City Council. 53 P.S. § 36002. The Council was composed of five members, one of whom was designated as the Mayor. The Mayor had no separate executive authority, including no ability to veto the actions of Council. 53 P.S. § 36007. The administrative responsibilities for operating the city were held exclusively by City Council. 53 P.S. § 36102. While the Mayor had the ability to supervise the conduct of certain city officers, 53 P.S. § 36205, it appears the Mayor's duties were not substantive because the powers to set policy and make personnel decisions were vested with Council. 53 P.S. § 36102. It is understandable, therefore, why the Third Class City Code would grant Council subpoena power since it was the sole entity in charge of city government.

The landscape of city government was significantly changed when the voters of the City of Erie adopted Plan A of the Optional Third Class City Charter in 1962. This new form of government separated the legislative and executive responsibilities by providing that the legislative power shall be exercised by the City Council, 53 P.S. § 41407, and the executive power

shall be exercised by the Mayor. 53 P.S. § 41411. The Optional Charter removed the Mayor from Council, 53 P.S. § 41413 (b), and gave the Mayor the power to veto an ordinance from Council. 53 P.S. § 41413(a). The number of Council members was expanded from five to seven. 53 P.S. § 41404.

The City of Erie has operated under this form of government since 1962. Under the Optional Third Class City Charter, the only possible statutory authority for a councilmanic investigation appears in 53 P.S. § 41409, which states:

> The council, in addition to such as other powers and duties as may be conferred upon it by this charter or otherwise by general law, may require any city officer, in its discretion, to prepare and submit sworn statements regarding his official duties in the performance thereof, and may otherwise investigate the conduct of any department office or agency of the city government.

It is uncontroverted that this section empowers City Council to conduct investigations. Such an investigation includes the ability of Council to secure oral and written statements from city employees/officials. However, glaringly lacking is any statutory authority to issue subpoenas. Unlike the Third Class City Code, which clearly gave Council subpoena power, the statutory scheme for the current form of government does not give Council subpoena power.

There may be various reasons for the elimination of subpoena power for Council. The most obvious explanation is the diffusion of power. Unlike the pre-1962 government, City Council is now divested of all executive authority. The role of Council is significantly reduced. The Mayor has separate authority to act unencumbered by the legislative body. Therefore, City Council does not need the expansive authority to investigate that it once possessed under the Third Class City Code.

Importantly, when the legislature enacted § 41409 in 1957, a provision for subpoena power for Council easily could have been retained. Notably, the legislature did adopt other specific portions of the Third Class City Code into the Optional Third Class City Charter. See 53 P.S. § 41418, adopting by specific reference § 36809, 36810 and 35811 of the Third Class City Code. The legislature did not incorporate the subpoena power of § 36105 of the Third Class City Code into § 41409 of the Optional Third Class City Charter. Therefore, this Court will not read into § 41409 the provision for subpoena power which was not included by the legislature.

The Defendants argue that the Optional Third Class City Charter Law did not supplant the Third Class City Code. Instead, the Third Class City Code should be used to supplement the powers of City Council. Therefore, the Defendants insist that Council has statutory authority to issue subpoenas pursuant to 53 P.S. § 36105 of the Third Class City Code.

However, the Defendants position is undermined by the City's enabling ordinance. Specifically, Ordinance Number 2-1962 was enacted to establish the organic law of the City of Erie. In the preamble, the Ordinance states, in part:

> The purpose of this ordinance is to provide the administrative structure of the government of the City of Erie on or after January 1, 1962, for the purpose of affecting the transition of the commission form of city government under the Pennsylvania Third Class City Code to the Mayor-Council Plan A as provided by the Pennsylvania Optional Third Class City Law. **In the absence of any provision herein, the city shall be governed by the provisions of the Optional Third Class City Charter, except as specifically otherwise provided by the provision of the Third Class City Code.** This ordinance, with its amendments shall be known and cited as the "Administrative Code of the City of Erie." (emphasis added)

As stated in this ordinance, effective January 1, 1962, the organic law for the City of Erie is the Third Class City Charter. It is only in the absence of any provision of the Third Class City Charter that there is a need to look to the Third Class City Code. In this case, the Third Class City Charter specifically addresses the power of Council to conduct investigations. Therefore the Third Class City Code is inapplicable.

This interpretation is consistent with the intent of the legislature regarding the potential conflict in powers granted under the Third Class City Code and the Optional Third Class City Charter. The legislature squarely addressed this issue by providing:

> [u]pon the adoption by the qualified voters of any city of any of the optional plans of government set forth in this act, the city shall thereafter be governed by the plan adopted and by the provisions of this act common to optional plans and by all applicable provisions of general law...The plan adopted and the provision of this act common to optional plans shall become the organic law of the city at the time fixed by this act. So far as they are consistent with the grant of powers and limitations, restrictions, and regulations hereinafter prescribed, they shall supersede any existing charter, and all acts and parts of acts, local, special or general, affecting the organization, government and powers of such city to the extent that they are inconsistent or in conflict therein. All existing acts or parts of acts and ordinances affecting the organization, government and powers of the city not inconsistent or in conflict with the organic laws so adopted shall remain in full force until modified or repealed as provided by law.

53 P.S. § 41301.

Under this provision, the Third Class City Charter Law replaces the Third Class City Code in all matters addressed by it. Given the distinctly different forms of government allowed under these two separate statutes, logic compels the conclusion that Council's investigative powers are governed solely by the Third Class City Charter Law, specifically §41409.

In reaching this result, the Court is mindful that City Council's power to conduct investigations under the Third Class City Charter is restricted. After all, Council is at the mercy of employees or officials to respond to its inquiries. Indeed, it is foreseeable the information that Council receives could be controlled by the Mayor. However, the executive branch has separate authority to act without approval of City Council. Therefore, it is understandable why the legislature would limit the power of Council to conduct an investigation of the executive actions of the Mayor.

CONCLUSION

A non-judicial body does not have the power to issue subpoenas absent express statutory authority. In the case sub judice, the Third Class City Charter does not grant subpoena power to City Council. Accordingly, the petition to quash subpoenas must be granted.

ORDER

AND now, to-wit this 19th day of January 2005, for the reasons set forth in the accompanying opinion, the Petition to Quash Subpoenas is hereby GRANTED. The Motion to Enforce Subpoenas and/or Compel Attendance is hereby DENIED.

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

COMMONWEALTH OF PENNSYLVANIA

v.

JEFFREY WALIZER

CRIMINAL LAW / SENTENCING

The Court of Common Pleas has 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 rehabilitative needs of the defendant.

CRIMINAL LAW / SENTENCING

A sentencing court is required to state on the record its reasons for the sentence imposed.

CRIMINAL LAW / SENTENCING

A sentence will not be disturbed on appeal unless there is evidence of a manifest abuse of discretion.

CRIMINAL LAW / SENTENCING

A manifest abuse of discretion is more than just an error in judgment. To constitute a manifest abuse of discretion, a sentence must either exceed the statutory limits or be manifestly excessive or the result of partiality, prejudice, bias, or ill will.

CRIMINAL LAW / SENTENCING

It is impermissible for the court to rely solely on factors already considered in the formulation of the sentencing guidelines to deviate from the guidelines

CRIMINAL LAW / SENTENCING

The court may depart from the sentencing guidelines as long as it specifies its reasons and the sentence is reasonable.

CRIMINAL LAW / SENTENCING

Consideration of the impact of the gravity of the offense on the victim and the community is required in formulating the sentence imposed.

CRIMINAL LAW / SENTENCING

Where the court provided specific reasons on the record for its decision to depart from the sentencing guidelines for the defendant's offense of driving under the influence and indicated that a reason was that alcohol played a significant role in the death which occurred, such factors justified the court's determination to impose a sentence beyond that set forth in the sentencing guidelines. 204 Pa. Code § 303.16.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 553 of 2004

Appearances: Office of the District Attorney for the Commonwealth
Tim Lucas, Esquire for the Defendant

OPINION

Bozza, John A., J.

On September 8, 2004, the defendant, Jeffrey Walizer, entered a plea of guilty to the following crimes: homicide by vehicle[1], reckless endangerment[2], driving under the influence[3], and reckless driving[4]. On November 8, 2004, Mr. Walizer was sentenced as follows:

> Count II - Homicide by Vehicle - sixteen (16) months to forty-eight (48) months incarceration, State Bureau of Corrections, $1000 fine, plus costs;
>
> Count IV - Recklessly Endangering Another Person - five (5) months to twenty-four (24) months, consecutive to Count 2, plus costs;
>
> Count VI - Driving Under the Influence of Alcohol - twelve (12) months to twenty-four (24) months, consecutive to Count 4, $300 fine, plus costs;
>
> Count IX - Reckless Driving - $200 fine plus costs.

A Motion to Modify Sentence was filed on November 17, 2004. Prior to this Court's decision on the motion, however, the defendant filed the instant appeal, dated December 8, 2004. Thereafter, this Court issued an Order on December 13, 2004, noting that it had been divested of jurisdiction due to the appeal, and clarifying that the defendant was boot camp eligible.

In his timely 1925(b) Statement of Matters Complained of on Appeal, Mr. Walizer states the following:

> (1) The Court went beyond the aggravated range and sentenced the defendant to the statutory maximum for driving under the influence of alcohol for the stated reason "it was the primary cause of the accident" where the record was devoid of sufficient facts for the Court to reach that conclusion.
>
> (2) The Court erred in maxing the defendant for driving under the influence since neither the defense nor the Commonwealth claimed defendant's alcohol intoxication was the "primary cause of the accident."

---

[1] 75 P.S. §3732.
[2] 18 P.S. §2705.
[3] 75 P.S. §3731.
[4] 75 P.S. §3736.

(3) The Court erred in sentencing the defendant at the highest end of the standard range of the sentencing guidelines for the non-DUI related homicide by motor vehicle charge where he plead guilty to a separate DUI offense that sufficiently reflected the impact of alcohol with respect to the incident.

(4) The Court erred or abused its discretion in imposing the statutory maximum for the DUI offense where alcohol had already been "factored-in" to the offense gravity score for the homicide by motor vehicle charge and there were other contributing factors to the incident.

(1925(b) Statement, ¶¶4-11).

Mr. Walizer's assertions of error involve the discretionary aspects of his sentence. Essentially, he argues that the DUI charge was "double-counted" in that the use of alcohol was factored into the offense gravity score for the homicide by vehicle charge in addition to being used as a justification for departing from the sentencing guidelines with respect to the DUI charge. Additionally, Mr. Walizer asserts that in imposing sentence this Court inaccurately referenced alcohol as the "primary cause" of the accident. Upon review the Court finds that these assertions are without merit.

Mr. Walizer faced a maximum penalty of a $15,000 find and up to seven (7) years in jail for the homicide by vehicle offense, which was graded as a felony of the third degree pursuant to his plea agreement. At the time of sentencing the Court was provided with a pre-sentence report and sentencing guideline work sheets indicating that Mr. Walizer faced a standard sentence of nine (9) months to sixteen (16) months incarceration and an aggravated sentence of twenty-five (25) months incarceration for the homicide by vehicle offense. 204 Pa. Code §303.16. Mr. Walizer faced a maximum penalty of $5,000 and up to two (2) years in jail on the DUI offense. According to the sentencing guidelines, Mr. Walizer faced a standard range sentence of restorative sanctions and an aggravated sentence of restrictive intermediate punishments to three months incarceration for the DUI offense. 204 Pa. Code §303.16.

The Court has 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). Additionally, 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). Therefore, a sentence will not be disturbed on appeal unless there is evidence of a manifest abuse of discretion. *Commonwealth v. Johnson*, 446 Pa. Super. 192, 666 A.2d 690 (1995). A manifest abuse of discretion is more than

just an error of judgment. To constitute a manifest abuse of discretion, a sentence must either exceed the statutory limits or be manifestly excessive or the result of partiality, prejudice, bias or ill will. *Commonwealth v. Smith*, 543 Pa. 566, 673 A.2d 893 (1996); *Commonwealth v. Haog*, 445 Pa. Super. 455, 665 A.2d 1212, 1214 (1995) (citations omitted).

At the time of sentencing, the Court made the following statement on the record:

> [W]e recognize first and foremost we have lost a dear member of our community and we also recognize that Mr. Walizer is remorseful for what he's done, and that we must proceed on the basis of doing what is required in the circumstances of this case, recognizing that there are limitations.
>
> So, Mr. Walizer, I'm going to sentence you in the standard range of the sentencing guidelines. The Commonwealth has not presented evidence of an aggravating circumstance, and we're going to be hopeful in passing judgment on you today that the future will provide for everyone, some measure of peace.
>
> So the standard range sentencing guidelines for the charge of homicide by motor vehicle, which is not the — which is not DUI related is nine to sixteen months in the minimum — in the minimum range, and so I will impose the minimum of which will be sixteen months and the maximum of which will be four years.
>
> .....
>
> Then at Count 6, which is the DUI offense, the Court is going to depart from the guidelines, finding that in this circumstance, the DUI was a factor, a significant factor in bringing about the death of this young woman, and even though it wasn't a direct cause, per say, as is indicated by the Commonwealth's plea arrangement, I do believe that it was a significant factor.
>
> So I'm going to impose the maximum sentence of twelve to twenty-four months consecutive to the sentence I previously imposed, recognizing that no matter what we do here today, it cannot possibly and completely rectify the harm that's been done to anybody. And I certainly hope that those are who are touched by this will be able to move on and do something that will ultimately bring some measure of peace, as I indicated before.

(Sentencing Transcript, 11/8/04, p. 34-36).

In this case, the defendant's sentence for the homicide by vehicle offense was not only within the statutory limits but also within the standard range of the sentencing guidelines. As such the sentence was not in error. Furthermore, with respect to the sentence imposed for the DUI offense, the Court provided specific reasons on the record for its decision to depart

from the sentencing guidelines. Rather than indicating that alcohol was the "primary" cause of the accident, as asserted by the defendant, the Court recognized that while the DUI was not a direct cause, it did play a significant role. In fact, the record indicates that the decedent, Barbara Ann Freitas, was involved in a car accident prior to the defendant arriving on the scene, and had exited her vehicle, which encroached upon his lane of traffic. (S. T., p. 31-32). The area was well lit due to a nearby industrial park. *Id.* at 29. However, the defendant, traveling over the speed limit down a straightaway with no impediments to his vision plowed directly into the decedent's vehicle without swerving or braking. *Id*. at 29-30. The decedent, who was standing on the other side of her vehicle, was struck by it and propelled into the air, ultimately dying at the scene. *Id.*

The defendant's position that it was improper for the Court to rely on his alcohol use to justify its guideline departure is misplaced. While it is impermissible for the Court to rely solely on factors already considered in the formulation of the sentencing guidelines to deviate from the guidelines, such was not the case here. *Commonwealth v. Simpson,* 2003 Pa. Super. 260, 829 A.2d 334 (2003). The guidelines for a DUI offense do not take into consideration whether the underlying conduct contributed to a death. It is a factor considered neither with regard to the offense gravity score nor the prior record score calculations for that offense. Apparently, it is the defendant's position that because he did not plead guilty to the homicide by motor vehicle while driving under the influence offense, 75 Pa. C.S. § 3735, but to a related but different offense that did not include the use of alcohol as an element, the Court may not consider such conduct in departing from the guidelines on a different offense. This Court is not aware of any support for this position and it is apparent that such an argument does not implicate the double-counting issue with regard to sentencing guidelines.

The court may depart from the sentencing guidelines so long as it specifies its reasons and the sentence is reasonable. *Commonwealth v. Smith,* 543 Pa. 566, 673 A.2d 893 (1996)*; Commonwealth v. Griffin*, 2002 Pa. Super. 203, 804 A.2d 1 (2002). Here the Court specified that it was departing from the guidelines because it concluded that the conduct of driving under the influence of alcohol contributed to the victim's death. This conclusion is amply supported by the factual basis of the defendant's plea. In addition to pleading guilty to the DUI and homicide by motor vehicle charges, he also pled guilty to the offense of reckless endangerment and the summary offense of reckless driving. With regard to the reckless endangerment charge the defendant admitted that he placed another in danger of death in that he "did drive a motor vehicle while intoxicated...". (Plea Transcript, 9/8/04, p. 13). The factual basis of the homicide by motor vehicle charge included the fact that the defendant was in violation of the DUI statute when he caused the victim's death. Moreover, the defendant's plea for

the DUI offense included the factual allegation that he had operated a motor vehicle while incapable of safe driving. Finally, at the time of the sentencing hearing it was noted that the defendant's blood alcohol was .18 %. (S.T., p. 32). Concluding that the defendant's conduct in driving under the influence of alcohol was a "significant factor" in bringing about Barbara Ann Freitas' death was reasonable and supported by the record.

At the time of sentencing the Court took note of the tragic circumstances of the victim's death and it's impact on her family. (S. T., 33-34). The Court made similar observations with regard to the defendant and his family. *Id.* Consideration of the impact of the gravity of the offense on the victim and the community is required. *Commonwealth v. Galletta*, 2004 Pa. Super. 463, 2004 Pa. Super. LEXIS 4443; 42 Pa. C.S. § 9721. There is nothing in the record to suggest that the court's decision was in anyway based on "partiality, prejudice, bias or ill will" or that it was otherwise unreasonable. *Commonwealth v. Smith*, 543 Pa. 566, 673 A.2d 893 (1996).

For the reasons set forth above, it is respectfully submitted that the Court's judgment of sentence should be affirmed.

Signed this 24 day of January, 2005.

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

CHAD BRACKEN, Plaintiff

v.

JAMES OLIVER SANDERS, M.D., JAMES R. MACIELAK, M.D., DONALD WOODS, M.D., SHRINERS HOSPITAL FOR CHILDREN, ORTHOPAEDIC ASSOCIATES OF MEADVILLE, Defendants

CIVIL PROCEDURE / SUMMARY JUDGMENT

Pa.R.C.P. 1035.2 provides that summary judgment can be granted at the close of the pleadings if there is no genuine issue of material fact or if the party with the burden of proof has failed to produce evidence of facts essential to the cause of action or defense. The court is required to review the record in the light most favorable to the non-moving party, resolving all doubts as to the existence of an issue of fact against the moving party. Summary judgment should be granted only in a case that is clear and free from doubt.

MEDICAL MALPRACTICE / INFORMED CONSENT / NON-SURGICAL PROCEDURES

The doctrine of informed consent, based upon the intentional tort of battery, requires consent to the material risks, complications and alternatives of a surgical procedure. The duty of a physician to disclose encompasses the therapy, the seriousness of the situation, the disease and the organs involved, the potential results of treatment, and those risks which a reasonable person would consider material in making the decision to undergo treatment. All known information need not be disclosed.

Informed consent is required in the context of a surgical procedure and does not encompass risks attendant to other procedures. MRI, CT scan and myelogram imaging modalities relate to the post-operative care and not to the surgical procedure. Therefore, an allegation that the defendants failed to advise the plaintiff that MRI, CT scan or myelogram imaging modalities were not available does not state a cause of action for failure to obtain informed consent.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 14522 - 2003

Appearances: Jonathan M. Cohen, Esq.
S.E. Riley, Jr. Esq.
Peter J. Hoffman, Esq.
T. Warren Jones, Esq.
Giles Gaca, Esq.

OPINION

This is a medical malpractice case in which the defendants, James Oliver Sanders, M.D. (“Sanders”) and Donald Woods, M.D. (“Woods”) have filed a motion for partial summary judgment.

On November 3, 2003, the plaintiff filed a complaint seeking damages from all defendants for injuries allegedly sustained as a result of a surgical procedure to repair a spinal deformity (Kyphosis). The surgery took place at Shriner's Hospital For Children in Erie, Pennsylvania on November 20, 2001.

As part of the action, the plaintiff asserts a claim for lack of informed consent. Specifically, he asserts that the defendants failed to adequately inform him of the risks and alternatives of the spinal surgery that a reasonable person would consider material to making a decision whether to undergo the surgery. *See,* Complaint, count VI ¶¶ 34-36. In support of his claim, he has submitted an expert report from Clyde L. Nash, Jr., M.D. Plaintiff argues that partial summary judgment should not be granted because Dr. Nash's expert opinion supports his claim that the defendants breached the duty related to informed consent by failing to advise him that MRI, CT scan or myelogram imaging modalities were not available at Shriner's Hospital.

A. The legal standard for summary judgment.

Summary judgment motions are governed by Pa.R.Civ.P. 1035.1-1035.5.

Summary judgment should only be granted in a case that is clear and free from doubt. *Ducjai v. Dennis,* 656 A.2d 102, 107 (Pa.1995). Additionally, summary judgment can be granted at the close of the pleadings:

> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which would be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.Civ.P. 1035.2.

In deciding a motion for summary judgment, the Court is required to review the record in the light most favorable to the non-moving party, resolving all doubts as to the existence of a genuine issue of material fact against the moving party. *Hayward v. Medical Center of Beaver County,* 608 A.2d 1040, 1042 (Pa. 1992).

The doctrine of informed consent is based upon or derived from the intentional tort of battery which precludes the touching of a person's body without permission. *See, Wu v. Spence,* 605 A.2d 395, 397 (Pa.Super. 1992).[1] Because of the invasiveness inherent in surgical procedures, informed consent as to the material risks, complications and alternatives of a surgical procedure is required.

[1] *See also,* 40 Pa.C.S.A. §1303.504(c).

Gray v. Grunnagle, 223A.2d 663, 668-69 (Pa. 1966).

A patient's consent is valid only if it is "clear that both parties understand the nature of the undertaking and what the possible as well as expected results might be." *Id.* at 668-69. In *Festa v. Greenberg*, 511A.2d 1371 (Pa. Super. 1986), *appeal denied*, 527 A.2d 541 (1987), the Superior Court noted, "a physician is duty bound to apprise the patient 'of such important matters as the nature of the therapy, the seriousness of the situation, the disease and the organs involved and the potential results of treatment.'" *Id.* at 1373 (internal quotations omitted). However, not all known information need be disclosed to the patient. *Stove v. Association of Thoracic & Cardiovascular Surgeons*, 635 A.2d 1047, 1051 (Pa. Super. 1993). A physician is bound to disclose only those risks which a reasonable man would consider material to his decision whether or not to undergo treatment. *Id.* (internal quotations omitted). Moreover, the informed consent requirement applies to the surgical context and does not encompass risks attendant to procedures other than surgery. *Wu v. Spence, supra* at 397. *See also, Dible v. Vagley*, 612 A.2d 493, 496 (Pa. Super. 1992), *appeal denied*, 629 A.2d 138 (1993).

After its review, this Court concludes that advising a patient whether defendants had access to an on-site MRI, CT scan or myelogram imaging does not fall within the scope of information that must be provided to insure an informed consent. Here, the information did not relate to the surgical procedure, but rather to plaintiff's post-operative care. Plaintiff's claim in this regard sounds in negligence, not intentional tort. Therefore, the allegations and proof do not support a cause of action for lack of informed consent.

ORDER

AND NOW, this 7th day of March, 2005, after having reviewed the Motion For Partial Summary Judgment of defendants James Oliver Sanders, M.D. and Donald Woods, M.D., as well as the plaintiff's response, and for the reasons set forth in the accompanying opinion, it is hereby **ORDERED** that the Motion For Partial Summary Judgment is **GRANTED**.

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

BAC, INC., Appellant

v.

BOARD OF ASSESSMENT APPEALS OF ERIE COUNTY, Appellee

v.

MILLCREEK TOWNSHIP SCHOOL DISTRICT, Intervenor/Appellee

ATTORNEY AND CLIENT

Under the common law, an attorney owes a fiduciary duty to his/her client.

A fiduciary duty requires that an attorney demonstrate loyalty to his client and avoid engaging in a conflict of interest.

An attorney who has represented a client in a matter shall not 1) represent another person in the same or substantially the same matter in which that person's interests are materially adverse to the former client unless the former client consents to representation after full disclosure and 2), use the information relating to the representation to the disadvantage of the former client.

When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or substantially related matter in which that lawyer, or a firm with which the lawyer was associated, previously represented a client whose interests are materially adverse to that person, unless 1) the disqualified lawyer is screened from all participation in the matter and receives no fee therefrom and 2), written notice is promptly given to the appropriate client.

To determine whether there is a substantial relationship between the prior and current litigation in order to disqualify counsel, the court must consider the nature and scope of the prior representation, the nature of the present lawsuit against the former client, and whether the former client disclosed confidences to the attorney which would be relevant and detrimental to the former client in the present action.

Where tax assessment counsel joined law firm that previously represented former client in potential acquisition of the same property by a government agency, counsel and firm were not disqualified from representation where the record failed to demonstrate that the matters were substantially similar and that confidences were disclosed that would be relevant and detrimental to the former client.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW NO. 14333 - 2002

Appearances: Gary Eiben, Esquire
Michael J. Visnosky, Esquire
John A. Onorato, Esquire

Evan E. Adair, Esquire
Lee S. Acquista, Esquire

OPINION

This case comes before the Court on the appellant's Petition For Disqualification of Counsel. A hearing was conducted on January 7, 2005 and briefs have been submitted by the parties.

I. BACKGROUND OF THE CASE

This is a tax assessment appeal case. BAC, Inc. (BAC) is a Pennsylvania corporation whose shareholders are Father Theo, Al and Dean Nacopoulos. General counsel to that entity is Vasilios Nacopoulos, Esquire who is the son of Father Theo Nacopoulos.[1] Timothy M. Zieziula is an attorney practicing with the law firm of Knox, McLaughlin, Gornall and Sennett, P.C. (Knox). Michael J. Visnosky is also an attorney with that firm who commenced his practice on or about September 27, 2004. Prior to that time, he was associated with the Erie law firm, McClure and Miller, LLP. Since April 15, 1998, Attorney Visnosky has been employed as special counsel to the Millcreek Township School District (MTSD), retained to handle tax assessment appeals.

In and around February, 2000, the Commonwealth of Pennsylvania General Services Administration (GSA) contacted the Nacopouloses to advise them of the Commonwealth's plans to acquire all of the property located in Millcreek Township, Pennsylvania from the Presque Isle Peninsula to Sixth Street along the east side of Peninsula Drive for the "Greenway Project". This acquisition would include BAC's property which fronts a considerable distance along the eastside of that roadway. In and around March, 2000, GSA announced the project in a published newspaper report. The article described the project and referred to a figure of $162,000.00 per acre which was GSA's preliminary estimate for the acquisition of properties within the proposed Greenway Project. At the time, Attorney Nacopoulos was an associate with the Knox Law Firm and, at his request, Attorney Zieziula began his representation of BAC (mid-March 2000). As part of his representation, Attorney Zieziula met with the Nacopoulos family and attended a public meeting(s) for the purpose of discussing their response to the Commonwealth's plan. Neither Attorney Zieziula nor anyone on behalf of the Nacopoulos family commissioned an appraisal of the BAC property. However, because they were not interested in selling, the Nacopouloses advised Attorney Zieziula to indicate that they did not wish to sell the property and to advise GSA that they felt the property was worth twice the reported price of $162,000.00 per acre. Attorney Zieziula also relayed this information to the Commonwealth's

[1] Attorney Nacopoulos was previously associated with Knox. However, he left the firm before the commencement of the tax assessment appeal.

counsel, Attorney James Walczak. Corroboration for the content of those discussions is found in Exhibit B which was entered into evidence at the time of the hearing.

As the evidence demonstrated, the Nacopouloses did not express a firm price for the property, nor did they intend to sell. It is equally evident that no appraisals were conducted, or for that matter, any other economic analysis of the value of the property. Within approximately 8 weeks of the announcement of the Greenway Project, it was abandoned by the Commonwealth. Attorney Zieziula's representation of BAC terminated on or about May 15, 2000. The file was closed and placed in storage in the basement of the building in which Knox has its offices and remained there until September 24, 2004.

This tax assessment appeal was filed by Attorney Visnosky on behalf of MTSD on August 7, 2002. Subsequently, BAC moved to disqualify Attorney Visnosky and the Knox Law Firm. Once aware of the motion, on September 24, 2004, at the telephone request of Attorney Visnosky, Attorney Zieziula retrieved the BAC, Greenway Project file from storage, thumbed through it to insure that it was complete, and sent it to Attorney Nacopoulos with an explanatory letter. (He believed that the file previously had been sent to Attorney Nacopoulos.) The testimony establishes that Attorney Visnosky did not have the opportunity to examine the BAC file and was not aware of its contents. There were no appraisals or similar opinions of property value contained in the BAC file.

Continuing, Knox has taken the following action regarding this matter: (1) it returned the complete BAC file to Attorney Nacopoulos; (2) directed Attorneys Visnosky and Zieziula not to discuss the file or Attorney Zieziula's representation of BAC in any way; and (3) directed Attorney Zieziula not to participate in the BAC assessment appeal.

II. LEGAL DISCUSSION

Under the common law, an attorney owes a fiduciary duty to his/her client. *Maritrans v. Pepper, Hamilton & Sheetz*, 602 A.2d 1277, 1283 (Pa. 1992). This duty demands loyalty to the client and prohibits the attorney from engaging in conflicts of interest. *Id.* The test is whether a possibility of a conflict may arise. *Middleberg v. Middleberg*, 233 A.2d 889 (Pa. 1967).

The applicable standard is set forth in RPC 1.9 and 1.10(b) which provide that:

> Rule 1.9. Conflict of Interest: Former Client
>
> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interest of the former client unless the former client consents after a full disclosure of the circumstances and consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Rule 1.10 - Imputed Disqualification: General Rule

. . . When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate client to enable it to ascertain compliance with the provisions of this rule.

The comments to Rule 1.10 are illustrative of its object and purpose.

A rule based on functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Confidentiality

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together.

Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or related matter even though the interests of the two clients conflict.

Adverse Positions

The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse

> to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification.

Initially, the Court must determine whether or not there is a substantial relationship between the prior and current litigation. This requires consideration of the following: (1) the nature and the scope of the prior representation at issue; (2) the nature of the present lawsuit against the former client; and (3) whether the former client disclosed confidences to the attorney which would be relevant and detrimental to the former client in the present action. *Estate of Pew,* 655 A.2d 521 (Pa. Super. 1994). As the *Pew* court noted:

> An attorney is prohibited from undertaking a representation adverse to a former client in a matter "substantially related" to that in which the attorney previously had served the client. (citation omitted). The fact that the two representations involved similar or related facts is not, in itself, sufficient to warrant the finding of a substantial relationship so as to disqualify the attorney from the representation, but, rather the test is whether information acquired by an attorney in his former representation is substantially related to the subject matter of subsequent representation. (citation omitted). If the attorney might have acquired confidential information related to the subsequent representation, Pennsylvania Rule of Professional Conduct 1.9 would prevent the attorney from representing the second client. (citation omitted). Confidential information gained by one member of a law firm is imputable to the other members of the same law firm. (citation omitted). Therefore, a former client seeking to disqualify a law firm representing an adverse party on the basis of its past relationship with a member of the law firm has the burden of proving: (1) that a past attorney/client-relationship existed which was adverse to a subsequent representation by the law firm of the other client; (2) that the subject matter of the relationship was substantially related; (3) that a member of the law firm, as attorney for the adverse party, acquired knowledge of confidential information from or concerning the former client, actually or by operation of law. (citation omitted).

Id. at 545-546.

As one court has astutely noted:

> The mere disclosure of confidential information to counsel in the course of prior representation is not, itself, sufficient grounds for disqualification of that counsel when he later represents an adverse party. The confidential information must be of the type which one would expect to be related to the issues in the present litigation.
>
> The burden of establishing this (substantial relationship) falls upon the moving party (citations omitted).

INA Underwriters Ins. v. Nalibotsky, 594 F.Supp. 1199, 1207E.D. (Pa 1984).[2]

Analyzing the instant case in light of the three-prong test, this Court notes the following. First, the scope of the prior proceeding involved preliminary discussions concerning potential acquisition and/or condemnation of the appellant's property relative to a project that never came to fruition. Although the GSA may have quoted a price it thought the property was worth, it is clear that the Nacopouloses were not interested in selling and did not convey any firm selling price or opinion of value as part of those discussions. Further, they did not take any steps to determine the possible value. Second, the instant lawsuit is a tax assessment appeal. At issue will be the determination of the "actual value" which has been defined as the fair market value for the property. *See, ENF Family Partnership v. Erie County Board of Assessment Appeals v. Millcreek Township School District,* 861 A.2d 438 (Pa. Cmwlth. 2004). Although the value of the subject property would have been relevant had the Greenway Project developed, it is clear that no definitive information was exchanged between the Nacopouloses and Knox which was anything more than speculation. Third, the record demonstrates that BAC did not disclose any confidences to any attorney which would be relevant and detrimental to it.[3] Broad allegations of sharing of alleged confidential information is not sufficient to support a petition to disqualify. *See, Realco Services, Inc., et al v. Thomas J. Holt, et al*, 479 F.Supp. 867 (E.D Pa. 1982).

III. CONCLUSION

This Court recognizes that at the heart of any petition to disqualify is the integrity of the attorney-client relationship. From a layperson's perspective, one can see how the owners of BAC may have, at first blush, believed that there was a conflict of interest. However, the legal analysis of this question requires an in-depth analysis of the facts. After completing its review of the record, the Court finds that the evidence is insufficient to show that there is a conflict because the past and present matters are not substantially related and no confidences were disclosed which would be relevant and detrimental to BAC.

However, the Court is also mindful that the disclosure of the discussions that occurred between Attorney Zieziula and the Nacopouloses (which are

---

[2] Although *Nalibotsky* is factually distinguishable, it is analogous to the case at bar. *See also, Focht v. Bryn Mawr Hospital*, 16 Pa.D.&C. 4th 150 (1992); *Wise v. U.S. Healthcare*, 30 Pa. D&C. 4th 162 (1996); *Dworkins v. General Motors Corporation*, 906 F.Supp. 273 (E.D. PR. 1995).

[3] The Court notes that the purported statements concerning twice the $162,000.000 were, in fact, conveyed to Attorney Walczak and during a public meeting(s). Therefore, they are not confidential.

now a part of the record) could raise a concern. The obvious one is that armed with the information of the Nacopouloses' position at the time of the discussions with GSA, some party might attempt to use this information during its case-in-chief (as an admission) or in cross-examination of the Nacopouloses (or their expert) if BAC took a different position during the tax assessment appeal. However, this easily can be avoided. Therefore, as part of this Court's order, it will preclude all parties from referring to GSA's estimate or to the BAC's position that were asserted as part of the Greenway matter. This prohibition applies during their cases-in-chief or on cross-examination of BAC representatives.

ORDER

AND NOW, this 14th day of January, 2005, for the reasons set forth in the accompanying opinion, it is hereby **ORDERED** that BAC, Inc.'s Petition For Disqualification is hereby **DENIED**. It is further **ORDERED** that during this case, all parties shall be precluded from referring to GSA's cost estimate or to the Nacopouloses' position taken at the time of the proposed Greenway Project. This includes any reference in their cases-in-chief or on cross-examination of BAC representatives.

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

JOSEPH RAUCCI, Plaintiff

v.

JERILU FRUIT AND PRODUCE COMPANY, Defendant

CIVIL PROCEDURE / SUMMARY JUDGMENT

Summary judgment may be granted only in those cases in which the record clearly shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.

CIVIL PROCEDURE / SUMMARY JUDGMENT

The party moving for summary judgment has the burden of proving that no genuine issues of material fact exist. In determining whether to grant summary judgment, the court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party.

CIVIL PROCEDURE / SUMMARY JUDGMENT

The nonmoving party facing a motion for summary judgment may not simply 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. Only when the facts are so clear that reasonable men cannot differ, may a court properly enter summary judgment.

WORKERS' COMPENSATION / PRECLUSION OF RECOVERIES

Under the Workers' Compensation Act, any recovery outside of the workers' compensation system for personal injuries is barred if the plaintiff suffered the injuries while in the course of employment. 77 Pa. C.S. §§ 441 (1) and 481(a).

WORKERS' COMPENSATION / PRECLUSION OF RECOVERIES

For an injured employee to fall within the confines of the Workers' Compensation Statute, he must show that his injury arose in the course of his employment and that it was causally connected with his work. The phrase "in the course of employment" as used in the Workers' Compensation Act is to receive liberal construction.

WORKERS' COMPENSATION / PRECLUSION OF RECOVERIES

The question of whether an injury arises in the course of employment is a question of law.

WORKERS' COMPENSATION / PRECLUSION OF RECOVERIES

Where the plaintiff had gone to the courthouse to testify about vandalism that had been done to his employer's property, the plaintiff was the employer's only representative called to testify at the hearing, the hearing on the criminal charges was clearly important to the employer and could have resulted in restitution to the employer as part of an order of restitution, the plaintiff was in the course of his employment when he was injured in the employer's parking lot where a co-employee had offered to drive the plaintiff home since the co-employee was going out on a sales call; and the Workers' Compensation Act is the exclusive means by which the

plaintiff could recover for his injuries.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 13614 - 2002

Appearances Benjamin D. Eberly, Esquire for the Plaintiff
Craig Murphey, Esquire for the Defendant

OPINION

Anthony, J., February 24, 2005

This matter comes before the Court on a motion for summary judgment filed on behalf of Defendant Jerilu Fruit and Produce Company. After a review of the record and considering the arguments of counsel, the Court will grant the motion. The factual and procedural history is as follows.

Plaintiff had been employed by Defendant at various times since 1987. At some point, a number of trucks owned by Defendant were vandalized by some kids. Plaintiff and a co-worker noticed the paint on the trucks, and Plaintiff called the police and gave a report. *See* Depo. of Joseph Raucci, April 13, 2004 at 95. In the fall of 2000, Plaintiff injured his shoulder in an ATV accident. Plaintiff continued to work for Defendant until the day of his surgery. *See id.* at 49-50. He had surgery on the shoulder on October 18, 2000, and was going to be off of work for two or three weeks. *See id.* at 51 & 53.

Plaintiff was subpoenaed to testify on October 19, 2000, at a preliminary hearing regarding the vandalism to Defendant's trucks. The subpoena was issued by the court, but it had been sent to Defendant. *See id.* at 81 & 83. The company's owner gave the subpoena to Plaintiff. *See id.* at 83. Plaintiff was the only employee of Defendant who was subpoenaed to testify. *See id.* at 81.

Defendant arranged to have one of its employees drive Plaintiff to the courthouse for the hearing. *See id.* at 82. When he arrived at the courthouse, Plaintiff was informed that the hearing had been cancelled because the vandals had pleaded guilty and were going to receive probation. *See id.* at 84 & 86. Plaintiff phoned Defendant and said that he needed a ride. *See id.* at 84. One of Defendant's truck drivers picked Plaintiff up at the courthouse and drove him back to Defendant's facility on East 26th Street. *See id.* Plaintiff went to the facility to tell the owner that the vandals had pleaded guilty, that the hearing had been cancelled, and to talk to some of his co-workers. *See id.* at 86. Defendant was not paid that day because he was off-duty. *See id.* at 103. He did not receive a sick pay benefit. *See id.* at 48.

Matthew Eichner, another employee of Defendant, offered to drive Plaintiff home since Mr. Eichner was going out on a sales call. *See id.* at 89. Plaintiff and Mr. Eichner got into the Toyota truck that was owned by

Defendant and used by Mr. Eichner when he went out on sales calls. *See id.* at 90. As he was backing the truck out of the parking lot, Mr. Eichner swerved to avoid one delivery truck and backed into a second truck. *See id.* The entire accident occurred within Defendant's parking lot. *See id.* at 91. Plaintiff did not file a worker's compensation claim with regard to the injuries he allegedly sustained as a result of the accident. *See id.* at 102.

Plaintiff filed this action alleging that Matthew Eichner was negligent in the operation of the truck owned by Jerilu and that Defendant was responsible for Mr. Eichner's negligence under the doctrine of repondeat superior. Defendant filed the instant motion for summary judgment contending that because Plaintiff's injuries are compensable under the Workers' Compensation Act he is precluded from recovering under this action. Plaintiff filed a response to Defendant' motion for summary judgment, and arguments were held in chambers at which all parties were represented.

The standard for summary judgment is well-settled. Summary judgment may be granted only in those cases in which the record clearly shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Ertel v. Patriot-News*, 544 Pa. 93, 674 A.2d 1038 (1996). The moving party has the burden of proving that no genuine issues of material fact exist. In determining whether to grant summary judgment, the court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. *See id.* However, the non-moving party may not simply 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. Only when the facts are so clear that reasonable minds cannot differ, may a court properly enter summary judgment.

The Workers' Compensation Act provides, in pertinent part:

> The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employes, his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) and (2) ...

77 Pa.C.S.A. § 481(a).

> Section 301(c)(1), now renumbered section 411(1), provides, in pertinent part:
>
> The terms "injury" and "personal injury," as used in this act, shall be construed to mean an injury to an employe, regardless of his

> previous physical condition, arising in the course of his employment and related thereto, ...
>
> The term "injury arising in the course of his employment," as used in this article, shall not include any injury. . . sustained while the employe is operating a motor vehicle provided by the employer if the employe is not otherwise in the course of employment at the time of injury; but shall include all other injuries sustained while the employe is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere, and shall include all injuries caused by the condition of the premises or by the operation of the employer's business or affairs thereon, sustained by the employe, who, though not so engaged, is injured upon the premises occupied by or under the control of the employer, or upon which the employer's business or affairs are being carried on, the employe's presence thereon being required by the nature of his employment.

77 Pa.C.S.A. § 441(1),

> A straightforward reading of the foregoing provisions makes it clear that for an injured employee to fall within the confines of the workmen's compensation statute, he must show that his injury arose in the course of his employment and that it was causally connected with his work. The question of whether an injury arises "in the course of employment" is a question of law to be determined on the basis of the applicable facts. The courts have also made it abundantly clear that the phrase "in the course of employment", as used in the Workmen's Compensation Act, is to receive liberal construction.

Speight v. Burens, 538 A.2d 542 (Pa. Super. 1988)(citations omitted).

The facts of the instant case are not in dispute. The only question before the Court is whether Plaintiff suffered an injury while "in the course of employment" such that he is barred from recovering for his injuries outside of the workers' compensation system.

Neither the parties nor the Court have been able to locate a case directly on point. The Court finds the case of *Hoffman v. Workers' Compensation Appeal Board*, 741 A.2d 1286 (Pa. 1999), to be the most factually similar situation to the case at bar. In *Hoffman*, the claimant, who was off-duty, visited her employer's premises for the sole purpose of picking up her paycheck. While there, she fell and injured herself. The Workers' Compensation Judge denied benefits on the basis that the injury had not arisen in the course of her employment. The Pennsylvania Supreme Court reversed the rulings of the lower courts. The Supreme Court found that the claimant had been injured on the employer's premises and that "an employee's presence at the workplace to obtain a paycheck pursuant to an

employer-approved practice bears a sufficient relationship to a necessary affair of the employer (payment of due wages) to fall within the course of employment as defined in Section 301(c)(1) of the Act." *Id.*

This Court finds that Plaintiff was engaged in the furtherance of the business or affairs of his employer at the time he was injured. That morning Plaintiff had gone to the courthouse to testify about vandalism that had been done to the company's property. Plaintiff was the only representative of the company that was called to testify at the hearing. The hearing on the criminal charges was clearly important to Defendant as is evidenced by the fact that the owner passed the subpoena on to Plaintiff after it was sent to the company and arranged to transport Plaintiff to the hearing. The company had an interest in the outcome of the criminal charges because, if found guilty, the vandals could be held liable for the amount of damages done to the trucks, and those damages could have been made part of a restitution order entered by the court. After the hearing was cancelled, Defendant arranged to transport Plaintiff back to the company's premises so that he could report to the owner about what had occurred at the courthouse. The accident occurred on Defendant's premises while Plaintiff was sitting in a company-owned vehicle.

As in *Hoffman*, Plaintiff was off-duty, and the Court finds that his presence at the courthouse to testify about damage to company property and his transportation back to the company's facility to report on what had transpired at the courthouse bear a sufficient relationship to the necessary affairs of his employer to place Plaintiff in the scope of his employment. Thus, the Court finds that Plaintiff was in the course of his employment and on company property when the injuries at issue occurred.
Consequently, the Workers' Compensation Act is the exclusive means by which Plaintiff could have recovered for his injuries. Accordingly, Defendant's motion for summary judgment is granted.

ORDER

AND NOW, to-wit, this 24 day of February 2005, it is hereby ORDERED and DECREED that the Motion for Summary Judgment filed on behalf of Defendant Jerilu Fruit and Produce Company is GRANTED.

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

RICHARD E. FILIPPI, MAYOR, CITY OF ERIE, Plaintiff

v.

CASIMIR KWITOWSKI, CONTROLLER, CITY OF ERIE, Defendant

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS

Preliminary objections may be sustained only if the law says with certainty that no recovery is possible.

To sustain preliminary objections, a complaint must be clearly insufficient to establish any right to relief, and preliminary objections will not be sustained if any theory of law will support a claim.

One may have standing in a lawsuit even if he or she has no pecuniary interest.

Mayor has standing to bring lawsuit because the city controller's actions directly implicates the scope and authority of the mayor's executive function.

CIVIL PROCEDURE / MANDAMUS

A writ of mandamus may be issued only where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and lack of any other appropriate and legal remedy.

The purpose of mandamus is not to establish legal rights, but to enforce those rights already established.

A writ of mandamus can be withheld if the act to be compelled would be illegal, invalid or in violation of a statute, or detrimental to the interests of the general public.

Mandamus is an extraordinary remedy which lies only to compel performance of a purely ministerial act or mandatory duty on the party of the public officer.

CONSTITUTIONAL POWERS / LEGISLATIVE POWERS

Under the Optional Third Class City Charter Law, Mayor-Council Plan A, the legislative power is exercised by city council.

City council can determine the amount for and purposes of expenditures during any budget year.

City council was not required to rescind resolution providing for office of public safety director in order to effectuate budgetary cuts.

CONSTITUTIONAL POWERS / EXECUTIVE POWER

The executive power lies with the mayor who has the responsibility of enforcing the Optional Third Class City Charter Law, Mayor-Council Plan A, ordinances, and all applicable general laws.

Under the Optional Third Class City Charter Law, the mayor may attend council meetings and may participate in discussion, but does not have a vote.

The mayor has power to veto legislation.

Under the Optional Third Class City Charter Law, the mayor has the authority to direct and supervise all administrative officers and employees of the city under his jurisdiction and in the performance of his duties.

Mayor has authority to control personnel and to administer the day-to-day operations of the city.

Mayor has authority to transfer funds from one budget account to another in the amount of $5,000 or 5% of the budget's unit's total budget, whichever is less.

CONSTITUTIONAL LAW / IMPAIRMENT OF CONTRACTS

The city controller is not entrusted with the duty of supervising other department's contracts, but is only to determine whether a department has exceeded its funding limit or diverted funds for a purpose not within the scope of its spending authority.

City controller does not have authority to exercise discretionary judgment in examining contracts.

City controller's refusal to sign paycheck for public safety director did not impinge upon mayor's ability to expend funds, where said funds were not authorized by city council's budget.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 10180 - 2005

Appearances: Paul F. Curry, Esquire, City Solicitor
Kenneth A. Zak, Esquire, Assistant City Solicitor
Gregory A. Karle, Esquire, Attorney for Defendant

OPINION

This case involves a complaint *in mandamus* brought by the Mayor of the City of Erie against the City of Erie Controller. The complaint was filed on February 2, 2005. The City filed an amended complaint on March 4, 2005. The defendant filed preliminary objections to the original complaint on February 22, 2005 and filed preliminary objections to the amended complaint on March 7, 2005. A hearing was conducted on March 11, 2005 and the parties have submitted briefs in support of their positions.

I. BACKGROUND OF THE CASE

Plaintiff, Richard E. Filippi, is the elected Mayor of the City of Erie. Defendant, Casimir Kwitowski, is the elected controller.

As part of the 2005 budgetary process, the mayor submitted a budget for the Department of Public Safety-Police and Department of Public Safety-Fire in the total amount of $29,289,525. During the budget process, City Council added funds for those services in the total amount of $488,106. However, it cut funding for the Public Safety Director in the amount of $161,540. The final budget ordinance reflecting these adjustments was adopted by City Council on December 22, 2004. It was approved and signed by the Mayor on December 27, 2004.[1]

[1] Ordinance No. 81-2004. The budget approved by City Council for 2004-2005 totaled $105,725,301 including $56,773,150 allocated to the general fund accounts. Defendant's Exhibits 1B and 1C show the general categories of budgetary items. Exhibit 1D indicates increases and decreases in various line items. Items 41 and 86 pertain to the Public Safety Director and, when combined, equal $161,540.

The Public Safety Director is Mr. Erby Conley.[2] On his first payday in 2005, the Controller refused to countersign the hand-drawn payroll check for Mr. Conley which was presented to him by the City's Finance Director. The Controller, per memorandum dated January 10, 2005, advised the Finance Director that he would not sign the check because he had been advised by the City Council President, Mr. James Thompson that the funding had been cut. The Controller also relied upon a legal opinion by Attorney Anthony Logue, whom he had retained privately to advise him in this matter.[3]

On January 11, 2005, the City Solicitor issued a memorandum to the Controller advising the latter that he should countersign the payroll check. The Controller refused. As a result, the Mayor brought suit. Mr. Conley has been working without pay since that time.

II. DISCUSSION

Procedurally, this case is before the Court on preliminary objections. Preliminary objections are governed by Pa. R. Civ. P. 1028. The rule provides that:

> (a) Preliminary objections may be filed by any party to any pleading and are limited to the following grounds:
>
> (1) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;
> (2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
> (3) insufficient specificity in a pleading;
> (4) legal insufficiency of a pleading (demurrer); and
> (5) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action; and
> (6) pendency of a prior action or agreement for alternative dispute resolution.

Preliminary objections may be sustained only if the law says with certainty that no recovery is possible. *Koken v. Steinberg*, 825 A.2d 723, 726 (Pa.

[2] The Public Safety Director's position is specifically codified in City Ordinance §117.03 enacted in 1987. Mr. Conley was appointed as Public Safety Director by the Mayor on January 14, 2004 and served in an acting capacity until he was formerly approved by City Council on September 9, 2004. The Controller asserts that funding for Mr. Conley's position was eliminated and therefore it would be illegal for the City to issue him a check.

[3] Neither City Council, Mr. Thompson nor Mr. Conley are parties to this action. Attorney Logue is not a city employee, nor does he work for the City Solicitor's office. Although it may have been appropriate for the Controller to seek the advice of the City Solicitor before he acted, it would appear that the City Solicitor would have had a conflict that would have precluded him from representing both the Mayor and the Controller in this controversy.

Cmwlth. 2003). To sustain preliminary objections, a complaint must be clearly insufficient to establish any right to relief, and preliminary objections will not be sustained if any theory of law will support a claim. *Id.* Any doubt should be resolved against the objecting party. *Id.*

In a mandamus action it is appropriate to decide the matter on the pleadings, "because whether mandamus should issue is a question of law that can be decided on undisputed facts". *Stork v. Sommers*, 630 A.2d 984, 987 (Pa. Cmwlth. 1993).

The City of Erie operates as a third-class city under the Optional Third Class City Charter Law, Mayor-Council Plan A. 53 P.S. §41401 *et seq.*[4] Under the optional charter, the legislative power is exercised by City Council. 53 P.S §41407.

The executive power lies with the mayor who has the responsibility of enforcing the charter, ordinances and all applicable general laws. 53 P.S. §§41411 and 41412. Under the current system, the mayor may attend council meetings and may participate in discussions, but does not have a vote. 53 P.S. §41413(b). However, the mayor has the power to veto legislation. 53 P.S. §41413(a).

Erie City Ordinance Nos. 113.01 and 113.02 define the mayor as the chief executive and chief of administration. Ordinance 113.01 provides in part that:

> He shall have direction and control of the administrative branch of the City government, which shall consist of the departments, bureaus, divisions, officers and personnel set forth in the Administrative Code, and such as shall be authorized by council. The mayor shall be responsible for the direction and supervision of the administrative affairs of the City in accordance with the Mayor-Council Plan A of the Optional Third Class City Charter Law and the Third Class City Code.

Id.

Furthermore, the mayor:

> . . . may, pending passage of an ordinance, distribute the work and the responsibilities of the departments, bureaus and subdivisions thereof in the administrative branch and establish temporary positions to the

[4] From 1931 to 1962, the provisions of the Third Class City Code governed Erie. In 1962, the voters adopted the optional Third Class City Charter Law, Option A. This arrangement replaced a commission form of government in which the mayor was a voting member of council and both the legislative and executive power of the City was vested in City Council. 53 P.S. §36002. The mayor was designated as chief executive *(Id.)* but had no veto power. 53 P.S. §36007. Under the former form of government, the executive departments of the City consisted of: (1) public affairs, (2) accounts and finance, (3) public safety, (4) streets and public improvements and (5) parks and public properly. 53 P.S. §36101. Each councilman was the head of a department.

extent that budgetary provisions have been made for the same.

Ord. 113.02.
The mayor has the authority to direct and supervise all administrative officers and employees of the City under his jurisdiction in the performance of his duties.
Ord. 113.03.

The Controller's authority is defined in 53 P.S.§41420. It provides in part that:

> The control function shall include provision for an encumbrance system of budget operation, for expenditures only upon written requisition, for the pre-audit of the City Controller of all claims and demands against the city prior to payment, and for the control of all payments out of any public funds by individual warrants for each payment to the official having custody thereof.

Id.

Moreover,

> The City Controller shall have the power to administer oaths and affirmations in relation to any matter touching the authentication of any account, claim or demand of or against the city, but shall not receive any fee therefore, and shall countersign all warrants for payment of monies out of the city treasury <u>when satisfied of the legality of such payment.</u>

Id. (emphasis added)

Ordinance No. 121.01 differs somewhat from the statute. It defines the Controller's function as follows:

> The City Controller shall be elected by law and shall be responsible for the exercise of the control function and the management of the finances of the City. The control function shall include provision for an encumbrance system of budget operation, for expenditures only upon written requisition and for pre-audit by the City Controller of all claims and demands against the City prior to payment, and for the control of all payments out of any public funds by individual warrants for each payment to the official having custody thereof. Both the City Controller and the City Treasurer shall endorse all City checks prior to issuance for payment thereon.

Id.

A. WHETHER THE MAYOR HAS STANDING.

One may have standing in a lawsuit, even if s/he has no pecuniary interest *Jefferson Bank v. Newton Associates,* 686 A.2d 834, 838 (Pa. Super. 1996). Here, the Mayor has standing because the Controller's action directly implicates the scope and authority of the Mayor's executive function.

B. MANDAMUS

A writ of mandamus may be issued only where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and lack of any other appropriate and legal remedy.[5] *Evans v. Board of Probation and Parole,* 820 A.2d 904, 915 (Pa. Cmwlth. 2003) (citation omitted). The purpose of mandamus is not to establish legal rights, but to enforce those rights already established. *Id.* In addition, a writ of mandamus can be withheld if the act to be compelled would be illegal, invalid or in violation of a statute, or detrimental to the interests of the general public. *Id. See, D.N. Corporation v. Roudabush,* 164 A. 60 (Pa. 1932), *Waters v. Samuel,* 80 A.2d 848 (Pa. 1951).

Mandamus is an extraordinary remedy which only lies to compel performance of a purely *ministerial* act or mandatory duty on the part of a public officer. *Flaherty v. City of Pittsburgh,* 515 A.2d 91 (Pa. Cmwlth. 1986), (citation omitted). As that court in an analogous situation stated:

> A ministerial act is defined as "one which a public officer is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed." (citation omitted).

Id. at 92.

In *Flaherty,* the City Controller contended that he had the discretionary authority to refuse to countersign an otherwise duly executed contract, and therefore, could not be compelled to countersign. The court responded that:

> A controller is not entrusted with the duty of supervising other department's contracts, <u>but is only to determine whether a department has exceeded its funding limit or diverted funds for a purpose not within the scope of its spending authority.</u> (citation omitted).

Id. at 92. (emphasis added).

The Commonwealth Court ultimately determined that the controller did not have authority to exercise discretionary judgment in examining the contracts. *Id.* However, addressing a point important for this Court's consideration, it noted that:

[5] With respect to the adequacy of another legal remedy, the Court notes the following. The Controller signed checks for the Mayor's administrative assistant and manager of administration during 2004, even though it appeared that City Council was attempting to eliminate their positions. Given that history, one can conclude that the Mayor did not know what position the Controller would take with respect to the request for Mr. Conley's pay. *See,* plaintiff's brief, pp. 3-4 and 25-26. Furthermore, even assuming that Council's action constituted a *de facto* elimination of the position, the Mayor's failure to veto the budget ordinance does not defeat his right to seek mandamus or declaratory relief questioning the legality of the Controller's action.

> These provisions simply obligate the controller to see that the necessary appropriations are authorized and available and do not exceed the scope of the council's intent. Since these requirements have been fulfilled, Flaherty must perform the ministerial duty countersigning the contract.

Id. at 92-93.

The Pennsylvania Commonwealth Court has recognized the discretionary nature of the Controller's functions in *Stork v. Sommers*, supra. Lancaster, like Erie, is a third-class city governed by the Plan A Option. In *Stork*, the treasurer refused to sign checks alleging that the mayor had engaged in fraudulent abuses with regard to the capital fund, including an attempt to operate a proprietary scheme with Lancaster's funds. *Id.* at 985. The mayor sued. Contrasting the role of the treasurer with that of the controller, the Commonwealth Court stated:

> The treasurer's authority differs markedly from that of the city controller and the director of a Department of Accounts and Finance, both of who possess discretionary powers, Section 1706 of the Code, 53 P.S. §36706, provides, in pertinent part: "The city controller shall . . . countersign all warrants for the payment of monies out of the city treasury *when satisfied of the legality of such payment.*" (Emphasis added).

Id. at 987.

The court went on to say:

> The treasurer, unlike the controller and the director of the Department of Accounts and Finance, is directed by the Code to sign the checks without any conditions attached. The treasurer's duty is purely ministerial. It is well-established that mandamus will lie against a Commonwealth official when that official clearly has a ministerial duty to perform but refuses to do so. (citations omitted).

Id. (Emphasis added).

Therefore, under both the statute and the ordinance the Erie City Controller possesses discretionary authority when authorizing payments.[6]

This Court will now examine the powers and duties of City Council because they directly relate to the budget process and because the Controller relied upon Council's action when he refused to sign the payroll check.

Pursuant to 52 P.S. §41418, the budget process works in this way. At the last November meeting of Council, the Mayor submits his/her recommended budget in the form of an ordinance together with such

[6] The ordinance cannot be interpreted to limit the statutory authority of the Controller. *See, Will v. City of Erie*, 763 A.2d 566 (Pa. Cmwlth. 2000); *City of Erie v. Woznicki*, 487 A.2d 42, 44 (Pa. Cmwlth. (1985).

explanatory information as s/he deems desirable. Council then reviews it and may reduce any item or items in the Mayor's budget by a vote of a majority of the Council, but an increase in any item or items shall become effective only upon an affirmative vote of two-thirds of the members of Council. *Id.*

The Mayor asserts that: (1) he had the ability to transfer funds allocated to the Department of Public Safety in order to pay the Public Safety Director because funds were available from other line items within that department; (2) the Controller was mandated to sign the check without question; (3) Council could only eliminate Mr. Conley's position by rescinding or amending the ordinance that established the position; and (4) only he, as mayor, can terminate Mr. Conley's employment.

In *Malloy v. Pfuhl,* 542 A.2d 202 (Pa. Cmwlth. 1980), the Johnstown City Council adopted an administrative code which established the positions and salaries of several elected and appointed officials, their employees and various other municipal service employees. *Id.* at 203. Mayor Pfuhl vetoed an ordinance on the grounds that Council had illegally encroached upon his executive branch powers. Council voted to override the veto which prompted Pfuhl to seek declaratory and injunctive relief. *Id.* In evaluating the claim, the Commonwealth Court noted:

> The sole issue for our disposition is whether Mayor- Council Plan A, as delineated in the Charter Law, precludes Council from enacting ordinances which establish the positions and salaries of municipal employees.

Id. at 203-204.

Analyzing §41303 of the Charter Law, the Court stated:

> This provision vests a local government with substantial authority to regulate its own affairs but does not permit it to adopt ordinances which contravene the enabling act itself. (citation omitted). Section 30410 provides that the Charter Law is intended to confer the greatest power of local self-government and any specific enumeration of that power shall not be construed to limit the general description of power contained in the Charter Law. So long as Council acts within its scope of authority and does not violate any laws of the Commonwealth, its actions or policies will not be disturbed by the judiciary. (citations and text of footnote omitted).

Id. at 204.

The Commonwealth Court found that the mayor's authority to control personnel is grounded in 53 P.S.§41415. Examining the applicable budgetary procedures. (53 P.S. §§41417-41418), it concluded that:

> The reasonable implication from the explicit budgetary directives contained in §418 and in §607(c) of the Charter Law is that Council

> ultimately determines the number and compensation of subordinate municipal employees. While §417 empowers the Mayor to submit a detailed budget which may include specific proposals as to the compliment and salaries of all public employees, in the final analysis Council must approve these proposals and may, pursuant to §418, reduce or increase any budgetary items.
>
> In this instance, the record discloses that the mayor failed to submit a detailed proposed salary ordinance for 1987 . . . which task was then taken up by Council. Therefore, we cannot say that Council usurped the executive's prerogative when, in fact, the Mayor failed to exercise whatever prerogative was within his pervue.
>
> It is beyond argument that Council must respect the separation of executive and legislative authority. Although in this instance Council's salary ordinance would cause several positions to be eliminated, Council did not arrogate the discretion of the executive branch to determine which individuals would be relieved of their positions. The exclusively executive functions of choosing personnel and administering the day-to-day operations of the municipal government have been left intact. . . . At the same time, the traditionally legislative function of ultimately deciding upon a budget and, thereby determining the size of government is likewise preserved. . . . While it is true that under the Mayor Council Plan A, the Mayor has the authority to consent to any hiring or firing by department, . . . we find that a valid legislative action for Council to require departmental reductions when budgetary concerns indicate their necessity.

Id. at 205. (Emphasis added). The *Malloy* rationale is applicable here.[7]

Based upon the above, the Court concludes that the Mayor has the exclusive executive authority to administer the day-to-day operations of the City. This includes the ability to hire and fire. He may spend funds subject to limits set by Council. Council can determine the amount for and purposes of expenditures during any budget year.[8] Finally, the Controller

---

[7] *Malloy* is factually distinguishable from the instant case only insofar as Mayor Filippi submitted a detailed proposed budget ordinance, albeit not a *per se* salary ordinance.

[8] There was no evidence presented to this Court that the decision of City Council relative to the relevant budget cuts was motivated by anything other than financial considerations.

In *Latch v. City of Johnstown*, 646 A.2d 22 (Pa. Cmwlth. 1994), a terminated city employee sued the mayor of Johnstown seeking mandamus relief requiring the city to reinstate him in his position as a utility man. He argued that council's action

has a responsibility to insure that expenditures made by any department (including the Mayor) have not exceeded the funding limit and are within the scope of the spending authority.

Continuing, this Court finds that: (1) the Mayor has standing to commence this action; (2) the Mayor met the basic pleading requirements; and (3) the Mayor did not neglect to pursue an adequate remedy of law. The next issue is whether the Mayor can prevail

C. WERE FUNDS AVAILABLE TO PAY THE PUBLIC SAFETY DIRECTOR?

Once the ordinance was approved, the Mayor was bound to operate within its restrictions. It does appear that he had, and may still have, the limited ability to transfer funds from one budget account to another. *See*, Ordinance No. 113.09(f). However, there is a monetary cap ($5,000 or 5% of the budget unit's total budget whichever is less). Amounts that exceed the cap may not be expended without Council's approval. Therefore, the funds were not available.

D. DID THE CONTROLLER HAVE DISCRETIONARY AUTHORITY TO DENY THE PAYROLL REQUEST?

The enabling statute and ordinance provide for the Controller's discretionary authority to insure that funds are available for expenditures. Here the Controller had a good faith basis to conclude that the funds were not available. Therefore, he acted within his discretion when he refused to sign the check.

E. IS AN ORDINANCE REQUIRED TO ELIMINATE MR. CONLEY'S POSITION?

53 P.S. §41607(c) directs Council to fix compensation for the controller, treasurer and department heads. However, an ordinance is only required to fix the salaries of the mayor, council members, controller and treasurer. *See, Marshall v. Bentzel*, 397 A.2d 444, 447 (Pa.Cmwlth. 1979). There, the Commonwealth Court stated that:

> We find, however, that Section 607(b) of the Charter Law which relates to the salaries of department heads merely requires that they be "fixed

[8] continued
amending an ordinance reducing the number of utility men was politically motivated and, therefore, unlawful. *Id.* He also argued that council did not have the authority to do so because it infringed upon the mayor's executive powers.

Denying his claim, the Commonwealth Court found that he ". . . did not present any evidence to demonstrate any fraudulent or political motives that would require the rescinding of Ordinance No. 4568." *Id.* at 23. Moreover, the Court found that 53 P.S. §§41411 and 41415 do not limit council's authority to pass amendments concerning its budgetary and fiscal policy. *Id.* Although factually distinguishable, the Commonwealth Court's rationale is applicable to the instant case as it relates to the respective powers of the Mayor and Council, and to the lack of any evidence presented on the issue of Council's motives.

> by council" and it is only Section 607(c) of that law which relates to salaries of elected officials, that requires such salaries to be fixed by ordinance. If the legislature intended the Council to set the salaries here in question by ordinance, it would have so provided.

Id.

Therefore, Council was not legally required to rescind Ordinance No. 117.03 in order to effectuate the budget cuts.

F. DID THE ACTIONS OF THE CONTROLLER UNLAWFULLY INFRINGE UPON THE POWERS AND DUTIES OF THE MAYOR?

The Mayor's ability to expend funds is limited by the parameters set by Council in the budget ordinance. The Controller may not approve unauthorized expenditures. Therefore, his actions did not unlawfully infringe upon the Mayor's authority.

III. CONCLUSION

This case has both legal and human dimensions. Legally, it involves the separation of powers between the executive and legislative branches of City government, as well as the lawful authority of the Controller. Also, it impacts Mr. Conley personally, a dedicated public employee, who has commendably continued to serve without pay pending resolution of this case. However, as sympathetic as one might be to his situation, this Court is bound by the law. It must stringently adhere to the Doctrine of Separation of Powers as well as the relevant statutes and ordinances which define the City's governmental structure. Furthermore, it is not for this Court to determine if the Public Safety Director's position should continue or be funded. That is a political decision, not a legal one. The citizens of the City of Erie elected Council and the Mayor to determine such issues.

When all is said and done, it is clear that the Mayor has the authority to discharge the managerial functions of municipal government. City Council has the exclusive authority to determine the size and extent of the budget.

The Controller, exercising a stewardship role, must insure that disbursements are authorized. He is permitted to exercise his sound discretion in that regard. To accept the Mayor's definition of the Controller's role would be to reduce it to a "rubber stamp". This clearly was not the intent of the Pennsylvania General Assembly nor City Council as reflected in the statute and ordinance defining the Controller's position.

In this case, the Controller made a decision within the discretionary authority that he possesses under the law. Therefore, the Mayor is not entitled to mandamus or declaratory relief .

ORDER

AND NOW, this 4th day of April, 2005, for the reasons set forth in the accompanying opinion, it is hereby ORDERED that the defendant's preliminary objections are SUSTAINED and the plaintiff's complaint in mandamus and for declaratory relief is DISMISSED.

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

COMMONWEALTH OF PENNSYLVANIA

v.

DAVID PAUL O'CONNELL

CRIMINAL PROCEDURE / INEFFECTIVE ASSISTANCE OF COUNSEL

In order to prove the ineffectiveness of counsel, the Defendant must overcome the presumption of competence by showing: (1) the 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 would have been different. *Commonwealth v. Miller*, 868 A.2d 578 (Pa. Super 2005) *citing Commonwealth v. Malloy*, 856 A.2d 767 (Pa. 2004).

CRIMINAL PROCEDURE / INEFFECTIVE ASSISTANCE OF COUNSEL

To prevail on a claim of ineffectiveness of counsel for failure to call a witness, the Defendant must demonstrate: (1) the witness existed; (2) the witness was available; (3) trial counsel was informed of the existence of the witness or should have known of the witness; (4) the witness was prepared to cooperate and would have testified on the defendant's behalf; and (5) the absence of the testimony prejudiced the defendant. *Id.*

CRIMINAL PROCEDURE / INEFFECTIVE ASSISTANCE OF COUNSEL

Based on the facts presented on appeal, the Court granted defendant's motion for new trial under the Post-Conviction Release Act.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 2256 OF 2001

Appearances: District Attorney's Office for the Commonwealth
Anthony Logue, Esq. for the Defendant

OPINION

Presently before the Court is the Defendant's request for a new trial under the Post Conviction Relief Act. After an evidentiary hearing held April 5, 2005 the Defendant's request is **GRANTED**.

This case involves a single charge of Solicitation to Commit Murder. The Commonwealth's case rests on the testimony of one witness, David Maddux. At a jury trial held on May 13, 2002, Maddux testified that while he was incarcerated at the Erie County Prison with the Defendant, David O'Connell, the Defendant offered to pay him $5,000.00 to kill a Nicole King. *Jury Trial Transcript*, May 13, 2002, p. 18 (hereinafter *T. T.)*. The purported reason that the Defendant wanted King killed was that she was a witness in a separate case involving sexual charges against the Defendant. *T.T.* at 19.

There were several inconsistencies in the testimony of David Maddux. For example, at trial the Commonwealth introduced Exhibit 1, which Maddux testified was a document he prepared containing personal information about Nicole King which he received from the Defendant. *T.T.* at 17. This testimony was inconsistent with a statement Maddux gave to Erie County Detective Mark Watts. When Detective Watts interviewed Maddux, he was given Exhibit 1 with an explanation by Maddux that the document was written by the Defendant. *T.T.* at 34. Meanwhile, Nicole King identified the handwriting on Exhibit 1 as that of the Defendant, David O'Connell. *T.T.* at 31.

In any event the dispositive issue before the jury was the credibility of David Maddux. The Defendant claims his trial counsel, Gustee Brown, was ineffective for failing to call two witnesses who would have impugned the credibility of David Maddux.

In order to prove the ineffectiveness of counsel, the Defendant must overcome the presumption of competence by showing: (1) the 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 would have been different. *Commonwealth v. Miller*, 868 A.2d 578 (Pa. Super 2005) *citing Commonwealth v. Malloy*, 856 A.2d 767 (Pa. 2004). Further, to prevail on a claim of ineffectiveness of counsel for failure to call a witness, the Defendant must demonstrate: (1) the witness existed; (2) the witness was available; (3) trial counsel was informed of the existence of the witness or should have known of the witness; (4) the witness was prepared to cooperate and would have testified on the defendant's behalf; and (5) the absence of the testimony prejudiced the defendant. *Id.*

The Defendant avers counsel's ineffectiveness for the failure to call Roger Vactor and Donald Golmer as witnesses who could expose the false testimony of David Maddux. These proffered witnesses were also inmates at the Erie County Prison during the time period in which Maddux was allegedly solicited by O'Connell. Both Vactor and Golmer participated in frequent card games with the Defendant and Maddux. Each had the opportunity to observe the interactions and relationship between the Defendant and Maddux. Importantly, either Vactor and Golmer, if called as a witness at trial, could testify to matters affecting the credibility determination of David Maddux. If Vactor or Golmer were found credible by a jury, then the outcome could exonerate the Defendant. Since Maddux was the sole witness establishing the Defendant's solicitation, the failure of trial counsel to call Vactor and/or Golmer caused serious prejudice to the Defendant.

This Court finds these witnesses were willing to testify about the interaction between the Defendant and Maddux, were available to so

testify, were known to trial counsel and were inexplicably not called as trial witnesses. But for counsel's ineffectiveness, there is a reasonable probability the verdict could have been in the Defendant's favor.

By any measure of justice, the Defendant deserves a new trial.

ORDER

AND NOW to-wit this 12 day of April 2005, after an evidentiary hearing, the Defendant's request for a new trial is hereby **GRANTED** based on the accompanying Opinion. The Defendant's conviction and sentence are hereby vacated. This matter shall be placed on the next criminal trial list.

BY THE COURT:
/s/ **WILLIAM R. CUNNINGHAM, JUDGE**

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN LEE, JR.

CRIMINAL LAW / ADMISSIBILITY OF EVIDENCE

"Testimonial" hearsay of an unavailable witness may not be admitted at trial unless the defendant has had a prior opportunity for cross-examination.

Prior Pennsylvania law held that hearsay statements of a child victim of sexual or physical abuse age 12 or younger were admissible at trial if the child was "unavailable" as a witness and the content and circumstances of the statement provided sufficient indicia of its reliability.

The Confrontation Clause of the Sixth Amendment of the U.S. Constitution prohibits the admission of hearsay statements unless the defendant has had the opportunity to cross-examine the declarant.

"Testimonial" statements include prior testimony, affidavits, depositions, statements made under circumstances that would lead an objective witness to reasonably believe that the statement would be used for trial, and pretrial statements that declarants would reasonably expect to be used prosecutorily.

Not all hearsay exceptions necessarily include testimonial statements.

Statements made by co-conspirators, spontaneous declarations, dying declarations, and excited utterances do not necessarily include testimonial statements.

Court must make a case-by-case determination as to whether statements at issue are testimonial in nature.

One portion of statement may be testimonial while another portion may not.

Statements of children regarding sexual abuse to family members do not constitute testimonial evidence.

While a child's competency to testify at trial is a consideration, it is not *per se* determinative of the reliability of the child's statements for purposes of the Tender Years statute, 42 Pa. C.S. § 5985.

Child's statement to Department of Public Welfare employee and physician's assistant were testimonial in nature and therefore, in violation of Confrontation Clause.

Where court has determined that child will suffer serious emotional distress if required to testify in presence of defendant, Tender Years statute, 42 Pa. C.S. § 5985, provides that testimony of child victim or child material witness may be conducted in another room other than the courtroom and televised by closed-circuit television to be viewed by finder of fact and the court.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 1227 OF 2004

Appearances: Lisa R. Stine, Esq. for the Commonwealth
A.J. Adams, Esq. for the Defendant

OPINION

Bozza, John A., J

This case presents important questions regarding the admissibility of child testimony pursuant to 42 Pa. C.S.A. § 5985.1, also known as the Tender Years Statute, following the decision of the United State Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004).[1] Prior to *Crawford*, the law in Pennsylvania was that hearsay statements of a child victim of sexual or physical abuse age 12 or younger were admissible at trial if the child was "unavailable" as a witness and the content and circumstances of the statement provided sufficient indicia of its reliability. *Commonwealth v. O'Drain*, 2003 Pa. Super. 255, 829 A.2d 316 (2003); 42 Pa. C.S.A. § 5985.1(a); *See also Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139 (1990). However, with the advent of that Supreme Court decision, the "testimonial" hearsay of an unavailable witness may not be admitted at trial unless the defendant has had a prior opportunity for cross-examination. *Crawford*, 124 S. Ct. at 1369. As such, before ruling on admissibility of certain hearsay statements the courts must determine whether they are testimonial in nature.

The Commonwealth has charged John Lee, Jr. with the crimes of involuntary deviate sexual intercourse, aggravated indecent assault, and two counts each of indecent assault, corruption of minors, and endangering the welfare of a child stemming from events that allegedly occurred between May 2002 and September 2003. At that time the victim, identified as K.C., was approximately four years old. The Commonwealth filed a Notice of Intent to Offer Hearsay Evidence as required by 42 Pa. C.S.A. § 5985.1. A hearing was scheduled, at which time the Commonwealth and the defendant stipulated that the child was "incompetent" to testify at trial and was therefore unavailable to testify pursuant to the statute. More precisely, the parties agreed that should the child be offered as a witness, due to her immaturity she would not understand the distinction between telling the truth and telling a lie. (Hearing Transcript, February 1, 2005, p. 9-10). In light of the child's unavailability, the Commonwealth seeks to introduce out-of-court statements made by K.C. on three separate occasions. As noted, the Court's initial inquiry must focus on whether the proffered statements are "testimonial" in nature. Before making that determination, a review of the state of the law in this area is necessary.

[1] For reasons not at all clear to this Court neither the Commonwealth nor the defendant have addressed the issue of the applicability of *Crawford v. Washington*.

I. BACKGROUND

In *Crawford v. Washington, supra*, the testimony at issue involved statements made by a defendant's wife in response to police questioning about her husband's complicity in an attempted murder. Because of the application of the marital privilege in Washington, the wife was considered unavailable to testify at the time of trial. *Crawford*, 124 S. Ct. at 1357. The trial judge, however, admitted her earlier statements to the police based on his determination that they bore "particularized guarantees of trustworthiness". *Id*.; *See also Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531 (1980). Thereafter, the Washington Supreme Court affirmed, concluding that the trial court properly admitted the statements based on a determination that they "bore guarantees of trustworthiness". *Crawford*, 124 S. Ct. at 1358. Upon review, the United States Supreme Court concluded that the hearsay statements of the wife were "testimonial" in nature, and as such they should not have been introduced because the defendant had not had the opportunity to cross-examine her. *Id.* at 1369. It was the Supreme Court's judgment that "an accuser who makes a formal statement to government officers" is bearing testimony, and the Confrontation Clause of the Sixth Amendment prohibits the admission of such statements unless the defendant had the opportunity to cross-examine the declarant. *Id.* at 1364.

While declining to comprehensively define the reaches of "testimonial" evidence, the Supreme Court concluded that under almost any definition statements made in response to police interrogation would qualify. *Crawford*, 124 S. Ct. at 1364, 1374. The Court observed that the Confrontation Clause is intended to protect a defendant from one who "bears testimony" but does not come to court to provide it. *Id.* at 1364. It pointed to common examples of "testimonial" statements such as prior testimony, affidavits, and depositions, but noted that others have suggested broader formulations such as "'statements' that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" or "...pretrial statements that declarants would reasonably expect to be used prosecutorially." *Id.* at 1364. Not all hearsay exceptions necessarily include testimonial statements. Exceptions for statements made by a co-conspirator, *see Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775 (1987), "spontaneous declarations", *see White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736 (1992), and "dying declarations", *see Crawford*, 124 S. Ct. at 1367, n.6 (2004), are less likely to involve statements where the declarant is bearing testimony against an accused. Recently, our Superior Court determined that an "excited utterance" made to police by someone seeking assistance is not testimonial hearsay. *Commonwealth v. Gray*, 2005 Pa. Super. 22, 867 A.2d 560 (2005).

While it does not appear that any one general definition of "testimonial" is

on the immediate legal horizon, some courts have come close. For instance, the Pennsylvania Superior Court parenthetically observed that testimonial statements are those made by a declarant who at the time reasonably would have expected the statement to be used in furthering judicial proceedings. *Commonwealth v. Levanduski*, 2005 Pa. Super. 117, 2005 Pa. Super. LEXIS 497, 512, n.7 (2005). In *United States v. Cromer*, the United States Court of Appeals for the Sixth Circuit adopted a definition offered by Professor Robert Friedman of the Michigan Law School, who opined that testimonial hearsay would include any statement "made in circumstances in which a reasonable person would realize that it likely would be used in the investigation or prosecution of a crime". 389 F.3d 662, 673 (6th Cir. 2004). Notwithstanding the lack of a precise definition and given the factual nature of the inquiry, in most instances where the statements at issue do not fall into what might be characterized as a testimonial per se category it will be necessary to make a case-by-case determination. *See e.g., People v. West*, 823 N.E.2d 82 (Ill. App. 2005)(rejecting a "bright line rule" deeming a 911 call testimonial or non-testimonial). While it may be likely that certain forms of statements such as dying declarations or excited utterances will not involve testimonial hearsay, it is not an entirely predicable matter as the precise characteristics of "testimonial" statements remain undetermined. Nonetheless, considering the Supreme Court's testimonial formulations in *Crawford* and synthesizing recent state court case law it appears that an out-of-court statement will more likely be the kind of ex-parte examination with which the framers were concerned if:

1. It resulted from governmental action or inquiry that intended to elicit it.
2. It was sought for the purpose of furthering a criminal or quasi-criminal investigation.
3. The declarant was aware or should have been aware of its potential use as proof in a criminal case.
4. It was made with the intention of having others, particularly government investigators, rely on it.
5. Its utterance did not arise spontaneously.

It must be emphasized that the presence of anyone or for that matter any particular combination of factors may not be determinative of the testimonial character of a statement. Nor is this intended to be a comprehensive list of considerations. Moreover, it is entirely foreseeable that one portion of a pre-trial statement will be considered testimonial while another portion is not. *See People v. West*, 823 N.E. 2d 82 (Ill. App. 2005)(holding that part of a victim's statement to a nurse and physician relating to the nature of the attack was not testimonial, but balance of statement concerning fault and identity was testimonial); *See also In re T.T.*, 815 N.E. 2d 789 (Ill. App. 2004).

II. DISCUSSION

K.C.'s Statements to her Grandmother

The first hearsay statement the Commonwealth wishes to admit was made in February or March of 2004 when the child was at the home of her grandmother, Karen Cabaday. According to the grandmother, she overheard the child talking to her dolls, suggesting that they have "pretend sex". The grandmother asked how she knew about such things, to which the child responded that she learned it from "John". In response to further questioning, K.C. indicated that John did things to her when they were sleeping. She said that he kissed her, demonstrating with her tongue, and stated that he puts his finger "down there", pointing to her genital area. Although she did not provide a timeframe within which these things occurred, she stated that they happened at "mommy's" house when "mommy was at work". According to Ms. Cabaday, upon her request the child repeated the same things to her father.

At least two courts have found that statements of children regarding sexual abuse to family members do not constitute testimonial evidence. In *Herrera-Vega v. State*, 888 So. 2d 66 (Fla. App. 2004), a Florida appellate court concluded that spontaneous statements made to a mother and father asserting that the defendant had placed his tongue in her "private parts" were not testimonial. Similarly, an Illinois appellate court decided that statements made by a three year old child to her mother as she bathed and dressed her indicating that her daddy had "pinched" and "kissed" her vagina were not testimonial. *People v. R.F.*, 2005 Ill. App. LEXIS 98 (2005). The Illinois court went so far as to conclude that *Crawford* only applies to statements made to government officials. *Id.* at * 17.

In the case at hand, the statements to the grandmother were made as part of a conversation that arose as a result of K.C.'s activity while playing with her dolls. They were not the result of a planned or intentional inquiry by the government. Nor did they occur in a formal setting or in circumstances that would lead a child to believe that she was providing particularly important information that someone would be relying on. This was certainly true with regard to the grandmother's initial question, which was the result of her surprise when she heard the child ask the dolls to have "pretend sex". K.C.'s response "from John" would more accurately be characterized as an "off-hand" remark rather than a statement intended to identify a perpetrator of sexual abuse. *See Crawford*, 124 S. Ct. at 1364. Furthermore, the nature of the resulting discussion, which was intended to clarify her initial response, was more consistent with a spontaneous conversation than a formal interrogation. *See Crawford*, 124 S. Ct. at 1365 (recognizing that there are varying definitions of "interrogation"). There is nothing in the record to suggest that at the time the discussion occurred K.C. was aware that John was in trouble with the law as a result of his activity with her. Furthermore, there is no indication that the child could have possibly concluded that the answers to her grandmother's

questions would have been used in a prosecutorial manner or, perhaps more applicable to a four year old child, lead to getting John in some kind of trouble. Under the circumstances, one would be hard pressed to conclude that K.C.'s statements to her grandmother bore any resemblance to the kind of "ex parte examinations" that the Confrontation Clause was intended" to address. *See Crawford*, 124 S. Ct. at 1354. In re-counting how she had come to learn about "pretend sex", K.C. was not in any sense bearing testimony against John. As such, her statements to her grandmother were not testimonial, and their admissibility at trial is limited only by the law of evidence.

Despite having established that these statements would not offend the Sixth Amendment's Confrontation Clause, they constitute hearsay and are inadmissible unless they fall within a recognized exception. The Tender Years Statute, 42 Pa. C.S.A. § 5985.1, provides the potential vehicle for their admissibility. That the child is unavailable to testify at trial is not in dispute, so pursuant to Section 5985.1 the sole remaining question is whether "the time, content and circumstances of the statements provide sufficient indicia of reliability" 42 Pa. C.S.A. § 5985.1(a)(1).[2] While a child's competency to testify at trial is a consideration indeed an important one, it is not per se determinative of the reliability of the child's statement for purposes of the Tender Years Statute. *Commonwealth v. Bean*, 450 Pa. Super. 574, 677 A.2d 842 (1996); *Idaho v. Wright*, 497 U.S. 809, 110 S. Ct. 3139 (1990).

As noted above, K.C.'s responses to her grandmother's questions were entirely spontaneous and not the product of a formal inquiry. She expressed herself using age-appropriate jargon and references and the content of her responses to her grandmother's questions is remarkably absent of any indication of embellishment. In addition, her statements about John arose because she was quite innocently asked where she learned about "pretend sex", a subject about which a child of her age would be expected to have only the most limited knowledge.

Finally, it is significant that there was nothing in the record to suggest that the child had any motive to either fabricate or exaggerate. While her legal incapacity to testify at trial is a compelling consideration, the multiple manifestations of trustworthiness with regard to the statements are sufficient to overcome any concern. It is also important to note that the entire issue of the defendant's alleged "touching" arose not because K.C. was prompted to disclose his involvement but because completely independent of any outside suggestion she innocently decided to play "pretend sex" with her dolls. Her assertion that "John" was the one who

[2] It is questionable after *Crawford* whether the "indicia of reliability " test remains a conceptually necessary concern. Prior to *Crawford* the reliability requirement was at least in part directed to 6th Amendment Confrontation Clause concerns. Since non-testimonial hearsay no longer appears to be the focus of the Confrontation Clause reliability issues would be a matter of only common law and statutory concern.

taught her about that subject was made in a context that did not require contemplation or the opportunity for reflection or deliberation. In such circumstances, fabrication is an unlikely result. For these reasons, this Court finds that the statements made to the grandmother also meet the threshold requirements of the "Tender Years" exception to the hearsay rule.

Admissibility of Remaining Statements

The Commonwealth also wishes to introduce statements made by K.C. to a staff member of the Children's Advocacy Center and a physician's assistant associated with the Office of Dr. Justine Schober, a pediatric urologist who receives referrals of suspected abuse victims from the Office of Children and Youth ("OCY"). As explained below, however, these statements fail to withstand the initial inquiry of whether they meet the requirements of the Sixth Amendment's Confrontation Clause.

On February 2, 2004, K.C. made statements to Michelle Peterson, who works at the Children's Advocacy Center, in the context of a "forensic interview". Ms. Peterson conducts these interviews, which require special training and the use of non-leading questions, in cases of alleged child abuse. OCY referred K.C. to Ms. Peterson's organization, and was aware that a criminal investigation was being conducted. In fact, during the interview there were five observers behind a two-way mirror including a law enforcement officer and an assistant district attorney who were gathering facts for their investigation. Also present at the time of the interview was an advocate from the Crime Victim Center. Additionally, prior to conducting the interview Ms. Peterson was aware of what the child had previously disclosed and to whom she had disclosed it. The interview was audiotaped and the tape would have been turned over to OCY. In response to Ms. Peterson's questions K.C. repeated the allegations she previously made about John, similarly indicating that he touched her where "she went pee" while at her mom's house and while her mother was at work or at the store. She added some additional details and said that she had "played sex" in a closet with a five year old named "Michael".

Although Pennsylvania appellate courts have not yet had the opportunity to address the issue of statements made to a sexual abuse counselor, a child protective officer, or a child abuse investigator, the courts in a number of other state jurisdictions have concluded that statements elicited through such interviews are testimonial in nature. *People v. Sisavath*, 118 Cal. App. 4th 1396 (2004)(quoting from *Crawford* in holding that a child victim of sexual abuse's statement to a forensic interview specialist was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."); *People ex rel. R.A.S.*, 2004 Colo. App. LEXIS 1032 (holding statements made to an investigator conducting a "forensic interview" were testimonial and not admissible

without cross- examination); *State v. Snowden*, 867 A.2d 314 (Md. App. 2005)(concluding based on "objective person" test rather than an "objective child" test that statements made to social worker at child protective facility were testimonial); *State v. Mack*, 101 P.3d 349 (Or. S. Ct. 2004)(holding three year old's statement to child protective worker at request of police was testimonial, and inadmissible without opportunity for cross-examination). There is nothing about the facts of this case that would dictate a different result.

The nature of the interview conducted, at the Child Advocacy Center by Ms. Peterson was fundamentally different from the exchange between K.C. and her grandmother. It had as its only purpose the identification of the perpetrator and the circumstances under which the abuse occurred. Indeed, K.C. was being examined by a person acting at the request of the government, and in every sense she was being asked to "bear witness" against a person whom the government now suspected as a perpetrator of sexual abuse. Furthermore, the fact that it was conducted by one trained to conduct a "forensic interview", utilizing techniques clearly intended to facilitate the admissibility of resulting statements in a trial, makes it fall squarely within the realm of the kind of "ex parte examinations" that are testimonial in nature. As the Supreme Court emphasized, "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse - a fact borne out time and again throughout a history with which the Framers were keenly familiar." *Crawford*, 124 S. Ct. at 1367. It is evident that the introduction of the child's responses to those interviews would violate the requirements of the Confrontation Clause as set forth in *Crawford v. Washington*.

An examination of K.C.'s statements made during an interview with Suzanne Carstater, a physician's assistant at the Office of Justine Schober, M.D on February 9, 2004 yields a similar result. K.C. was referred to Dr. Schober by OCY for an "interview" and "physical exam" following a report of sexual abuse. Ms. Carstater, an experienced practitioner trained in interviewing children in sexual abuse cases, asked the child a series of open-ended questions about the circumstances that may have led to her examination. During the interview it is likely that an OCY caseworker was present. Ms. Carstater did not know the exact nature of the allegations against the defendant at the time. Prior to asking the child about the alleged abuse the interviewer asked a series of questions intended to determine if she knew the difference between telling the truth and telling a lie. The child said she was telling the truth. She then asked the child if "she had ever been touched in a way she thought was wrong or she didn't like", The child answered "yes" and in response to Ms. Carstater's further questions essentially repeated what she had told her grandmother about John and the circumstances of the abuse. She said that he touched her with his finger and tongue where the "pee comes out", that it happened in the "green" house and that John asked her to take off

her clothes. She told Ms. Carstater that "[t]his stuff is what people do when they are married".

Although once again there are no Pennsylvania cases on point, a number of state courts have addressed the issue of admissibility of statements to health care providers in light of the *Crawford* decision. In both *State v. Lee*, 2005 Ohio 996 (Oh. App. 2005), and *State v. Stahl*, 2005 Ohio 1137 (Oh. App. 2005), the Ohio Court of Appeals determined that statements made by adult victims to nurses at a hospital unit specializing in violent sexual assault cases were made for the purpose of medical diagnosis and treatment and accordingly were not testimonial in nature. In *State v. Scacchetti*, 690 N.W.2d 393 (Minn. App. 2005), the Minnesota Court of Appeals came to a similar conclusion with regard to a child victim's statements to a nurse who worked at the hospital's Children's Resource Center. *See also State v. Vaught*, 682 N.W.2d 284 (Neb. S. Ct. 2004)(holding statements to doctors made for purposes of diagnosis and treatment are not testimonial); *State v. Fisher*, 2005 Wash. App. LEXIS 467 (2005) (holding statements to emergency room physician by a 29-month-old child were not testimonial). In *People v. West*, 823 N.E.2d 82 (Ill. App. 2005), however, the court found that only the portion of the victim's statement relating to the cause of her symptoms and pain qualified as a statement made for medical purposes, and the balance of her statement identifying the perpetrator was therefore testimonial in nature. *See also In re T.T.*, 815 N.E. 2d 789 (Ill. App. 2004).

The present facts are distinguishable from these cases because, as explained below, the interview arose in circumstances that make it much more similar to a governmental interrogation than an effort to collect information relevant to medical diagnosis or treatment. Initially, the Court notes that the interview with Ms. Carstater was conducted after the disclosure to the child's grandmother and following the "forensic interview" at the Children's Advocacy Center. As such, this represented at least the third time that the child had been asked about the circumstances of child abuse, and it occurred only days after a similar interview conducted by someone entirely removed from the health care profession. By this time a reasonable person in the position of K.C. would most assuredly have been aware that others were relying on her accusations and that a criminal investigation was under way.

K.C. was referred to Dr. Justine Schober's office by OCY for what appear to be two purposes: "for an interview" and to be medically examined. The record is absolutely silent as to whether the interview was conducted for the purpose of medical diagnosis or treatment and more significantly whether the child had any reason to believe that it was.[3] It is apparent, however, that the focus of the interview was directed at determining whether someone had

[3] As such the statements of the child would not be admissible as an exception to the hearsay rule for such statements. *See* Pa. R. E. 803(4).

ever touched the child in a way "she thought was wrong" or "didn't like", and that the interviewer was interested in establishing that the child was actually telling the truth. Furthermore, it is noteworthy that only a small portion of the interview had anything to do with physical manifestations of the alleged abuse. In essence, Ms. Carstater's interview technique was very similar to that of forensic interviewer Michelle Peterson. Under the circumstances of this case it is apparent that the child's statements about the defendant's role in the suspected child abuse were the intended outcome of the interview - at least from the point of view of OCY.

The testimony of Ms. Carstater did not reveal that the information elicited from the child was "reasonably pertinent to treatment, or diagnosis in contemplation of treatment." Pa. R. E. 803(4). In addition the child was brought to the doctor's office by the OCY caseworker for the purpose of conducting an "interview" at a time when a criminal investigation concerning the defendant was ongoing. While it may well be that in most circumstances statements made to a health care provider, particularly those made within a reasonably short time following a sexual assault, are likely to have been made for purposes of diagnosis and treatment, the mere occurrence of such an event is not sufficient to place a statement into the non-testimonial column and thus avoid the requirements of the Confrontation Clause. As such, under these circumstances the statements of the child to Ms. Carstater are testimonial and not admissible in the defendant's trial without the opportunity for cross-examination.

For all the reasons set forth above, this Court finds that K.C.'s statements to her grandmother meet the threshold requirements of the Confrontation Clause and the "Tender Years" exception to the hearsay rule. The statements made to Ms. Peterson and Ms. Carstater, however, are inadmissible based on the United States Supreme Court's decision in *Crawford v. Washington*. An appropriate order shall follow.

ORDER

AND NOW, to-wit, this 27 day of April, 2005, upon consideration of the Commonwealth's Notice of Intent to Offer Hearsay Evidence and argument thereon, the Court finding that the child's statements to her grandmother meet the threshold requirements of the Confrontation Clause and the Tender Years Statute, 42 Pa. C.S.A. §5985.1, and her remaining statements do not meet this threshold, it is hereby **ORDERED**, **ADJUDGED and DECREED** that the Commonwealth is permitted to introduce the child's statements to her grandmother only.

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

COMMONWEALTH OF PENNSYLVANIA

v.

ANTONIO D. FERGUSON

CRIMINAL LAW/SENTENCING

A "substantial question" permitting appellate review of the sentence exists where the statement of matters complained of sets forth a plausible argument that the sentence violates a particular provision of the Sentencing Code or is contrary to the fundamental norms underlying the sentencing scheme.

CRIMINAL LAW/SENTENCING

An allegation that a sentencing court "failed to consider" or "did not adequately consider" certain factors does not raise a substantial question that the sentence was inappropriate. Such a challenge goes to the weight accorded to the evidence and will not be considered absent extraordinary circumstances.

CRIMINAL LAW/SENTENCING

The sentencing court has discretion to determine whether a sentence should be consecutive or concurrent, and thus such a challenge does not present a substantial question for review.

CRIMINAL LAW/SENTENCING

It is only where an aggrieved party can articulate clear reasons why the sentence issued by the trial court compromises the sentencing scheme that a substantial question exists for appellate review.

CRIMINAL LAW/SENTENCING

The sentencing court's absence of bias, prejudice, or ill will is shown partly because of merger of offenses, not only as a merger of law (theft with burglary), but also with the court's discretionary merger of six separate counts of loitering and prowling which did not merge as a matter of law. Of appellant's twenty-five convictions, the court sentenced him only on nine counts.

CRIMINAL LAW/SENTENCING

The sentencing court's absence of bias, prejudice, or ill will is shown partly by the fact that the maximum sentence of 76 years was less than one-half of the possible maximum sentence.

CRIMINAL LAW/SENTENCING

The sentencing court's absence of bias, prejudice, or ill will is indicated partly by the fact that the minimum sentence of twenty-four years, four months, would allow defendant to serve his full minimum sentence when he would just turn fifty years of age and still lead a productive, law-abiding life.

CRIMINAL LAW/SENTENCING

The sentencing court's absence of bias, prejudice, or ill will is partly shown by the fact that sentences imposed on the nine counts were within the standard range of sentencing guidelines and were made to run

concurrent with two prior sentences that defendant received.

CRIMINAL LAW/SENTENCING

Among the reasons for the sentencing court's imposition of consecutive sentences were the appellant's lengthy criminal history as a juvenile and as an adult, including the fact that appellant has been committing burglaries since the age of thirteen. There is an overriding need to protect the community from the threat of violence appellant has posed since the age of thirteen.

CRIMINAL LAW/SENTENCING

Among the reasons for the sentencing court's determination to sentence the appellant to consecutive sentences was the fact that the appellant was under sentence at the time of these offenses and had two separate felony cases pending for which he was subsequently convicted.

CRIMINAL LAW/SENTENCING

Among the reasons for the sentencing court's determination to sentence the appellant to consecutive sentences was his lack of remorse and lack of understanding of the significance of his criminal behavior and lack of any significant work history or completed education.

CRIMINAL LAW/SENTENCING

Among the reasons for the sentencing court's determination to sentence the appellant to consecutive sentences were his prior convictions of possession of marijuana, larceny, driving without a license, and sale of crack cocaine in the state of New York and, while still under sentence in New York, his convictions of access device fraud, theft of a credit card and use of same, and forgery and access device fraud in Erie County, Pennsylvania. The record reflects that, prior to committing the present crimes, appellant was convicted of serious crimes in the juvenile and adult court systems in four jurisdictions across two different states.

CRIMINAL LAW/SENTENCING

Among the reasons for the sentencing court's imposition of consecutive sentences was that he was a career criminal for one-half of his life and that the Erie Police Department was so concerned that it created a special detail to investigate appellant's string of burglaries.

CRIMINAL LAW/SENTENCING

Among the reasons for sentencing court's imposition of consecutive sentences were the facts that he demonstrated no remorse and therefore posed a continued threat to this community, did not ask for any form of rehabilitative help, including drug and/or alcohol help, admitted that he conservatively ingested seven marijuana blunts each week, and received substance abuse counseling since 1996 with no effect.

CRIMINAL LAW/SENTENCING

Among the reasons for sentencing court's imposition of consecutive sentences was the violent nature of the crimes he committed in breaking into the residences of several families.

CRIMINAL LAW/SENTENCING

Among the personal circumstances taken into consideration by the sentencing court were the facts that the appellant dropped out of high school in his sophomore year, had no significant employment history, had no history of stable residence, and had children born out of wedlock and still did not consider their welfare when he broke into six different homes and attempted to enter two others.

CRIMINAL LAW/SENTENCING

The sentencing court's determination to sentence the appellant to consecutive sentences was justified by the fact that there were separate egregious crimes and that a potential burglar should not receive an incentive to commit the crime by knowing that he is getting a discount for additional burglaries.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NOS. 1279-1285 OF 2004

Appearances: District Attorney's Office for the Commonwealth
Kenneth Bickel, Esq. for the Appellant

OPINION

This matter is an appeal from the denial of Appellant's Post Sentence Motion. As this appeal is without merit, it is DENIED.

PROCEDURAL/FACTUAL HISTORY

On November 10, 2004, a jury found Appellant guilty of twenty-five separate criminal offenses. These offenses were committed in November and December, 2003 and included six residential burglaries and two attempted residential burglaries. Appellant was also found guilty of escape after jumping out of a second story window of the Erie Police Department while in official police custody. Appellant was apprehended one week later in New York State.

On January 14, 2005, Appellant was sentenced to an aggregate of twenty-four years and four months to seventy-six years of incarceration for the twenty-five convictions. On January 24, 2005, Appellant filed a Motion to Modify/Reconsider Sentence. This Motion was denied by Order dated January 24, 2005.

Thereafter, Appellant perfected an appeal to the Superior Court. A Statement of Matters Complained of on Appeal was filed on March 8, 2005. This Opinion is in response thereto.

APPELLATE REVIEW HAS BEEN WAIVED

Appellant does not allege any trial error nor does Appellant contest any pre-trial ruling. Instead, Appellant's Statement of Matters Complained of on Appeal focuses solely on his sentence. Appellant raises the following issues:

"6. Bias, prejudice or ill-will must have been the true basis for the sentence since circumstantially no other conclusion is possible especially in light of the relative youth of Appellant (26 years old); large capacity for rehabilitation; and lack of any suggestion of a need for community protection from violence or any other harm.

7. It was error to impose such a stringent sentence without an expression of reasons that is adequate as a matter of law.

8. The sentence, in light of #6 above, could not have been individualized as required by law.

9. The sentence was manifestly excessive in its consecutiveness, particularly in that no substantial basis for such a lengthy sentence exists, rendering the sentence an abuse of the discretion to sentence consecutively. See *Commonwealth v. Bauer*, 604 A.2d 1098 (Pa. Super. 1992) rev'd and rem'd 533 Pa. 69 (1993)."

See, Statement of Matters Complained of on Appeal, Paragraphs 6, 7, 8 and 9.

All of Appellant's assertions challenge the discretionary aspect of his sentence. The threshold inquiry is whether Appellant has raised a "substantial question" permitting appellate review of his sentence. *Commonwealth v. Maneval*, 688 A.2d 1198 (Pa. Super. 1997). "A substantial question exists where the statement sets forth a plausible argument that the sentence violates a particular provision of the Sentencing Code or is contrary to the fundamental norms underlying the sentencing scheme." *Commonwealth v. McNabb*, 819 A.2d 54, 56 (Pa. Super. 2003) citing *Commonwealth v. Mouzon*, 812 A.2d 617 (Pa. 2002); *Commonwealth v. Maneval*, *supra*. "An allegation that a sentencing court 'failed to consider' or 'did not adequately consider' certain factors does not raise a substantial question that the sentence was inappropriate. Such a challenge goes to the weight accorded the evidence and will not be considered absent extraordinary circumstances." *Commonwealth v. Pettaccio*, 764 A.2d 582, 587 (Pa. Super. 2000). Additionally, the sentencing court has discretion to determine whether a sentence should be consecutive or concurrent and thus, such a challenge does not present a substantial question for review. *Commonwealth v. Boyer*, 856 A.2d 149 (Pa. Super. 2004).

Appellant has also failed to identify which part of the Sentencing Code or which fundamental norm of sentencing was breached or how there was a departure from the norm. *Commonwealth v. Pollard*, 832 A.2d 517, 525 (Pa. Super. 2003). "It is only where an aggrieved party can articulate clear reasons why the sentence issued by the trial court compromises the sentencing scheme" that a substantial question exists. *Commonwealth v. Lutes*, 793 A.2d 949, 964 (Pa. Super. 2002).

In the case *sub judice*, Appellant has failed to raise a substantial question preserving appellate review of his sentence. Accordingly, Appellant's appeal must be dismissed.

APPELLANT'S CLAIM OF BIAS, PREJUDICE OR ILL WILL IS IRRESPONSIBLE AND UNSUPPORTED

Assuming arguendo appellate review is available to Appellant, his claims are without merit.

Appellant's first allegation that "bias, prejudice or ill-will must have been the true basis for the sentence..." is an irresponsible and unsupportable averment. Appellant does not specify any conduct which demonstrated bias, prejudice or ill-will.

Appellant ignores the fact that he received a fair trial. Indeed, on appeal

Appellant does not contest any pre-trial or trial rulings issued by this Court.

Appellant also ignores the fact that he faced a maximum sentence of 217 (two hundred and seventeen) years for the twenty-five offenses. A number of the Theft offenses merged as a matter of law with the Burglary offenses. However, this Court went even further and merged six separate counts of Loitering and Prowling which otherwise did not merge as a matter of law. See Count 2, Docket Number 1282 of 2004; Counts 4 and 5 at Docket Number 1284 of 2004 and Counts 2, 6 and 8 at Docket Number 1285 of 2004. Of Appellant's twenty-five convictions, this Court sentenced him on only nine Counts.

The maximum sentences for these nine counts was a total of 167 (one hundred and sixty-seven) years. Thus, Appellant's maximum sentence of 76 years was less than one half (it was 45%) of the possible maximum sentence.

Appellant's minimum sentence does not constitute a "life sentence" as so often is claimed. Appellant will just turn fifty years old if he serves his full minimum sentence. He can still lead a productive, law-abiding life.

Each of the sentences imposed on these nine Counts were within the standard range of the Sentencing Guidelines. Further, the sentences imposed were made to run concurrent with two prior sentences Appellant received (at Docket Numbers 2362 of 2003 and 2449 of 2003).

Hence, Appellant's claim of bias, prejudice or ill-will is unwarranted given the record.

THERE WERE SUFFICIENT REASONS OF RECORD FOR APPELLANT'S SENTENCE

Appellant's remaining three allegations of sentencing errors shall be addressed in one combined response. The gravamen of Appellant's complaints are that his sentence was "manifestly excessive in its consecutiveness" without any reasonable explanation. To the contrary, there were ample reasons in this record for the sentence imposed.

Among the reasons were Appellant's lengthy criminal history as a juvenile and as an adult, including the fact Appellant has been committing burglaries since the age of thirteen. There is an overriding need to protect the community from the threat of violence Appellant has posed

since the age of thirteen. Appellant has repeatedly committed crimes while under juvenile and adult court supervision. Appellant was under sentence at the time of these offenses and had two separate felony cases pending for which he was subsequently convicted. Appellant's lack of rehabilitative progress despite the extensive resources available to him in the juvenile and adult systems was a factor. The violent nature and extent of the crimes Appellant committed were important. Appellant remains remorseless and has not internalized the significance of his criminal behavior. Appellant's lack of any significant work history or completed education were of record. Each of these factors will now be fleshed out further.

As the pre-sentence report reflects, Appellant has been convicted of serious crimes in four separate jurisdictions across two different states. Prior to his fourteenth birthday, Appellant was convicted as a juvenile in Erie, Pennsylvania of three counts of Burglary, three counts of Criminal Conspiracy to Commit Burglary, three counts of Theft by Receiving Stolen Property and one count of Aggravated Assault[1]. He underwent placement at Harborcreek Youth Services but absconded. Thereafter he was committed to the Vision Quest Youth Services program.

Appellant was also convicted in two different counties in New York as a juvenile. Specifically, on September 15, 1995, Appellant possessed marijuana in Hanover, New York. On March 20, 1996, he was sentenced to three years of probation. Less than one month later, on April 19, 1996 Appellant committed the same offense, Possession of Marijuana, in Chautauqua County, New York. He received three years of probation on July 29, 1996.

Appellant was under this sentence when he began committing offenses as an adult. On August 29, 1998, Appellant committed a larceny offense in Chautauqua County for which he received a three year period of probation on November 5, 1998. While under probationary supervision from the juvenile and adult court, Appellant committed a summary offense in Buffalo, New York on February 13, 1999, Driving Without a License.

Soon Appellant's criminal behavior escalated. Undeterred by his probationary status for the larceny, on October 7, 1999, Appellant sold three rocks of crack cocaine to a confidential informant in Jamestown, New York. Then on October 15, 1999, Appellant again sold three rocks of crack cocaine to a confidential informant in Jamestown, New York.

For the two cocaine sales, Appellant was sentenced on August 21, 2000 to a period of six months in the Chautauqua County jail followed by five years of probation. This sentence was subsequently revoked and Appellant

[1] Given Appellant's age, these convictions were not factored into his Prior Record Score. Nonetheless, Appellant was adjudicated delinquent on these counts.

did an additional six months of incarceration in the Chautauqua County jail.

Upon his release from jail in Chautauqua County and while still under sentence, Appellant began committing crimes in Erie County, Pennsylvania, On October 29, 2003, Appellant pled guilty at Docket Number 2362 of 2003 to a felony count of Access Device Fraud committed on June 22, 2003. He used a stolen credit card to obtain $242.05 worth of merchandise from Walmart, $192.10 worth of merchandise from Quality Market and $66.78 worth of merchandise from Country Fair. Sentencing was scheduled for January 7, 2004. Hence, Appellant was awaiting sentencing for this felony offense at the time he committed the twenty-five crimes herein.

Meanwhile, on June 27, 2003, Appellant committed the felony offense of Forgery and Access Device Fraud (as a Misdemeanor One) at Docket Number 2449 of 2003. He was charged on July 18, 2003. Appellant entered a guilty plea on March 11, 2004 to these two offenses. He was sentenced on April 21, 2004.

Thus the record reflects that prior to committing the present crimes, Appellant was convicted of serious crimes in the juvenile and adult court systems in four different jurisdictions across two different states. Appellant was given the benefit of probation as a juvenile and as an adult. While under supervision, he repeatedly committed additional crimes. In fact, Appellant was revoked from his sentence in Chautauqua County and reincarcerated prior to the commission of the current offenses. In addition, Appellant was awaiting sentence in this jurisdiction for a felony offense and had another felony case pending at the time he committed the instant offenses.

Although Appellant wants his age to be considered, the most prominent conclusion drawn from Appellant's age is that he is a career criminal. For well over a decade, indeed for one-half of his life, Appellant has committed serious felony offenses. Despite being placed on community supervision and incarcerated several times, Appellant's criminal activity only increased. Absolutely nothing has deterred Appellant from a life of crime as his own behavior demonstrates.

Furthermore, Appellant's actions in the cases at bar affected more than just the eight immediate families. As the trial record reflects, Appellant committed burglaries in all different parts of the City of Erie. In fact, the Erie Police Department was so concerned that it created a special detail to investigate Appellant's string of burglaries. See Trial Transcript, Day II, page 92. It was the efficient work of the ten to fifteen officers assigned to this special detail that resulted in the apprehension of Appellant. What is notable is that Appellant's criminal conduct had become so threatening to all parts of the City of Erie that it took a special complement of police officers to catch him.

Unfortunately, Appellant's criminal mindset still had not changed after the trial. At sentencing, Appellant stated "I feel as though I am a victim". *See* Sentencing Transcript, January 14, 2005 at pg. 9. He further stated "I've done nothing wrong" regarding the burglaries. Sentencing Transcript at pg. 9. Obviously Appellant has not accepted responsibility for the burglaries. While Appellant can maintain his innocence, he does not allege any trial error nor can he explain away all of the evidence that resulted in his convictions.

It can also be inferred that Appellant intended to escape responsibility for these burglaries when he jumped out of the police station window and fled to another state. He did not turn himself in; instead he was apprehended by law enforcement authorities in New York. Accordingly, Appellant has demonstrated no remorse for his criminal behavior, which means he poses a continued threat to commit criminal acts in this community[2].

Appellant's claim that he has a "large capacity for rehabilitation" is vacuous. Appellant does not specify from what he needs rehabilitated. Appellant certainly has not been rehabilitated from his criminal behaviors. At sentencing, Appellant did not ask for any form of rehabilitative help, including any drug and/or alcohol help.

Appellant does have a history of substance abuse. As part of a pre-sentence report prepared in Chautauqua County, Appellant was interviewed on July 14, 2000. These records were made a part of the present pre-sentence report and reveal: "(a)ccording to Mr. Ferguson he began using marijuana at 13 years of age and admitted a heavy daily use of this substance until he was placed on probation. Probation records reflect a period of abstinence while on probation. However, according to the defendant he resumed marijuana use on a regular basis when released from custody...and indicated that his last use of the substance was on the day prior to the pre-sentence investigation interview." *See* Pre-Trial

[2] Appellant's claim to be a victim can only be derived from his statement at sentencing that he was intimidated by the Erie Police Department Sentencing Transcript, pg. 9. Appellant's statement was unconvincing. The record reflects that the police department was very accommodating to all of Appellant's personal comfort needs, after all, they wanted information from him. Appellant was provided dinner. Thereafter he was provided something to drink and a cigarette. See Trial Transcript Day II, pg. 101. Notably Appellant directed which police officers with whom he would speak. For example, he would speak with Officers Franklin or Dickens but not Officer Grassi. Trial T.T., Day II, pg. 101. He was able to meet one-on-one with Officer Dickens to discuss his case. Accordingly there is nothing in this record to establish any form of intimidation or reason for Appellant to twist the facts to hold himself out as a victim. His attempt to do so is a further reflection of his lack of remorse.

Report excerpt, Case Number 194502, Chautauqua County, New York at page 7. Thereafter, drug counseling was made available to Appellant but the records reflect Appellant was "an active client however all urine toxicologies have tested positive for marijuana." *Id*. at pg 7.

Appellant's explanation for selling crack cocaine was "I was hurting at that time, I had no money, no nothing, someone just broke into my apartment and I almost lost my life, I saw other people making fast money, I'm not a follower, I made up my own mind to do this, I needed money to maintain, I was stressed at this time." *Id.* at pg. 5. Appellant indicated he made approximately two thousand dollars during the two week period he sold crack cocaine. *Id.* at pg. 5.

In the pre-sentence report prepared for this case, Appellant admitted that he "conservatively ingested seven marijuana blunts each week." Pre-Sentence Report at pg. 8. Hence, since age thirteen until his apprehension in January 2004, Appellant was a consistent user of marijuana and has been convicted on two separate occasions of selling crack cocaine.

It was also apparent from the pre-sentence report Appellant has received substance abuse counseling since 1996. He has had the opportunity to receive drug and alcohol services in four different jurisdictions. Nonetheless, he continued to abuse illegal substances. Given this history, Appellant's contention he has a "large capacity for rehabilitation" is untenable.

Appellant also expresses concern about the "lack of any suggestion of a need for community protection from violence or any other harm". Statement of Matters at Paragraph 6. Appellant ignores the law of Pennsylvania. Burglary is a crime of violence under Pennsylvania law. *See* 42 Pa. C.S. §9714(g). *See* also 18 Pa. C.S.A. §3502(c)1). *See Commonwealth v. Belak*, 825 A.2d 1252 (Pa.Supreme Ct. 2003).

Appellant also overlooks the violent nature of the crimes he committed herein. A review of his crimes reveals a stunning level of violence. All of Appellant's home invasions were in the middle of the night when the occupants were sleeping. Appellant did an extraordinary amount of property damage to five of his victims' homes[3].

For example, Appellant broke into a home at 1254 West 21st Street wherein Kim Miodus resided with her husband and son. This burglary occurred between 1:00 a.m. and 5:00 a.m. on November 21, 2003. All three residents were asleep at the time. Appellant broke in through the kitchen door with such force that the door frame was completely blown out. In fact, the paneling around the door frame was also broken out and tile was ripped off the floor. The kitchen door was beyond repair. Appellant did

[3] The remaining cases involved entry through an unlocked door which obviated the need for Appellant to forcibly enter.

nearly $4,000.00 worth of damage to the Miodus home. Trial Transcript, Day I, pp. 31-37.

Appellant took the purse of Mrs. Miodus and her son's wallet. Besides the charge cards, money, car keys, cell phone, checkbook and other normal items in the purse, Appellant took Mr. Miodus's wedding band, a gift certificate to the Outback Steak House and money from the son's wallet. In their victim claim form, Mrs. Miodus stated, *inter alia:* "would love to get back the personal items, especially my husband's wedding band. That's something we can never replace."

Appellant broke into 2955 Poplar Street where John Kies resided with his wife and four sons. The Kies family had lived in this home since 1988. In the early morning hours of December 22, 2003, Mr. Kies was awakened by his two older boys who said someone had kicked in their back door. Mr. Kies then discovered their kitchen door frame had been busted with so much force that the deadbolt had split the casing around the door and all the woodwork lay on the kitchen floor. One of the Kies boys was so afraid that he immediately picked up a bat for protection. Appellant stole a digital camera and a bag of Mary Kay cosmetics worth $800.00. The camera was later recovered in Appellant's car. *See* Trial Transcript, Day I, pp. 45-49.

Appellant broke into the Heasley residence located at 420 Sanford Place on December 18, 2004. Mr. & Mrs. Heasley had lived in this home for five and one-half years preceding the burglary. The Heasleys were asleep along with their four year old daughter when they were awakened at 4:00 a.m. to a loud, crashing noise. The Heasleys discovered their kitchen door knocked off the hinges. Appellant smashed the door with such force that the deadbolt was ripped out and the door trim was torn away. The plaster from the adjoining walls was ripped out and debris was strewn all around the kitchen. The screen door had been propped open. Fortunately, Mrs. Heasley did not leave her purse in the kitchen. *See* Trial Transcript, Day I, pp. 67-70.

On December 18, 2003, Appellant broke into the Boncella residence at 516 Euclid Street. In the early morning hours the Boncellas were asleep when Appellant kicked in their kitchen door. The force was so powerful that the door frame was broken. Appellant took Debbie Boncella's purse containing her car keys, house keys, identification, credit cards, cash, makeup and other assorted items. Appellant did $800.00 worth of damage to the residence. *See* Trial Transcript, Day I, pp. 54-56.

Appellant broke into the Bowers home at 3902 Eliot Street at 3:00 a.m. at a time when Mr. and Mrs. Bowers were asleep along with their three children. They were awoken to the thunderous sound of a large cement block being thrown through their kitchen door. Appellant stole Mrs. Bowers' purse with her wallet containing credit cards, car keys, antique jewelry and money. The kitchen door was so broken that snow openly

blew in the kitchen. *See* Trial Transcript Day I, pp. 20-24.

Appellant broke into 917 West 31st Street where Christine Hess had resided for eight years with her husband and two children. Christine Hess is a hairdresser and the proceeds from her night's work were in her purse. Between midnight and 6:00 a.m., as Christine Hess slept on her couch, Appellant entered through an unlocked kitchen door and stole Mrs. Hess' purse. All of her work money, valuable jewelry, credit cards, bank statements, driver's license, makeup and cell phone were taken by Appellant. *See* Trial Transcript, Day I, pp. 25-29.

All of Appellant's burglaries perpetuated substantial violence to entire families, including children. Appellant has forever traumatized each of these victims who can no longer feel safe in homes they have lived in for a considerable time. For Appellant to claim that he is not a threat of violence to this community is further evidence of his lack of insight and remorse. Appellant poses a real and significant threat to the safety of every person within any community in which he resides.

The overriding concern in the imposition of Appellant's sentence was the protection of the community. Appellant presents a clear and present danger to violently break into anyone's home at any time. He is a threat to more than the eight victims in this case, he is a threat to any community. Unless Appellant is incarcerated for an extended period of time, this community will be seriously at risk.

APPELLANT'S PERSONAL CIRCUMSTANCES WERE TAKEN INTO ACCOUNT

As the probation officer who prepared the present pre-sentence report observed: "(t)he defendant is a 26 year old, single father, with no apparent job or career aspirations. Mr. Ferguson schemed dishonestly, used marijuana, sold crack cocaine, lacked internalization, from youth to adulthood. Jurors decided that he was a purse-oriented thief in these crimes looking for the quick score and get away. This writer sees an unrepentant man, threatening our neighborhood security." Pre-sentence Report at pg. 9.

According to the pre-sentence report, Appellant quit school in the 10th grade in Dunkirk, New York in 1995. Appellant "stated he obtained a GED from Erie Community College in 1999. However, a telephone contact with the NYS General Equivalency Diploma Information line revealed no record found on this defendant." *See* Chautauqua County P.S.I., Case Number 194502 at pg. 6. Hence there is no verification of Appellant's education other than he dropped out of high school in his sophomore year.

Appellant also has no significant employment history. According to the present pre-sentence report, Appellant indicated he was unemployed at the time of his arrest. According to Appellant, he had worked at low wage jobs in Buffalo for short periods of time. At other times he was financially supported by his grandmother or his girlfriend(s). At the time

he committed the present burglaries, he was driving his grandmother's car. Hence it does not appear Appellant has established any meaningful work history or possesses any vocational skill(s). Instead, he has chosen a life of crime.

Appellant also has no history of a stable residence. He has floated between two states. He has lived with various family members and/or girlfriends.

Appellant asked for leniency because of his three children. All of these children were born out of wedlock. As Appellant was informed, he had these children at the time he committed these twenty-five offenses. Appellant obviously did not consider the welfare of his three children at the time he broke into six different homes and attempted to enter two others. Appellant was not being a father when he escaped from the police station and became a fugitive in another state. Being a father has not deterred Appellant from being a serious, felonious criminal.

In sum, the record reflects that Appellant's sentence was individualized in that it was based on the circumstances Appellant has created. There exists ample justification to sentence Appellant to the term imposed.

APPELLANT'S OBJECTION TO THE
CONSECUTIVE SENTENCES IS WITHOUT MERIT

The record establishes the reasons for the consecutive sentences. These were all separate and unrelated violent crimes. Appellant broke into homes in the middle of the night, caused extensive damage and terrorized the residents. He stole personal and sentimental items (e.g. a wedding band). He stole people's identification cards.

To not impose consecutive sentences would be to say to anyone of these families that it does not matter what the Appellant did to you or what he took from you. Each of these victims deserves for Appellant to be held separately accountable for his egregious conduct toward them. None of these families deserve to be re-victimized by a sentence which ignores the serious impact of Appellant's crimes. None of these families need to be burdened with a concern that Appellant could do these crimes again in the near future.

Further, Appellant does not get a volume discount for crimes. In other words, Appellant does not receive a free pass for committing more than one crime. Each of these crimes were separate, serious and deserving of a consequence.

To hold otherwise would create an open season for burglaries. If a burglar knows that he cannot receive an additional sentence for additional burglaries, there is no disincentive for the burglar. The potential result is chaos, or at a minimum an increase in crime. Such a result is surely not consistent with the fundamental norms of our Sentencing Code. Nor is such a result consistent with the protection and interests of the community.

CONCLUSION

Appellant has not preserved review of the discretionary aspects of his sentence. There is no evidence even alleged that amounts to bias, prejudice or ill will. Appellant was sentenced on only nine of his twenty-five convictions, receiving less than one-half of the possible maximum sentences. Appellant's sentences were in the standard range of the guidelines. Appellant's aggregate sentence was run concurrent with two prior sentences.

The circumstances Appellant created were the basis for his sentence. Appellant has committed serious crimes of violence as a juvenile and adult. He has been convicted of crimes in four different jurisdictions across two states. He has been put on probation, placed in jail and revoked from community supervision. He has persistently committed additional crimes while under juvenile and/or adult court supervision. He was under sentence at the time he committed these twenty-five crimes. He was also awaiting sentence on a felony charge, with another felony case pending. Appellant demonstrates no remorse, instead portraying himself as the victim.

Appellant's crimes were extremely violent. Appellant terrorized at least six families and stole their personal and sentimental belongings. Appellant has proven incapable of rehabilitation from criminality and substance abuse. Appellant is lacking any notable educational or employment history. Appellant has not even had a stable residence, except when incarcerated.

Appellant poses a clear and present danger to commit violent crimes if not incarcerated for a significant period. There is an urgent, overriding need to protect the community from Appellant.

BY THE COURT:
/s/ **WILLIAM R. CUNNINGHAM, JUDGE**

COMMONWEALTH OF PENNSYLVANIA

v.

BRUCE ALAN CHASE

CRIMINAL PROCEDURE / CONSTITUTIONAL LAW / JUDICIAL REVIEW

It is the role of the judiciary to interpret the Constitution and it is the duty of courts to invalidate legislation repugnant to the Constitution. This power of judicial review must be exercised cautiously. It is the role of the judiciary to determine if legislation passes constitutional muster, not to question the wisdom of legislation.

A lawfully enacted statute commands a presumption of constitutionality and should be upheld unless it clearly, palpably, and plainly violates the Constitution. All doubts are to be resolved in favor of the constitutionality of the legislation. A court may presume that the General Assembly did not intend a result that is absurd, impossible of execution or unreasonable.

CRIMINAL PROCEDURE / CONSTITUTIONAL LAW / SEARCH AND SEIZURE / MOTOR VEHICLE STOP

A person is seized for purposes of Fourth Amendment analysis if a reasonable person would believe he or she was not free to leave or to terminate the encounter. A traffic stop of a motorist is a seizure which implicates the Fourth Amendment and even a temporary or limited restraint on the liberty of a person during a traffic stop may be constitutionally impermissible if, under all the circumstances, the traffic stop was unreasonable.

There is a split of authority as to whether probable cause or the lesser, reasonable suspicion standard, applies to determine the validity of a temporary stop for a traffic violation. The court holds that probable cause is required pursuant to the Fourth Amendment for the temporary detention of a motorist for a motor vehicle code violation in accordance with the majority of federal circuit courts which have considered this issue.

Accordingly, 75 Pa.C.S.A. §6308(b), authorizing a police officer to stop a vehicle upon reasonable suspicion that a violation of the motor vehicle code is occurring or has occurred is unconstitutional as a violation of the Fourth Amendment.

CRIMINAL PROCEDURE / PENNSYLVANIA CONSTITUTION ARTICLE 1, §8 / SEARCH AND SEIZURE / MOTOR VEHICLE STOPS

In determining whether activities fall within the right of privacy recognized by Article 1, §8, the courts examine the individual's expectation of privacy and whether that expectation is reasonable. A court must balance an individual's right to privacy against countervailing state interests, recognizing the nature of the right of privacy and its relationship to other basic rights.

Article 1, §8 requires probable cause before a police officer may stop a motor vehicle for traffic offenses. As 75 Pa.C.S.A. §6308(b) authorizes a motor vehicle stop for violations of the motor vehicle code on the basis of reasonable suspicion rather than probable cause, it is unconstitutional.

CRIMINAL PROCEDURE / SEARCH AND SEIZURE / MOTOR VEHICLE STOP

A police officer does not have probable cause to believe a violation of the motor vehicle code has occurred on the basis of a brief period where the vehicle exceeded the speed limit, where the vehicle crossed the center and fog line three times, each only for a few seconds, where the car made a wide right-hand turn, where the weather conditions were dry and clear, and where there were no pedestrians or cars on the road. Accordingly, defendant's omnibus pretrial motion is granted and evidence obtained as a result of the stop is suppressed.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 3520 OF 2004

Appearances: Douglas G. McCormick, Esq. for the Commonwealth
Philip B. Friedman, Esq. for the Defendant

OPINION AND ORDER:

This matter comes before the Court on Defendant's Omnibus Pre-trial Motion for Relief

I. HISTORY OF THE CASE

On August 24, 2004 at approximately 3:30 a.m., Officer John Stephens (Stephens) of the Lake City Police Department observed a black coupe driven by the Defendant, Bruce Alan Chase, traveling west on Route 5. Stephens was parked in a marked patrol car next to a fire department facing north (perpendicular to Route 5). This section of Route 5 is a two-lane highway separated by a single dotted-yellow line (passing zone) with no traffic signals. From his vantage point, Stephens could see 200 feet in either direction. NT., 4, 12-13.[1]

Stephens observed the coupe for 20 to 30 seconds before it passed his stationary position. During this period of time, he saw the coupe's driver-side tires cross the centerline for about twenty feet (a few seconds) before gradually returning to its lane. Stephens estimated that the coupe was exceeding the 45 mph speed limit. N.T., 5-6, 15-17, 26-28. Stephens followed the car and noticed that the passenger side tires crossed the right-hand fog line for a few seconds before gradually re-entering the lane (approximately 0.2 miles from where Officer Stephens first observed the coupe). Further down the road, he noticed the coupe's tires cross the single yellow-dotted centerline again for a few seconds before returning to the lane (this was approximately 0.4 miles from where Officer Stephens first observed the coupe cross the centerline of the highway. He could not estimate the coupe's speed at that time.). N.T., 7-9, 18-19, 29-30.

Shortly thereafter, the coupe veered right onto Old Lake Road. Next,

[1] N. T. denotes references to the March 3, 2005 suppression hearing transcript.

the Defendant veered into the left side of the road while making a wide right turn onto West Park Road (both turns were not unusual). N.T., 10, 22. Finally, the coupe turned left on Edgewood Drive before Stephens turned on his lights and stopped the vehicle. The area is residential with the exception of a BP gas station located near the corner of Route 5 and Old Lake Road. Officer Stephens observed the Defendant's vehicle for a total of eight-tenths of a mile. N.T., 10-11, 20-24. During these events, no cars or pedestrians were on the road, no accident occurred, and the road conditions were dry and clear. N.T., 9-10, 19.

As a result of the investigation, the Defendant was arrested and charged with three offenses: (1) DUI: General Impairment, 75 Pa.C.S.A. §3802 (a)(l); (2) Driving on Roadway Laned for Traffic, 75 Pa.C.S.A §3309 (1); and (3) Driving on Right Side of Roadways, 75 Pa.C.S.A. §3301(a). Defendant filed an Omnibus Pre-Trial Motion for Relief on January 18, 2005. An evidentiary hearing was conducted on March 3, 2005. Officer Stephens was the sole witness.

II. DISCUSSION

The Defendant argues that Officer Stephens improperly stopped him in violation of both the United States and Pennsylvania Constitutions. Therefore, all evidence obtained as a result of the stop should be suppressed.

The Court's resolution of the issue is dependent upon a determination of the evidentiary standard required for a motor vehicle stop for alleged violations of Pennsylvania's Motor Vehicle Code. Simply, the issue is whether probable cause or reasonable suspicion is required for such a seizure. The defendant argues that the standard is probable cause. The Commonwealth asserts that it is reasonable suspicion pursuant to 75 Pa.C.S.A §6308(b), which the Defendant argues is unconstitutional.[2]

On February 1, 2004, the amended version of 75 Pa.C.S.A. §6308(b), became law. It provides that:

> Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

75 Pa.C.S.A § 6308(b). In contrast, the former version of the statute

[2] Contrary to the Commonwealth's position, this Court finds that the Defendant did not waive the issue because he properly responded after the Commonwealth asserted the reasonable suspicion standard at the suppression hearing.

stated: "[w]henever a police officer is engaged in a systematic program of checking vehicles or drivers or has articulable and reasonable grounds to suspect a violation of this title, he may stop a vehicle..." 75 Pa.C.S.A. § 6308(b) (effective prior to February 1, 2004).

The amendment was intended by Pennsylvania's General Assembly to legislatively overrule current Pennsylvania caselaw and establish reasonable suspicion as the standard for motor vehicle stops for traffic violations.[3] Pennsylvania appellate courts have held that police officers must possess probable cause for such a stop. *Commonwealth v. Garcia*,

[3] This intention is reflected in the following remarks made by Representative Kate Harper during the legislative process.

> Mr. Speaker, I would like to address the portion of this bill that amends section 6308 of the Vehicle Code. The topic at issue here deals with the authority of police officers to stop a vehicle in order to enforce the Vehicle Code. Pennsylvania courts have recently discarded the reasonable suspicion justification for making traffic stops in DUI cases. The Pennsylvania Courts are now requiring a stricter probable cause standard to justify these stops. As evidenced by *Com. v. Gleason*, 785 A.2d 983 (Pa. 2001), broad, stricter limits on police authority to make these stops are permitting drunk drivers to evade accountability. Evidence of their drunkenness is being suppressed and their convictions overturned. While drunk drivers and their attorneys benefit from the elimination of the reasonable suspicion justification, this development in the Pennsylvania criminal law is cause for great concern among not only the police and prosecutors but among law-abiding citizens as well, and the issue requires, once again, the action of the General Assembly.
>
> Mr. Speaker, this issue is much larger than simply counting how many times a drunk driver crosses lines on the road. *Gleason* has created an untenable double standard for justifying traffic stops in Pennsylvania. Pennsylvania courts now require probable cause to make a traffic stop based on a Vehicle Code offense, while reasonable suspicion is sufficient for other traffic stops. This dichotomy is particularly dangerous considering some of the serious offenses that fall under the Vehicle Code, including homicide by vehicle, homicide while DUI, aggravated assault while DUI, and accidents involving death or personal injury, and, of course, DUI itself. ...
>
> Mr. Speaker, this interpretation of Whitmyer is flawed. ...
>
> Nonetheless, the *Gleason* court rejected this view and created an untenable double standard. According to *Gleason*, section 6308(b) imposes a higher standard of justification for making traffic stops in Pennsylvania based on Vehicle Code violations than is constitutionally required for other traffic stops. ...
>
> Mr. Speaker, clearly, constitutional considerations are satisfied by the application of the reasonable suspicion standard to all traffic stops in Pennsylvania. ...
>
> Mr. Speaker, this legislation is right for Pennsylvania, and I urge all members to support the bill.

House Legislative Journal, p. 1887-1888, September 29, 2003. See also, *Commonwealth v. Cook*, 865 A.2d 869, 873 n.1 (Pa.Super. 2004).

859 A.2d 820 (Pa.Super. 2004); *Commonwealth v. Gleason*, 785 A.2d 983 (Pa. 2001); *Commonwealth v. Whitmyer*, 668 A.2d 1113 (Pa. 1995).

THE SCOPE OF LEGISLATIVE AND JUDICIAL AUTHORITY IN CASES OF CONSTITUTIONAL DIMENSION

The Pennsylvania General Assembly is vested with "the power to make, alter and repeal laws." *Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108, 121-122 (Pa.Cmwlth. 1998). See, Pa.Const. Article 2, § 1. However, it is the judiciary's role to ultimately interpret the Constitution. *Zemprelli v. Daniels*, 436 A.2d 1165, 1169 (Pa. 1981); see, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). Furthermore, "statutory effort[s] must not offend" the Constitution, "which binds both the legislature and the courts." *Ieropoli v. AC&S Corporation*, 842 A.2d 919, 932 (Pa. 2004). However, "if the Constitution is silent on the subject, the legislative authority, being uncontrolled, is supreme." *Collins v. Commonwealth*, 106 A. 229, 230 (Pa. 1919).

Chief Justice John Marshall formulated the basic premise of judicial review in the *Marbury* case. There he stated:

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Marbury, supra, at 178, 73-74; see also, *Commonwealth v. DeFrancesco*, 393 A.2d 321, 328 (Pa. 1978). It is the duty of the courts to invalidate legislation repugnant to the Constitution. *Commonwealth v. Stern*, 701 A.2d 568, 571-572 (Pa. 1997) (citing, *Zemprelli*, supra, at 1169).

The power of the judicial review must be exercised cautiously. As the Pennsylvania Supreme Court has stated:

> There can be no change to statutory law when there has been no amendment by the legislature and no prior decision by this Court. Only the legislature has the authority to promulgate legislation. Our role is to interpret statutes as enacted by the [General] Assembly. We affect legislation when we affirm, alter, or overrule our prior decisions concerning a statute or when we declare it null and void, as unconstitutional. Therefore, when we have not yet answered a specific question about the meaning of a statute, our initial interpretation does not announce a new rule of law. Our first pronouncement on the substance of a statutory provision is purely a clarification of existing law.

Commonwealth v. Eller, 807 A.2d 838, 844 (Pa. 2002) (citing, *Fiore v. White*, 757 A.2d 842 (Pa. 2000)). Further:

> The power of 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. 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.

Commonwealth v. Smith, 732 A.2d 1226, 1235-1236 (Pa.Super. 1999) (citing, *Finucane v. Pennsylvania Marketing Bd.*, 582 A.2d 1152, 1154 (Pa. Cmwlth. 1990)). "The right of the judiciary to declare a statute void, and to arrest its execution, is one which, in the opinion of all courts, is coupled with responsibilities so grave that it is never to be exercised except in very clear cases." *Smith*, supra, at 1235 (citing, *Erie & North-East Railroad Co. v. Casey*, 26 Pa. 287, 300-301 (1856)).

Given the issue before it, this Court finds itself in one of those situations where it has an obligation to determine if 75 Pa.C.S.A. § 6308(b) passes constitutional muster.

The examination of any lawfully enacted statute begins with the proposition that the act commands a presumption of constitutionality and should be upheld unless it clearly, palpably, and plainly violates the Constitution. *Commonwealth v. Williams*, 733 A.2d 593, 603 (Pa. 1999); *Commonwealth v. Barud*, 681 A.2d 162, 165 (Pa. 1996). Any doubts are to be resolved in favor of sustaining the legislation. *Commonwealth v. Blystone*, 549 A.2d 81, 87 (Pa. 1988). Furthermore, a court may presume the General Assembly did not intend a result that is absurd, impossible of execution or unreasonable. *Commonwealth v. Wituszynski*, 784 A.2d 1284, 1288 (Pa. 2001). With this presumption in mind, this Court will now examine the statute in light of the relevant constitutional provisions.

FOURTH AMENDMENT ANALYSIS

Three levels of interaction between citizens and the police may implicate constitutional concerns. They are defined as follows:

> The first is a "mere encounter" (or request for information), which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. See, *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319 (1983); *Florida v. Bostick,* 501 U.S. 429, 111 S.Ct. 2382 (1991). The second, an "investigative detention" must be supported by reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. See, *Berkemer v. McCarthy,* 468 U.S. 420, 104 S.Ct. 3138 (1984); *Terry v. Ohio,* 391 U.S. 1, 88 S.Ct. 1868 (1968). Finally, an arrest or "custodial detention" must be supported by probable cause. See, *Dunaway v. New York*, 442, U.S. 200, 99 S.Ct. 2248 (1979); *Commonwealth v. Rodriguez,* 614 A.2d 1378 (Pa. 1992).

Commonwealth v. Ellis, 662 A.2d 1043, 1047-48 (Pa. 1995) (footnote

omitted).

The Fourth Amendment of the United States Constitution, applicable to the individual states through the Fourteenth Amendment, states that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV (1791).

The Fourth Amendment protects against unreasonable searches and seizures. A person is considered "seized" for Fourth Amendment purposes if, under all the circumstances, a reasonable person in the position of the suspect would believe that he or she was not free to leave or to terminate the encounter. *Florida v. Bostick*, 501 U.S. 429, 436, 111 S.Ct. 2382, 2387 (1991). A traffic stop of a motorist is a seizure which implicates the Fourth Amendment. *United States v. Sharpe*, 70 U.S. 675, 682, 105 S.Ct. 1568, 1573 (1985). Therefore, even temporary or limited restraints on the liberty of a person during a traffic stop may not be constitutionally permissible if, under all of the circumstances, the traffic stop was unreasonable. *Id.* (citing, *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879 (1968).[4]

The United States Supreme Court has stated that "where the police have probable cause to believe that a traffic violation has occurred, a traffic stop and the resultant temporary detention may be reasonable." *Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772 (1996). A traffic stop may also be constitutionally permissible where the officer has a reasonable belief that "criminal activity is afoot." *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585 (1989); *Terry v. Ohio*, supra, at 30, 884. Whether probable cause or a reasonable articulable suspicion exists to justify a stop depends on the totality of the circumstances. *United States v. Cortez*, 449, 417, 101 S.Ct. 690, 696 (1981). Thus, the Supreme Court has held that the Fourth Amendment is violated:

> [W]here there is neither probable cause to believe nor reasonable suspicion that the car is being driven contrary to the laws governing the operation of motor vehicles or that either the car or any of its occupants is subject to seizures or detention in connection with the violation of any other applicable laws.

---

[4] A driver who commits a traffic violation has a lessened expectation of privacy, *York v. Class*, 475 U.S. 106, 113, 106 S.Ct. 960, 965 (1986), because motorists are aware that, "as an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order." *South Dakota v. Opperman*, 428 U.S. 364, 368, 96 S.Ct. 3092, 3096 (1976).

Delaware v. Prouse, 440 U.S. 648, 650, 99 S.Ct. 391, 1394 (1979); see also, *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574 (1974).

The majority of the federal courts of appeal have interpreted the Supreme Court's holdings to require probable cause for the stop of a motor vehicle for a traffic violation. See *United States v. Scopo*, 19 F.3d 777, 784 (2nd Cir. 1993); *United States v. Harrell*, 268 F.3d 141, 148 (2nd Cir. 2001); *United States v. Jeffus*, 22 F.3d 554, 557 (4th Cir. 1994); *United Slates v. Scheetz*, 293 F.3d 175, 184 (4th Cir. 2002); *United States v. Roberson*, 6 F.3d 1088, 1092 (5th Cir. 1993); *United States v. Granado*, 302 F.3d 421, 423 (5th Cir. 2002); *United States v. Ferguson*, 8 F.3d 385, 389-91 (6th Cir. 1993); *United States v. Copeland*, 321 F.3d 582, 592 (6th Cir. 2002); *United States v. Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989); *United States v. Smith*, 80 F.3d 215, 219 (7th Cir. 1996); *United States v. Caldwell*, 97 F.3d 1063, 1067 (8th Cir. 1996); *United States v. Long*, 320 F.3d 795, 798 (8th Cir. 2003).

However, there is some federal authority for the proposition that because traffic stops are analogous to *Terry* detentions, they are governed by a reasonable suspicion standard. See, *United States v. Fox*, 393 F.3d 52, 59 (1st Cir. 2004); *United States v. Johnson*, 63 F.3d 242, 245 (3rd Cir. 1995); *United States v. Cannon*, 29 F.3d 472 (9th Cir. 1995); *United States v. Lopez-Santo*, 205 F.3d 101, 1104 (9th Cir. 2000); *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995); *United States v. Ozbirn*, 189 F.3d 1194, 1197 (10th Cir. 1999).

Based upon the prevailing federal authority, this Court concludes that probable cause is the required Fourth Amendment standard for traffic stops for motor vehicle violations. Reasonable suspicion is required for other motor vehicle stops, except in rare cases. See, *Delaware v. Prouse*, supra. Therefore, 75 Pa.C.S.A. § 6308(b) violates that amendment and is unconstitutional.[5]

ARTICLE 1, § 8 ANALYSIS

The Pennsylvania Constitution provides similar protection against illegal searches and seizures. Article 1, § 8 states that:

> 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.

Id. In an extensive historical analysis of that provision, the Pennsylvania

[5] Of course, if one were to conclude that the federal standard is reasonable suspicion, § 6308(b) would not violate the Fourth Amendment. In that event, the statute must be examined in light of the requirements of the Pennsylvania Constitution. That analysis is set forth later in this opinion.

Supreme Court noted:

> The requirement of probable cause in this Commonwealth thus traces its origin to its original Constitution of 1776, drafted by the first convention of delegates chaired by Benjamin Franklin. The primary purpose of the warrant requirement was to abolish "general warrants," which had been used by the British to conduct sweeping searches of residences and businesses, based upon generalized suspicions. Therefore, at the time the Pennsylvania Constitution was drafted in 1776, the issue of searches and seizures unsupported by probable cause was of utmost concern to the constitutional draftsmen.
>
> We reiterated our statement ... that "the survival of the language now employed in Article I, Section 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth."

Commonwealth v. Polo, 759 A.2d 372, 375 (2000) (citations omitted).

It has been held that the protection provided by Article 1, § 8 of the Pennsylvania Constitution extend to those zones where one has a reasonable expectation of privacy, *Commonwealth v. DeJohn*, 403 A.2d 1283, 1289 (Pa. 1979); and that Article 1, § 8 creates an implicit right to privacy in this Commonwealth. *Blystone*, supra, at 87. To determine whether one's activities fall within the right of privacy, courts examine: first, whether appellant has exhibited an expectation of privacy; and second, whether that expectation is one that society is prepared to recognize as reasonable. *Commonwealth v. Sell*, 470 A.2d 457, 464 (Pa. 1983); *Katz v. United States*, 389 U.S. 347, 360, 88 S.Ct. 507, 516 (1967) (Concurring Opinion, Harlan, J.).

There is an implicit balancing of an individual's right to privacy against countervailing state interests, which may or may not justify an intrusion on privacy. See, *DeJohn*, supra. at 1291. The balancing process must be carried out with recognition of the nature of the privacy right and its important relationship to other basic rights. See, *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572 (1928) (Dissenting Opinion of Mr. Justice Brandeis)

In the motor vehicle context, Article 1, § 8 requires that police officers have probable cause before they can stop a motor vehicle for violating traffic offenses *Whitmyer*, supra; *Gleason*, supra.

In *Whitmyer*, the Pennsylvania Supreme Court first stated:

> Confusion had arisen in recent case law as to whether, in order to stop a vehicle for a traffic violation, the officer must possess "probable cause to believe" or a "reasonable suspicion to believe" that a violation of the Vehicle Code had occurred. We recognized

> that the difference in the terms was merely semantic and that police officers may stop a vehicle whenever they have articulable and reasonable grounds to suspect that a violation of the Vehicle Code had occurred.

Whitmyer, supra, at 1116-1117; *Wituszynski*, supra, at 1289; *Gleason*, supra, at 988.

Clearly, under Pennsylvania caselaw, § 6308(b) is unconstitutional because it sets the standard at reasonable suspicion rather than probable cause. Therefore, in enacting it the General Assembly exceeded its authority.[6]

THE VEHICLE STOP AT ISSUE

This Court finds that these facts are established by the record: First, the defendant's car exceeded the 45 mph speed limit for a brief period of time;[7]

---

[6] If one concludes that the federal standard is reasonable suspicion, 75 Pa.C.S.A. § 6308(b) would still be violative of Article 1, § 8 of the Pennsylvania Constitution because the Pennsylvania Supreme Court has held that in interpreting the state constitution courts are not bound by the United States Supreme Court's interpretation of similar federal constitutional provisions. See, *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991); *Sell*, supra. Instead, thc Pennsylvania Supreme Court has the "power to provide broader standards, and go beyond the minimum floor which is established by the federal government." *Commonwealth v. Louden*, 638 A.2d 953, 956 (Pa. 1994); *Edmunds*, supra, at 897; see also, *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 791 (1967).

In determining the scope of Article 1, § 8 this Court must consider four factors: (1) the text of the provision; (2) the history and caselaw of the provision; (3) related caselaw from other states; and (4) policy considerations. See, *Edmunds*, supra, at 895.

Here, the Court has examined the text of Article 1, §8. It has reviewed the history and caselaw relevant to that provision. Furthermore, it has surveyed the federal caselaw and notes that other state courts have determined that probable cause is required for motor vehicle violations. See, *People v. Johnson*, 803 N.E.2d 385, 388 (N.Y. Ct.App. 2003); *State v. Dickey*, 706 A.2d 180, 184 (N.J. 1998); *State v. Smith*, 495 S.E.2d 798, 801 (S.C. Ct.App. 1998): *Christian v. State*, 592 S.W.2d (Tex.Crim.App. 1975); *Rowe v. State*, 769 A.2d 879, 884 (Md.Cl.App. 2001); *Commonwealth v. Fox*, 48 S.W.3d 24, 27 (Ky. 2001). Relative to the fourth factor, this Court concludes that a citizen's privacy interests must be balanced against the governmental interests in achieving public safety and investigation of serious alcohol-related crimes.

When the Court considers all the *Edmunds* factors, it concludes that Article I, § 8, requires probable cause for a motor vehicle violation stop. Therefore, 75 Pa.C.S.A. §6308(b) violates the Pennsylvania Constitution and is unconstitutional.

[7] There are two relevant motor vehicles code provisions related to speeding. However, there was insufficient evidence of probable cause that the defendant violated either of them. See, 75 Pa.C.S.A. §§ 3361-3362.

second, over a distance of four-tenths of a mile the defendant's vehicle crossed the center and fog line three times, each time for a few seconds; third, the car made a wide right-hand turn onto West Park Road (into the left lane); fourth, the weather conditions were dry and clear; and fifth, no pedestrians and cars were on the road in the early morning hours. These facts are remarkably similar to cases in which the courts have found insufficient evidence to establish probable cause for the stop.[8]

After its review, this Court finds that Officer Stephens was confronted with evidence of defendant's erratic driving. However, Pennsylvania appellate courts have held that "perceived 'erratic driving' in and of itself is not a violation of the [Vehicle] Code, and, without more [creation of a safety hazard], does not provide probable cause to execute a traffic stop." *Commonwealth v. Battaglia*, 802 A.2d 652, 657 (Pa.Super. 2002); see also, *Commonwealth v. Chernosky,* 2004 Pa.Super. 272 (2004). In this case, the totality of the facts and circumstances do not establish probable cause of a motor vehicle violation.

III. CONCLUSION

Based on the above, Defendant's Omnibus Pre-trial Motion for Relief will be GRANTED.

ORDER

AND NOW, this 20th day of April, 2005 for the reasons set forth in the accompanying opinion, the Defendant's Omnibus Pre-trial Motion for Relief is hereby GRANTED.

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

[8] *Commonwealth v. Gleason*, supra (No probable cause found when defendant was observed "crossing the berm line by six to eight inches on two occasions for a period of a second or two over a distance of approximately a quarter-mile" in the early morning with no other cars on the road.); *Commonwealth v. Chernosky*, supra, at P14-15 (Court did not find probable cause where motorist almost struck telephone pole, crossed centerline twice and drifted from left side to right side of road.); *Commonwealth v. Garcia*, supra (Likewise, probable cause did not exist when an officer followed a Defendant for two blocks and observed his car cross the right fog line twice in response to oncoming traffic.).

JOHN B. LAIRD, d/b/a, DAVID JAMES LAIRD ASSOCIATES, Plaintiff

v.

MILLCREEK TOWNSHIP, ERIE COUNTY, PENNSYLVANIA, Defendant

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - EQUITY No. 60039-2003

THE PENNSYLVANIA SOCIETY of LAND SURVEYORS, Plaintiff

v.

MILLCREEK TOWNSHIP, ERIE COUNTY, PENNSYLVANIA, Defendant

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW No. 15232 - 2003

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment may be granted only in those cases in which the record clearly shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.

In determining whether to grant summary judgment, the court must view the record in the light most favorable to the nonmoving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party.

The nonmoving party, if it bears the burden of proof at trial, must produce evidence of the facts to its cause of action in order to defeat a motion for summary judgment.

MUNICIPAL CORPORATIONS / POWERS & FUNCTIONS

Local ordinance providing that a professional engineer must be the principal in charge of a storm water management plan was not preempted by the Engineer, Land Surveyor and Geologist Registration Law.

Local ordinance requiring a professional engineer to be in charge and to seal a storm water management plan does not prohibit professional land surveyors from exercising the rights given to them under the Engineer, Land Surveyor and Geologist Registration Law.

Municipal ordinances are presumed to be constitutional.

Only if an ordinance is unreasonable, unduly oppressive and patently beyond the necessities of the call will it be declared unconstitutional.

STATUTES

The Storm Water Management Act requires that each county prepare and adopt a watershed storm water management plan for each watershed.

A person who practices or offers to practice engineering or land surveying must be properly licensed and registered under the laws of the Commonwealth.

CONSTITUTIONAL LAW

Preemption is a judicially created principal based on the proposition that a municipality, as an agent of the state, cannot act contrary to the state.

The state is not presumed to have preempted a field merely by legislating in it; the General Assembly must clearly show an intent to preempt the area in which it has legislated.

A municipality may be foreclosed from exercising its power it would otherwise have if the state has sufficiently acted in it.

CONSTITUTIONAL LAW / EQUAL PROTECTION

Fourteenth Amendment provides that no state shall deprive any person of life, liberty, or property without due process of law, nor shall any state deny any person within its jurisdiction the equal protection of the law.

CONSTITUTIONAL LAW / DUE PROCESS

Local ordinance did not violate due process because it did not infringe on rights granted under the Engineer, Land Surveyors and Geologist Registration Law.

Due process rights attach where there is a deprivation of a property right or other interest that is constitutionally protected.

Appearances: David Black, Esq. for John B. Laird
Evan Adair, Esq. for Millcreek Township
Eric J. Purchase, Esq. for PA Society of Land Surveyors
Jeff Batoff, Esq. for PA Society of Land Surveyors

OPINION

Anthony, J., December 20, 2004

This matter comes before the Court on a joint motion for summary judgment filed on behalf of Plaintiff John B. Laird, d/b/a David James Laird Associates and Plaintiff Pennsylvania Society of Land Surveyors and a motion for summary judgment filed on behalf of Defendant Millcreek Township. After a review of the record and considering the arguments of counsel, the Court will deny Plaintiffs' joint motion for summary judgment and grant Defendant's motion for summary judgment. The factual and procedural history is as follows.

On May 6, 2003, Millcreek Township's Board of Supervisors enacted Ordinance 2003-5 (hereinafter "new Ordinance" or "new Millcreek Ordinance") which amended Ordinance 97-4, the existing Millcreek Township Stormwater Management Ordinance. The new Ordinance required that a professional engineer be the principal in charge of and seal any stormwater management plan submitted for Township approval. Under the previous Ordinance, either a professional engineer or a registered land surveyor could be the principal in charge of and seal the stormwater management plan.

On June 4, 2003, Plaintiff John B. Laird, a professional land surveyor, filed an Action for Injunctive and Declaratory Relief seeking a declaration that the new Ordinance was preempted by state law and a Court Order enjoining Millcreek Township from enforcing those portions of the new Ordinance that precluded land surveyors from performing all of the tasks they are permitted to perform under the Engineer, Land Surveyor and Geologist Registration Law, 63 Pa.C.S.A. § 148 *et seq*.[1] On December 29, 2003, Plaintiff Pennsylvania Society of Land Surveyors, a non-profit professional organization of land surveyors and those interested in land surveying, also filed a Declaratory Judgment Action against Millcreek Township seeking to have the Ordinance declared invalid and/or unconstitutional. The Court consolidated the two actions.

Plaintiffs filed the instant joint motion for summary judgment raising four issues: (1) that the new Ordinance is preempted by the Registration Law; (2) that the General Assembly has not delegated the authority to regulate land surveying to the local municipalities; (3) that the new Ordinance deprives Plaintiffs of substantive due process; and (4) that the new Ordinance deprives Plaintiffs of equal protection. Defendant also filed a motion for summary judgment rebutting Plaintiffs' arguments and asking that the Ordinance be declared valid. Argument was held in chambers at which all parties were represented.

The standard for summary judgment is well-settled. Summary judgment may be granted only in those cases in which the record clearly shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Ertel v. Patriot-News*, 544 Pa. 93, 674 A.2d 1038 (1996). The moving party has the burden of proving that no genuine issues of material fact exist. In determining whether to grant summary judgment, the court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. *See id.* However, the non-moving party may not simply 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. Only when the facts are so clear that reasonable minds cannot differ, may a court properly enter summary judgment.

The Storm Water Management Act, 32 P.S. § 680.1 *et seq.* was enacted in 1978 with the stated purpose of encouraging planning and management of storm water runoff and authorizing "a comprehensive program of storm water management designated to preserve and restore the flood carrying

[1] The Act is known as the "Engineer, Land Surveyor and Geologist Registration Law." Plaintiffs refer to the Act as the Licensing Statute. The Court will refer to it as the Registration Law.

capacity of Commonwealth streams; to preserve to the maximum extent practicable natural storm water runoff regimes and natural course, current and cross-section of water of the Commonwealth; and to protect and conserve ground waters and ground-water recharge areas." The Storm Water Management Act requires each county to prepare and adopt a watershed storm water management plan for each watershed. *See* 32 P.S. §680.5. The watershed storm water management plan is required to include "criteria and standards for the control of storm water runoff from existing and new development." *ld.* The Storm Water Management Act provides, in part:

> (a) Within two years following the promulgation of guidelines by the department pursuant to section 14, each county shall prepare and adopt a watershed storm water management plan for each watershed located in the county as designated by the department, in consultation with the municipalities located within each watershed, and shall periodically review and revise such plan at least every five years. ...
>
> (b) Each watershed storm water plan shall include, but is not limited to:
>
> (1) a survey of existing runoff characteristics in small as well as large storms, including the impact of soils, slopes, vegetation and existing development;
>
> (2) a survey of existing significant obstructions and their capacities;
>
> (3) an assessment of projected and alternative land development patterns in the watershed, and the potential impact of runoff quantity, velocity and quality;
>
> (4) an analysis of present and projected development in flood hazard areas, and its sensitivity to damages from future flooding or increased runoff;
>
> (5) a survey of existing drainage problems and proposed solutions;
>
> (6) a review of existing and proposed storm water collection systems and their impacts;
>
> (7) an assessment of alternative runoff control techniques and their efficiency in the particular watershed;
>
> (8) an identification of existing and proposed State, Federal and

local flood control projects located in the watershed and their design capacities;

(9) a designation of those areas to be served by storm water collection and control facilities within a ten-year period, an estimate of the design capacity and costs of such facilities, a schedule and proposed methods of financing the development, construction and operation of such facilities, and an identification of the existing or proposed institutional arrangements to implement and operate the facilities;

(10) an identification of flood plains within the watershed;

(11) criteria and standards for the control of storm water runoff from existing and new development which are necessary to minimize dangers to property and life and carry out the purposes of this act;

(12) priorities for implementation of action within each plan; and

(13) provisions for periodically reviewing, revising and updating the plan.

(c) Each watershed storm water plan shall:

(1) contain such provisions as are reasonably necessary to manage storm water such that development or activities in each municipality within the watershed do not adversely affect health, safety and property in other municipalities within the watershed and in basins to which the watershed is tributary; and

(2) consider and be consistent with other existing municipal, county, regional and State environmental and land use plans.

32 P.S. § 680.5

The Storm Water Management Act also imposes duties upon landowners and developers. It provides:

Any landowner and any person engaged in the alteration or development of land which may affect storm water runoff characteristics shall implement such measures consistent with the provisions of the applicable watershed storm water plan as are reasonably necessary to prevent injury to health, safety or other property. Such measures shall include such actions as are required:

(1) to assure that the maximum rate of storm water runoff is no greater after development than prior to development activities; or

> (2) to manage the quantity, velocity and direction of resulting storm water runoff in a manner which otherwise adequately protects health and property from possible injury.

63 Pa.C.S.A. § 680.13.

In response to the Storm Water Management Act, Millcreek Supervisors enacted Millcreek Township Storm Water Management Ordinance No. 97-4. Section 703 of that Ordinance set out the required contents of Stormwater Plans. Section 703 provided, in pertinent part:

> Professional Certification: The principal in charge of preparing the stormwater management plan (including all calculations) shall be a registered professional engineer or registered land surveyor and the stormwater management plan shall be sealed by a registered professional engineer or professional land surveyor with training and expertise in hydrology and hydraulics. Documentation of qualifications may be required by the Township.

The Ordinance at issue, Millcreek Township Ordinance No. 2003-5, amended this section of Ordinance No. 97-4. Section 1.14 of Ordinance No. 2003-5 provides:

> Professional Certification: The principal in charge of preparing the stormwater management plan (including all calculations) shall be a registered professional engineer and the stormwater management plan shall be sealed by a registered professional engineer with training and expertise in hydrology and hydraulics. A professional engineer certifying a stormwater management plan and/or as-built drawings shall maintain in force at all times professional liability or errors omissions insurance coverage having limits of not less than $1,000,000.00. Documentation of qualifications and insurance coverage may be required by the Township.

Preemption

Plaintiffs' first argue that Ordinance 2003-5 is preempted by the Registration Law, 63 Pa.C.S.A. § 48 *et seq.* Specifically, they contend that the Registration Law grants land surveyors the right to prepare and seal storm water management plans. The Court disagrees.

"The matter of preemption, is a judicially created principle, based on the proposition that a municipality, as an agent of the state, cannot act contrary to the state." *Duff v. Township of Northampton*, 532 A.2d 500 (Pa. Commw. Ct. 1987).

> The state is not presumed to have preempted a field merely by legislating in it. The General Assembly must clearly show its intent to preempt a field in which it has legislated. The test for preemption in this Commonwealth is well established. Either the statute must state on its face that local legislation is forbidden, or indicate an intention on the part of the legislature that it not be supplemented by municipal

> bodies. If the General Assembly has preempted a field, the state has retained all regulatory and legislative power for itself and no local legislation is permitted.

Id. (citations omitted).

> [I]t is clear that municipalities have been granted limited police power over matters of local concern and interest as specified in several of the cases cited above. However, their scope does not extend to subjects inherently in need of uniform treatment or to matters of general public interest which necessarily require an exclusive state policy. In addition, a municipality may be foreclosed from exercising power it would otherwise have if the state has sufficiently acted in a particular field. Obviously local legislation cannot permit what a state statute or regulation forbids or *prohibit what state enactments allow.*

Id. (emphasis in the original)

> Preemption analysis calls for the answer initially to whether the field or subject matter in which the ordinance operates, including its effects, is the same as that in which the state has acted. If not, then preemption is clearly inapplicable. An affirmative answer calls for a further search for it is not enough that the legislature has legislated upon the subject. The ultimate question is whether, upon a survey of all the interests involved in the subject, it can be said with confidence that the legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act.

Id.

The primary purpose of the Registration Law is to "safeguard life, health or property and to promote the general welfare." 63 Pa.C.S.A § 150(a). In other words, the purpose of the Registration Law is "to protect the lay public and their property by assuring, subject to limited exceptions, that...a licensed engineer will be retained when the client requires their professional services to guarantee the structural integrity of all manner and types of buildings and construction, including, but certainly not limited to, bridges, subways, office buildings, multi-level garages, stadiums, etc." *Rosen v. Bureau of Prof'l & Occupational Affairs*, 763 A.2d 962, 965 (Pa. Commw. Ct. 2000). Thus, a person who practices or offers to practice engineering or land surveying must be properly licensed and registered under the laws of the Commonwealth. *See* 63 Pa.C.S.A § 150(a). Engineers and land surveyors are regulated "primarily to ensure that there are fundamental baseline standards with regard to education and experience." *Id.*

The Registration Law does not prohibit local legislation on its face. But more importantly, there is nothing in the new Millcreek Ordinance that attempts to regulate, license or certify professional engineers or land

surveyors. Moreover, in the case of stormwater management, the legislature has compelled local municipalities to take action. Thus, the Court does not find that Millcreek is attempting to regulate the practice of engineering.

Nonetheless, Plaintiffs argue that the Ordinance forbids professional land surveyors from performing tasks that the legislature specifically granted them the authority to do as part of the Registration Law. The Registration Law sets forth the following pertinent definitions:

> **(a)(1) "Practice of Engineering"** shall mean the application of the mathematical and physical sciences for the design of public or private buildings, structures, machines, equipment, processes, works or engineering systems, and the consultation, investigation, evaluation, engineering surveys, construction management, planning and inspection in connection therewith, the performance of the foregoing acts and services being prohibited to persons who are not licensed under this act as professional engineers unless exempt under other provisions of this act.
>
> **(2) The term "Practice of Engineering"** shall also mean and include related acts and services that may be performed by other qualified persons, including but not limited to, municipal planning, incidental landscape architecture, teaching, construction, maintenance and research but licensure under this act to engage in or perform any such related acts and services shall not be required.
>
> ...
>
> **(4)(d) "Practice of Land Surveying"** means the practice of that branch of the profession of engineering which involves the location, relocation, establishment, reestablishment or retracement of any property line or boundary of any parcel of land or any road right-of-way, easement or alignment; the use of principles of land surveying, determination of the position of any monument or reference point which marks a property line boundary, or corner setting, resetting or replacing any such monument or individual point including the writing of deed descriptions; procuring or offering to procure land surveying work for himself or others; managing or conducting as managers, proprietors or agent any place of business from which land surveying work is solicited, performed, or practiced; the performance of the foregoing acts and services being prohibited to persons who are not granted certificates of registration under this act as a professional land surveyor unless exempt under other provisions of this act.
>
> **(e) "Professional Engineer"** means an individual licensed and registered under the laws of this Commonwealth to engage in the

> practice of engineering. A professional engineer may not practice land surveying unless licensed and registered as a professional land surveyor as defined and set forth in this act; however, a professional engineer may perform engineering land surveys.
>
> **(f) "Professional Land Surveyor"** means an individual licensed and registered under the laws of this Commonwealth to engage in the practice of land surveying. A professional land surveyor may perform engineering land surveys but may not practice any other branch of engineering.
> ...
>
> **(j) "Engineering Land Surveys"** means surveys for: (i) the development of any tract of land including the incidental design of related improvements, such as line and grade extension of roads, sewers and grading but not requiring independent engineering judgment: Provided, however, that tract perimeter surveys shall be the function of the Professional Land Surveyor; (ii) the determination of the configuration or contour of the earth's surface, or the position of fixed objects thereon or related thereto by means of measuring lines and angles and applying the principles of mathematics, photogrammetry or other measurement methods; (iii) geodetic survey, underground survey and hydrographic survey; (iv) storm water management surveys and sedimentation and erosion control surveys; (v) the determination of the quantities of materials; (vi) tests for water percolation in soils; and (vii) the preparation of plans and specifications and estimates of proposed work and attendant costs as described in this subsection.

63 Pa.C.S.A. § 149.

Plaintiffs correctly state that the Registration Law grants land surveyors the right to perform "storm water management *surveys*" as well as prepare plans and specifications associated with storm water management surveys. *See* 63 P.S. § 149(j). They argue that this right granted to them by the Registration Law gives them the right to prepare and "seal storm water management *plans"* as that term is used in the new Millcreek Ordinance.

The Court, however, does not find that a storm water management *survey* is the same as a storm water management *plan.* Thus, the Court does not find that the new Millcreek Ordinance precludes professional land surveyors from performing a task that the Registration Law grants them the authority to do. There is nothing in the new Millcreek Ordinance that prevents professional land surveyors from performing "engineering land surveys" including "storm water management surveys and sedimentation and control surveys." 63 Pa.C.S.A. § 149(j). Indeed,

such surveys would be included as part of the storm water management plan. Surveyors can continue to prepare and seal these surveys. The only things surveyors are not permitted to do under the Ordinance is to be in charge of the stormwater management plan or to seal the plan. There is nothing in the Registration Law that grants them those rights.

The Court notes that professional land surveyors "may perform engineering land surveys but may not practice any other branch of engineering." 63 Pa.C.S.A. § 149(f). Moreover, they may conduct "engineering land surveys" including "storm water management surveys and sedimentation and erosion control surveys," but they may not conduct surveys requiring "independent engineering judgment." 63 Pa.C.S.A. § 149(j). Thus, land surveyors may not engage in the application of mathematical and physical sciences for the design of equipment, processes, etc. *See* 63 Pa.C.S.A. § 149(a)(1).

It would appear, however, that the application of mathematical and physical sciences as well as independent engineering judgment would be required in the creation of a stormwater management plan. The Storm Water Management Act requires that the post-development storm water runoff not exceed the pre-development runoff. *See* 63 Pa.C.S.A. § 680.13. Thus, the plan must include calculations for determining "pre- and post-development discharge rates and for designing proposed stormwater control facilities." Millcreek Ordinance 97-4, Section 703(D). Additionally, the plan must show "[a]ll proposed stormwater runoff control measures ... including methods for collecting, conveying and storing stormwater run-off onsite, which are to be used both during and after construction. ... The plan shall provide information on the exact type, location, sizing, design and construction of all proposed facilities and their relationship to the existing watershed drainage system." *Id.*, Section 703(E). The Court finds that this requires the type of independent engineering judgment that the Registration Law prohibits professional land surveyors from exercising. Thus, the Court finds that the new Millcreek Township Stormwater Management Ordinance does not prohibit professional land surveyors from exercising the rights given to them under the Registration Law. Accordingly, the Registration Law does not preempt the new Millcreek Ordinance.

Substantive Due Process and Equal Protection Challenges

Plaintiffs also contend that the new Ordinance violates their rights to substantive due process and equal protection under the law. "Substantive due process is the 'esoteric concept interwoven within our judicial framework to guarantee fundamental fairness and substantial justice,' and its precepts protect fundamental liberty interests against infringement by the government." *Khan v. State Rd. of Auctioneer Examiners*, 842 A.2d 936 (Pa. 2004)(internal citations omitted).

Preliminarily, for substantive due process rights to attach there must

> first be the deprivation of a property right or other interest that is constitutionally protected. Pursuant to Article I, Section 1 of the Pennsylvania Constitution, all persons within this Commonwealth possess a protected interest in the practice of their profession. Thus, after a license to practice a particular profession has been acquired, the licensed professional has a protected property right in the practice of that profession. Nevertheless, the right to practice a chosen profession is subject to the lawful exercise of the power of the State to protect the public health, safety, welfare, and morals by promulgating laws and regulations that reasonably regulate occupations.

Id. (internal citations omitted).

The Court begins with the proposition that municipal ordinances are presumed to be constitutional. *See Simco Sales Service, Inc. v. Lower Merion Bd. of Comm'rs,* 394 A.2d 642 (Pa. Commw. Ct. 1978). "Even where there is room for difference of opinion as to whether an ordinance is designed to serve a proper public purpose, or if the question is fairly debatable, the courts cannot substitute their judgment for that of the authorities who enacted the legislation." *Id.* Only if an ordinance is unreasonable, unduly oppressive and patently beyond the necessities of the case will it be declared unconstitutional. *See id.*

Here, Plaintiffs contend that the new Millcreek Ordinance violates substantive due process because it "arbitrarily strips Members of the Society and Mr. Laird of rights expressly granted to them by the General Assembly." As the Court has discussed above, Millcreek's new Ordinance does not deprive them of any rights granted to them under the Registration Law. There is nothing in the Registration Law that expressly grants professional land surveyors the right to be the principal in charge of a stormwater management plan or the right to seal a stormwater management plan. Again, the Registration Law gives land surveyors the right to conduct and seal "engineering land surveys" which include "storm water management *surveys*." 63 Pa.C.S.A. § 149(j). As the Court has found that Plaintiffs have not been deprived of any property right granted to them under the Registration Law, there can be no substantive due process violation.

Likewise, the Court does not find that the new Ordinance violates Plaintiffs' rights to equal protection. The equal protection clause of the Fourteenth Amendment of the United States Constitution, in pertinent part, provides: "No State shall . . . deprive any person of life, the equal protection of the laws."

> The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly. However, it does not require that all persons under all circumstances enjoy identical protection under the law. The right to equal protection under the

> law does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment, and does not require equal treatment of people having different needs. The prohibition against treating people differently under the law does not preclude the Commonwealth from resorting to legislative classifications, provided that those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. In other words, a classification must rest upon some ground of difference which justifies the classification and have a fair and substantial relationship to the object of the legislation.

Curtis v. Kline, 666 A.2d 265 (Pa. 1995)(internal citations omitted)

Here, Plaintiffs contend that Millcreek's new Ordinance violates equal protection because the new Ordinance discriminates against professional land surveyors in direct contraction with the Registration Law. Again, they contend that the new Ordinance impermissibly prohibits them from being in charge of and sealing stormwater management plans. Plaintiffs argue that the new Millcreek Ordinance draws a distinction between professional engineers and professional land surveyors where the Registration Law does not. The Court disagrees.

While the Registration Law authorizes both professional engineers and professional land surveyors to conduct "engineering land surveys," the statute itself contains the caveat that "engineering land surveys" are surveys that do not require independent engineering judgment. *See* 63 Pa.C.S.A. § 149(j). Thus, a land surveyor cannot perform the engineering land survey for the development of a tract of land where independent engineering judgment is required. *See id.* It is the Registration Law, and not the new Millcreek Ordinance that distinguishes between professional engineers and professional land surveyors. Accordingly, the Court finds that the Millcreek Ordinance does not violate Plaintiffs' right to equal protection under the law

For all the foregoing reasons, Plaintiffs' joint motion for summary judgment is denied. Defendant's motion for summary judgment is granted.

ORDER

AND NOW, to-wit, this 2nd day of December 2004, it is hereby ORDERED and DECREED that Plaintiffs' Joint Motion for Summary Judgment is DENIED. It is further ORDERED and DECREED that Defendant's Motion for Summary Judgment is GRANTED.

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

BRIDGET SHEEHAN, Appellant

v.

MILLCREEK TOWNSHIP ZONING HEARING BOARD, Appellee

v.

MILLCREEK TOWNSHIP, Intervenor

REAL ESTATE / EASEMENTS

When there is no additional evidence or testimony submitted to the trial court, the scope of review is limited to a determination of whether the Zoning Hearing Board committed an abuse of discretion or an error of law. *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 555, 462 A.2d 637 (1983).

REAL ESTATE / EASEMENTS

Absent any express prohibition of a proposed height expansion in the zoning ordinance, a request for a building permit to add a second story that does not include any further setback encroachment must be granted.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 15198 - 2003

Appearances: David J. Rhodes, Esq. for the Appellant
Richard W. Perhacs, Esq. for the Appellee
Evan E. Adair, Esq. for the Intervenor

OPINION

Bozza, John A. Judge

This case is before the Court on a Land Use Appeal from the decision of the Millcreek Township Zoning Hearing Board ("ZHB"), in which Appellant, Bridget Sheehan contends that the ZHB committed an error of law or abused its discretion in rejecting a request for a variance to expand the subject structure. Ms. Sheehan initially requested a building permit to construct a second-story addition to her one-story cottage located at 3176 Lakefront Drive in the Kelso Beach area of Millcreek Township. After her request was denied on October 31, 2003, for the stated reason that it did not comply with the requirements of the Millcreek Township Zoning Ordinance, she appealed to the ZHB requesting a variance. Following a hearing on December 3, 2003, at which Ms. Sheehan represented herself, the appeal was denied. Thereafter, Ms. Sheehan filed the instant Notice of Land Use Appeal on December 22, 2003.[1]

The ZHB issued a written Adjudication in support of its decision on January 7, 2004. The ZHB found that Ms. Sheehan's cottage failed to meet the yard requirement amendments[2] of the current zoning ordinance

[1] Millcreek Township filed a Notice of Intervention on January 7, 2004.

[2] The applicable requirements are set forth in Section 601 of the Millcreek Township Zoning Ordinance, which indicates a set-back of fifteen feet for the front yard, seven feet for side yards, and thirty feet for the rear yard.

and therefore was one of a series of lots containing "non-conforming structures"[3] in the Kelso Beach Subdivision. (Adjudication, ¶2). The ZHB further noted that Ms. Sheehan's request for a variance should be construed as a request for the expansion of a "non-conforming use". In support of this conclusion, the ZHB noted that the proposed addition included "an additional one foot overhang over each side yard" that would "encroach into the already existing side yard violation by an additional foot." (Adjudication, ¶4) The ZHB concluded that "the expansion of the existing non-conforming structure will constitute an almost 100% enlargement of the non-conformity, and will further increase the amount of encroachment into the already small side yard by virtue of the overhang which we must count as part of the dimensions of the structure." (Adjudication, p. 2). As such, the ZHB denied the appeal because "[n]one of the requirements for a variance nor those prerequisite to the expansion of a non-conforming use have been established." *Id.*

On March 18, 2004, Ms. Sheehan, having retained counsel, filed a Motion for Leave to Submit Additional Evidence, which was granted by the Honorable William R. Cunningham in an Order dated that same day. As a result the record was remanded to the ZHB for an additional hearing, held on April 28, 2004, at which time Ms. Sheehan indicated that her proposed addition had been revised, eliminating the one foot overhang so that the addition would coincide with the current footprint of the cottage. She also presented evidence regarding a number of other two-story structures in the Kelso Beach and neighboring Baer Beach areas. The ZHB issued a Supplemental Adjudication on June 17, 2004, indicating that "the evidence offered by Appellant is largely irrelevant to the legal issues raised by her appeal" and reaffirmed its earlier conclusions. (Supplemental Adjudication, p. 3-4).

The Court notes initially that while Ms. Sheehan apparently referred to her appeal to the ZHB as a request for a variance it is apparent that ultimately she was not asking for relief from a particular zoning requirement. This is true in part because at the second hearing the proposed addition's dimensions changed to eliminate an overhang that would have extended beyond the dimensions of the current non-conforming character of the cottage. It appears that the ZHB concluded that in denying Ms. Sheehan's request for a building permit it was applying the requirements of Section 502 of the Millcreek Zoning Ordinance relating to "structural alterations"

[3] The Pennsylvania Municipalities Planning Code defines "non-conforming structure" as "a structure or part of a structure manifestly not designed to comply with the applicable use *or extent of use* provisions in a zoning ordinance or amendment heretofore or hereafter enacted, where such structure lawfully existed prior to the enactment of such ordinance or amendment or prior to the application of such ordinance or amendment to its location by reason of annexation." *See* 53 P.S. §§ 10107 (emphasis added).

of buildings used for a "non-conforming use" as more fully set forth below.

When there is no additional evidence or testimony submitted to the trial court, the scope of review is limited to a determination of whether the ZHB committed an abuse of discretion or an error of law. *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 555, 462 A.2d 637 (1983). An abuse of descretion will only be found where the ZHB's findings of fact are not supported by substantial evidence, which is "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *Id.* At 640. In her brief in support of this land use appeal, Ms. Sheehan argues *inter alia* that her case does not involve a non-conforming use, but rather a non-conforming structure that is non-conforming only because it is not in compliance with the dimensional set-back requirements of the current zoning ordinance. Accordingly, it is the Appellant's position that her case should be resolved consistent with the requirements set forth in two Pennsylvania Supreme Court cases: *In re Yocum*, 393 Pa. 148, 141 A.2d 601 (1958), and *Nettleton v. Zoning Board of Adjustment of the City of Pittsburgh*, 574 Pa. 45, 828 A.2d 1033 (2003). In opposing this argument, the ZHB asserts that the facts in this case are distinguishable from both cases relied on by Ms. Sheehan.

The provision of the Millcreek Township Zoning Ordinance at issue states as follows:

> The lawful use of a building or structure existing at the time of the enactment of this ordinance, or of an amendment thereto, although such use does not conform to the provisions hereof, may be continued and such use may be extended through the building; provided no structural alterations are made, other than those ordered by an authorized public officer to assure the safety of the building or structure; and provided further that such extension does not displace a conforming use in a district established by this ordinance.

(Zoning Ordinance, Article V, Sec. 502(A)). It is apparent that this section is intended to deal with non-conforming uses, and not non-conforming structures. However, there is no mention in the ZHB's Adjudication or Supplemental Adjudication that the "use" the property was being put to did not conform to the current zoning ordinance. In fact, Ms. Sheehan's use of the subject property for residential purposes conforms to the current zoning ordinance, and would not change as a result of the proposed addition. *See* Zoning Ordinance, Article IV, Sec. 412A(1). Instead, it is the structure that is not in conformity with the current dimensional requirements, and as such it is the modification of this structure rather than its use that is at issue in this case. Therefore, it is evident that the decisions in both *Yocum* and *Nettleton* apply to the resolution of this issue.

In *Nettleton*, the Pennsylvania Supreme Court sought to clarify its

earlier decision in *Yocum*, which permitted a vertical addition to a lawful non-conforming structure. In so doing, the Court recognized that "nonconforming structures (in contrast with nonconforming uses) have no protected right to expand in violation or further violation of the municipality's regulations governing the area, bulk, dimension, or intensity of development." 574 Pa. at 54, n.8. However, the Court went on to state:

> [I]n cases where the regulation at issue controls only the horizontal location of the building footprint on the lot and the nonconformity concerns only an encroachment of the building footprint within an area of the lot from which building footprints are prohibited by later-enacted regulation, then a vertical addition to the building creating no further encroachment of the footprint into the prohibited area is a permitted use. Where these conditions are met and the regulations are materially similar to those here involved, the landowner must be granted leave to construct such a vertical addition. *A variance is not required because the proposal contemplates a permitted use.*

Id. at 54 (emphasis added). In so holding, the Court recognized the right to enlarge lawful non-conforming structures "so long as no regulatory nonconformity is thereby created or increased." *Id.*

Applying this logic to the case at hand the Court notes that based on Ms. Sheehan's revised plans for the proposed addition there would be no further encroachment of the footprint of her cottage into the prohibited area. The ZHB's reliance on *Chacona v. Zoning Board of Adjustment*, 143 Pa. Commw. 408, 599 A.2d 255 (1991), as determinative in this matter is without merit. In that case, the applicable regulations contained a specific provision expressly requiring that any new stories erected on lawful non-conforming structures be built in conformance with current set-back provisions. In contrast, the Millcreek Township Zoning Ordinance does not expressly regulate or prohibit vertical additions to existing non-conforming structures. As noted in *Nettleton*, "in the absence of such regulations *Yocum Zoning Case* controls." 574 Pa. at 52, n.4.

As in *Yocum* the appellant does not seek to change the property to a different "use" category, nor does she propose a change in the dimensions of the building that would cause further encroachment of the set-back requirements. Rather she desires to add to the building in a manner that does not violate any dimensional requirement. While on appeal the ZHB has argued that the zoning ordinance does not permit the expansion of non-conforming structures, it is apparent that the ordinance does not specifically address the issue of structures with dimensional nonconformities. Additionally, though the ZHB concluded that Ms. Sheehan did not meet the "requirements...prerequisite to the expansion of a non-conforming use" it has not specified what requirements were missing. Furthermore,

based on the Court's reasoning such requirements are inapplicable.

Relying on the above reasoning, the Court concludes that absent any express prohibition of the proposed height expansion in the zoning ordinance, the request for a building permit to add a second story that does not include any further set-back encroachment, must be granted, and the ZHB committed an error of law by deciding otherwise. While it does not appear from the record that the ZHB denied Ms. Sheehan's request for a building permit on the basis that it was detrimental to the health, safety or welfare of the public, it was argued in its brief and to the extent that such a rationale was contemplated the Court notes that such considerations would only be implicated if this case involved a variance for expansion of non-conforming use. Had such considerations been at issue, the limited testimony presented at both hearings in opposition to her request centered on concerns that the proposed addition would block the current view of the property owner behind her and impede the view of another located some distance away. Considering the additional testimony and other evidence in the case, however, such concerns are not sufficient to allow the municipality to deny the appellant's request to modify an existing structure in a way that does not violate any zoning prohibition. It is noteworthy, however, that, had Ms. Sheehan maintained her initial position that she required an additional one foot overhang in further intrusion into the side yard dimensional restriction, a variance would have been required and the record may have supported the ZHB's conclusion to deny such a request. Based on the above determination, the Court finds it unnecessary to address Appellant's "equal protection" argument.

An appropriate order shall follow.

ORDER

AND NOW, to-wit, this 2 day of June, 2005, upon consideration of the Land Use Appeal filed by Appellant, Bridget Sheehan, and argument thereon, the Court finding that the Millcreek Township Zoning Hearing Board erred as a matter of law in denying the appeal as explained in the attached Memorandum, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** that the decision is hereby **REVERSED** and the appeal is **GRANTED**.

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

PAUL RUST, SR. and RUTH RUST, Assignee's of CHARLES D. CHATHAM and MARGARET C. CHATHAM t/d/b/a CLEAN CARPET PLUS and t/d/b/a CHARLES CHATHAM DRAPERY INSTALLATION, Assignors, Plaintiffs

v.

UTICA FIRST INSURANCE COMPANY, Defendant

INSURANCE / INTERPRETATION OF POLICIES

Words not defined by policy of insurance must be construed in favor of policy holder.

INSURANCE / CAUSES OF ACTION

In determining whether insurance coverage exists, the first inquiry is whether the factual allegations of the complaint, accepted as true, state a claim to which the policy applies.

Loss or risk to the insurer is triggered by the injury, and not by a verdict of liability.

INSURANCE / RESERVATION OF RIGHTS

Assignment of insurance policy or rights thereunder is not precluded after the occurrence of the event which creates liability for the insurer.

EVIDENCE / OPINIONS / EXPERT TESTIMONY

Expert testimony is proper only where the formation of an opinion on a subject requires knowledge, information or skill beyond what is possessed by the ordinary trier of fact.

Witness's testimony was properly limited where party failed to identify witness as an expert in its pre-trial narrative.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 13639 of 1999

Appearances: Michael J. Koehler, Esq. for the Plaintiff
Mark E. Mioduszewski, Esq. for the Defendant

OPINION

This case involves a request for declaratory judgment. At issue is whether Utica First Insurance Company (Utica) is obligated to provide bodily injury liability insurance. After a non-jury trial, Utica was ordered to provide coverage. Following the denial of its post-trial motion, Utica filed the present appeal.

PROCEDURAL/FACTUAL HISTORY

The genesis of this case is an accident on September 22, 1996 in which Paul Rust Sr. (Rust) fell down a flight of stairs leading to the basement of a multiple unit commercial building known as 4021 Main Street, Erie, Pennsylvania (the property). Emily Chatham was the owner of the property at that time. At least two businesses operated out of this property.

Since the early 1980's, Emily Chatham's son, Charles D. Chatham (Chatham) operated several businesses from this location. Primarily, Chatham was in the drapery business but he also did upholstery work and carpet cleaning. At various times, Chatham did business as Clean Carpet Plus and Charles Chatham Drapery Installation. On the date of Rust's fall, Chatham utilized the basement area and the rear of the first floor of the property.

Also doing business on the property was a pizza shop known as Primo's Pizza. As with most pizza shops, Primo's Pizza had a streetfront location on the first floor. Rust was an employee of Primo's Pizza. While the pizza shop had its own separate bathroom, on September 22, 1996 Rust decided to use the bathroom in the basement of the building which was accessible through a back door inside the restaurant kitchen. Unfortunately, Rust fell down the stairs and received extensive, serious injuries.

Rust initiated a civil action against the Chathams at Erie County Docket Number 13725 of 1996. In his Complaint, Rust alleges his fall was caused by the unsafe conditions in the hallway and stairwell.

In September, 1996, Utica carried an insurance policy with Chatham, specifically Policy No. ART1038484-00 (the policy). See Plaintiffs' Exhibit 4. The named insured was Charles Chatham Drapery Installations located at 4021 Main Street, Erie, Pennsylvania 16511. Utica contends the injuries to Rust are beyond the scope of the bodily injury liability coverage of the policy. Utica's contention ultimately prompted this case.

Prior to trial at Docket Number 13725 of 1996, the Chathams filed for Chapter 7 bankruptcy and the litigation was stayed. By written assignment dated July 14, 1999, the Chathams assigned all of their rights and interest under the policy to Rust and his wife, Ruth Rust. See Plaintiff's Exhibit 5. By Order dated July 19, 1999 the Honorable Warren Bentz, the presiding Judge in the Chathams' bankruptcy case, allowed the Rusts to proceed with their civil action against the Chathams to the extent of any available insurance policy, including Utica's policy. Thus, an action for declaratory judgment was filed on October 18, 1999 at the above Docket Number. In this case, the Rusts are seeking an order requiring Utica to provide insurance coverage pursuant to the policy issued to the Chathams.

On November 23, 2004, a non-jury trial was held. By Order dated January 4, 2005, Utica was obligated to provide bodily injury liability insurance under the policy issued to the Chathams and defend against the lawsuit filed by the Rusts against the Chathams.

On January 11, 2005, Utica filed a Motion for Post-Trial Relief. After oral argument, Utica's Motion was denied by Order dated March 7, 2005. A timely Notice of Appeal was filed by Utica on March 17, 2005. A Statement of Matters Complained of on Appeal was filed thereafter. This

Opinion is in response thereto.

WHETHER INSURANCE COVERAGE EXISTS

The primary issue is whether Utica is obligated to provide bodily liability insurance on a policy issued to the Chathams. Utica maintains the terms of its policy are "intended to cover the insured against liability arising out of his business as an artisan and not out of the ownership, possession, occupancy, management or leasing of real property." See Statement of Matters, Paragraph l(a). Utica contends its policy only covers claims arising from the conduct of Chatham's business. Utica argues Chatham did not conduct business at 4021 Main Street. Instead, to the extent he was conducting any business, Chatham was working out of his home and/or at his customers' locations.

This case turns on whether Rust's injuries occurred within the conduct of Chatham's business at 4021 Main Street. Based on a host of factual findings, this Court finds that Chatham was conducting business at 4021 Main Street in the area where Rust fell.

Utica's position is burdened by the fact that its policy does not define the phrase "conduct of a business." The relevant terms of the policy provide:

Common Policy Definitions

1. **Basic Territory** - This means the United States of America, its territories and possessions, Canada and Puerto Rico.
2. **Described Premises** - This means that part of the building and grounds which **you** occupy at the location shown.

Commercial Liability Coverages

7. **Insured** - If shown on the Declarations as an "individual," **insured** means **you** and **your** spouse, but only with respect to the conduct of a business of which you are the sole owner.

COVERAGE L - BODILY INJURY LIABILITY PROPERTY DAMAGE LIABILITY

We pay all sums which an **Insured** becomes legally obligated to pay as damages due to **bodily injury** or **property damage** to which this insurance applies.

The **bodily injury** or **property damage** must be caused by an **occurrence**.

This insurance applies only to **bodily injury** or **property damage** which occurs:

1. within the **coverage territory**; and
2. during the policy period.

COVERAGE M - MEDICAL PAYMENTS

We pay the medical expenses defined below for **bodily injury** caused by accidents:

1. on premises **you** own or rent;
2. on ways adjacent or next to premises **you** own or rent; or
3. arising out of **your** own operations.

See Plaintiff's Exhibit 1; (Emphasis in Original).

The policy explicitly provides commercial liability coverage for "the conduct of a business of which you are the sole owner." Under definitions, the "described premises" are defined as "that part of the building and grounds which you occupy at the location shown." It is uncontroverted that the location shown on the policy was 4021 Main Street, Erie, PA.

Utica characterizes its policy as an "artisans policy" providing coverage for the installation of draperies at customer locations. Utica contends the policy does not cover against liability arising out of the ownership or management of real property. However, Utica's interpretation is not contained within the written terms of its policy.

In determining whether insurance coverage exists in this case, the first inquiry is whether the factual allegations of the Rust Civil Complaint, accepted as true, state a claim to which the policy potentially applies. *See Erie Insurance Exchange v. Transamerican Insurance Company*, 533 A.2d 1363 (Pa. 1987). In the Fourth Amendment Complaint filed by the Rusts against the Chathams, these are the allegations relevant to whether the policy is applicable:

"14. At the above time and place, Paul Rust, Sr. was caused to fall down the steps as a result of the defective condition of the steps, doorway, door, hallway, flooring, lighting, and/or handrail in the following particulars:

a. The hallway and/or interior stairway lighting was non- existent, and/or insufficient to provide safe passage down the hallway and stairway;

b. The hallway and/or interior stairway light switch was improperly placed in an area which was inaccessible or difficult to ascertain or access;

c. The steps of the interior stairway were in deteriorating condition, broken, worn down, slippery, debris-littered, and containing food and foreign substances;

d. The doorway to the interior stairway was left in the open position without adequate lighting or guarding;

e. The flooring leading to the interior stairway was in deteriorating

condition, broken, worn down, slippery, debris littered and containing food and foreign substances; and

f. The handrail on the interior stairway was in deteriorating condition, broken, improperly positioned, worn down, slippery, and built of board not proper for use as a handrail.

- - -

26. The injuries sustained by Rust were caused solely by the negligence, carelessness and recklessness of Defendants, in that:

a. Defendants failed to maintain the interior stairway properly by allowing the defects to exist;

b. Defendants knew, or should have known, of the defect and of the dangerous condition it caused, but nevertheless permitted the interior stairway to remain in an unsafe, unsuitable and dangerous condition;

c. Defendants failed to exercise reasonable care to inspect and discover the defect;

d. Defendants failed to warn Rust and those similarly situated of the defect;

e. Defendant permitted the interior stairway to remain in an unreasonably dangerous, unsuitable and unsafe condition, having actual and constructive notice of the defect;

f. Defendant failed to notify Defendants Robert Warner, Lynne M. Warner, his wife, of the defect and dangerous conditions of the stairway;

g. Defendant allowed its employees, tenants, and/or other persons, including [P]laintiffs to use the stairway when it was aware, or should have known, of the defect and of [the] dangerous condition it caused;

h. Defendant failed to correct, remedy, repair and eliminate the defect."

See Rusts' Fourth Amended Complaint, p. 3 at ¶14 and pp.7-8 at ¶26.

The question at hand is whether these claims come within the conduct of Chatham's business thereby triggering insurance coverage. Since the phrase "conduct of business" is not defined within the policy, it must be construed in a manner most favorable to the insured. *Pennsylvania National Mutual Insurance Company v. Travelers Insurance Company*, 592 A.2d 51 (Pa. Super. 1991), *appeal denied* 600 A.2d 538 (Pa. 1991).

There are no reported Pennsylvania appellate decisions interpreting "conduct of a business" in the language of an insurance policy. The

parties have cited several federal cases, each of which is factually distinguishable.

In *Travelers Indemnity Company v. Nix*, 644 F.2d 1130 (5th Cir.1981) the policy in question was a "special business" policy. The insurer's definition of the "insured" was similar to that of Utica's, including coverage to acts "only with respect to the conduct of a business." 644 A.2d at 1131. Unlike Utica's policy, however, Traveler's policy specifically defined "business operations" to include *"the ownership, maintenance or use of the premises for garage operations and other commercial purposes and all operations necessary or incidental thereto." Id*. at 1132. (Emphasis added).

Traveler's policy was found to be clear and unambiguous because the term "business operations" was specifically defined. The policy was construed within its plain meaning of "business operations" such that the injury resulting from a shooting incident on the insured's premises was clearly outside the scope of the policy because it was a "purely personal transaction." *Id.* The injury did not arise out of or was incidental to the insured's conduct of a garage operation. *Id.*

The conduct of business was also litigated in *Cincinnati Insurance Co. v. Balizet*, 84 Erie Cty. L.J. 23 (W.D. Pa. August 30, 2000). The issue was whether the installation of a pellet stove used to heat a building, which included a beauty shop, was installed "with respect to the conduct of a business." The spouse of the named insured installed a pellet stove not only to heat the basement which the beauty shop employees used as a breakroom, but also as the primary heat source for the building. *Id.* at 10. Relying on the definition in *Nix*, the Honorable Judge Sean McLaughlin held, "[a]n act or omission is 'with respect to the conduct of a business' if it is related to, for the benefit of, or necessary for the operation of the business." *Id.* The insurance company was found to owe a duty to defend and indemnify the estate of the spouse of the named insured who died in a fire.

Although neither *Nix* nor *Cincinnati Insurance* are binding precedent, the "business operations" definition in *Nix* and utilized in *Cincinnati Insurance* provide guidance herein. The artisan's policy issued to the Chathams was similarly classified as a "special policy" as in *Nix*. Also, comparable to the policies in *Nix* and *Cincinnati Insurance*, Utica's policy was drafted to protect Chatham from liability arising out of the business operation.

CHATHAM USED THE PREMISES IN THE CONDUCT OF THE BUSINESS

Utica asserts "the evidence at trial established that at the time of the accident, the insured was no longer utilizing the real estate on which the claimant was allegedly injured in connection with the conduct of his business identified in the policy of artisan's insurance." *See* Statement of

Matters *supra.* at paragraph 1(b). This allegation belies the record.

The testimony of Charles Chatham as well as photographs entered into evidence established Chatham frequently utilized and was responsible for the maintenance of the basement stairs leading to his drapery/upholstery business. When he began his business in the early 1980's, Chatham made several structural changes to the property. He removed a wooden gate that was in front of the staircase. *See* Non-Jury Trial, November 23, 2004, p. 8 (hereinafter N.T.). Chatham also added a wall next to the staircase and installed a light switch above the staircase. N.T. at 8. The basement area was used for the storage of supplies in Chatham's upholstery cleaning, carpet cleaning, and drapery business. N.T. at pp. 12-13.

Chatham frequented the property on a daily basis to perform office tasks, such as checking messages, doing paper work and collecting mail as part of the conduct of his drapery business. N.T. at 14. He also utilized the bathroom located in the back of the building, which is accessed by the stairs on which the accident occurred. N.T. at 13.

Chatham also stored catalogs, manuals, invoices, adding machine tapes, stationery and file folders on shelving located alongside a wall directly to the right of the basement stairs. N.T. at 14-15. Chatham's use of the shelves is depicted in Plaintiff's Exhibits 1, 2, and 3. Chatham retrieved supplies from the shelves and would restock them as a necessary part of the conduct of his business. N.T. at 15.

The nature of Chatham's work meant he would perform services at a customer's location. However, Chatham used 4021 Main Street as a base of operation. Also, the property was specifically listed under the "description and location of property covered" in the policy, a fact Utica continually overlooks.

At the time of the accident, Chatham was within his coverage period of the policy[1]. Thus, in accordance with the terms of Utica's policy, the injuries sustained by Rust are within the scope of coverage for bodily injury.

A DEFENSE AND COVERAGE ARE OWED TO THE CHATHAMS

Utica argues that Rust was injured on a portion of the property that was not utilized by Chatham in his business nor on the premises of Rust's employer. Accepting Utica's argument as true means Rust was injured in "no man's land."

The fact that Rust was injured on a part of the premises which was not in the conduct of his employer's business has no bearing on Utica's duty to defend or provide coverage under the policy issued to the Chathams. Utica did not insure Rust's employer. Further, the part of the premises

[1] The Chathams' policy was effective from 9/19/96 to 9/19/97. See Rust's Exhibit 4 at Declaration Page.

where the injuries occurred was utilized by Chatham in the conduct of his drapery installation/carpet cleaning business. Hence, the relevant language in the policy invoking a duty to defend and provide coverage is applicable only to its insured, not Rust's employer.

Likewise, it is immaterial that Chatham acknowledged he did not have insurance on the "real property" on which Rust was injured or that he did not have an ownership interest or title in the property where the accident occurred.

Again, Utica attempts to belatedly define the terms of its policy. There is no language in the policy limiting coverage to accidents on premises in which the insured had legal title. If this were the case, there would be no coverage for liability at a customer's location.

Instead, the policy includes coverage liability for "bodily injury caused by accidents. . . arising out of your own operation." *See* Plaintiff's Exhibit 4. As such, the policy includes the premises utilized by Chatham for the conduct of his business.

Utica also challenges the status of Rust on the Chathams' property. Utica maintains Rust was not a patron of Chatham's business and did not conduct any business as identified in the policy. However, the status of Rust on the premises is of no consequence in resolving the ambiguity of the policy. The policy does not contain language restricting coverage liability to Chatham's patrons or to people with whom he does business. The policy does cover liability incurred in the conduct of the business. Therefore, the status of Rust is not dispositive.

THE TESTIMONY OF SHAWN KAIN WAS PROPERLY LIMITED

Shawn Kain is the manager of Utica's Commercial Lines Underwriting Department. Utica proffered Kain's testimony to describe the nature and extent of coverage under the policy. The Rusts' objections were sustained to the extent Kain would be offering opinion testimony of an expert and there was no expert report provided nor was Kain identified as an expert in Utica's Pre-Trial Narrative. Kain was permitted to testify regarding the range of insurance products available to Chatham in 1996.

It is well established that expert opinion testimony is proper only where the formation of an opinion on a subject requires knowledge, information, or skill beyond what is possessed by the ordinary trier of fact. *See Ovitsky v. Capital City Econ. Dev. Corp.*, 846 A.2d 124, 126 (Pa. Super. 2004); *see also Commonwealth v. Montavo*, 653 A.2d 700 (Pa. Super. 2005). Further, when the matter can be described to the trier of fact and the evidence evaluated without the assistance of one claiming to possess special expertise, expert testimony is inadmissible. *Montavo supra*.

The opinion testimony of Mr. Kain is not needed to define the terms undefined in the policy. Kain's testimony essentially went to the ultimate issue before the Court.

Additionally, Kain did not author an expert report containing his

opinion nor the basis for his opinion in violation of Rule 212.2(a)(5) of the Pennsylvania Rules of Civil Procedure. *See* Pa. R.C.P. Rule 212.2 (a)(5).[2] Since Kain was not listed as an expert in Utica's Pre-Trial Narrative, his testimony was properly limited to a discussion of insurance products which would have been available to Chatham during the period in question. *See* Pa. R.C.P. 212.2(c).[3]

Kain did not draft the policy at issue, neither did he have independent knowledge of the use of the premises, the nature of the Chathams' business nor the circumstances of the accident. *See* N.T. at 76. Thus, going beyond a discussion of Utica's other products to discuss the applicability of the present policy, of which Kain had no independent knowledge, was inadmissible testimony. There was no error in precluding such testimony.

Notably, Kain admitted Utica's policy does not specifically exclude injuries occurring on the insured's property. *See supra.* N.T. at 76.

THE CHATHAMS VALIDLY ASSIGNED THEIR RIGHTS TO THE RUSTS WHO HAVE STANDING TO BRING THE PRESENT ACTION

Utica challenges Chatham's assignment pursuant to a non-assignment provision contained in the policy. *See* Plaintiff's Exhibit 4 at p.1. Utica contests Rust's ability as an assignee to file suit directly against Utica where the insurer did not give the insured (Chatham) consent to the assignment. Utica also contends Rust lacks standing to bring the present action where tort liability has not been imposed on the insured. *See* Statement of Matters, paragraphs 2 & 3. These issues will be addressed together.

The law in this Commonwealth is complex regarding the validity of non-assignment clauses after a loss has occurred. However, the Superior Court has recently enforced the Supreme Court's ruling in *National Memorial Services v. Metropolitan Life Insurance Company,* 49 A.2d 382 (Pa. 1946), holding that an assignment of a policy or rights thereunder is not precluded after the occurrence of the event which creates the liability of the insurer. *Egger v. Gulf Ins. Co.*, 864 A.2d 1234, 1240 (Pa. Super.

[2] Rule 212.2(a)(5) provides: (a) A pre-trial statement shall contain. . . (5) a copy of the written report, or answer to written interrogatory consistent with Rule 4003.5, containing the opinion and the basis for the opinion of any person who may be called as an expert witness.

[3] Rule 212.2(c) provides: (c) Where the trial judge determines that unfair prejudice shall occur as the result of non-compliance with subdivisions (a) and (b), the trial judge shall grant appropriate relief which may include. . . (1) the preclusion or limitation of the testimony of, (i) any witness whose identity is not disclosed in the pre-trial statement, or (ii) any expert witness whose opinions have not been set forth in the report submitted with the pre-trial statement or otherwise specifically referred to in the pre-trial statement, consistent with Rule 4003.5.

2004); *citing National*, 49 A.2d at 383; *see also Continental Casualty Co. v. Diversified Enterprise*, 884 F.Supp. 937 (E.D. Pa. 1995); *Viola v. Fireman's Fund Insurance Co.*, 965 F. Supp. 937 (E.D. Pa. 1995).[4]

In *Egger,* the administratrix of a spouse's estate sued a company for her husband's death. Just before the jury verdict, the insurer of the company, Gulf, denied the company umbrella coverage under its policy. Pursuant to an agreement to settle, the company and the administratrix agreed that she would not pursue the company beyond its general liability insurance, and the company assigned all its rights under the umbrella policy to the administratrix. A judgment was subsequently entered against the company and Gulf refused to pay. Gulf challenged the company's assignment claiming there was no consent. Gulf also challenged the standing of the Appellees arguing there was no liability on the part of Gulf until a jury verdict was rendered.

The Superior Court rejected Gulf's reliance on *Fran & John's Doylestown Auto Center, Inc., v. Allstate Ins. Co.*, 638 A.2d 1023 (Pa. Super 1994) and *High-Tech-Enterprises, Inc., v. General Accident Insurance Co.*, 635 A.2d 639 (Pa. Super. 1993) which hold assignments without consent are invalid under non-assignment clauses. The Court recognized an insurer's interest in restricting an insured's right to assign a policy to a third party but stated "after a loss has occurred, the right of the insured or his successors interest to the indemnity provided in the policy becomes a fixed and vested right; it is an obligation or debt due from the insurer to the insured, subject only to such claims, demands or defenses as the insurer would have been entitled to make against the original insured." *Egger*, 864 A.2d at 1240; *citing National supra.* at 383.

The Superior Court also noted "it is against public policy to restrict the relation of debtor and creditor by... rendering subject to the control of the insurer an absolute right in the nature of the chose in action" or right to bring an action to recover on an insurance policy at the time of a covered injury. *Id.* at 1240-41. The Court reasoned "were there no assignable right to recover until a jury returned a verdict in favor of insured. . . then any reference to an insurer's right to raise 'defenses' would be gratuitous." *Id.* Accordingly, the company's assignment of its rights to recover from Gulf was effective and the Plaintiffs had standing to bring the litigation against Gulf.

---

[4] In *National,* the Superior Court explained, "Notwithstanding this Court's more recent decisions affirming our aim to effect the plain language of an insurance policy, we can only honor those decisions to the extent that they comport with the binding law we find in *National Memorial Services.*" *See Egger*, 864 A.2d at 1239. *See also Commonwealth v. Droller*, 486 A.2d 382, 386 (Pa. 1985)("The formal purpose of the Superior Court is to maintain and effectuate the decisional law of [the Supreme] Court as faithfully as possible.")

In the case *sub judice*, Rust's fall occurred in September, 1996. The Chathams did not assign their rights under the policy until July, 1999. Hence, the injury or loss giving rise to the Chathams' interest in indemnity from Utica occurred well before their assignment to the Rusts. Therefore, the assignment is not precluded.

Utica's refusal to participate in the litigation and provide a defense or coverage to its insured against the injured Rusts triggered the Chathams' right to assignment. *See Continental* 884 F.Supp. at 948 ("a mere denial of coverage by an insurer triggers an insured's right to assign its right to an injured Claimant." *Id.* at 948).

Further, the Chathams' assignment was a transfer of their right to a potential money claim. Utica's risk of loss or liability was not increased with the assignment. Since Rust's accident and injuries giving rise to the claim for indemnity had already occurred prior to the assignment, Utica's risk of increased liability was not affected. *Id.* at 946.[5] Because the Chathams' right to proceed vests at the time of the loss giving rise to the insurer's liability, restrictions on the right to assign its proceeds are generally rendered void. *Id.; see also Viola supra.*[6]

Utica maintains, nonetheless, the Rusts lack standing to bring the present declaratory action because the underlying tort liability has not yet been imposed against the Chathams.

Appellant overlooks the policy embodied in *Egger* and *National* which provides the loss or risk to the insurer is triggered by the injury and not a verdict of liability. *See supra.*, *Egger*, 864 A.2d at 1242; *National* 49 A.2d at 383. Even if the loss is not "fixed" at the time of the assignment, whether Utica would owe anything to the Rusts under a verdict of liability against the Chathams is uncertain. Utica risks nothing insofar as the assignment by the Chathams was subject to "such claims, demands, or defenses as the insurer would have been entitled to make against the original insured." *Id.*

Moreover, this declaratory action was properly commenced to determine whether the premises on which Rust fell was used in the conduct of the Chathams' business such that liability under the policy was invoked. *See Redevelopment Authority v. International Ins. Co.*, 685 A.2d 581, 585 (Pa.

[5] The District Court also explained that although a non-assignment clause is designed to guarantee the insurer's risk of loss cannot be increased, that risk of loss is not effected where an insured assigns his or her policy rights after the occurrence of the events giving rise to the claim for indemnity.

[6] In *Viola v. Fireman's Fund Insurance Co.*, 965 F. Supp. 937 (E.D. Pa. 1995), the Court held policies prohibiting assignments do not prevent assignment after loss reasoning "the clause by its own terms ordinarily prohibits merely the assignment of the policy, as distinguished from a claim thereunder, and the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is a transfer of a right to a money claim." *Id.* at 659.

Super. 1996)(the proper construction of an insurance policy is an issue which may be resolved as a matter of law in a Declaratory Judgment Action.) Hence, the matter was ripe for judicial determination. In accordance with *Egger* and *National*, the Chathams' assignment to the Rusts is effective and standing exists to bring the instant action against Utica.

CONCLUSION

Rust's injuries occurred within the conduct of Chatham's business. The property was the described location of business in the policy. Chatham used the property as his base of operations. He was there on a daily basis. Chatham received phone messages, mail and stored supplies in connection with his business at the described premises. He was solely responsible for the maintenance of the hallway and the stairwell on which the accident occurred.

The ambiguity in the policy regarding the "conduct of a business" must be construed against the drafter and in favor of the insured. The policy does not contain a provision excluding coverage for injuries occurring on the property. The phrase can reasonably be interpreted to include the maintenance of any area in the conduct of the Chathams' drapery installation business.

Utica's additional claims are irrelevant. Knowledge of Primo Pizza's use of the premises, the Chathams' lack of ownership and real property insurance, as well as Rust's status on the property at the time of his fall are all immaterial.

The testimony of Shawn Kain was properly limited to his knowledge of products available to the Chathams at the time of the accident. Any additional testimony from Mr. Kain regarding the applicability of Utica's policy was unwarranted. Kain was not presented as an expert witness and had no independent knowledge of the Chathams' policy, the use of the premises or the circumstances surrounding Rust's fall. The proffered testimony went to the ultimate issue before the Court.

The Chathams' assignment of their rights under the policy is not precluded by the non-assignment clause. The Chathams made the assignment after the loss occurred and therefore transferred their vested right to, a money claim, which is valid.

The Rusts have standing to bring this action despite the uncertainty of tort liability against the Chathams. The injuries sustained by the Rusts triggers Utica's duty to provide coverage, not a verdict of tort liability. Therefore, the Rusts' claims are not premature and are properly before this Court.

Therefore, this appeal must be DENIED.

BY THE COURT:
/s/ **WILLIAM R. CUNNINGHAM, JUDGE**

DANIELLE BIMBER, Petitioner

v.

JENNIFER RICE, Respondent

JAMES FLYNN, Intervenor

FAMILY LAW / INVOLUNTARY TERMINATION / SURROGACY

Pennsylvania law has traditionally recognized two legal parents and that there may in some instances only be one parent. Pennsylvania does not recognize that a child may have three parents. Where, by virtue of a surrogacy contract, previously held invalid by this court as contrary to public policy, there is a father, a birth mother, and the egg donor, all three cannot be legal parents simultaneously.

FAMILY LAW / INVOLUNTARY TERMINATION / NOTICE OF INTENTION TO ADOPT

Pennsylvania law does not require a legal parent to file a notice of intention to adopt. Furthermore, an individual having custody or standing *in loco parentis* to the child may file a petition for termination.

FAMILY LAW / INVOLUNTARY TERMINATION / RELINQUISHMENT OF RIGHTS

The burden is on the party seeking termination to establish by clear and convincing evidence the existence of grounds for termination, focusing upon the conduct of the parent whose rights the petitioner seeks to terminate. A trial court must consider all circumstances, and not mechanically apply the six-month statutory provision, examining all circumstances and the explanations offered by the parent.

Parental duty requires that the parent act affirmatively to maintain the parent-child relationship even in difficult circumstances and utilize all available resources to preserve the parental relationship. A parent has a duty to exert him or herself to maintain a place of importance in the child's life. A parent's constitutional right to custody and rearing of a child is converted, upon failure to fulfill parental duties, to the child's right to have proper parenting. A mere statement that a parent does not wish to have his rights terminated is insufficient to maintain parental rights.

FAMILY LAW / INVOLUNTARY TERMINATION / RELINQUISHMENT OF RIGHTS

Where the donor of the eggs under the invalid surrogacy contract has, during the 18 month life of the children, visited the children only once, and that at the time of a legal proceeding, has been notified seven times about developments in the children's lives, has six times sent gifts to the father and his paramour, has never accepted the invitation of the birth mother to participate in the lives of the children and has only taken minimal legal action regarding the children, the court finds that the birth mother has met her burden of establishing by clear and convincing evidence the standards for involuntary termination of parental rights.

Furthermore, the court finds the respondent's explanations for her conduct insufficient to forestall the termination of parental rights.

Respondent's conduct indicates she is more interested in her own career and wishes no further role in the lives of the children than that which is offered to her by the father and the father's paramour, even to the point of acquiescing in the termination of parental rights if the paramour could adopt the children.

FAMILY LAW / INVOLUNTARY TERMINATION / BEST INTERESTS OF THE CHILDREN

After reviewing the statutory factors for the involuntary termination of parental rights, a court must analyze the best interests of the children. This involves consideration of the intangible needs and welfare of a child, continuity of relationships, natural parental bonds and the strength of that bond. Where the respondent has not had a relationship with the children and no bond has formed and is not physically or emotionally available to provide necessary love, protection, guidance and support, the court finds that the children's best interests are served by termination of parental rights. The biological link alone is not determinative.

FAMILY LAW / INVOLUNTARY TERMINATION / EXPERT WITNESSES

The court finds further justification for termination in the testimony of two witnesses, a clinical child psychologist and a developmental psychologist and professor. Their testimony that confusion and stress would result from interruption of the attachment of the children to their current caregivers supports the conclusion that the best interests of the children are served by termination of parental rights.

FAMILY LAW / INVOLUNTARY TERMINATION / PENDING PROCEEDINGS

The court will not stay consideration of the IVT petition awaiting appeals in the Pennsylvania Superior Court and the Ohio Court of Appeals. Against the background of the respondent's continuation with her own activities which indicate no desire to parent the children, this request is only an additional source of unnecessary delay.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION NO. 96 of 2004

Appearances: Joseph P. Martone, Esq., Attorney for Petitioner
John Rogala Evanoff, Esq., Attorney for Respondent
Melissa Hayes Shirey, Esq., Attorney for Intervenor
Michael J. Nies, Esq., Attorney for the Children

ADJUDICATION

Connelly, J., June 21, 2005

Procedural History

This matter comes before the Court pursuant to a Petition for Involuntary Termination of Parental Rights (hereinafter IVT) filed on August 26, 2004, and an Amended Petition filed on December 9, 2004, by Danielle Bimber (hereinafter Petitioner), the legal and birth mother, against Jennifer

Rice (hereinafter Respondent), the genetic mother via egg donation. A Petition to Intervene was filed on September 23, 2004, by James Flynn (hereinafter Intervenor), the biological father. He opposes the termination of Respondent's parental rights. Intervenor also filed a Motion to Stay IVT Proceedings, which was denied by this Court on February 14, 2005. An IVT trial was held before this Court on April 5, 2005.

The subjects of the IVT petitions are triplet boys, Matthew, Mark, and Micah Flynn, born November 19, 2003, the results of a surrogacy contract between the three above-captioned parties. Their biological and legal father is the Intervenor, James Flynn, a resident of Ohio.[1] The biological mother is the Respondent, Jennifer Rice, a resident of Arlington, Texas, who donated the eggs that were fertilized by Flynn's sperm. The legal and birth mother is the Petitioner, Danielle Bimber, a gestational surrogate who was implanted with three embryos and subsequently gave birth to the triplets. Bimber and the triplets reside in Corry, Pennsylvania.

Findings of Facts

In December 2002, Respondent signed a surrogacy contract prepared by Surrogate Mothers, Inc. Intervenor and his paramour, Eileen Donich, and Danielle and Douglas Bimber were also parties to the contract.[2] In February 2003, Respondent met Intervenor and his paramour in Cleveland, Ohio, after she was examined at the Cleveland Clinic to determine whether she was a good candidate for egg donation. (Intervenor's Brief, p. 3). At that time, the three discussed how Respondent would be involved in and informed about the children after they were born. *Id.* It was agreed that Respondent would be consulted on decisions regarding the children's upbringing and would have the ability to visit the children in Ohio or have the children visit her in Texas. *Id.* No testimony was presented that Respondent and Petitioner ever met during that time.

Respondent's eggs were extracted in February 2003. Petitioner was implanted with three embryos during April 2003 and found to be pregnant in May 2003. Respondent was made aware of this by a phone call from Eileen Donich (hereinafter Dr. Donich). (N.T., 4/5/05, Morning Session, p. 16). Throughout Petitioner's pregnancy, Respondent and Dr. Donich

[1] Intervenor's actual residence remains unclear. At least three (3) different addresses in Ohio have appeared in pleadings related to this matter filed in both Ohio and Pennsylvania. Briefs submitted to the Court differ as to the actual address as well. (Petitioner's brief p. 3, Respondent's brief p. 8, Intervenor's brief, pp. 4-5, Guardian *Ad Litem's* brief, p. 1) Without more concrete evidence, the Court is disinclined to choose one and definitively state that Intervenor resides there. What is clear is that Intervenor resides in the state of Ohio.

[2] The surrogacy contract has been declared null and void by this Court's April 2, 2004, Order as contrary to Pennsylvania public policy in that it failed to provide the triplets with a legal mother.

spoke approximately twice a month by phone. (Intervenor's Brief, pp. 3, 5). Respondent also sent a list of potential names for the children in the summer of 2003. (Respondent's Exhibit 2).

Both Respondent and Intervenor testified that Respondent speaks with Dr. Donich quite frequently by telephone regarding the triplets. (N.T. 4/5/05, Morning Session, pp. 36, 44; Afternoon Session, pp. 60, 73). However at trial, neither Respondent, Intervenor, nor Dr. Donich produced phone records to corroborate the existence of these calls. *Id.* Intervenor testified to times when Respondent was put on speakerphone to talk with the triplets. The Court finds the existence of these alleged calls to be unsubstantiated. Surely if Intervenor and Dr. Donich are so eager to demonstrate Respondent's bond with the triplets, they very likely would have gone to great lengths to obtain the bills and present them to the Court. Unfortunately, they have not, and without such relatively easily obtainable corroborative evidence, the Court is not inclined to place a great deal of credence in such testimony.

Dr. Donich informed Respondent of the triplets' birth and their subsequent discharge from the hospital to Petitioner in November 2003. It is Dr. Donich, not Mr. Flynn, who communicates with both Petitioner and Respondent regarding the triplets. (N.T. 4/5/05, Morning Session, p. 64; Afternoon Session, pp. 60, 72-73).

Respondent was made aware via phone calls from Dr. Donich of the legal proceedings filed by Intervenor against Petitioner in Erie County, Pennsylvania, regarding the custody of the children. (N.T. 4/5/05, Morning Session, pp. 16, 43-44). Respondent was not joined as a party to the action in the Court of Common Pleas of Erie County, Pennsylvania, at Docket No. 15061-2003, nor did Respondent ever petition the Court to intervene in the proceedings. Respondent claims that she was never given notice of the action and her right to intervene. (Intervenor's Brief, p. 4).

On April 2, 2004, this Court issued an Opinion and Order (hereinafter April 2nd Order) granting standing to Petitioner to pursue custody and support of the children.[3] The Court also declared Petitioner to be the legal mother since the surrogacy contract failed to provide for one in violation of state public policy and family law. At the time of the April 2nd Order, the Court decided to treat Respondent as an anonymous biological donor who had signed away her rights by contract.[4] Now, she is no longer anonymous, the surrogacy contract she signed has been declared void, and she is objecting to the possible termination of her parental rights.

[3] The April 2nd Order is now available at *J.F. v. D.B.*. 66 Pa. D. & C. 4th 1 (2004).

[4] *J.F. v. D.B.*, 66 Pa. D. & C. 4th, at 4, n. 4.

On April 21, 2004, Respondent filed a Verified Complaint to Establish Parent/Child Relationship in Summit County, Ohio. Domestic Relations Court Judge John P. Quinn issued a final order on October 29, 2004, ruling in part that the Erie County Court of Common Pleas "has exclusive jurisdiction over the parenting determination with respect to the triplets".[5]

A combined custody and support *de novo* trial was held before this Court on July 9 and 31, 2004. Respondent was aware of the trial but did not attend or participate, nor did she petition to intervene. (N.T. 4/5/05, Morning Session, pp. 27-28). In an Opinion and Order dated January 5, 2005 (hereinafter January 5th Order), this Court awarded shared custody to Petitioner and Intervenor, with primary residential custody with Petitioner. No provisions for visitation by Respondent were set forth in that Order. To date, Respondent has never filed anything regarding her rights to the children in Pennsylvania, such as a motion to reconsider, a petition to intervene, or an appeal until Petitioner filed her IVT petition in August. She also has not petitioned for custody or visitation on her own.

On February 26 and 27, 2005, Rice visited with the triplets in person for the first time in Ohio. (N.T. 4/5/05, Morning Session, pp. 40, 62-63; Afternoon Session, pp. 57-58). She testified that she had flown from Texas to Cleveland to attend a deposition for the present case in Erie, Pennsylvania. Intervenor and Dr. Donich paid for Respondent's airfare. They have also paid all of Respondent's legal fees in Ohio and Pennsylvania, a total of $7,500.00 to date. (Intervenor's Brief p. 5). Respondent testified that she could not afford to pay these expenses on her own. (N.T. 4/5/05, Morning Session, pp. 25-26; Afternoon Session, p. 67). Respondent also claims that she was not promised anything by Intervenor or Dr. Donich in exchange for her taking legal action in Ohio and testifying at the IVT trial in Pennsylvania. (N.T. 4/5/05, Morning Session, p. 13). Intervenor testified that he and his paramour have a "gentleman's agreement" with Respondent to see and be informed about the triplets.[6] (N.T. 4/5/05, Afternoon Session, p. 59). Respondent has not asked Intervenor for regular contact with the triplets.

Respondent has known that the children were with Petitioner since November 2003. (N.T. 4/5/05, Morning Session, pp. 10, 14-16). Since that time, she has not personally written to or called Petitioner to find out how they were doing. Petitioner, however, wrote to Respondent on February 27, 2005, after the deposition, indicating, "my home is always open to you". (Respondent's Exhibit 1). Petitioner also included her

[5] Order, p. 5. All of the parties at bar have since appealed Judge Quinn's order to the Ohio Court of Appeals.

[6] Intervenor also testified that he is "in favor of legalizing the parent/child relationship between Jennifer and the triplets." N. T. 4/5/05, Afternoon Session, p. 70, lines 22-24.

telephone number and e-mail address in the letter. *Id.* To date, Respondent has never replied.

LAW

A) Two Legal Parents

As this Court previously held in its April 2nd Opinion:

> Pennsylvania has traditionally recognized that a child has two legal parents, usually a mother and father. In some circumstances, there may only be one legal parent (e.g. death or abandonment). There cannot be three legal parents. See *Beltran v. Piersody,* 2000 Pa. Super. 66, 748 A.2d 715, Dissenting Opinion by J. Olszewski:
>
> > "While a child may have two mothers or two fathers, *see J.A.L. v. E. P. H.*, 453 Pa. Super. 78, 682 A.2d 1314 (Pa. Super. 1996) (parties by their conduct created a parent-like relationship between appellee's homosexual partner and her biological child, thus giving partner standing to seek custody), he cannot have two fathers and one mother. *See Michael H.*, 491 U.S. at 130-31 (stating that "multiple fatherhood has no support in the history or traditions of this country")."

J.F. v. D.B., supra, at 19-20, quoting *Beltran* at 720, n. 3.

Intervenor, Respondent, and Petitioner cannot all be legal parents simultaneously, nor can Respondent and Petitioner both be legal mothers to the triplets so long as Intervenor remains involved as their father. Still, Intervenor argues that Petitioner has in part acknowledged Respondent's interests by filing the IVT petition. However, Respondent has not alleged *in loco parentis* status nor was she declared the legal mother of the triplets. Defendant has been adjudged both.

B) *In Loco Parentis* Status and Filing of the IVT Petition

Respondent, joined by Intervenor who previously denied that Petitioner stood *in loco parentis* to the triplets, now contends *in loco parentis* status alone is not enough to terminate Respondent's rights since Petitioner has not also filed a Notice of Intention to Adopt. While this Court held that Petitioner has legal standing *in loco parentis* to the triplets, it held overall that she was their legal mother because the surrogacy contract did not provide for any legal mother. Therefore, Petitioner's *in loco parentis* status is secondary to her legal parent status. Under Pennsylvania adoption law, a legal parent is not required to file a Notice of Intention to Adopt.

Moreover, the nature of the relationship between parents has no legal significance for *in loco parentis* standing. *T.B. v. L.R.M.*, 567 Pa. 222, 786 A.2d 913 (2001). Children are not to be treated as the offspring of the biological single parent only. *J.A.L. v. E.P.H.*, 453 Pa. Super. 78, 682 A.2d 1314 (1996). Thus, despite the unusualness of the surrogacy arrangement, Intervenor and Respondent cannot claim to be the only parents of the triplets. Petitioner, through her actions, has clearly shown that she "doing

all things a parent would do" in a nontraditional family setting created by surrogacy. Respondent's one-time visit and handful of phone calls to the triplets do not make her a mother. While her desire to receive updates about and have input into the triplets' lives is understandable, it is not enough to justify inserting her into their lives as a maternal figure.

Since this Court held Petitioner to be the legal mother of the triplets, she may file under §2512 (a)(1) as a parent seeking to terminate another parent's rights. The Court also found Petitioner to stand *in loco parentis*. *J.F. v. D.B., supra*, at 24-27. By law, legal parents have automatic standing for custody, as do those who stand *in loco parentis*. *See Vicki N. v. Josephine N.*, 437 Pa. Super. 166, 649 A.2d 709 (1994); *Silfies v. Webster*, 713 A.2d 639 (1998); and *In re Adoption of W.C.K*, 2000 Pa. Super. 68, 748 A.2d 223 (2000). According to 23 Pa.C.S. §2512 (a)(3), Petitioner may also file her petition because she is an "individual having custody or standing in loco parentis to the child[ren]".

C) Statutory Grounds for IVT of Parental Rights

Petitioner raises two grounds for terminating Respondent's parental rights under 23 Pa. C.S. §2511:

> (a) GENERAL RULE — The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:
>
> (1) The parent by conduct continuing for a period of at least six months immediately preceding the filing of the petition either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties.
>
> (b) OTHER CONSIDERATIONS — The court in terminating the rights of a parent shall give primary consideration to the developmental, physical and emotional needs and welfare of the child. The rights of a parent shall not be terminated solely on the basis of environmental factors such as inadequate housing, furnishings, income, clothing and medical care if found to be beyond the control of the parent. With respect to any petition filed pursuant to subsection (a)(1), (6) or (8), the court shall not consider any efforts by the parent to remedy the conditions described therein which are first initiated subsequent to the giving of notice of the filing of the petition.

23 Pa. C.S. §2511 (a)(1) and (b).

Under 2511 (a), Petitioner alleges Respondent failed to perform parental duties and/or exhibited a settled purpose of relinquishing her parental rights for at least six months prior to the filing of the IVT petition. (Petitioner's Brief, pp. 3-4). Petitioner states that the relevant six-month time period is February 26, 2004 to August 26, 2004. Petitioner also filed an amended petition on December 9, 2004, to establish grounds from April 21, 2004, the date Respondent filed her verified complaint in Ohio stating she was the children's biological mother, through October 21, 2004, six months

later. There is little difference between the two time periods with regard to Respondent's actions. She sent the children a few gifts for Easter 2004, but never visited them, not even once. *See In re Adoption of Hamilton,* 379 Pa. Super. 274, 549 A.2d 1291 (1988) where the court must consider parental attempts at remedying relationship with child before an IVT determination is made.

A recent case, *In re: B., N.M.,* 2004 Pa. Super. 311, 856 A.2d 847, sets forth the standards for involuntarily terminating a person's parental rights:

> In an involuntary termination of parental rights proceeding, the burden of proof is on the party seeking termination to establish by clear and convincing evidence the existence of grounds for termination. *In re Adoption of Atencio, supra* 539 Pa. at 166, 560 A.2d at 1066 (citing *Santosky v. Kramer,* 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). The focus of the termination proceeding is on the conduct of the parent and whether his conduct justifies termination of parental rights. *In re B.L.L.,* 2001 Pa. Super. 341, 787 A.2d 1007, 1013 (Pa. Super. 2001) (internal citation omitted); *In re Child M.,* 452 Pa. Super. 230, 681 A.2d 793, 797 (Pa. Super. 1996), *appeal denied,* 546 Pa. 674, 686 A.2d 1307 (1996). Although it is the six months immediately preceding the filing of the petition that is most critical to the analysis, the trial court must consider the whole history of a given case and not mechanically apply the six-month statutory provision. *In re D.J.S.,* 1999 Pa. Super. 214, 737 A.2d 283, 286 (Pa. Super. 1999) (internal citations omitted). The court must examine the individual circumstances of each case and consider all explanations offered by the parent facing termination of his or her parental rights, to determine if the evidence, in light of the totality of the circumstances, clearly warrants the involuntary termination. *Id.* at 285...
>
> Parental duty requires that the parent act affirmatively with good faith interest and effort, and not yield to every problem, in order to maintain the parent-child relationship to the best of his or her ability, even in difficult circumstances. *In re Adoption of Dale A., II,* 453 Pa. Super. 106, 683 A.2d 297, 302 (Pa. Super. 1996) (internal citations omitted). A parent must utilize all available resources to preserve the parental relationship, and must exercise reasonable firmness in resisting obstacles placed in the path of maintaining the parent-child relationship. *In re C.M.S., supra* at 462 (citing *In re Shives,* 363 Pa. Super. 225, 525 A.2d 801 (Pa. Super. 1987)). Parental rights are not preserved by waiting for a more suitable or convenient time to perform one's parental responsibilities while others provide the child with his or her physical and emotional needs. *In re D.J.S., supra* at 287... Where a non-custodial parent is facing termination of his or her parental rights, the court must consider the non-custodial parent's explanation, if any, for the apparent neglect, including situations in which a custodial parent has deliberately created obstacles and

> has by devious means erected barriers intended to impede free communication and regular association between the non-custodial parent and his or her child. *In re C.M.S., supra* at 463 (quoting *In re Shives, supra* at 803). Although a parent is not required to perform the impossible, he must act affirmatively to maintain his relationship with his child, even in difficult circumstances. *In re: G.P.-R., supra* (internal citation omitted). A parent has the duty to exert himself, to take and maintain a place of importance in the child's life. *Id.* Thus, a parent's basic constitutional right to the custody and rearing of his or her child is converted, upon the failure to fulfill his or her parental duties, to the child's right to have proper parenting and fulfillment of his or her potential in a permanent, healthy, safe environment. *In re B.L.W., supra* at 388. (Internal citations omitted). A parent cannot protect his parental rights by merely stating that he does not wish to have his rights terminated. *In re C.M.S., supra* at 464 (internal citation omitted).

At 315-320, 854-856.

DISCUSSION

Looking at Respondent's conduct towards the children in either six-month period, the Court notes that she did not do much overall. *(See* Petitioner's Brief, p. 3, ¶s 1-2). In fact, Respondent's actions since the triplets were born (almost 18 months ago) have been fairly limited. (Petitioner's Exhibit 7, Timeline).[7]

Seven (7) times Respondent has been notified about developments in the triplets' lives, most by phone calls from Dr. Donich. Those events include the triplets' birth in November 2003, Petitioner taking them home from the hospital, Intervenor filing his emergency custody petition in December 2003, this Court's standing decision in April 2004, the custody/support trial in July 2004, the IVT petition filed in August 2004, and this Court's custody/support decision in January 2005.

Six (6) times Respondent has sent gifts to Ohio for the triplets. She sent receiving blankets for their birth in November 2003, blue sleepers for Christmas 2003, clothes and stuffed animals for Easter 2004, clothes and blankets for their first birthday, clothes, toys, and ornaments for Christmas 2004, and clothes for Easter 2005.

Four (4) times Respondent could have taken legal action in Pennsylvania and did not. She could have joined Intervenor or taken her own action

[7] The statutory time period set forth by §2511 (a) is not absolutely applied. As *Adoption of M.S.*, 445 Pa. Super. 177, 664 A.2d 1370 (1995) held: "Failure to have contact with the child for six months will not automatically forfeit a parent's rights. *In re Adoption of Hamilton*, 379 Pa. Super. 274, 549 A.2d 1291 (1988). Moreover, this court consistently has refused to apply the statutory six-month time frame mechanically. *In re E.S.M.*, 424 Pa. Super. 296, 622 A.2d 388 (1993). Instead, the court must consider the individual circumstances of each case. *Id."* At 183-184, 1373.

against Petitioner in November-December 2003, appealed this Court's standing decision in April 2004, joined or intervened in the custody/support trial in July 2004, or appealed this Court's custody/support Order in January 2005.

Instead, Respondent has only taken legal action regarding the triplets twice. The first was filing her verified complaint in Ohio on April 21, 2004. The second was her first and only in-person visit with the triplets in Ohio on February 26-27, 2005, almost 6 months to the day the original IVT petition was filed. (Petitioner's Brief, pp. 2-3).

Respondent admitted at trial that she was aware of the location of triplets and had both Petitioner and Intervenor's addresses from the surrogacy contract and copies of pleadings filed here and in Ohio. (N.T., 4/5/05, Morning Session, pp. 8-10). Respondent did not act affirmatively to maintain or even begin a parent-child relationship with the triplets until she filed her verified complaint in April at the encouragement of Intervenor and Dr. Donich. Even after that filing, she did not visit the triplets, she did not send them anything, and there is no concrete evidence that she spoke with them regularly by telephone.[8]

Respondent also did not act when legal problems first arose regarding the triplets. Rather, she yielded to them, resisting only when Intervenor and Dr. Donich called upon her to do so. Further, Respondent did not utilize all resources available to her to exercise her parental rights. This includes seeking legal help, filing pleadings to assert her rights, and even contacting Petitioner to inquire about the welfare of the children.[9] Instead, Respondent waited until this Court issued its April 2nd Order and then she acted, not in Erie County where the triplets principally reside, but in Summit County, Ohio.[10] Respondent did not take legal action or hire counsel in Erie County until she was served with the first IVY petition. *See In re: C.M.S.*, 2003 Pa. Super. 292, 832 A.2d 457. (Father's 14-month delay in asserting parental rights was unreasonable despite his claim that he did not know the child's whereabouts and instead just waited for service

[8] The Court does not consider Dr. Donich to be a stand-in via phone for the children. The Court is well aware of the triplets' young age and generally inability at this time to carry on a normal phone conversation with anyone, including Respondent. To believe otherwise, would go against all common sense.

[9] Besides Danielle Bimber, the triplets' legal mother, the list of people Respondent could have contacted to obtain information about the triplets includes James Flynn, the biological father; Eileen Donich, his paramour; Douglas Bimber, Danielle's husband; Hamot Medical Center, the hospital where the triplets were born; the Erie Times-News and other news organizations that have covered this case; or even this Court.

[10] The Court is uncertain as to why legal action was taken in Summit County since no parties to this matter reside there, nor do the triplets.

of IVT petition.) Respondent did not even attend the custody and support trial in July 2004.

Further, Respondent's explanations for her conduct are hollow at best. From her testimony, it appears that she does not intend to raise the children or take any particular role in their lives other than what Intervenor and Dr. Donich offer to her. She seems content to continue living her life in Texas, pursuing her education and career as she was doing before the IVT petition was filed. (N.T., 4/5/05, Morning Session, pp. 32-33). She even admitted during her testimony that she would willingly give up her parental rights so Dr. Donich could adopt the children. (N.T., 4/5/05, Morning Session, pp. 34, 65).

The Court finds this position to be inconsistent with Respondent's other arguments. On one hand she is fighting termination of her parental rights by Petitioner, and on the other she seems ready to acquiesce to termination of her parental rights by Intervenor and Dr. Donich. Respondent should also understand that the purported "gentleman's agreement" between her and Intervenor is not legally binding.[11] The Court during its tenure on this case has seen several instances where Intervenor and Dr. Donich have been less than credible and less than truthful.[12] Based on this, the Court has some concerns as to whether Intervenor and Dr. Donich's "agreement" with Respondent will endure the test of time and distance. The Court believes that Respondent, an impressionable young woman, is getting only half of the story and cannot make a fully informed decision regarding the children's current and future welfare. That determination at present falls within the purview of this Court.

Respondent's delineated inaction demonstrates that she indeed has a settled purpose of relinquishing her parental rights. More than a year passed and Respondent made no plans to visit the children in Ohio or have them visit her in Texas, until her presence was legally required at a deposition in Erie. Then and only then, she traveled to Ohio and spent <u>one day</u> with the children. Respondent could not testify to anything she has done as a mother with the children since they were born, including the six months preceding the filing of the IVT Petition. (N.T. 4/5/05, Morning Session, pp. 28, 31, lines 14-20). Her inability to articulate any particular thing she has done as a parent for the triplets in the six months preceding the filing

[11] Intervenor stated at the custody trial that he wanted "complete control" over the children and their care. A "gentleman's agreement" with Respondent would hardly impede that goal. *See* N.T., 7/9/04 Day 1, p. 57 (Intervenor discussing gentleman's agreement rules)

[12] *See J.F. v. D.B., supra* at 7-8, 29-31, and the January 5th Order, pp. 4-6, 9-11, 32-34, 36-37,45-46. *See also* N.T., 4/5/05, Afternoon Session, p. 74, lines 11-22.

of the IVT petition is clear and convincing evidence that she has no real plans for mothering, parenting, or raising the children.[13] It appears to the Court that she will simply follow the lead of Intervenor and Dr. Donich, passively doing what they tell her to do, rather than taking the initiative and being an assertive, active participant in the lives of the triplets.

Respondent also did not offer any convincing evidence that Petitioner created any barriers to her contacting, visiting, or establishing a relationship with the triplets. In fact, Petitioner's letter to her indicates the exact opposite.[14] Yet, with an open invitation, Respondent has chosen not to respond to Petitioner's attempts at communication. In fact, Respondent has not attempted to contact Petitioner at all. She has not inquired as to the children's well being, nor has she sent any cards, letters, or gifts to the children while they are in Petitioner's care. She testified that she feels that the children should be with Intervenor and not Petitioner, all based on a handful of in-person meetings and phone calls with Intervenor and Dr. Donich and no contact whatsoever with Petitioner. Clearly, she is not exerting herself to maintain a place in the children's lives by remaining silent and inactive. *See Appeal of L.S. and B.S.*, 1999 Pa. Super. 312, 745 A.2d 620 where the court awarded custody of children to foster parents because it could not "in good conscience" turn the children over to a stranger, their father, who only saw them once in their entire lives.

A parent-child relationship is not created by having warm thoughts about the children over a long distance.[15] In addition, a one-time visit as an adjunct to a legally required appearance cannot instantaneously

---

[13] By the Court's recollection, Ms. Rice paused for approximately 40 seconds before answering, "I'm not sure" and "I can't think of anything." *See also* "Mom Times 3? Egg donor lays claim to Corry triplets", Ed Palattella, *Erie Times-News*, April 6, 2005.

[14] If Petitioner is truly sincere in her testimony that she is willing to keep Respondent informed of the triplets' progress, then nothing can prevent her from doing so. (Petitioner has testified in previous proceedings that she has no intention of hiding the triplets' heritage from them.) An order terminating Respondent's parental rights does not require that Petitioner maintain or suspend contact with Respondent. That issue is left for Petitioner and Respondent to work out between themselves. Given the publicity surrounding this case, the Court notes that even marginal contact between Petitioner and Respondent may be in the children's best interests when they start asking questions about their origins.

[15] *Distinguish In re Adoption of Ostrowski*, 324 Pa.Super. 216, 471 A.2d 541 (1984) where Father's parental rights were upheld because he overcame several obstacles between him and his children, including distance (800 miles), support (provided health insurance for child), and tensions with mother who limited his access to child and refused further support checks.

establish a lasting parent-child bond. While Respondent obviously means well, she just has not done enough to be considered someone exercising his/her parental rights. In addition, the Court cannot help but wonder if Respondent is merely parroting the wishes of Intervenor and Dr. Donich, rather than her own maternal instinct and desire to be a parent to these children.

Petitioner has met her burden of proving by clear and convincing evidence that Respondent's parental rights should be terminated pursuant to 23 Pa. C.S. § 2511(a)(1). Petitioner has shown that Respondent, through her own testimony and actions, has failed to perform her parental duties and refused to make reasonable efforts in maintaining contact with the children for the six months preceding the filing of the IVT petition. Further, Respondent has failed to financially support the children in any significant way. Sending a few clothes and gifts and a scrapbook to one party with partial custody (Intervenor) does not amount to supporting the children. (Respondent's Exhibits 3 and 4, Intervenor's Exhibit 1).

Intervenor claims there has been no showing by clear and convincing that Respondent ever caused the children to be without essential parental care, control, or necessary subsistence as required by 23 Pa. C.S. §2511(a)(2). The Court finds that while Respondent did not specifically deprive the children of essential care, she, by her inaction, necessitated Petitioner provide all the care the triplets needed. Respondent's omissions rather than actions allowed Petitioner to step in and act like a parent to the triplets rather than herself so doing. At no time has the Respondent ever voluntarily assumed the burden or felt the joy of substantially participating in these children's lives, abdicating that responsibility to Petitioner and Intervenor.

This opinion will be continued in the next issue of the Erie County Legal Journal, Vol. 88 No. 32.

DANIELLE BIMBER, Petitioner
v.
JENNIFER RICE, Respondent

JAMES FLYNN, Intervenor

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION NO. 96 of 2004

Appearances: Joseph P. Martone, Esq., Attorney for Petitioner
John Rogala Evanoff, Esq., Attorney for Respondent
Melissa Hayes Shirey, Esq., Attorney for Intervenor
Michael J. Nies, Esq., Attorney for the Children

ADJUDICATION

This opinion is continued from the previous issue of the Erie County Legal Journal, August 5, 2005, Vol. 88 No. 31.

D) Best Interests of the Children

After reviewing the statutory factors for the IVT of parental rights, the Court must then conduct an analysis of the best interests of the children. *In re B.L.L.,* 787 A.2d 1007 (2001). "In a termination proceeding, the focus is on the conduct of the parents. Paramount, however, is that adequate consideration be given to the needs and welfare of the child." *In re N. W.,* 2004 Pa. Super. 368, 859 A.2d 501, at 507 (citations omitted). *In the Interest of C.S., supra,* held that the best interests and welfare of the child included examining the existence of a parent-child bond. The Court there noted:

> Before granting a petition to terminate parental rights, it is imperative that a trial court carefully consider the *intangible* dimension of the needs and welfare of a child—the love, comfort, security, and closeness—entailed in a parent-child relationship, as well as the tangible dimension." *In re Matsock,* 416 Pa. Super. 520, 540, 611 A.2d 737, 747 (1992). "Continuity of relationships is also important to a child, for whom severance of close parental ties is usually extremely painful." *In re William L.,* 477 Pa. 322, 348, 383 A.2d 1228, 1241 (1978). The trial court, "in considering what situation would best serve the children's needs and welfare, must examine the status of the natural parental bond to consider whether terminating the natural parents' rights would destroy something in existence that is necessary and beneficial." *In re P.A.B.,* 391 Pa. Super. 79, 86, 570 A.2d 522, 525-26 (1990), *appeal dismissed,* 530 Pa. 201, 607 A.2d 1074 (1992).

At 1202-1203 quoting *In re Bowman,* 436 Pa. Super. 10, 647 A.2d 217, 219 (Pa Super. 1994), *aff'd by an equally divided court,* 542 Pa. 268, 666 A.2d 274 (1995) (emphasis original).

The strength of the parent-child bond and/or whether a bond exists must also be considered by the Court when deciding termination of parental rights. *See In re Adoption* of *A.C.H*, 2002 Pa. Super. 218, 803 A.2d 224 and *In re: G.P.-R.*, 2004 Pa Super. 205, 851 A.2d 967. The key is whether a bond has developed, not the parent's pledges to do more in the future. *In re: J.L.C. and J.R.C.*, 2003 Pa. Super. 466, 837 A.2d 1247, at 1249.

Respondent has not had a continuous relationship with the triplets. She visited them in person once. There is no supporting evidence that she regularly called them. Again, the Court notes the children are less than two years old. It is reasonable to conclude that the triplets are too young to remember their one visit with Respondent, much less form a bond with her. There is no close personal relationship or parental tie with Respondent to be severed by granting the IVT petition. She has no more a tie to the children than the incarcerated parents from *In re G.P.-R*, *In the Interest* of *C.M.S., In re: J.L.C. and J.R.C.,* and *In re B., N.M., supra*, whose rights were terminated because they either did not make the effort to see their children or they were complete strangers to their children because of their imprisonment. *See also Gulla v. Fitzpatrick,* 408 Pa. Super. 269, 596 A.2d 851 (1991) where the court found introduction of a new "parent" (natural father and mother's boyfriend) would be destructive to child's well being. The *Gulla* Court had no intention in taking the only father the 3-year-old child had known (the putative father) and substituting him with a total stranger (the biological father) whom the natural mother preferred.

Respondent is not much more than a stranger to the triplets and the life they know right now. The Court does not doubt that Respondent has feelings for the triplets and wants to know about their growth and progress. It is only natural given that she helped them come into being. However, her interest is only passive. *See In re Burns,* 474 Pa. 615, 379 A.2d 535 (1977) and *In re C.M.S., supra*. She is not physically or emotionally available to regularly provide the love, protection, guidance, and support the children require. Petitioner has done that from the very beginning. Respondent was aware of this but chose to allow Petitioner to continue in a motherly role. Respondent's presence now can only be explained as a disagreement with the children's placement with Petitioner, just like in *Gulla* and *Burns*. Her claims now that she wants a role in the children's lives, that she would help financially if she could, are well meaning but rather empty without actions behind them. Again, as the courts in *In re C.M.S.* and *Burns* held, she cannot protect her parental rights by merely stating she does not wish to have her rights terminated and that she wants to be kept informed about the children.

Respondent and Intervenor also emphasize Respondent's biological link to the triplets as an important factor against terminating her parental rights. This Court has previously held that a biological link alone is not

determinative of parental rights. *See J.F. v. D.B., supra* at 27-30 and January 5th Order, pp. 26-27. The Court finds the language of the court from *In re Adoption of Lindsey E.*, 31 Pa. D. & C. 4th 376 (Clinton County Court of Common Pleas, 1996) to be particularly relevant to the case at bar:

> The law requires that "a parent desiring to retain parental rights must exert himself to take and maintain a place of importance in his child's life." *Baby Boy A. v. Catholic Social Services*, 512 Pa. 517, 522, 517 A.2d 1244, 1246 (1986). A parent must affirmatively show love, protection and concern for his child. *Id.* Providing sperm [or eggs] or being present in the birthing room does not make one a parent.

At 381, emphasis added.

See also In re Adoption of S.M.D., 49 Pa. D. & C. 4th 353 (Chester County Court of Common Pleas, 2000). (Court commended stepfather for taking over parental duties after child's biological father terminated his rights to avoid paying child support and immediately thereafter disappeared from child's life.)

E) Testimony of the Expert Witnesses

A biological link does not necessarily or automatically imply a parent-child bond. As the Court in *In re: J.L.C. and J.R.C.* held:

> It is clear from the limited involvement Father had with the children that he did not bond with the children in the way a parent should bond with his or her children. It is not enough that "both boys know their father," "enjoy being with him," and "love their dad." That is not bonding. Being "Uncle Daddy" is not enough. Being a Parent means assuming responsibility so that a real bond develops, not just having a casual relationship with one's children. Children often know, love, and sometimes have an enjoyable time with parents who have little to do with their upbringing, and even with parents who physically and mentally abuse them.

In re: J.L.C. and J.R.C., supra at 1249, quoting the Trial Court Opinion, 5/13/03, p. 2, emphasis added.

In support of her contention that there is no parent-child bond between Respondent and the triplets, Petitioner presented the testimony and reports of two expert witnesses. Dr. James Schierberl and Dr. Charisse Nixon. (Petitioner's Exhibits 5 and 6).

Dr. James P. Schierberl, Ph.D., is a clinical child psychologist with a practice in Erie. He testified that he works exclusively with children and has testified as an expert "numerous times" in cases involving children. (N.T. 4/5/05, Morning Session, pp. 76-77, lines 14-15, 22-25, 1-4). Dr. Schierberl conducted an "abbreviated family evaluation" of Danielle and Douglas Bimber, their three children, and the triplets. (Petitioner's Exhibit 5, p. 1). He interviewed the Bimbers on January 28, 2005. He then traveled to their home in Corry on March 15, 2005 to observe their

interactions with the triplets. Both the interview and the home visit each lasted approximately one hour. (Petitioner's Exhibit 5, p. 5 and N.T. 4/5/05, Morning Session, p. 104).

Dr. Schierberl had "no significant concerns" with the Bimber home, finding it to be "clean and non-cluttered" and "a very positive environment for young children". (Petitioner's Exhibit 5, p. 6). He was also "impressed" by the Bimbers overall attitude towards raising their three children plus the triplets. (Petitioner's Exhibit 5, p. 7). He expressed some concerns over the triplets' "limited vocalizations" but attributed that to many possible causes - a stranger in the home, the difficulties of traveling between two homes, having three older talkative siblings, etc. (Petitioner's Exhibit 5, p. 6, N.T. 4/5/05, Morning Session, p. 81). The crux of Dr. Schierberl's report and trial testimony as to Respondent's parental role can be summarized as follows:

> The question is essentially how the potential addition of another "parent" into the children's lives would affect the children. The most probable impact that could be anticipated would be further confusion and stress for the children... However, in this unique case, it is difficult to envision any meaningful psychological benefits that would warrant subjecting these children to such unusual confusion.

(Petitioner's Exhibit 5, p. 7)

> Theoretically, in certain families you have extended families and all kinds of different relatives that come in and play a role. But it's very, very risky in my opinion. Those potential theoretical benefits are greatly outweighed by the probable risks, almost certain risks in terms of confusion for the children. That confusion — my concern with the confusion is heightened based on what I have heard today in terms of the interaction Jennifer has already had with the children... I wonder how she is being presented to the children. Have the parties agreed how she will be described? ... Families have to agree what the child is going to be told and when...
>
> MR. MARTONE: Would you also say that it would be detrimental to allow Jennifer at this point to impose herself in their lives as a maternal figure?
>
> DR. SCHIERBERL: As a maternal figure, yes, I think it would be detrimental.

(N.T. 4/5/05, Morning Session, p. 85, lines 10-23; p. 88, lines 12-16).

Dr. Schierberl was also able to review Respondent's deposition testimony and see her testify at trial. (N.T. 4/5/05, Morning Session, p. 78). He admitted on cross as to the limited scope his evaluation in his report and at trial. (Petitioner's Exhibit, p. 6 and N.T. 4/5/05, Morning Session, pp. 94-95). However, he was still able to conclude, based on

his observations, training, and clinical experience working with children that there was not any potential advantage of involving Respondent in the children's lives. (N.T. 4/5/05, Morning Session, pp. 86-87, lines 20-25, 1-7).

Dr. Charisse L. Nixon, Ph.D., is an Assistant Professor of Psychology at Penn State Behrend College in Erie. (Petitioner's Exhibit 6, p. 1). She is also a developmental psychologist, trained in the field of children's social and emotional development, mostly teaching, conducting research and publishing articles and books in that area. (Petitioner's Exhibit 6, p. 1 and N.T. 4/5/05, Afternoon Session, p. 3). Her report is a summary of the relevant research literature on attachment and parent-child bonds. Dr. Nixon observed Petitioner and the triplets as part of her research. (N.T. 4/5/05, Afternoon Session, p. 11 lines 10-16 and p. 27, lines 6-19). She also reviewed Respondent's deposition and trial testimony. (N.T. 4/5/05, Afternoon Session, p. 10, lines 21-24).

Dr. Nixon's testimony and report showed that children generally develop attachments to their caregivers within the first two years of life. (Petitioner's Exhibit 6, p. 1 and N.T. 4/5/05, Afternoon Session, p. 8, lines 19-25 and p. 9, lines 2-10). "[A]ttachment results from the *relationship* between a particular caregiver and a child." (Petitioner's Exhibit 6, p. 1, emphasis in original). This attachment lays the foundation for all other relationships in the child's future. (Petitioner's Exhibit 6, p. 1, N. T. 4/5/05, Afternoon Session, p. 9, lines 12-18). While multiple attachments are possible, children are more prone to develop an attachment to one specific person, usually their primary caregiver. (Petitioner's Exhibit 6, p. 1, N.T. 4/5/05, Afternoon Session, p. 9, lines 19-25). By the age of six months, a child can single out that one specific attachment but can establish other special attachments to familiar people. (Petitioner's Exhibit 6, p. 1). Such attachments lend predictability to the child's life. Interruption of the attachment during the first two years of life can cause the child significant stress and possible developmental delays. (*Id.*)

Dr. Nixon also cited research that shows "even very young children are very sensitive to the relationship between the two competing custody parties". (Petitioner's Exhibit 6, p. 2). Like Dr. Schierberl, she stressed the importance of cooperation and open communication between all parties involved in order to help the children thrive. *(Id.)* She also reviewed Dr. Schierberl's findings in his report and at trial and concurred with his assessment. She found that triplets had developed secure attachments with the Bimbers who have raised them since infancy. (Petitioner's Exhibit 6, p. 3, N.T. 4/5/05, Afternoon Session, p. 11, lines 10-16). She notes:

> During these early critical years, inconsistent, unpredictable care is more likely to forecast negative child outcomes in all areas of development, particularly in the area of the children's social and emotional development. Therefore, the introduction of new,

> inconsistent caregiver(s) to these three young children is not recommended at this time.

(Petitioner's Exhibit 6, p. 3)

On cross-examination, Dr. Nixon was adamant about the serious harm of introducing Respondent as another maternal figure to the triplets. (N.T. 4/5/05, Afternoon Session, pp. 14, 16, 18, 23-24). She did not waver from her conclusion that Respondent's one visit to the triplets was not enough to form an attachment, let alone a secure one. (N.T. 4/5/05, Afternoon Session, p. 12, lines 1-11). An attachment "is developed through repeated physical and emotional interactions" which is "not possible" with Respondent based on the definition of attachment. *Id.* Dr. Nixon also expressed doubts as to the triplets forming an attachment to Respondent via telephone or from the gifts she sent to Ohio, stating the children's cognitive abilities are not developing enough yet to appreciate or recognize those things. (N.T. 4/5/05, Afternoon Session, p. 13, lines 11-21).

The Court finds the testimony and reports of both Drs. Schierberl and Nixon to be credible in that they provide further support for the involuntary termination of Respondent's parental rights.

F) Motion to Stay IVT Petitions Pending Other Courts' Decisions

Merely months ago, this Court held, "the custody of the children needs to be decided in a timely fashion. Thus far, there have been only two interested parties...James Flynn and Danielle Bimber." (January 5th Order, p. 23). If Ms. Rice was truly as interested in being a part of the triplets' lives as she now claims, the Court cannot help but ask where was she at the time of the custody trial? As the Guardian *Ad Litem* appointed on behalf of the triplets noted, Respondent did not come see the triplets after they were born or at any other time prior to the deposition, nor did she involve herself in any of the other legal proceedings. (Guardian *Ad Litem's* Brief, p. 4). Respondent did not make any legal claims until after the standing decision was issued in April, almost five months after the triplets were born. She did not file *anything* regarding her rights to the children in Pennsylvania until Petitioner filed her IVT petition in August 2004.

Intervenor's additional argument that this Court should stay the IVT petition and await the decisions of the Pennsylvania Superior Court and the Ohio Court of Appeals is not persuasive. (Intervenor's Brief pp. 8-10). Hearings on standing, custody, and support have all been held here. The IVT trial was held here as well. Only after this Court issued its ruling on standing, did Rice, at the behest of Intervenor and Dr. Donich, become involved in this matter and file pleadings in Ohio. Until then, there was no "live" proceeding in Ohio. *See Boudwin v. Boudwin*, 419 Pa. Super. 570, 615 A.2d 785 (1992). Furthermore, the Court cannot engage in speculation and conjecture about what the Superior Court might decide in the future. *See In re: Adoption of S.M.*, 2003 Pa. Super. 35, 816 A.2d 1117. The Court should only be concerned with Respondent's recent conduct for purposes

of the IVT matter.

The Court finds Intervenor's request to stay the IVT proceedings as further unnecessary delay in the resolution of this case. As the Court in *In the Interest of L.S.G.*, 2001 Pa. Super. 22, 767 A.2d 587 held:

> "...[T]his situation has languished from the time these children were infants. In the meantime, Mother continues to be unable or unwilling to accept responsibility for them. These children... cannot be expected to wait in limbo for their mother to grow up."

At 591.

The Pennsylvania Superior Court upheld the trial court's finding that Mother failed to perform her parental duties, failed to avail herself of the services offered to her to improve the situation and was "unwilling" to accept responsibilities of motherhood. *See also In the Interest of C.S.*, 2000 Pa. Super. 318, 761 A.2d 1197 where court found Father "has taken little initiative on his own" to maintain a parent-child relationship with child, sending a few cards and making one phone call to child who had been living with foster parents for over three years.

Similarly, this Court finds, like *In the Interest* of *C.S.*, that Respondent has "taken little initiative" of her own to maintain a parent-child relationship with the triplets. She seemed content until April 2004 to allow them to be raised by others while continuing with her own life. She enrolled in school, worked part-time, rented her own apartment. Nothing in her activities indicates a desire to become a parent to these children. More likely, it is Intervenor and Dr. Donich who took the initiative to track down Respondent and assist her in filing her complaint in Ohio and fighting the IVT petition in Pennsylvania. After all, it is they who have found attorneys for her and paid her legal fees in two states.

Intervenor's consent to Petitioner's legal actions is, as previously noted by the Court in its prior opinions, largely irrelevant. While he remains dissatisfied with this Court's decisions, his mere unhappiness is not enough to prevent Petitioner from moving to terminate Respondent's parental rights. His claim that he is agreeable to Respondent voluntarily terminating her rights to allow Dr. Donich to adopt the triplets is incongruous with his argument that Petitioner has no right to ask Respondent to terminate her rights.

Further, Intervenor has consistently deferred the majority of his parental responsibilities to his paramour, Eileen Donich. Indeed, it is she, not Intervenor, who spends the majority of the partial custody time with the triplets. It is evident that she is the one primarily in contact with Respondent and Petitioner regarding the triplets.

The Court reiterates its concerns over the participation of Eileen Donich in the lives of the children. (January 5th Order, pp. 31-32, 35-36). The Court finds it hard to believe that Dr. Donich will step aside and allow Respondent to exercise her parental rights/responsibilities towards the triplets when she has become so entwined in orchestrating even the biological father's interaction with the children. While the Court has

continued reservations about Dr. Donich, she is less a stranger to the triplets than the Respondent.

Conclusion

Based upon the experts' testimony and all of the evidence, it is apparent that Respondent's one visit to the triplets is virtually the same as a stranger stopping on the street and saying hello to them. They will remember her no more or less than a brief visitor in their young lives. To further complicate this case and the lives of the triplets by adding another mother figure would only add "stress and confusion" as Dr. Schierberl noted to the already unique and increasingly complex situation. Thus, this Court finds it necessary to terminate the rights of Respondent to avoid further harm and to allow the triplets to continue to grow in a stable home environment. Furthermore, as Petitioner has proven and as the children's Guardian *Ad Litem* concurs, the best interests and welfare of the children would most favorably be served by terminating Respondent's parental rights.[16]

DECREE NISI

AND NOW, TO-WIT, this 21st day of June, 2005, upon consideration of the Petition for Involuntary Termination of Parental Rights of Jennifer Rice, and after hearing, testimony, and submission of legal memoranda, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED**, that the Petition is **GRANTED**.

For the reasons set forth in the foregoing Adjudication, the developmental physical, and emotional needs of the triplet children, Matthew, Mark, and Micah Flynn, would best be served if they had only one identifiable mother and one identifiable father. Thus, parental rights of the biological mother and egg donor, Jennifer Rice, relative to Matthew, Mark, and Micah Flynn, are forever **TERMINATED**.

Pursuant to 23 Pa.C.S. §2905 (d)(2), Ms. Rice may place on file with the Court and the Department of Health a consent form giving her permission to disclose any information pertaining to her to the triplets any time after they attain the age of 18. Ms. Rice is also entitled under the statute to update that information as needed.

FURTHER, Intervenor's renewed request to stay the IVT proceedings pending the review of appealed orders by the Pennsylvania Superior Court and the Ohio Court of Appeal is hereby **DENIED.**

BY THE COURT:
Shad Connelly, Judge

[16] By doing such the Court merely reverts her status to what she intended it be when she entered into the egg donor agreement and consistent with her actions thereafter in which she assumed no parental responsibilities for nor performed any parental duties as to the triplets.

COMMONWEALTH OF PENNSYLVANIA

v.

ROBERT NORMAN VANTINE

CRIMINAL PROCEDURE

Three levels of interaction between citizens and the police as recognized by the Supreme Court are as follows: (1) "mere encounter," which need not be supported by any level of suspicion and does not require a citizen to stop or to respond, (2) "investigative detention," which must be supported by a reasonable suspicion and subjects a citizen to a stop and reasonable detention but does not involve coercive conditions and (3), the "custodial detention," which must be supported by probable cause.

CRIMINAL PROCEDURE / DRIVING UNDER THE INFLUENCE

Perceived erratic driving in and of itself is not a violation of the Vehicle Code and without more does not provide probable cause to execute a traffic stop.

Police did not have probable cause to stop vehicle where driver (1) traveled in wrong lane for a distance of 75 to 100 feet to one-tenth of a mile, (2) traveled at a slow rate of speed for two-tenths of a mile and (3), caused only one other driver to proceed slowly for a short distance and brief period of time.

Driving in the middle of the road may constitute reckless driving.

CRIMINAL PROCEDURE / ADMISSIBILITY OF EVIDENCE

If probably cause exists to effectuate a traffic stop, all observations of police officer as well as driver's performance on field sobriety tests are admissible to establish guilt.

Where probable cause does not exist to effectuate a traffic stop, all fruits of the unlawful stop should be suppressed.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 556 OF 2005

Appearances: Lisa R. Stine, Esquire for the Commonwealth
J. Timothy George, Esquire for the Defendant

OPINION

This case comes before the Court on the defendant's Omnibus Pretrial Motion For Relief filed May 26, 2005. Currently, the defendant is charged with Driving Under the Influence, first offense. See, 75 Pa.C.S.A. §3802(b). A suppression hearing was held on July 5, 2005 at which time the arresting officer and defendant testified.

I. BACKGROUND OF THE CASE

On November 10, 2004, Trooper Mark Stevick was operating his marked patrol car in Lawrence Park Township, Erie County, Pennsylvania. At approximately 11:00 p.m. he was traveling east on Iroquois Avenue and

reached the lighted intersection of Iroquois Avenue and Nagle Road in Lawrence Park Township. At that time, he stopped directly behind the defendant's green Dodge Ram truck. The defendant then made a right hand turn traveling south onto Nagle Road. Trooper Stevick followed. According to the trooper, as the defendant turned onto Nagle Road, one-half of his vehicle traveled into the northbound turning lane of Nagle Road.[1] This lane is 75-100 feet in length and is immediately adjacent to the north and southbound lanes. The trooper testified that 1/2 of the defendant's vehicle remained in that lane and the northbound lane for approximately .1 of a mile.[2] He also noted that the defendant was traveling at a very slow rate of speed and clocked him by use of his odometer at 14 mph for approximately .2 of a mile. At some point another vehicle appeared directly behind the cruiser and had to travel at a low rate of speed for a brief period and short distance.

After the defendant had traveled approximately the .2 of a mile, Trooper Stevick pulled the defendant over by activating his lights. Trooper Stevick testified that the reasons for the stop were alleged violations of 75 Pa.C.S.A. §§ 3364(a) and 3309(1).[3] Once the defendant was stopped, the trooper made additional observations which resulted in a DUI arrest.

The defendant testified that as he made the turn onto Nagle Road, he reached behind him to retrieve a purse for his passenger. He admitted that for a brief period he went into the turning lane, but then returned to his lane. He stated that when the trooper stopped him, the trooper told him that he "crossed over the dividing line, brought it back and that he was traveling 14 mph". There was little traffic in the area. In fact, both the trooper and defendant agreed that there was no oncoming traffic on Nagle Road.

II. LEGAL DISCUSSION

The defendant argues that the stop of the defendant's vehicle for purported violations of 75 P.C.S.A. §§ 3364(a) and 3309(1) was not supported by probable cause. Therefore, under the Fourth Amendment of the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution all evidence obtained as a result of the stop should be suppressed.

---

[1] Nagle Road has two lanes running north and south. At the intersection with Iroquois Avenue, there is an additional turning lane which is referred to above.

[2] Although many of the facts are not at dispute, this point was contested. There was evidence that called into question the accuracy of this assertion. See, Suppression Hearing Exhibits 1 and 2 which do not reflect this fact and defendant's testimony.

[3] Section 3309(1) requires driving within a single lane. Section 3364(a) governs minimum speeds.

The Fourth Amendment of the United States Constitution states that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. 4 (1791). The Pennsylvania Constitution, likewise, provides a similar protection against state or municipal agencies. It states that:

> 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.

Pa. Const. Art. 1, § 8 (1968).

Three levels of interaction between citizens and the police are recognized by the Pennsylvania Supreme Court:

> The first is a "mere encounter" (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. See, *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319 (1983); *Florida v. Bostick,* 501 U.S. 429, 111 S.Ct. 2382 (1991). The second, an "investigative detention" must be supported by reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. See, *Berkemer v. McCarthy,* 468 U.S. 420, 104 S.Ct. 3138 (1984); *Terry v. Ohio,* 391 U.S. 1, 88 S.Ct. 1868 (1968). Finally, an arrest or "custodial detention" must be supported by probable cause. See, *Dunaway v. New York,* 442, U.S. 200, 99 S.Ct. 2248 (1979); *Commonwealth v. Rodriguez,* 614 A.2d 1378 (Pa. 1992).

Commonwealth v. Ellis, 662 A.2d 1043, 1047-48 (Pa. 1995) (footnote omitted). Relative to vehicle stops, the Pennsylvania Supreme Court defined the issue as:

> whether the facts articulated by the arresting officer were sufficient to establish probable cause warranting the traffic stop. If probable cause was established, then all observations by the police officer upon stopping appellant, as well as the evidence regarding the appellant's performance in the field sobriety tests, were admissible to establish his guilt. If probable cause was not established, then all of the fruits of the unlawful stop should have been suppressed. Plainly, if suppression was warranted, appellant's conviction cannot stand.

Commonwealth v. Garcia, 859 A.2d 820, 822 (Pa.Super. 2004) (citing *Commonwealth v. Gleason*, 785 A.2d 983 (Pa. 2001); See *Commonwealth v. Whitmyer*, 668 A.2d 1113, 1116 (Pa. 1995); *Commonwealth v. Swanger*, 307 A.2d 875, 879 (Pa. 1973). *Gleason* confirmed the *Whitmyer* standard.

In *Whitmyer* the Defendant was cited for driving at an unsafe speed. However, the police failed to time the Defendant for the requisite three-tenths of a mile required by the statute. The Court granted the motion to suppress because the police lacked probable cause for the stop. *Commonwealth v. Whitmyer*, 668 A.2d 1113, 1114-1115 (Pa. 1995).

The Defendant in *Gleason* was observed "crossing the berm line by six to eight inches on two occasions for a period of a second or two over a distance of approximately a quarter-mile." This occurred in the early morning and no other cars on the road. The Court held that the evidence failed to establish that police had probable cause. *Commonwealth v. Gleason*, 785 A.2d 983 (Pa. 2001).[4] In *Commonwealth v. Battaglia*, 802 A.2d 652 (Pa.Super. 2002), the Defendant was observed weaving inside his lane of travel, but not crossing either line. Furthermore, he was traveling five to ten miles slower than the posted speed limit and made some awkward turns. The Superior Court stated that: "perceived 'erratic driving' in and of itself is not a violation of the [Vehicle] Code, and, without more, does not provide probable cause to execute a traffic stop." *Id*. at 657. Likewise, probable cause did not exist when an officer followed a Defendant for two blocks and observed his car cross the right fog line twice in response to oncoming traffic. (Nearly half of the Defendant's vehicle was outside of the proper lane.) *Commonwealth v. Garcia*, 859 A.2d 820, 822 (Pa.Super. 2004).

In some instances, driving in the middle of the road constitutes careless driving. For example, in *Commonwealth v. McGrady*, 685 A.2d 1008, 1010 (Pa.Super. 1996), the Defendant was:

> traveling slower than normal for the type of road and the speed limit. [citation omitted]. In addition, 'the vehicle was in the middle of the lane, seemed to be hesitant with its driving, going a little quicker, a little slower, vice-versa.' [citation omitted]. The car was driving right on the centerline, in the middle of the lane, veering in and out over the road. [citation omitted]. ... and, as he [Officer] followed the car, the erratic driving became more pronounced. [citation omitted].

Id.[5]

[4] The Defendant in *Gleason* was charged with Driving within a single lane, 75 Pa.C.S.A. § 3309(1).

[5] To prove a violation of 75 Pa. C.S.A.S 3364(w), the Commonwealth need not establish that the defendant was traveling at any particular speed. See *Commonwealth v. Robbins*, 657 A.2d 1003, 1004 (Pa. Super. 1995).

At the time of the stop Trooper Stevick made the following observations: (1) the defendant traveled partially in the wrong lane for a distance of 75-100 feet to a maximum of approximately .1 of a mile; (2) the defendant traveled at a slow rate of speed for .2 of a mile, and (3) at some point a third vehicle traveling directly behind the trooper had to proceed slowly for a short distance and brief period of time. As to his first observation, the facts at bar are more similar to *Whitmyer, Battaglia, Gleason,* and *Garcia* than to *McGrady* in that it represents brief erratic driving. As to his second and third observations regarding speed, probable cause of a violation occurs when the operator's actions "impeded the normal and reasonable movement of traffic." *Commonwealth v. Robbins*, supra at 1004. This is a matter of degree. In *Robbins,* the driver's conduct caused a back-up of 18-20 cars who were extremely irritated. *Id*. Here, one car slowed down for a brief period of time for a short distance.

III. CONCLUSION

There is no bright-line test for analyzing these cases. The assessment often turns on subtle nuances in the facts. What is clear is that the Pennsylvania appellate courts have determined that erratic driving alone does not amount to probable cause of a motor vehicle violation. Here, Trooper Stevick was confronted with suspicious circumstances. However, the facts neither individually nor collectively amounted to probable cause of a violation of the motor vehicle code. Therefore, the stop of the defendant's vehicle was not authorized and the fruits of that stop must be suppressed.

ORDER

AND NOW, this 1st day of August, 2005, for the reasons set forth in the accompanying opinion, it is hereby **ORDERED** that the defendant's Omnibus Pretrial Motion To Suppress is hereby **GRANTED**.

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

BAILEY B. NAGLE, JR., Appellant
v.
ERIE COUNTY BOARD OF ASSESSMENT APPEALS, Appellee
v.
MILLCREEK TOWNSHIP SCHOOL DISTRICT, Intervenor

REAL ESTATE TAXATION / ASSESSMENT

In a real estate assessment appeal, the trial court's obligation is to arrive at a decision as to the value of the property that is just and equitable.

It is not the role of the trial court to act as an expert real estate appraiser but to independently determine the fair market value of the property on the basis of the competent, credible and relevant evidence presented by the parties.

The trial court may properly find that the value of the property at issue falls somewhere between the range of opinions offered by two equally credible experts.

EVIDENCE / EXPERT TESTIMONY

When considering the testimony of differing opinions, it is the court's responsibility to ascribe to the testimony whatever weight it believes it deserves based on the evidence presented.

In real estate tax assessment cases, matters of credibility are within the province of the trial court acting as factfinder.

Credibility implicates two different considerations: the veracity of the witness and the substantive reasonableness of the testimony.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL ACTION - LAW NO. 14131-2002

Appearances: John J. Mehler, Esquire for Nagle
Michael J. Visnosky, Esquire for Millcreek Township School District
Lee S. Acquista, Esquire for Erie County Board of Assessment Appeals

MEMORANDUM

Bozza, John A., Jr.

This is an appeal of the decision of the Erie County Board of Assessment Appeals ("ECBAA") concerning the value of real estate located at 2264 South Shore Drive. The Millcreek Township School District ("MTSD") intervened, and the case proceeded to trial on August 2nd and 5th of 2005. At issue are the tax years 2002 and 2003.

The property at issue is located in the City of Erie on a street that runs adjacent to Presque Isle Bay and is comprised of Lots J and K of the Tracy Subdivision. The lots are combined for purposes of real estate tax assessment. The entire parcel is comprised of 4.32 acres with 300 feet of

frontage on the Presque Isle Bay. Located on Lot J, the eastern portion of the subject property, is a 4,612 square foot dwelling constructed in 1932. It has a brick exterior with a slate roof and includes ten rooms. The condition of the interior is fair and it would require substantial renovation to be brought up to current neighborhood standards.[1] The outside condition of the home is average.

As required in an assessment appeal hearing, the taxing authority proceeded to introduce its assessment record into evidence indicating that the property is valued by the ECBAA at $665,500. The taxpayer then proceeded to call witnesses and introduce testimony, including the testimony of an expert real estate appraiser, Gerald J. Stubenhofer. MTSD then presented evidence including testimony from an expert real estate appraiser, Robert E. Glowacki. The testimony revealed a substantial difference of opinion as to fair market value of the property, with Mr. Stubenhofer concluding that it was $530,000 and Mr. Glowacki concluding that the fair market value was $875,000. The ECBAA did not present any additional evidence.

In a real estate assessment appeal, the court's obligation is to arrive at a decision as to the value of the property that is just and equitable. Factual disputes must be resolved solely on the basis of the evidence presented. *Green v. Schuylkill County Board of Assessment Appeals*, 565 Pa. 185, 196, 772 A.2d 419, 426 (2001). It is not the role of the court to act as an expert real estate appraiser but to independently determine the fair market value of the property on the basis of the "competent, credible and relevant evidence presented by the parties." *Id.* In addition as the Supreme Court has observed a determination of fair market value is not simply a matter of science but rather requires a practical approach carried out in the context of the court's role as factfinder. *Id.*

A central issue in the case is the credibility of the parties' respective appraisal experts. In a real estate tax assessment case matters of credibility are within the province of the trial judge, who is the factfinder. *In re Springfield School District*, 2005 Pa. Commw. LEXIS 344 (2005). When considering the testimony of experts with differing opinions it is the court's responsibility to ascribed to the testimony whatever weight it believes it deserves based on the evidence presented. *See Westinghouse Electric Corp. (R & D Center) v. Board of Property Assessment*, 539 Pa. 453, 464, 652 A.2d 1305, 1312 (1995). The trial court may properly find that the value of the property falls somewhere between the range of opinion of two equally credible experts. *Id.* Credibility implicates two

[1] Both parties requested the Court conduct a "view" of the property. However, as discussed at the time of the hearing, since there was agreement on the condition of the property, personally visiting the home would not have assisted the Court in resolving a contested factual issue.

different considerations: the veracity of the witness and the substantive reasonableness of the testimony. *In Re Koppel Steel Corp.* 2004 Pa. Commw. LEXIS 380, 849 A.2d 303 (2004). This case involves challenges to the opinions of the experts, at least to that of Mr. Glowacki, of both kinds.

While conceptually similar, the approaches taken by Mr. Glowacki and Mr. Stubenhofer could not have been more substantively divergent. As noted above the subject property is actually comprised of two lots of a subdivision and one of the lots has a very large house that both parties agree requires significant updating. Mr. Glowacki testified that the unimproved lot, which is equivalent in size to the lot with the house, adds significantly to the value of the entire parcel. Mr. Stubenhofer, on the other hand, essentially maintains that the unimproved lot is of little or no significance to the parcel's fair market value. Their opinions as to the value of the improved portion of the property appear to be substantially the same. Following a thorough review of the evidence the Court concludes that Mr. Glowacki's opinion of the fair market value of the subject property is more persuasive.

Mr. Glowacki's conclusion was the result of an in-depth comparative analysis of five other sales of similar properties on South Shore Drive from October 2000 through November 2002 and one other waterfront property on Lakeshore Drive in 2003. In addition, he considered nine other comparable sales after 1996, seven of which were also sales of properties on South Shore Drive. All of the 15 properties considered by Mr. Glowacki were properties that adjoined either Presque Isle Bay or Lake Erie. The record reveals that Mr. Glowacki's conclusion was not only the result of a comprehensive analysis of a number of commonly considered appraisal criteria but also consideration of the idiosyncratic behavior of individuals interested in living on South Shore Drive. Specifically he provided support for his position that buyers interested in purchasing lakefront or bay front property are commonly willing to pay a premium for such real estate not withstanding the less than desirable condition of improvements. Moreover, he utilized a reasoned approach to the valuation of the portion of the parcel that was unimproved waterfront property in which he did not limit the lot's value to its development potential.

The taxpayer's vigorous attack on Mr. Glowacki's credibility, while raising relevant considerations of bias and carelessness, was insufficient to diminish the persuasiveness of his opinions. His error with regard to the calculation of the frontage of the property of 1480 South Shore Drive was inadvertent and of little consequence to his overall opinion. In light of the overall thoroughness of this approach, the evidence presented about his past and ongoing financial relationship with the MTSD did not detract in a material way from Mr. Glowacki's believability.

Mr. Stubenhofer also used the comparison method to evaluate the fair market value of the subject property. However, he only utilized three

comparable properties, only two of which were from South Shore Drive, and the third was not located on the waterfront. He suggested during his testimony that he chose this approach because of the difficulty in making adjustments for other comparable sales on South Shore Drive because of age and other factors. Significantly, Mr. Stubenhofer attributed virtually no value to the undeveloped portion of the subject property, maintaining that buyers are primarily interested in location and condition and not in the size of the lot. He further argued that there was no market for new homes on South Shore Drive and therefore, even assuming the parcel could be subdivided, future development would not be feasible. This court did not find Mr. Stubenhofer's conclusions persuasive, as they were not sufficiently supported by credible evidence.

As a result of a thorough review of the evidence the court concludes that the fair market value of the subject property for the years in question is $875,000. An appropriate order shall follow.

ORDER

AND NOW, to wit, this 25 day of August, 2005, upon consideration of the expert testimony and related evidence admitted during the non-jury trial held in the above captioned matter, and after a thorough review of the record, the Court finds in favor of Intervenor Millcreek Township School District. As such, it is hereby **ORDERED, ADJUDGED and DECREED** that the fair market value of the subject property for the tax years 2002 and 2003 is properly assessed at $875,000.

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

COMMONWEALTH OF PENNSYLVANIA

v.

HEMANT MANTRI, Defendant

CRIMINAL PROCEDURE / ADMISSIBILITY OF EVIDENCE / CONFESSIONS / MIRANDA WARNINGS

When counsel is requested, interrogation must cease and police may not reinitiate interrogation without counsel present, regardless of whether the accused has consulted with his attorney.

Where the accused has invoked the right to counsel, a valid waiver of that right is not established by showing that the accused responded to further interrogation after having been advised of his rights.

Trial court denied motion to suppress statements made prior to request for counsel where the accused did not invoke his right to counsel prior to interrogation.

Trial court granted motion to suppress statements made after the accused requested counsel during interrogation.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION Case No.: 1237 of 2005

Appearances: Elizabeth A. Vanstrom, Esq. for the Commonwealth
Robert A. Sambroak, Jr., Esq. for the Commonwealth
J. Timothy George, Esq. for the Defendant
Jonathan A. Bartell, Esq. for the Defendant

OPINION

This matter comes before the Court on Defendant's Omnibus Pretrial Motion for Relief. After an evidentiary hearing on the matter and considering the arguments of counsel, the Court will grant the motion in part and deny it in part. The factual and procedural history is as follows.

On the evening of March 15, 2005, Defendant Hemant Mantri was arrested at McDowell Intermediate High School in Millcreek Township, Pennsylvania. Defendant was transported to the Millcreek Police Department where he was handcuffed in a holding cell. After approximately thirty minutes, Defendant was removed from the holding cell and was escorted to an interrogation room. Detective Skonieczka of the Millcreek Police Department conversed briefly with Defendant during the short walk to the interrogation room, but he testified that he did not recall what was said during the conversation other than that he mentioned the interrogation would be taped. *See* N.T., Sept. 7, 2005 at 13. Defendant testified that during the conversation he said something to the effect that he needed a lawyer and that the detective responded that there will be a lawyer. *See id.* at 24.

Once in the interrogation room, Detective Skonieczka read Defendant the arrest warrant, the affidavit of probable cause, and the charges that had been filed against him. Defendant had been charged with two counts of Involuntary Deviate Sexual Intercourse, one count of Corruption of Minors and two counts of Indecent Assault. Defendant began to volunteer some statements, at which point Detective Skonieczka stopped him and read Defendant his *Miranda* rights. The detective also presented him with a *Miranda* waiver form for him to review and sign. He asked Defendant if he wanted to make a statement. Defendant indicated that he understood his rights and signed that portion of the waiver form.

It is clear from the videotape of the interrogation that Defendant was unsure about what he should do. He asked the detective to explain what a felony was, asked him what the possible implications of the charges were, and repeatedly asked "What should I do?" Detective Skonieczka told Defendant he could not give him legal advice and could not tell him what to do. Defendant then asked, "When can I get a lawyer? If there is a lawyer." Detective Skonieczka replied that a lawyer probably would not be available until the next day and possibly not until the day after that. Defendant then said "Oh, God." Detective Skonieczka asked if he should take that as a no, apparently understanding that Defendant did not wish to give a statement. Defendant asked the detective what he wanted Defendant to know, and Detective Skonieczka replied, "Well, I just need to know, you wanna tell me what happened?" Thereupon Defendant signed the waiver of *Miranda* rights and made his statement.

Defendant filed the instant omnibus motion seeking to suppress all statements made to Detective Skonieczka. Defendant contends that the statements were obtained in violation of the rule first announced in *Edwards v. Arizona*, 451 U.S. 477 (1981). In *Edwards*, the United States Supreme Court held that:

> when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-85. The Supreme Court further reflected that:

> *Miranda* itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, the interrogation must cease until an attorney is present, [and that]

> an accused's request for an attorney is a *per se* invocation of his Fifth Amendment rights, requiring that all interrogation cease.

ld. at 485 (citations omitted). The Supreme Court clarified the bright-line nature of the *Edwards* rule in *Minnick v. Mississippi*, 498 U.S. 146 (1990), wherein the Court stated:

> when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.

498 U.S. at 153.

Based upon the holdings of *Edwards* and *Minnick*, the Court finds that the interrogation of Defendant should have ceased once Defendant asked when he could see a lawyer. The Court finds that this was an invocation of his right to counsel, and the interrogation should have ended at that point. The Court holds that all statements obtained after Defendant asked when he could see a lawyer must be suppressed. Accordingly, Defendant's motion to suppress all statements made after he asked when he could see a lawyer is granted.

The question remaining before the Court is whether Defendant invoked his right to counsel, thereby triggering the *Edwards* rule, prior to the interrogation such that all of the statements he made during the interrogation must be suppressed. After careful review of the transcript of the evidentiary hearing and the videotape of the interrogation, the Court finds that the Defendant had not invoked his right to counsel prior to the interrogation, and the statements made prior to the time he asked for an attorney need not be suppressed.

At the evidentiary hearing, Defendant testified that he asked about a lawyer prior to entering the interrogation room. Specifically, Defendant testified as follows:

Q: Did you talk to the detective as you walked from the holding cell to the interview room?
A: Yes.
Q: What did you say to him?
A: I was asking about a lawyer. I do not remember my exact words. But I said something to the effect that I needed a lawyer and the response I got was there will be a lawyer.
THE COURT: The response was what? Wait a minute, I didn't hear the response
MR. MANTRI: There will be a lawyer.
THE COURT: There will be a lawyer?
MR. MANTRI: Yes.
Q: There will be a lawyer?
A: Yes. So actually I walk [sic] into that room expecting a lawyer to be present.

Q: When you didn't see a lawyer in the room, did you say anything about it?

A: I did not say anything about it. The exact feeling is I got into the room and I sat down there where I was brought in, provided a seat, and I'm thinking a lawyer will be there at some point now. And the detective started to read the charges on me --

N.T. at 24-25.

Detective Skonieczka testified that it was possible that Defendant asked for an attorney prior to entering the interrogation room. On cross-examination he testified:

Q: Do you remember what was said to you or what you said to Mr. Mantri during the period when he was being walked from the holding cell to the interview room?

A: I believe my only comment to him was the fact that we were going into a room that had audio and videotaping.

Q: He asked you would there be a lawyer there?

A: I don't recall that.

Q: Is it possible that he asked you --

A: Is it possible?

Q: -- would there be a lawyer there?

A: Is it possible? I would say yes.

Id. at 13.

Defendant argued that while in the interview room the statement that he made to the detective when inquiring about an attorney, "When can I get a lawyer? You said there was a lawyer," corroborates his assertion that he asked about an attorney prior to the interrogation and the detective lead him to believe that an attorney would be present. While the Court would agree that this is a compelling argument, and Defendant's statement "You said there was a lawyer," would lead one to believe that Defendant had previously inquired about an attorney, the Court does not find that this was the statement made by Defendant. After reviewing the videotape multiple times, the Court finds that the following exchange occurred:

Defendant: When can I get a lawyer?

Detective: What's that?

Defendant: When can I get a lawyer? *If there is a lawyer*.

Defendant's statement "If there is a lawyer," does not indicate to the Court that Defendant had asked about counsel prior to entering the interrogation room. The Court does not find that Defendant inquired about counsel on the walk from the holding cell to the interview room. This is particularly true in light of the fact that Defendant did not inquire about the absence of counsel immediately upon his entry into the interrogation room. Indeed, several minutes passed while Detective Skonieczka read Defendant the charges, while he apprised Defendant of his *Miranda* rights, and while Defendant struggled with making the

decision about whether or not to give a statement to the detective before he finally asked about speaking to an attorney.

Based upon Defendant's statements and demeanor, both on the videotape and at the evidentiary hearing, the Court does not find credible his assertion that he asked about speaking to an attorney prior to entering the interrogation room. Thus, the Court does not find that Defendant invoked his right to counsel while walking from the holding cell to the interrogation room, and there was no violation of the *Edwards* rule prior to the time on the videotape when Defendant asked when he could talk to a lawyer. Accordingly, Defendant's motion to suppress his statements prior to the point in time when he invoked his right to counsel is denied.

ORDER

AND NOW, to-wit this 29 day of September 2005, it is hereby ORDERED and DECREED that Defendant's Omnibus Pretrial Motion for Relief is GRANTED in part and DENIED in part in accord with the foregoing Opinion.

BY THE COURT:

/s/ **Fred P. Anthony, J.**

LORI SAUERS, Administratrix of the Estate of Michael Matson, Deceased, Plaintiff,

v.

RACK and ROLL, INC., ANGELA DANDREA, THE CITY OF ERIE, BENJAMIN GEORGE, DUSTIN RAS and DERRICK RUDLER, Defendants.

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS

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.

Preliminary objections are only to be sustained in cases where the law is clear and free from doubt.

Where any doubt exists as to whether a demurrer should be sustained, the matter must be resolved in favor of overruling the demurrer.

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.

POLITICAL SUBDIVISIONS / MUNICIPAL CORPORATIONS / ACTIONS INVOLVING GOVERNMENT IMMUNITY

Absence of sidewalk does not constitute a "dangerous condition" of the sidewalk under 42 Pa. C.S. § 8542(b)(7).

In order to come within sidewalk exception to government immunity, the dangerous condition or defect alleged must be directly related to the sidewalk.

Local agency is not legally responsible for failing to enforce an ordinance requiring property owners to install sidewalks or for failing to prevent cars from illegally parking in area where sidewalk would normally be constructed.

TORTS / NEGLIGENCE / DUTY

Passengers of motor vehicle are not liable to third parties for injuries sustained in motor vehicle accidents.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CIVIL DIVISION NO. 14639 of 2004

Appearances: Tibor R. Solymosi, Esq. for Lori Sauers
Francis J. Klemensic, Esq. for Nathan Bielecki
Miles A. Kirshner, Esq. for Rack and Roll, Inc. and Angela Dandrea
Patrick M. Carey, Esq. for Derrick Rudler
Gary J. Shapira, Esq. for Dustin Ras
James D. McDonald, Jr., Esq. for Benjamin George
David Haber, Esq. of Pittsburgh for the City of Erie

OPINION

To be decided are various Preliminary Objections filed by three of the Defendants. After oral argument, the City of Erie's Preliminary Objections

are hereby **GRANTED**. As to Defendants Dustin Ras and Derrick Rudler, their Preliminary Objections in the Nature of a Demurrer are **GRANTED** as are their Objections to punitive damages.

FACTUAL/PROCEDURAL HISTORY

On December 24, 2002, Nathan Bielecki, Dustin Ras and Derrick Rudler, all minors, left a party where they had been consuming alcohol. According to the Plaintiff's Complaint, at 12:30 a.m., a vehicle driven by Nathan Bielecki went through a red light at Greengarden Boulevard and West 32nd Street in the City of Erie and collided with another vehicle. With the urging of Ras and Rudler, Bielecki fled the scene. Bielecki drove south on Greengarden Boulevard, turned onto West 38th Street and was traveling at a high rate of speed.

Meanwhile, Michael Matson reached the intersection of West 38th Street and Schaper Avenue intending to make a left-hand turn from Schaper onto West 38th Street. Plaintiff claims Matson's view was obstructed by vehicles parked along West 38th Street adjacent to the parking lot of Rack and Roll, Inc. As Matson turned onto West 38th Street, his vehicle was struck by Bielecki's. Tragically Matson was killed.

The personal representative of Matson's estate filed a Praecipe for Writ of Summons on December 17, 2004 followed by a Complaint on February 17, 2005. In response, the City of Erie filed Preliminary Objections in the Nature of a Demurrer, Derrick Rudler filed Preliminary Objections/Legal Insufficiency of Pleading (Demurrer) and Dustin Ras filed Preliminary Objections in the Nature of a Demurrer. Rudler and Ras also challenge Plaintiffs' claim for punitive damages.

LEGAL STANDARDS

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*, 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 is clear and free from doubt. *Pennsylvania AFL-CIO v. Commonwealth*, 757 A.2d 917 (Pa. 2000). Where any doubt exists as to whether a demurrer should be sustained, the matter must be resolved in favor of overruling the demurrer. *Shick, supra*.

The City of Erie

Plaintiff argues that Matson's death was caused by the absence of a sidewalk in front of Rack and Roll, Inc. Because there was no sidewalk, Plaintiff alleges patrons illegally parked on West 38th Street thereby obstructing the view of traffic turning onto 38th Street from Schaper Avenue.

The City of Erie (the City) raises the shield of governmental immunity. *See* 42 P.C.S.A. §8541 and §8542. The City claims that Plaintiff failed to plead facts that fall within any of the eight exceptions to governmental immunity.

The Plaintiff's response is that the "sidewalk" exception pierces the City's immunity. This exception provides:

> § 8542. **Exceptions to governmental immunity**
>
> ...
>
> (7) Sidewalks. A dangerous condition of sidewalks within the right-of-way of streets owned by 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. When a local agency is liable for damages under this paragraph by reason of its power and authority to require installation and repair of sidewalks under the care, custody and control of other persons, the local agency shall be secondarily liable only and such other persons shall be primarily liable.

42 Pa.C.S. § 8542 (b)(7).

Plaintiff argues that a "no sidewalk" condition is tantamount to a "dangerous condition" under the statute. Plaintiff contends the sidewalk exception would make a municipality liable for damages because of its authority to require the installation of the sidewalk. Plaintiff claims that had the sidewalk been constructed in front of Rack and Roll, Inc., then cars would not have been parked along the street obstructing the vision of drivers entering 38th Street from Schaper Avenue.

Plaintiff argues that immunity can be defeated with proof that the sidewalk is "improperly designed," "improperly constructed" or "badly maintained, deteriorating, crumbling." *Finn v. The City of Philadelphia*, 664 A.2d 1342, 1346 (Pa. 1995). However, a non-existent sidewalk cannot be improperly designed, constructed or maintained. The Plaintiff cites no case in which the lack of a sidewalk was treated as a dangerous condition resulting in an injury.

In *Ziccardi v. School District of Philadelphia,* 498 A.2d 452 (Pa. Commw. Ct. 1985), student George Ziccardi was attacked on the sidewalk immediately adjacent to the school. He suffered various injuries. Ziccardi filed a complaint against the School District as well as the City. Both the School District and the City filed preliminary objections in the nature of a demurrer asserting governmental immunity. Ziccardi, appealed, arguing his claim fell under various exceptions including the sidewalk exception in 42 Pa.C.S. §8542(b)(7). The Commonwealth Court affirmed stating:

> [W]e do not believe the School District can be held liable under Section 8542(b)(7) since the appellants have failed to allege a physical defect in the sidewalk. The property is not a cause of injuries sustained...
>
> The sidewalk exception under Section 8542(b)(7) also does not apply because appellants did not allege any physical defect directly related to the sidewalk. Essentially, they have alleged a general failure to prevent criminal misconduct.

Ziccardi, 498 A.2d at 454.

Likewise, in the present case, Plaintiff has failed to allege any "physical defect directly related to the sidewalk." *Id.* As in *Ziccardi*, Plaintiff alleges a general failure to prevent misconduct (illegal parking) where a sidewalk was absent - not a physical defect in the sidewalk itself. Accordingly, Plaintiff failed to plead facts that would make the absence of a sidewalk a "dangerous condition".

Plaintiff also argues the City is liable for failing to enforce its ordinances. Legal authority belies this assertion. The City is neither legally responsible for failing to enforce the sidewalk ordinance nor liable for failing to prevent cars from illegally parking in front of Rack and Roll, Inc.

In *Buffalini v. Shrader*, 535 A.2d 684 (Pa. Commw. Ct. 1987), the Plaintiff was a passenger injured when the driver of the car failed to stop at an intersection because a commercial sign obstructed the driver's view of a stop sign. *Buffalini*, 535 A.2d at 684. The location of the commercial sign violated the Hempfield Township's ordinance. *Id.* at 686. Plaintiff argued that Hempfield Township was negligent in failing to enforce its ordinance. *Id.* The trial court awarded summary judgment to the Township and the Plaintiff appealed. *Id.* The Commonwealth Court affirmed the grant of summary judgment. *Id.* The Court found that the Township did not have an affirmative duty to order the removal of the commercial sign since there was no evidence to support the allegation that the Township knew the sign existed prior to the accident. *Buffalini*, 535 A.2d at 688. Further, even if the Township had breached a duty to enforce the ordinance with respect to the commercial sign, the Court found that the Township would still be protected under governmental immunity. *Id.*

The Plaintiff in *Buffalini* also argued that the Township had an affirmative duty under the Motor Vehicle Code. *Id.* The Commonwealth Court held the Motor Vehicle Code section "does not impose an affirmative duty upon the municipality but rather, allows it discretion to exercise its police powers." *Id.* at 689.

In *Wecksler v. Philadelphia*, 115 A.2d 898 (Pa. Super 1955), the Plaintiff was seriously injured while walking on a sidewalk and trying to step around illegally parked vehicles. Plaintiff argued that "[t]he city in permitting vehicles to be parked on the sidewalk over a long period of time, caused

sidewalk lighting to be impaired which created a condition of hazard for sidewalk travel and a nuisance on the highway." *Wecksler*, 115 A.2d at 899. Affirming the dismissal of Plaintiff's case, the Superior Court stated, "a municipality is not liable for failure to enforce an ordinance enacted pursuant to permissive authority." *Id.* at 901.

In the present case, the City is protected by government immunity. Notably, "exceptions to governmental immunity are to be narrowly construed." *Regester v. County of Chester*, 797 A.2d 898, 901 (Pa. 2002). The sidewalk exception is not applicable since the lack of a sidewalk is not a physical defect constituting a known dangerous condition. Further, a municipality is not liable under these facts for the failure to require Rack and Roll, Inc. to install a sidewalk.

PRELIMINARY OBJECTIONS OF DUSTIN RAS AND DERRICK RUDLER

Dustin Ras and Derrick Rudler have separately filed a Motion to Dismiss for a Failure to State a Legal Claim of Relief. These Defendants contend that as passengers, there is no legal duty owed to third parties injured by the negligence of the driver of the passengers vehicle.

Ras and Rudler are similarly situated as passengers in a vehicle operated by Nathan Bielecki. Plaintiff contends Ras and Rudler "aided and abetted" Bielecki in committing unlawful acts by "advising and encouraging" Bielecki to flee the scene of an accident at a high and dangerous speed while under the influence of alcohol in violation of the Pennsylvania Motor Vehicle Code. Plaintiff further alleges Ras, Rudler and Bielecki entered into a conspiracy to commit unlawful acts to avoid being charged with underage drinking.

The gaping hole in Plaintiff's case is the lack of any legal duty owed by Ras and Rudler to Matson. As passengers, Ras and Rudler are not liable to third parties based on the negligent operation of a motor vehicle by Bielecki.

Our Appellate Courts have repeatedly addressed the liability of passengers in a vehicle being negligently operated by a driver. To date, all attempts to impose liability on passengers, including under the Restatement (Second) of Torts §876, have been rejected.

In *Brandjord v. Hooper,* 455 Pa. Super. 426, 688 A.2d 721, alloc. denied, 550 Pa. 675, 704 A.2d 633 (1997), a plaintiff sued the passengers of a van being operated by an intoxicated driver. It was undisputed that the driver and his passengers had been consuming alcohol for a lengthy period of time prior to, during and after a Philadelphia Eagles football game. In affirming summary judgment in favor of the defendants, the Superior Court stated:

> "A passenger does not owe a duty to a third person when the driver of the vehicle is intoxicated, particularly when passengers and the driver merely participate in the joint procurement and ingestion of alcohol,

> absent the existence of a special relationship, joint enterprise, joint venture or a right of control to the vehicle. . .to impose a duty on a passenger making him liable to others for what the driver chooses to do is inappropriate; such a rule assumes, incorrectly, that a passenger somehow shares in the management of the vehicle and the driver is amenable to the passengers influence. Even more troubling, however, is that such a duty would open a variable Pandora's box of potential liability and responsibility problems."

Brandjord, 688 A.2d at 723 - 24.

The result in *Brandjord*, *supra*, was based in part on *Clayton v. McCullough*, 448 Pa. Super. 126, 670 A.2d 710, alloc. denied., 544 Pa. 667, 677 A.2d 838 (1996). The Plaintiff in *Clayton* tried to establish a claim of negligence against a passenger for allowing a driver to operate a motor vehicle while intoxicated. Specifically, Rebecca McCullough and Wanda Steinhoff were consuming alcohol together and leaving one tavern to drive to another. McCullough requested to drive out of concern for Steinhoff's level of intoxication. Steinhoff refused and drove the two of them towards the next bar, with McCullough holding Steinhoff's drink for her. McCullough expressed concern for the erratic manner in which Steinhoff was driving and even warned her of the presence of a pedestrian alongside the road. Unfortunately, Steinhoff struck and killed the pedestrian. The Superior Court affirmed McCullough's demurrer to the complaint by concluding that a passenger does not owe a duty to a third party despite knowledge that the driver of the passenger's vehicle is intoxicated. *Clayton*, *supra*, 670 A.2d at 713.

A similar result was reached in *Welc v. Porter*, 450 Pa. Super. 112, 675 A.2d 334 (1996). The Superior Court framed the issue as "whether a minor passenger owes a duty of care to a third person who is injured as a result of the negligent conduct committed by the driver of the vehicle in which the passenger is riding." 675 A.2d at 336. The plaintiffs were passengers in a vehicle struck by an intoxicated driver. The defendant was a passenger of the intoxicated driver. Both the plaintiff and the defendant were minors. In dismissing plaintiff's claim, the Superior Court noted:

> "With regard to the question of whether a recognized duty of care exists, appellants have not referred to any Pennsylvania cases, nor their own research uncovered any such authority, in which a minor passenger of a vehicle has been held liable for injuries sustained by a third person as a result of the drivers negligent operation of the vehicle."

Welc, 675 A.2d at 337.

In arriving at its holding, the Court in *Welc* relied in part on *Clayton*, *supra*.

> "Moreover, it would be anomalous for this Court to find that appellee, who was a minor at the time of the accident, owed a duty to appellant based on his status as a passenger in the vehicle when a similar duty has been deemed lacking on the part of an adult passenger. We thus conclude that appellee owed no duty to the decendent [sic]. Our holding is consistent with the decisions of our sister states which have generally acknowledged that absent the existence of a special relationship, joint enterprise, joint venture or a right to control the vehicle, a passenger owes no duty to protect third persons or other passengers from the negligent acts of the driver."

Welc, 675 A.2d at 338.

Undeterred by these decisions, Plaintiff contends that Ras and Rudler are liable under a "concert of action" theory as found in the Restatement (Second) of Torts, which provides in relevant part:

> **"Section 876 - Persons Acting in Concert:**
> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he: (a) does a tortious act in concert with the other or pursuant to a common design within, or (b) knows that the other's conduct constitute a breach of duty and gives substantial assistance or encouragement to the other to so conduct himself..."

Restatement (Second) of Torts §876(a)(b) (1977).

The Pennsylvania Supreme Court has yet to adopt Section 876 of the Restatement (Second) of Torts. In *Clayton, supra*, the Pennsylvania Superior Court stated: "(w)e are not bound by Section 876(b) of the Restatement (Second), as it has not been adopted by the Pennsylvania Supreme Court." *Clayton*, 670 A.2d at 713.

As discussed in *Clayton*, a passenger who thought her driver was too intoxicated to drive yet held the driver's drink and warned the driver about her erratic driving and the presence of a pedestrian, was not sufficient for the Superior Court to invoke Section 876 as a basis for liability. In a different setting, the Pennsylvania Supreme Court has not extended liability under Section 876 to a social host for a third party injured as a result of the negligence of an intoxicated guest. See *Klein v. Raysinger*, 504 Pa. 141, 470 A.2d 507 (1983). By comparison, there is nothing factually unique or compelling in this case requiring liability based on a concert of action theory.

Both Ras and Rudler were minors as was the defendant in *Welc*. Ras and Rudler had no authority to control Bielecki's operation of the motor vehicle. Ras and Ruler were not Bielecki's employer, parent or any other person in authority to whom Bielecki would be expected to comply with a request to drive a motor vehicle at a high rate of speed.

As a general rule, liability is based upon accountability for choices

made by a person. Nathan Bielecki clearly had his own choices to make. Regardless of any input from Ras or Rudler, it was Bielecki who was in charge of his conduct. While Ras and Rudler may have been advising and/or encouraging Bielecki to make wrong choices about the operation of a motor vehicle, the uncontrovertible fact remains that the final choice was Bielecki's.

To adopt Plaintiff's theory would result in a slippery slope of liability from which there is no return. For example, would liability be extended for passengers who encouraged a driver to go at a high rate of speed to arrive on time for school, work or a medical appointment, etc.? Would liability attach to a passenger who encouraged a driver to violate the traffic code enroute to the hospital or a religious service? Indeed, there is a Pandora's box of possibilities which dictates as a matter of policy that liability cannot be extended from passengers to third parties.

Lastly, Plaintiff alleges liability for Ras and Rudler based on a conspiracy to commit unlawful acts to avoid being charged with underage drinking. Plaintiff's argument is unpersuasive.

Factually, Plaintiff fails to establish how this purported conspiracy was the proximate cause of the accident. After all, it was Matson who pulled out onto 38th Street into oncoming traffic.

Further, the Defendants cannot conspire to violate Sections 3744 and 3361 of the Pennsylvania Motor Vehicle Code. In Pennsylvania, liability for violating 75 Pa. C.S. §3744 (Fleeing the Scene of an Accident), 75 Pa. C.S. §3361 (Operating a Vehicle at a High and Dangerous Speed) has never been extended to a passenger in the vehicle. Liability is limited to the actual driver of the vehicle. It is not an acceptable defense to these offenses that the driver was encouraged or assisted in violating these provisions by a passenger. Only the driver can be held criminally and/or civilly liable for violating these provisions.

In sum, there is no cause of action in negligence arising from an allegation that a passenger in a motor vehicle "aided and abetted" or "assisted and encouraged" a driver to commit a violation of the Motor Vehicle Code. It is the driver who is accountable for his or her own negligence. Accordingly, all of Plaintiff's claims against Ras and Rudler must be dismissed.

MOTION TO DISMISS PUNITIVE DAMAGES

Given the dismissal of the substantive claims, it follows that the Plaintiff's claim for punitive damages must likewise be dismissed.

CONCLUSION

This Court is empathic for the Plaintiff's loss. Nonetheless, established legal authority precludes recovery against a municipality or passengers under these facts. Therefore, the Preliminary Objections must be granted.

BY THE COURT:
/s/ **WILLIAM R. CUNNINGHAM, JUDGE**

TRACY BUTLER

v.

ROBERT D. ALLISON

NO. NS910896 PACSES NO. 373003880

KATRINA POWELL

v.

ROBERT D. ALLISON

NO. NS914129 PACSES NO. 042003887

VANESSA M. ZEARFOSS

v.

ROBERT D. ALLISON

NO. NS941711 PACSES NO. 557003878

FRANCES L. BRESEE

v.

ROBERT D. ALLISON

NO. NS200000006 PACSES NO. 157101858

FAMILY LAW / CHILD SUPPORT

A party appealing a domestic relations matter, who does not raise appellate issues at the time of the hearing, must file a motion for reconsideration in order to preserve those issues for appellate review, and comply with Pa. R.A.P. 1930.2(b). Failure to do so results in failure to preserve these issues for appellate review. Pa. R.A.P. 302.

The Court reviewed the merits of each of the defendants four issues on appeal assuming, arguendo, that defendant had not waived these issues. With respect to the first issue, whether defendant is factually incorrect in his claim that he was not found in contempt of Court at two of the docket numbers, the Court noted four separate orders where the defendant was found in contempt of Court.

With respect to the second issue, whether the lower Court abused its discretion in setting defendant's purges, the Court determined that the defendant had the present ability to pay these purges and ordered that the defendant be held in civil contempt. Punishment for contempt in support actions is governed by 23 Pa. C.S. §4345 which provides that a person who willfully fails to comply with any order may be judged in contempt. Contempt shall be punishable by any one or more of the following:

1. Imprisonment for a period not to exceed six months.
2. A fine not to exceed $1,000.00.
3. Probation for a period not to exceed one year.

23 Pa. C.S. §4345(b) provides that (an order committing a defendant to jail under this section shall specify the condition the fulfillment of which will result in the release of the obligor).

Since the defendant did not present any evidence that he is presently unable to pay the purges, and in fact raised no objection to the lower

Court's imposition of purges, the Court found that the defendant had the present ability to pay his purges.

The third issue, whether the lower Court abused its discretion by imposing consecutive incarceration sentence of six months on each of the four separate cases, also fails. Imposing sentences of incarceration with consecutive findings is authorized within the statute.

The defendant's fourth issue, whether he is entitled to a jury trial, also fails. The United States and Pennsylvania Constitutions require that when accused of a serious offense a defendant has the right to trial by jury. The decisions of the Supreme Court of the United States established a fixed dividing line between petty and serious offenses: those crimes carrying more than six month sentences are serious; those carrying less are petty. Therefore it is well established that no right to a jury trial exists where a sentence of six months or less is imposed. *Cmwlth. v. Smith,* 868 A.2d 1253 (Pa. Super. 2005).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA DOMESTIC RELATIONS

Appearances: Stephen J. Lagner III, Esq., Assistant Public Defender
Thomas S. Kubinski, Esq. on behalf of the Department of Public Welfare
Heather L. Purcell, Esq., on behalf of the Erie County Office of Domestic Relations

OPINION

Domitrovich, J., September 1, 2005

This matter is currently before the Court on the appeals of Robert D. Allison (hereinafter referred to as Defendant) from four separate support Orders, entered by this Lower Court on May 2, 2005.[1] In each of these Orders, this Lower Court found Defendant in contempt of court for failure to pay support as ordered, sentenced Defendant to six months of incarceration for each of the four cases, to be run consecutively, and set Defendant's purge amounts, based on his ability to pay, at the total current amount of Defendant's arrearages for each case.[2] Since all four appeals are premised on similar factual, procedural, and legal backgrounds, this

[1] Defendant's four appeals are docketed in the Superior Court of Pennsylvania as follows: Butler, R. v. Allison, R. at Docket Number 1050 WDA 2005; Zearfoss, V. v. Allison, R. at Docket Number 1051 WDA 2005; Bresee, F. v. Allison, R. at Docket Number 1052 WDA 2005, and Powell, K. v. Allision, R. at Docket Number 1053 WDA 2005.

[2] The amounts of the purges in Defendant's cases are as follows: $835.70 at Docket Number NS910896; $760.64 at Docket Number NS914129; $615.17 at Docket Number NS941711; and $545.95 at Docket Number NS200000006.

Lower Court will address each issue as to each case in the same Pa. R.A.P. 1925(a) opinion. Defendant, by and through Stephen J. Lagner III, Esq., has raised four issues on appeal;[3] however, Defendant has failed to preserve any of these issues by raising them at the time of the May 2, 2005 hearing in this matter, or by filing a Motion for Reconsideration, pursuant to Pa. R.C.P. 1930.2. Pa. R.A.P. 302(a) provides, "issues not raised in the lower court are waived and cannot be raised for the first time on appeal." The Pennsylvania Rules of Civil Procedure that relate to domestic relations matters do not permit the filing of post-trial motions. Pa. R.C.P. 1930.2(a); Pa. R.C.P. 1910.25-6. Nevertheless, the Rules do provide litigants with an opportunity to raise issues that were not previously raised by filing a Motion for Reconsideration, pursuant to Pa. R.C.P 1930.2(b). Motions for Reconsideration "allow the trial court to take a second look at a case before it is appealed to the Superior Court. . .The aim of these rules is to ensure that domestic cases are moved as quickly as possible toward a final resolution." *Domestic Relations Committee Explanatory Comment to Pa. R.C.P. 1930.2.* Motions for Reconsideration are particularly important in domestic relations cases since Pa. R.C.P. 1930.2 does not permit post-trial motions in domestic relations cases. It is true that Pa. R.C.P. 1930.2 is not a mandatory rule. It states, "a party aggrieved by the decision of the court *may* file a motion for reconsideration..." Pa. R.C.P. 1930.2 (emphasis added). However, Pa. R.A.P. 302(a) requires appellants to preserve their issues for appellate review. Therefore, a party appealing a domestic relations matter, who does not raise appellate issues at the time of the hearing, *must* file a Motion for Reconsideration in order to raise the issues before the Lower Court, and preserve those issue for appellate review.

In *In re: Griffin*, 690 A.2d 1192 (Pa. Super. Ct. 1997), the Superior Court of Pennsylvania addressed the importance of filing a Motion for Reconsideration, in order to preserve issues for appellate review. *In re: Griffin*, the appellants asserted that Pa. R.C.P. 1930.2(a), which provides, "there shall be no motions for post-trial relief in any domestic relations matter," allowed the appellants to advance an issue on appellate review that had never been raised before the trial court. *In re: Griffin, supra* at

[3] Specifically, Defendant raised the following from issues on appeal: (1) "it is believed and therefore averred that the Court erred in setting the purge figures at each and all dockets by failing to adequately find that Defendant had an actual ability to pay such amounts;" (2) "it is believed and therefore averred that the Court erred in imposing the contempt sentences consecutively to a total amount of incarceration which exceeded 6 months;" (3) "it is believed and therefore averred that the Court erred in not advising Defendant that he had a right to a trial by jury when the total amount of incarceration exceed[ed] 6 months;" and (4) "Defendant believes and therefore avers that according to support docket information, he was not, in fact, found to be in contempt, at two of the docket numbers thus rendering sentence of incarceration at those dockets void and illegal."

1208. The Pennsylvania Superior Court held that this assertion "is patently false." *Id.* Issues that were not raised in the lower court are waived and cannot subsequently be raised on appeal. *Id.*

Furthermore, an appellant has the obligation to demonstrate, with citation to the record, that an issue has been raised or preserved for appellate review. *In re Griffin,* 690 A.2d 1192, 1208 (Pa. Super. Ct. 1997). In an appellate brief, the appellant is required to include a statement of the case, pursuant to Pa. R.A.P. 2117(c). Specifically, an appellant must include a "statement of place of raising or preservation of issues. Where under the applicable law an issue is not reviewable on appeal unless raised or preserved below, the statement of the case shall also specify:"

> (1) The state of the proceedings in the court of first instance, and in any appellate court below, at which, and the manner in which, the questions sought to be reviewed were raised.
>
> (2) The method of raising them (e.g. by a pleading, by a request to charge and exceptions, etc.).
>
> (3) The way in which they were passed upon by the court.
>
> (4) Such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g. ruling or exceptions thereto, etc.) as will show that the question was timely and properly raised below so as to preserve the question on appeal.

Furthermore, pursuant to Pa. R.A.P. 2119(e), an appellant must provide.

> A statement of place of raising or preservation of issues. Where under the applicable law an issue is not reviewable on appeal unless raised or preserved below, the argument must set forth, in immediate connection therewith or in a footnote thereto, either a specific cross reference to the page or pages of the statement of the case which set forth the information relating thereto required pursuant to Rule 2117(c) (statement of place of raising or preservation of issues), or substantially the same information.

See also In re Griffin, 690 A.2d 192, 1208 (Pa. Super. Ct. 1997).

In the instant matter, at the time of the May 2, 2005 support contempt hearing, at which Defendant appeared *pro se*,[4] Defendant failed to raise any

[4] It is noted that Defendant had been properly served with the Petition for Contempt, which notified and advised Defendant that he is entitled to representation by a Public Defender at the time scheduled for his support contempt hearing. Although Public Defenders are available to advise and represent defendants involved in support contempt proceedings, Defendant chose not to be represented by counsel at his hearing. Rather, subsequent to the time of Defendant's May 2, 2005 support contempt hearing, Defendant decided to obtain a Public Defender to represent him for purposes of the instant appeal.

of the specific issues he now raises on appellate review. Defendant never objected to this Lower Court's finding that he had the ability to pay the purge amounts, Defendant never objected to this Lower Court's imposition of consecutive contempt sentences of six months of incarceration at each Docket Number, Defendant never requested a jury trial, and Defendant never raised his completely inaccurate claim that he was found in contempt of court at only two of the instant Docket Numbers. At the conclusion of the May 2, 2005 hearing, the undersigned judge specifically stated that she was entering four separate Orders of Court, finding Defendant was capable of working, finding Defendant in contempt of court for each of the four cases for failure to pay as ordered, imposing an incarceration sentence of six months for each of the four cases, to be run consecutively, and setting the purge amounts for each case at the total amount of Defendant's arrearages. (N.T. 5/2/05 p. 10); *See also Orders of Court at each Docket Number, entered May 2, 2005.* However, at the time of the hearing, Defendant did not raise any objection to the Court's Orders. *See* (N.T. 5/2/05 p. 10). Therefore, all of the issues Defendant now advances in the instant appeal were never raised before this Lower Court at the time of the May 2, 2005 support contempt hearing.

Furthermore, as previously set forth, in domestic relations cases, the proper vehicle through which to raise issues for appellate review that were not previously raised, is the Motion for Reconsideration, which Defendant failed to file with this Lower Court. Even though Pa. R.C.P. 1930.2 is not a mandatory rule, a party appealing a domestic relations matter, who does not raise appellate issues at the time of the hearing, must file a Motion for Reconsideration in order to preserve those issues for appellate review, and comply with Pa. R.A.P. 1930.2(b). In the instant case, Defendant failed to file a Motion for Reconsideration. Therefore, Defendant failed to raise before this Lower Court, at the time of the hearing or at any time thereafter, any of the issues he now advances on appeal, and, consequently, Defendant failed to preserve these issues for appellate review. Accordingly, pursuant to Pa. R.A.P. 302, Defendant waived all of the issues he now advances for the first time on appeal.

Additionally, in his appellate brief to the Superior Court of Pennsylvania, Defendant will not be able to demonstrate where in the record he raised or preserved any of the issues he now advances on appeal. As previously set forth, pursuant to Pa. R.A.P. 2117(c), appellants must include a statement of the case, indicating where in the record they preserved their appellate issues. In the instant matter, however, Defendant cannot comply with Pa. R.A.P. 2117(c) since Defendant failed to preserve any of the issues he now advances on appeal. Therefore, as Defendant failed to raise any of the issues included in his Pa. R.A.P. 1925(b) Concise Statement of Matters Complained of on Appeal before this Lower Court, Defendant has waived all of his issues for purposes

of appellate review. Accordingly, Defendant's appeal is meritless.

Assuming *arguendo* that Defendant had not waived all of the issues he now advances for the first time on appeal, Defendant's issues would still fail. Accordingly, this Lower Court will address the substantive merits of each of the following issues: (1) whether Defendant is factually incorrect in his claim that he was not found in contempt of court at two of the docket numbers in this matter; (2) whether this Lower Court abused its discretion in setting Defendant's purges at $835.70 at Docket Number NS910896, $760.64 at Docket Number NS914129, $568.24 at Docket Number NS941711, and $527.61 at Docket Number NS200000006, as Defendant had the present ability to pay these purges; (3) whether this Lower Court abused its discretion by imposing an incarceration sentence of six months at each of the four separate cases, pursuant to 23 Pa.C.S. §4345; and (4) whether Defendant had the right to a jury trial, where none of his incarceration sentences, at any of the four docket numbers, exceeded six months.

The extensive and complicated factual and procedural history of this case is as follows: At **Docket Number NS910896**, on March 15, 1991, Tracy Butler, hereinafter referred to as Plaintiff #1, filed a Complaint for Child Support, on behalf of the parties' minor child, Nathaniel Butler (hereinafter referred to as N.B.), born on June 13, 1990. On July 1, 1991, the undersigned judge entered an Order, directing Defendant to appear at a conference, scheduled for August 12, 1991. Subsequently, on August 12, 1991, the undersigned judge entered an Order, directing Plaintiff #1, Defendant, and N.B. to submit to genetic testing. The results of the genetic testing revealed there was a 99.96% probability that Defendant is the father of N.B. On January 22, 1992, Defendant signed an Acknowledgment of Paternity, as to N.B., and waived his right to a paternity trial. The undersigned judge accepted Defendant's Acknowledgment.

On January 28, 1992, the undersigned judge directed Defendant to appear for a support conference, scheduled for March 6, 1992. On March 6, 1992, the undersigned judge entered the original support Order in this matter, pursuant to the agreement of both parties, directing Defendant to pay $52.00 per month for the support of T.B. and $10.00 per month for the payment of genetic testing costs.

Between 1992 and 1996, Defendant was directed to appear for several domestic relations interviews, for the purpose of assessing Defendant's income and compliance with the existing support Order. Specifically, the Court entered Orders on May 6, 1992, May 18, 1992, August 6, 1992, December 18, 1992, May 27, 1993, March 24, 1994, April 14, 1994, June 6, 1995, September 24, 1995, and July 31, 1996, directing Defendant to appear for domestic relations interviews. Furthermore, between 1992 and 1996, the Office of Domestic Relations scheduled support conferences

for July 27, 1995, August 22, 1995, October 2, 1995, November 8, 1995, December 28, 1995, and February 7, 1996, at which a support officer could recommend that a new Order of Support be entered. Nevertheless, between 1992 and 1996, no such recommendation was made, no new Order was entered, and the amount of Defendant's monthly support obligation, pursuant to the March 6, 1992 Order, remained the same.[5]

Additionally, between 1992 and 1996, the Court entered several Orders, directing the attachment of Defendant's income. On March 10, 1992 the undersigned judge entered an Order of Attachment of Income, directing Defendant's employer, Career Concepts, to deduct $14.31 weekly from the income otherwise payable to Defendant. Subsequently, on April 24, 1992, the undersigned judge entered an Order for Attachment of Income, directing Defendant's employer, EMI, to deduct $20.00 weekly from the income otherwise payable to Defendant. On June 1, 1992, Judge Bozza entered an Order of Attachment of Unemployment Compensation Benefits, directing the Bureau of Unemployment Compensation Benefits and Allowances (hereinafter referred to as BUCBA) to attach $18.00 per week of the Unemployment Compensation benefits otherwise payable to Defendant. Subsequently, on August 24, 1992, Judge Bozza entered an Order for Attachment of Income, directing Defendant's employer, Better Baked Foods Inc., to deduct $18.00 weekly from the income otherwise payable to Defendant. On March 17, 1993, Judge Bozza entered an Order for Attachment of Income, directing Defendant's employer, Adem Salvage, to deduct $18.00 weekly from the income otherwise payable to Defendant. On February 2, 1994, Judge Bozza entered an Order for Attachment of Income, directing Defendant's employer, Adem Salvage, to deduct $18.00 weekly from the income otherwise payable to Defendant. On April 26, 1994, Judge Bozza entered an Order for Attachment of Income, directing Defendant's employer, Dunn Tire, to deduct $15.69 weekly from the income otherwise payable to Defendant. On August 8, 1994, Judge Bozza entered an Order for Attachment of Income, directing Defendant's employer, Adem Salvage, to deduct $15.69 weekly from the income otherwise payable to Defendant. Finally, on April 26, 1996, Judge Fischer entered an Order for Attachment of Income, directing Defendant's employer, Interim Personnel, to deduct $15.69 weekly from the income otherwise payable to Defendant.

On October 25, 1996, the Erie County Office of Domestic Relations filed a Petition for Civil Contempt against Defendant, stating that an Order for support was entered in this matter on March 6, 1992; however, Defendant had failed to pay as directed. Furthermore, Defendant had failed to appear before a domestic relations officer, pursuant to the

[5] In fact, Defendant's support obligation, with regard to Plaintiff #1's case, did not change until March 2, 2000.

July 31, 1996 Order. Finally, the Office of Domestic Relations certified that Defendant's arrears amounted to $2,442.34. Accordingly, on October 23, 1996, Judge Fischer directed Defendant to appear for a support contempt hearing on November 18, 1996.

On November 18, 1996, Judge Cunningham entered an Order, after a hearing, continuing the Petition for Contempt, until disposition of the criminal charges that were pending against Defendant. On March 5, 1997, Judge Fischer entered an Order for Suspension, suspending the March 6, 1992 support Order, effective January 22, 1997, as Defendant had been sentenced, at his criminal case, by Judge Connelly to one to twelve months of county incarceration, with an effective date of sentence of January 22, 1997. The child support Order was to reinstate automatically upon Defendant's release from prison. Furthermore, it is noted that on May 23, 1997, a Judgment was entered against Defendant, regarding his case involving Plaintiff #l, on the arrearages in this matter, in the amount of $2,597.75. *See Attached Exhibit A.*

On May 14, 1998, Plaintiff #1 filed a Petition to Modify Defendant's support obligation. Plaintiff requested that the suspension on the March 6, 1992 Order be lifted, retroactive to the date of Defendant's release from prison. Furthermore, Plaintiff #l requested an increase in Defendant's child support obligation. Therefore, Judge Fischer directed Defendant to appear for domestic relations support conferences, scheduled for June 18, 1998 and November 10, 1998. On November 10, 1998, Judge Fischer entered an Order, after a hearing, stating that the Order was to remain suspended as Defendant was under a doctor's care and was receiving cash assistance. Defendant was directed to contact the Support Office once he was released from the doctor's care, so that a review hearing could be held and the support Order could be reinstated. Subsequently, on June 10, 1999, Judge DiSantis directed both Plaintiff #1 and Defendant to appear at a domestic relations support conference, scheduled for July 22, 1999.

On March 2, 2000, Judge Kelly entered an Order, suspending the active March 2, 1992 Order of support in this matter, as N.B. resided with his maternal great-grandmother, Frances Bresee, Plaintiff #4, and not with Ms. Butler, Plaintiff #1. Nevertheless, Defendant was directed to continue to pay on his arrears owed to the Department of Public Welfare, totaling $2,426.34, and owed to Plaintiff #1, totaling $180.91. This Order marks the first and only modification of the original March 2, 1992 Order.

On March 31, 2000, Plaintiff #1 filed a Petition for Modification of an Existing Support Order, requesting that the March 2, 2000 suspension Order be lifted, as N.B. was returned to Plaintiff #1's care on April 30, 2000. On April 20, 2001, Judge DiSantis directed Plaintiff #1 and Defendant to appear at a support conference, scheduled for May 29, 2001. Subsequently, on May 30, 2001, Judge DiSantis entered a Consent Order,

dismissing without prejudice Plaintiff #1's Petition for Modification, as Plaintiff #1 failed to appear at the hearing, and as N.B. continued to live with his maternal great-grandmother. Subsequently, on July 1, 2002, Judge Kelly entered an Order of Attachment of Unemployment Compensation Benefits, directing BUCBA to attach the lesser of $81.77 per week or 55% of the unemployment compensation benefits otherwise payable to Defendant.

On September 30, 2003, the Erie County Office of Domestic Relations filed a Petition for Contempt, regarding Defendant's case involving Plaintiff #1 , stating that Defendant had failed to pay support as ordered. Furthermore, the Office of Domestic Relations determined that Defendant's arrearages totaled $1,806.43 as of September 30, 2003. Additionally, Judge Kelly directed Defendant to appear for a support contempt conference, scheduled for November 12, 2003, before Judge Trucilla. Accordingly, on November 12, 2003, after a hearing, Judge Trucilla entered an Order, finding Defendant in contempt of court for his failure to pay support as ordered. Furthermore, Judge Trucilla ordered Defendant to make the following lump sum payments: $50.00 by November 21, 2003; $50.00 by December 19, 2003; and $50.00 by January 21, 2004. Defendant was also directed to pay the regular monthly support obligation of $25.00 on time. It was further ordered that if Defendant failed to make any of these payments, Defendant was to report to the Erie County Sheriff's Department for incarceration for a period of two months or pay a purge in the amount of $2,000.00, to be proportionately divided between the four instant cases, at Docket Numbers NS910896, NS914129, NS941711, and NS200000006. Finally, Judge Trucilla directed Defendant to pay $50.00 in contempt fees and costs outstanding.

Subsequently, Defendant failed to comply with Judge Trucilla's Order, and the undersigned judge issued a bench warrant for Defendant's arrest, at the instant Docket Number. On January 14, 2004, since Defendant was facing the threat of incarceration, Defendant paid the lump sum purge, in the amount of $2000.00, and was released from imprisonment. *See Attached Exhibit B, Defendant's payment history, payment made on January 14, 2004.* Therefore, Defendant did not spend any days in prison as a result of his non-compliance.

On June 28, 2004, Judge Kelly entered an Order of Attachment of Unemployment Compensation Benefits, directing BUCBA to attach the lesser of $153.08 per week or 55% of the unemployment compensation benefits otherwise payable to Defendant.

On March 21, 2005, the Erie County Office of Domestic Relations filed the instant Petition for Contempt, at Docket Number NS910896, stating that Defendant had failed to make support payments as ordered. Defendant was also informed that his arrearages were set at $835.70 at

Docket Number NS910896, with regard to Plaintiff #1's case only. On March 21, 2005, Defendant was served with an Order, directing Defendant to appear at a support contempt hearing, scheduled for May 2, 2004.

At **Docket Number NS914129**, on December 19, 1991, another Plaintiff, Katrina Powell, hereinafter referred to as Plaintiff #2, filed a Complaint for Child Support on behalf of the parties' minor child, Christopher Powell (hereinafter referred to as C.P.), born November 20, 1991. On January 7, 1992, the undersigned judge entered an Order, directing Defendant to appear at a conference, scheduled for February 11, 1992, for the purpose of discussing Plaintiff #2's allegations of paternity. On February 11, 1992, the undersigned judge entered an Order, directing Plaintiff #2, Defendant, and C.P. to submit to genetic testing. The results of the genetic testing revealed there was a 99.92% probability that Defendant is the father of C.P. On November 17, 1992, Defendant signed an Acknowledgment of Paternity, as to C.P., and waived his right to a paternity trial. Judge Bozza accepted Defendant's Acknowledgment.

On November 23, 1992, Judge Bozza entered an Order, directing Defendant to appear for a domestic relations support conference, scheduled for January 14, 1993. On January 14, 1992, Judge Bozza entered the original Order of Support in this matter, pursuant to the agreement of both parties, directing Defendant to pay $65.00 per month for the support of C.P., and $21.67 per month for the payment of arrears.

Between mid-1993 and mid-1995, Defendant was directed to appear for several domestic relations interviews, for the purpose of assessing Defendant's income and compliance with the existing support Order. Specifically, the Court entered Orders on May 27, 1993, March 25, 1994, April 14, 1994, and June 6, 1995, directing Defendant to appear for domestic relations interviews. Furthermore, on June 27, 1995, Judge Fischer directed Defendant to appear for a domestic relations support conference, scheduled for July 27, 1995, at which a support officer could recommend that a new Order of Support be entered. Nevertheless, between mid-1993 and mid-1995, no such recommendation was made, no new Order was entered, and the amount of Defendant's monthly support obligation, pursuant to the January 14, 1992 Support Order, remained the same.

Additionally, between mid-1993 and mid-1995, the Court entered several Orders, directing the attachment of Defendant's income. On March 17, 1993, Judge Bozza entered an Order for Attachment of Income, directing Defendant's employer, Adem Salvage, to deduct $20.00 weekly from the income otherwise payable to Defendant. On February 2, 1994, Judge Bozza entered an Order for Attachment of Income, directing Defendant's employer, Adem Salvage, to deduct $20.00 weekly from the income otherwise payable to Defendant. On April 26, 1994, Judge Bozza entered an Order for Attachment of Income, directing Defendant's

employer, Dunn Tire, to deduct $20.00 weekly from the income otherwise payable to Defendant. On August 8, 1994, Judge Bozza entered an Order for Attachment of Income, directing Defendant's employer, Adem Salvage, to deduct $20.00 weekly from the income otherwise payable to Defendant.

On February 7, 1996, Judge Fischer entered an Order for Modification, directing Defendant to pay $65.00 per month for the support of C.P., $21.67 for arrears and $21.67 for costs associated with genetic testing. Furthermore, both parties consented to the entry of this Order, which was based on a monthly income total of $600.00 for Defendant. This Order marked the first modification of the original January 14, 1992 Order.

On April 19, 1996, Judge Fischer entered an Order for Attachment of Income, directing Defendant's employer, Interim Personnel, to deduct $25.00 weekly from the income otherwise payable to Defendant. On July 31, 1996, Judge Fischer directed Defendant to appear for an interview with a domestic relations enforcement officer, scheduled for August 15, 1996.

On October 3, 1996, the Erie County Office of Domestic Relations filed a Petition for Civil Contempt against Defendant, for failure to pay support as directed. Furthermore, Defendant had failed to appear for the August 15, 1996 interview in the support office. Finally, the Office of Domestic Relations certified that Defendant had arrears in the amount of $2,569.96, as of October 3, 1996. Defendant was directed to appear at a support contempt hearing, scheduled for November 18, 1996. On November 18, 1996, after a hearing, Judge Cunningham entered an Order, continuing the Petition for Contempt, until there was disposition of the criminal charges that were pending against Defendant.

On March 5, 1997, Judge Fischer entered an Order for Suspension, suspending the January 14, 1992 Order, effective January 22, 1997, as Defendant had been sentenced by Judge Connelly, at his criminal case, to one to twelve months of county incarceration, with an effective date of sentence of January 22, 1997. The child support Order, involving Plaintiff #2, was to automatically reinstate upon Defendant's release from prison. Furthermore, it is noted that on May 23, 1997, a Judgment was entered against Defendant, regarding his case involving Plaintiff #2, on the arrearages in this matter, in the amount of $2,752.40. *See Attached Exhibit C.*

Subsequently, Judge Fischer directed Defendant to appear for a domestic relations support conference, scheduled for November 10, 1998. Subsequently, on November 10, 1998, Judge Fischer entered an Order, after a hearing, stating that the January 14, 1992 was to remain suspended, as Defendant was under a doctor's care and was receiving cash assistance. Defendant was further directed to contact the Support Office once he was released from the doctor's care, so that a review hearing could be held

and the support Order could be reinstated.

On June 10, 1999, Judge DiSantis ordered Plaintiff #2 and Defendant to appear for a domestic relations support conference, scheduled for July 22, 1999. On July 22, 1999, after a hearing, the Office of Domestic Relations recommended that the active support Order be suspended to terminate in this matter, as Plaintiff #2 no longer wished to pursue support against Defendant. Therefore, Judge DiSantis dismissed the non-welfare arrears owed to Plaintiff #2. Nevertheless, Defendant still owed $2,519.96 in welfare arrears, $180.00 in genetic testing fees, $7.50 in constable fees, and $9.50 in court costs. Finally, Judge DiSantis directed that the wage attachment of $100.00 per month was to continue until all costs and fees were paid in full. Finally, in this Order, Judge DiSantis noted that Defendant was presently incarcerated, for unrelated criminal matters, at the Pennsylvania State Correctional Institution at Albion, and Defendant's anticipated release date was September 20, 1999.

On February 15, 2000, Judge DiSantis entered an Order for Attachment of Income, directing Exclusive Temporaries, Inc. to attach $23.01 weekly in income otherwise payable to Defendant. This Order for Attachment, however, was terminated by Judge DiSantis on March 2, 2000. Subsequently, on July 1, 2002, Judge Kelly entered an Order of Attachment of Unemployment Compensation Benefits, directing BUCBA to attach the lesser of $81.77 per week or 55% of the unemployment compensation benefits otherwise payable to Defendant.

On September 30, 2003, the Office of Domestic Relations filed a Petition for Contempt, regarding Defendant's case involving Plaintiff #2, as Defendant had failed to pay support as ordered. Furthermore, the Office of Domestic Relations determined that Defendant's arrearages totaled $1,852.51 as of September 30, 2003. Additionally, Judge Kelly directed Defendant to appear at a support contempt hearing, scheduled for November 12, 2003. On November 12, 2003, after a hearing, Judge Trucilla entered an Order, finding Defendant in contempt of court for his failure to pay support as ordered. Furthermore, Judge Trucilla ordered Defendant to make the following lump sum payments: $50.00 by November 21, 2003; $50.00 by December 19, 2003; and $50.00 by January 21, 2004. Defendant was also directed to pay the regular monthly support obligation of $25.00 on time. It was further ordered that if Defendant failed to make any of these payments, Defendant was to report to the Erie County Sheriff's Department for incarceration for a period of two months consecutive, or pay a purge in the amount of $2,000.00, to be proportionately divided between the four instant cases, at Docket Numbers NS910896, NS914129, NS941711, and NS200000006. Finally, Judge Trucilla directed Defendant to pay $50.00 in contempt fees and costs outstanding.

Subsequently, Defendant failed to comply with Judge Trucilla's Order, and the undersigned judge issued a bench warrant for Defendant's arrest,

at the instant Docket Number. On January 14, 2004, since Defendant was facing the threat of incarceration, Defendant paid the **lump sum** purge, in the amount of $2000.00, and was released from imprisonment. *See Attached Exhibit B, Defendant's payment history, payment made on January 14, 2004.* Therefore, Defendant did not spend any days in prison as a result of his non-compliance.

On June 29, 2004, Judge Kelly entered an Order for Attachment of Unemployment Compensation Benefits, directing BUCBA to attach the lesser of $153.08 per week or 55% of the unemployment compensation benefits otherwise payable to Defendant.

On March 21, 2005, the Erie County Office of Domestic Relations filed the instant Petition for Contempt at Docket Number NS914129 against Defendant, stating that Defendant has failed to make support payments as ordered. Defendant was also informed that his arrearages were set at $760.64 at Docket Number NS914129, with regard to Plaintiff #2's case only.[6] On March 21, 2005, Defendant was served with an Order, directing Defendant to appear at a support contempt hearing, scheduled for May 2, 2004.

At **Docket Number NS941711**, on June 20, 1994, another Plaintiff, Vanessa Zearfoss, hereinafter referred to as Plaintiff #3, filed a Complaint for Child Support on behalf of the parties' minor child, Alina Allison (hereinafter referred to as A.A.), born May 1, 1994. On June 30, 1994, Judge Bozza entered an Order, directing Defendant to appear at a conference, scheduled for August 9, 1994, for the purpose of discussing Plaintiff #3's allegations of paternity. On August 9, 1994, Judge Bozza directed Plaintiff #3, Defendant, and A.A. to submit to genetic testing. The results of the genetic testing revealed there was a 99.97% probability that Defendant is the father of A.A. Judge Bozza entered Orders, directing both Plaintiff #3 and Defendant to appear for domestic relations support conferences, scheduled for November 21, 1994 and January 5, 1995. On January 5, 1995, Defendant signed an Acknowledgment of Paternity,

[6] It is noted that the Petition for Contempt, entered on March 21, 2005, states that Defendant has failed to make payments as ordered, pursuant to the *May 1, 1997* support Order. In fact, no May 1, 1997 Order exists at Docket Number NS914129. Rather, the relevant Support Order, in this matter, is the February 7, 1996 Order. This discrepancy was caused by the transition that occurred on November 1, 1998, when the Erie County Office of Domestic Relations changed its docketing system to the statewide PACES system. Since that transition, on occasion, some data that existed prior to November 1, 1998, such as the February 7, 1996 Support Order, does not appear on the new PACES system in a completely accurate manner. In this case, attached *Exhibit D* reflects that the PACES system has identified that an Order was issued in this case on May 1, 1997 that has an effective date of February 7, 1996. Since no Order was issued on May 1, 1997, the PACES system simply incorrectly indicated that the February 7, 1996 Order was issued on May 1, 1997, which accounts for this inconsistency.

with respect to A.A., and waived his right to a paternity trial. Judge Bozza subsequently accepted Defendant's Acknowledgment. Furthermore, on January 5, 1995, Judge Bozza entered the original support Order in this matter. Judge Bozza directed Defendant to pay $43.33 per month for the support of A.A. and $5.00 per month for payment of genetic testing fees.

On January 9, 1995, Judge Bozza entered an Order for Attachment of Income, directing Defendant's employer, Adem Salvage, to attach $11.15 weekly of the income otherwise payable to Defendant.

On June 6, 1995, Judge Fischer directed Defendant to appear for an interview in the domestic relations support office, for the purpose of assessing Defendant's income and compliance with the existing support Order. Subsequently, on June 27, 2005, Judge Fischer directed Defendant to appear at a domestic relations support conference, scheduled for July 27, 1995, at which a support officer could recommend that a new Order of Support be entered. Nevertheless, no such recommendation was made, no new Order was entered, and the amount of Defendant's monthly support obligation, pursuant to the January 5, 1995 Support Order, remained the same.

On April 19, 1996, Judge Fischer entered an Order for Attachment of Income, directing Interim Personnel to withhold $11.15 weekly from the income otherwise payable to Defendant. On July 31, 1996 Judge Fischer entered an Order, directing Defendant to appear for a domestic relations interview, scheduled for August 15, 1996.

On October 25, 1996, the Erie County Office of Domestic Relations filed a Petition for Civil Contempt against Defendant with regard to his case involving Plaintiff #3, as Defendant had failed to pay support as directed, and Defendant had failed to appear at a domestic relations interview, pursuant to the July 31, 1996 Order. The Office of Domestic Relations certified that Defendant's arrears totaled $1,099.08 as of October 25, 1996. Accordingly, Judge Fischer directed Defendant to appear for a support contempt hearing, scheduled for November 18, 1996. On November 18, 1996, Judge Cunningham entered an Order, continuing the Petition for Contempt, until disposition of the unrelated criminal charges pending against Defendant.

On March 5, 1997, Judge Fischer entered an Order for Suspension, suspending the March 6, 1992 Order, effective January 22, 1997, as Defendant had been sentenced by Judge Connelly, at his criminal case, to one to twelve months of county incarceration, with an effective date of sentence of January 22, 1997. The child support Order was to automatically reinstate upon Defendant's release from prison. Furthermore, it is noted that on May 23, 1997, a Judgment was entered against Defendant, regarding his case involving Plaintiff #3, on the arrearages in this matter, in the amount of $1,223.27. *See Attached Exhibit E.*

On September 23, 1998, Judge Fischer ordered Defendant to appear for a

domestic relations support conference, scheduled for November 10, 1998. On November 10, 1998, after the conference, Judge Fischer entered an Order, stating that the Order was to remain suspended, as Defendant was under a doctor's care and was receiving cash assistance. Defendant was further directed to contact the Support Office once he was released from the doctor's care, so that a review hearing could be held and the support Order could be reinstated.

On July 22, 1999, Judge DiSantis directed both Plaintiff #3 and Defendant to appear at a domestic relations support conference, scheduled for July 22, 1999. However, immediately following this conference, no Order was entered, and Defendant's support obligation remained suspended. On April 24, 2000, Judge Dunlavey entered an Order, stating that the existing Order in this matter was to continue to remain suspended, as Defendant had been incarcerated in the Erie County Prison since March 14, 2000. Furthermore, the support Order was subject to reinstatement upon Defendant's release from prison.

On November 30, 2000, Judge Kelly entered an Interim Order of Court, reinstating Defendant's support obligation, pursuant to the original January 5, 1995 Order, as Defendant had been released from prison. Judge Kelly ordered Defendant to pay $43.33 per month for his current support obligation, and $21.73 per month for arrears. Additionally, Judge Kelly noted that at the time of this Order's entry, Defendant's arrears totaled $1,276.10.

On July 1, 2002, Judge Kelly entered an Order of Attachment of Unemployment Compensation Benefits, directing BUCBA to attach the lesser of $81.77 per week or 55% of the unemployment compensation benefits otherwise payable to Defendant.

On March 4, 2003, Plaintiff #3 filed a Petition for Modification of the Interim Support Order. Plaintiff #3 requested an increase on the basis that she believed Defendant's income had increased. Accordingly, on March 24, 2003, Judge Kelly directed both Plaintiff #3 and Defendant to appear at a Modification Conference, scheduled for April 24, 2003. On April 24, 2003, following the conference, a Modified Order was entered, stating that Defendant's monthly net income was $1,414.17, and directing Defendant to pay $260.00 per month for current support, and $21.73 per month for payment of arrears. Furthermore, the Court noted that as of March 24, 2003, Defendant's arrears totaled $1,125.40. Finally, on April 24, 2003, Judge Kelly entered a Modified Order of Attachment of Unemployment Benefits, directing BUCBA to attach the lesser of $126.69 per week or 55% of the unemployment benefits otherwise payable to Defendant.

On September 30, 2003, the Office of Domestic Relations filed a Petition for Contempt, regarding Defendant's case involving Plaintiff #3, as Defendant had failed to pay support as ordered. Furthermore, the Office

of Domestic Relations determined that Defendant's arrearages totaled $1,170.62 as of September 30, 2003. Additionally, Judge Kelly directed Defendant to appear at a support contempt hearing, scheduled for November 12, 2003. On November 12, 2003, after a hearing, Judge Trucilla entered an Order, finding Defendant in contempt of court for his failure to pay support as ordered. Furthermore, Judge Trucilla ordered Defendant to make the following lump sum payments: $50.00 by November 21, 2003; $50.00 by December 19, 2003; and $50.00 by January 21, 2004. Defendant was also directed to pay the regular monthly support obligation of $310.00 on time. It was further ordered that if Defendant failed to make any of these payments, Defendant was to report to the Erie County Sheriff's Department for incarceration for a period of two months consecutive, or pay a purge in the amount of $2,000.00, to be proportionately divided between the four instant cases, at Docket Numbers NS910896, NS914129, NS941711, and NS200000006. Finally, Judge Trucilla directed Defendant to pay 550.00 in contempt fees and costs outstanding.

Subsequently, Defendant failed to comply with Judge Trucilla's Order, and the undersigned judge issued a bench warrant for Defendant's arrest, at the instant Docket Number. On January 14, 2004, since Defendant was facing the threat of incarceration, Defendant paid the lump sum purge, in the amount of $2000.00, and was released from imprisonment. *See Attached Exhibit B, Defendant's payment history, payment made on January 14, 2004.* Therefore, Defendant did not spend any days in prison as a result of his non-compliance.

On June 29, 2004, Judge Kelly entered an Order of Attachment of Unemployment Compensation Benefits, directing BUCBA to attach the lesser of $153.08 per week or 55% of the unemployment compensation benefits otherwise payable to Defendant.

On March 21, 2005, the Erie County Office of Domestic Relations filed the instant Petition for Contempt against Defendant, stating that Defendant has failed to make support payments as ordered, at Docket Number NS941711, with regard to Plaintiff #3's case only. Defendant was also informed that his arrearages were set at $568.24. On March 21, 2005, Defendant was served with an Order, directing Defendant to appear at a support contempt hearing, scheduled for May 2, 2004.

On March 22, 2005, one day after Defendant had been served with the Contempt Petition, Defendant filed a Petition for Modification of the Support Order. Defendant requested a decrease in his support obligation because he alleged he had been terminated from employment with Custom Engineering on March 17, 2005, and had no income. Defendant further alleged he had maxed out unemployment compensation benefits previously. Accordingly, on April 5, 2005, Judge Kelly directed both Plaintiff #3 and Defendant to appear for a modification conference, scheduled for April 25, 2005. Following the conference, an Interim Order was entered, stating that

Defendant's monthly net income was $764.97 per month, and directing Defendant to pay $91.26 per month for his current support obligation, and $50.00 for arrears.

Subsequently, on May 2, 2005, Plaintiff #3 filed a Demand for a Court hearing, regarding the April 25, 2005 Order. Accordingly, on May 11, 2005, Judge Kelly directed both parties to appear before the Court on June 9, 2005 for a hearing. Subsequent to the hearing, on June 15, 2005, Judge Kelly entered a Final Order, stating that Defendant's monthly net income was $764.97 per month, and directing Defendant to pay $260.00 per month for his current support obligation, and $50.00 for arrears.

This opinion will be continued in the next issue of the Erie County Legal Journal, November 4, 2005, Vol. 88 #44.

TRACY BUTLER
v.
ROBERT D. ALLISON
NO. NS910896 PACSES NO. 373003880
KATRINA POWELL
v.
ROBERT D. ALLISON
NO. NS914129 PACSES NO. 042003887
VANESSA M. ZEARFOSS
v.
ROBERT D. ALLISON
NO. NS941711 PACSES NO. 557003878
FRANCES L. BRESEE
v.
ROBERT D. ALLISON
NO. NS200000006 PACSES NO. 157101858
IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA DOMESTIC RELATIONS

Appearances: Stephen J. Lagner III, Esq., Assistant Public Defender
Thomas S. Kubinski, Esq. on behalf of the Department of Public Welfare
Heather L. Purcell, Esq., on behalf of the Erie County Office of Domestic Relations

This opinion is continued from the previous issue of the Erie County Legal Journal, October 28, 2005, Vol. 88 #43.

OPINION

Finally, at **Docket Number NS200000006**, on January 3, 2000, another Plaintiff, Frances Bresee, hereinafter referred to as Plaintiff #4, filed a Complaint for Child Support on behalf of the minor child of Defendant and Tracy Butler, N.B., born on June 13, 1990. This Court notes that Plaintiff #4 is the great-grandmother of N.B., and was the custodial caregiver of N.B. beginning in approximately early 2000. *See Complaint for Support.* On January 7, 2000, Judge DiSantis entered separate Orders, directing Plaintiff #4 and Defendant to appear for a domestic relations support conference, scheduled for March 2, 2000. Furthermore, on December 4, 2000, Judge DiSantis entered separate Orders, directing Plaintiff #4 and Defendant to appear for a domestic relations support conference, scheduled for January 8, 2001. On January 8, 2001, after the conference, Judge Dunlavey entered the original support Order in this matter. This order stated that Defendant's monthly net income was $965.04, and directed

Defendant to pay $217.28 per month for current support.[7]

On July 1, 2002, Judge Kelly entered an Order of Attachment of Unemployment Compensation Benefits, directing BUCBA to attach the lesser of $81.77 per week or 55% of the unemployment compensation benefits otherwise payable to Defendant. Subsequently, on August 26, 2002, Judge Kelly entered a Modified Order of Attachment of Unemployment Compensation Benefits, directing BUCBA to attach the lesser of $76.69 per week or 55% of the Unemployment Compensation benefits otherwise payable to Defendant.

On September 30, 2003, the Office of Domestic Relations filed a Petition for Contempt, regarding Defendant's case involving Plaintiff #4, as Defendant had failed to pay support as ordered. Furthermore, the Office of Domestic Relations determined that Defendant's arrearages totaled $246.46 as of September 30, 2003. Additionally, Judge Kelly directed Defendant to appear at a support contempt hearing, scheduled for November 12, 2003. On November 12, 2003, after a hearing, Judge Trucilla entered an Order, finding Defendant in contempt of court for his failure to pay support as ordered. Furthermore, Judge Trucilla ordered Defendant to make the following lump sum payments: $50.00 by November 21, 2003; $50.00 by December 19, 2003; and $50.00 by January 21, 2004. Defendant was also directed to pay the regular monthly support obligation of $239.28 on time. It was further ordered that if Defendant failed to make any of these payments, Defendant was to report to the Erie County Sheriff's Department for incarceration for a period of two months consecutive, or pay a purge in the amount of $2,000.00, to be proportionately divided between the four instant cases, at Docket Numbers NS910896, NS914129, NS941711, and NS200000006. Finally, Judge Trucilla directed Defendant to pay $50.00 in contempt fees and costs outstanding.

Subsequently, Defendant failed to comply with Judge Trucilla's Order, and the undersigned judge issued a bench warrant for Defendant's arrest, at the instant Docket Number. On January 14, 2004, since Defendant was facing the threat of incarceration, Defendant paid the **lump sum** purge, in the amount of $2000.00, and was released from imprisonment. *See Attached Exhibit B, Defendant's payment history, payment made on January 14, 2004.* Therefore, Defendant did not spend any days in prison as a result of his non-compliance.

On December 5, 2003, Plaintiff #4 filed a Petition for Modification of the January 8, 2001 support Order, requesting an increase in Defendant's support obligation. Accordingly, on December 18, 2003, Judge Kelly entered an Order, directing both Plaintiff #4 and Defendant to appear at a

[7] It is noted that Defendant had not accumulated any arrears in this case as of January 8, 2001. Therefore, Defendant was not directed to make any arrears payments.

domestic relations conference, scheduled for January 13, 2004. On January 13, 2004, after the conference, a Modified Support Order was entered, directing Defendant to pay $281.67 per month for current support, and $21.67 per month for arrears.

On January 13, 2004, Judge Kelly entered a Modified Order of Attachment of Unemployment Benefits, directing BUCBA to attach the lesser of $148.08 per week or 55% of the unemployment compensation benefits otherwise payable to Defendant. Subsequently, on March 1, 2004, Judge Kelly entered another Modified Order of Attachment of Unemployment Benefits, directing BUCBA to attach the lesser of $153.08 per week or 55% of the unemployment compensation benefits otherwise payable to Defendant. On April 1, 2004, Judge Kelly entered another Modification Order of Attachment of Unemployment Benefits, directing BUCBA to attach the lesser of $148.08 per week or 55% of the unemployment compensation benefits otherwise payable to Defendant. On June 28, 2004, Judge Kelly entered another Modification Order of Attachment of Unemployment Benefits, directing BUCBA to attach the lesser of $153.08 per week or 55% of the unemployment compensation benefits otherwise payable to Defendant.

On March 21, 2005, the Erie County Office of Domestic Relations filed the instant Petition for Contempt against Defendant, stating that Defendant has failed to make support payments as ordered at Docket Number NS200000006, with regard to Plaintiff #4' s case only. Defendant was also informed that his arrearages were set at $527.61 On March 21, 2005, Defendant was served with an Order, directing Defendant to appear at a support contempt hearing, scheduled for May 2, 2004.

On March 22, 2005, one day after Defendant was served with the Contempt Petition, Defendant filed a Petition for Support Modification of the January 13, 2004 support Order. Defendant requested a decrease in his support obligation because he alleged he had been terminated from employment with Custom Engineering on March 17, 2005, and had no income. Defendant further alleged he had maxed out unemployment compensation benefits previously. Therefore, Judge Kelly directed both Plaintiff #4 and Defendant to appear for a domestic relations conference, scheduled for April 25, 2005. On April 25, 2005, after the conference, a Final Order of Court was entered, stating that Defendant's monthly net income is $965.04, and directing Defendant to pay $91.26 per month for current support and $21.67 per month for arrears. Defendant's arrears totaled $545.95 as of April 25, 2005.

Subsequently, on April 26, 2005, Plaintiff #4 filed a Petition for Support Modification of the April 25, 2005 support Order, requesting an increase in Defendant's support obligation. Accordingly, on April 29, 2005, Judge Kelly directed Plaintiff #4 and Defendant to appear at a domestic relations conference, scheduled for May 31, 2005. Subsequently, on June 1, 2005,

Judge Connelly dismissed Plaintiff #4' s Petition to Modify, as Plaintiff #4 agreed to dismiss her Petition since Defendant was incarcerated. Therefore, the April 25, 2005 Order, directing Defendant to pay $91.26 per month for current support and $21.67 per month for arrears, remained in effect.

Accordingly, on May 2, 2005, a hearing was held before this Lower Court concerning the Petitions for Contempt filed in all four of the instant cases. Jeffrey Willet, an Erie County Support Enforcement Officer, credibly testified that Defendant had failed to make any support payments between December 25, 2004 and March 7, 2005, and between March 24, 2005 and May 2, 2005. (N.T. 5/2/05 p. 2). It is noted that Defendant was employed between March 7, 2005 and March 23, 2005 and his wages were attached. (N.T. 5/2/05 p. 4). Therefore, Defendant did make support payments between March 7, 2005 and March 23, 2005. (N.T. 5/2/05 p .6). Furthermore, Defendant did not provide the Office of Domestic Relations with any explanation for his failure to work between December 25, 2004 and March 7, 2005, and between March 24, 2005 and May 2, 2005, such as a medical excuse. (N.T. 5/2/05 p. 2). Defendant is a thirty-four year old male with a current daily obligation of $14.62 for the support of his three minor children. (N.T. 5/2/05 p. 3). Mr. Willet noted that Judge Trucilla previously found Defendant in contempt of court in all four of the instant cases on November 12, 2003. (N.T. 5/2/05 p. 3). Moreover, Mr. Willet recommended that this Lower Court find Defendant in contempt of court for his failure to pay support as ordered, and further recommended that this Lower Court order Defendant to be incarcerated for six months consecutive or pay a purge in the total amount of his arrearages. (N.T. 5/2/05 p. 3).

At the time of the hearing, Defendant admitted he is capable of working, and capable of paying a considerable support obligation. (N.T. 5/2/05 pp. 4-8). Specifically, Defendant testified that for a period of five and a half years, he was employed as a blueprint reader for Career Skill,[8] and he paid $668.00 per month for the support of two children.[9] (N.T. 5/2/05 pp. 4-5). Defendant also stated he is capable of getting a job at a fast food

[8] It is noted that there is a small error in the court reporter's transcription at page 4, line 24 of the transcript of the May 2, 2005 hearing. Defendant did not work for "Career Skill;" rather, Defendant worked for "Carrara Steel."

[9] This Lower Court notes that Domestic Relations records reflect that Defendant was not, in fact, employed by Carrara Steel over a five and a half year period. However, Defendant was employed for Carrara Steel during three separate intervals between November 30, 2000 and July 8, 2002, October 23, 2002 and January 12, 2004, and January 13, 2004 and June 23, 2004. *See Attached Exhibit F, Defendant's employment history.* Furthermore, at no point did Defendant pay child support in the amount of $668.00 per month. *See Attached Exhibit B, Defendant's payment history for all four cases.* Nevertheless, Defendant's wages were attached when he was working at Carrara Steel, and, therefore, Defendant did make support payments.

restaurant or as a manual laborer. (N.T. 5/2/05 pp. 5, 8). In fact, Defendant stated, "I'm willing to work wherever it takes." (N.T. 5/2/05 p. 8).

Defendant stated, however, that he did not pay his support obligation between March 24, 2005 and May 2, 2005 because he had not had a job for the past two months. (N.T. 5/2/05 p. 5). Defendant indicated that he was in the process of training for a new job, but Defendant had not yet earned any money in association with that job. (N.T. 5/2/05 p. 5). Defendant testified that he was paying his support obligation between December 25, 2004 and March 7, 2005; however, this Lower Court did not find Defendant's unsubstantiated claim to be credible. (N.T. 5/2/05 p. 6). Rather, this Lower Court found credible the statement of Mr. Willet, that the Office of Domestic Relations had no record of any payments received from Defendant between December 25, 2004 and March 7, 2005. (N.T. 5/2/05 pp. 6-7).

At the conclusion of the hearing, this Lower Court found that Defendant was capable of working; however, Defendant had failed to do so. (N.T. 5/2/05 p. 10). Therefore, this Lower Court found Defendant in contempt of court, at each of the four individual, separate, Plaintiff's cases, for his failure to pay support as ordered, and incarcerated Defendant for a period of six months consecutive on all four cases. (N.T. 5/2/05 p. 10). This Lower Court found it to be reasonable, based on Defendant's ability to pay, to set Defendant's purge amounts at $835.70 at Docket Number NS910896, $760.64 at Docket Number NS914129, $568.24 at Docket Number NS941711, and $527.61 at Docket Number NS200000006, which represent the total amount of arrears owed in each case by Defendant. (N.T. 5/2/05 p. 10). Finally, this Lower Court stated Defendant would be permitted to participate in the Work Release Program and the Work Furlough program. (N.T. 5/2/05 p. 10).

Accordingly, on May 2, 2005, this Lower Court entered four separate Orders at each individual Plaintiff's case, at the above-captioned Docket Numbers. Specifically, at Docket Number NS910896, regarding Plaintiff #l's case, this Lower Court entered an Order, finding Defendant in civil contempt of Court for willfully failing to pay support as ordered. This Lower Court further ordered that Defendant was to be incarcerated in the Erie County Prison for a period of six months, or, in the alternative, pay a purge in the amount of $835.70. Additionally, this Lower Court stated that Defendant shall be eligible for Work Release. Finally, this Lower Court stated that Defendant shall be eligible to be released from prison entirely[10] based on a Work Furlough/suspended sentence after sixty days, provided Defendant has complied with the rules and regulations of the Work Release Program, maintained regular support payments for sixty

[10] It is noted, however, that in this case, Defendant is also presently imprisoned on unrelated criminal convictions.

days, and participated in the Parent's Workshop while in Work Release, and will continue to do so for a total of six months.[11]

Furthermore, on May 2, 2005, at Docket Number NS914129, regarding Plaintiff #2's case, this Lower Court entered an Order, finding Defendant in civil contempt of Court for willfully failing to pay support as ordered. This Lower Court further ordered that Defendant was to be incarcerated in the Erie County Prison for a period of six months, consecutive to the sentence imposed at Docket Number NS910896, or, in the alternative, pay a purge in the amount of $760.64. Additionally, this Lower Court stated that Defendant shall be eligible for Work Release. Finally, this Lower Court stated that Defendant shall be eligible to be released from prison entirely based on a Work Furlough/suspended sentence after sixty days, provided Defendant has complied with the rules and regulations of the Work Release Program, maintained regular support payments for sixty days, and participated in the Parent's Workshop while in Work Release, and will continue to do so for a total of six months.

Additionally, on May 2, 2005, at Docket Number NS941711, regarding Plaintiff #3's case, this Lower Court entered an Order, finding Defendant in civil contempt of Court for willfully failing to pay support as ordered. This Lower Court further ordered that Defendant was to be incarcerated in the Erie County Prison for a period of six months, consecutive to the sentence imposed at Docket Number NS914129, or, in the alternative, pay a purge in the amount of $615.17. Additionally, this Lower Court stated that Defendant shall be eligible for Work Release. Finally, this Lower Court stated that Defendant shall be eligible to be released from prison entirely based on a Work Furlough/suspended sentence after sixty days, provided Defendant has complied with the rules and regulations of the Work Release Program, maintained regular support payments for sixty days, and participated in the Parent's Workshop while in Work Release, and will continue to do so for a total of six months.

Finally, on May 2, 2005, at Docket Number NS200000006, regarding Plaintiff #4' s case, this Lower Court entered an Order, finding Defendant in civil contempt of Court for willfully failing to pay support as ordered. This Lower Court further ordered that Defendant was to be incarcerated in the Erie County Prison for a period of six months, consecutive to the sentence imposed at Docket Number NS941711, or, in the alternative, pay a purge in the amount of $545.95. Additionally, this Lower Court stated that Defendant shall be eligible for Work Release. Finally, this Lower

[11] It is noted that the Work Furlough program is a special program that exists in Erie County. This program was developed as an incentive to encourage non-support paying parents to become more responsible parents. Furthermore, the program empowers non-support paying parents since they hold the key to their imprisonment and are eligible for early release upon compliance with the requirements of the Work Furlough program.

Court stated that Defendant shall be eligible to be released from prison entirely based on a Work Furlough/suspended sentence after sixty days, provided Defendant has complied with the rules and regulations of the Work Release Program, maintained regular support payments for sixty days, and participated in the Parent's Workshop while in Work Release, and will continue to do so for a total of six months.

On June 1, 2005, Defendant filed his Notices of Appeal from the four separate Orders, entered by this Lower Court on May 2, 2005 Order. On June 3, 2005, this Lower Court directed Defendant to file a Pa. R.A.P. 1925(b) Concise Statement of Matters Complained of on Appeal. Defendant filed his Concise Statement on June 17, 2005.

As previously set forth, Defendant has waived all of the issues he raised in his 1925(b) Statement, by failing to raise them before this Lower Court at the time of the May 2, 2005 hearing, and by failing to raise them by filing a Motion for Reconsideration. Nevertheless, assuming *arguendo* that Defendant had not waived all of the issues he now advances on appeal, Defendant's issues would still fail. Therefore, this Lower Court will briefly address the merits of each of Defendant's issues. Defendant's first issue on appeal is whether Defendant is factually incorrect in his claim that he was not found in contempt of court at two of the docket numbers in this matter.

A review of the record in this case reveals that on May 2, 2005, a support contempt hearing was held before this Lower Court, regarding all four of Defendant's support cases, involving Ms. Butler, Plaintiff #l; Ms. Powell, Plaintiff #2, Ms. Zearfoss, Plaintiff #3, and Ms. Bresee, Plaintiff #4. *See transcript of 5/2/05 hearing.* After hearing testimony concerning Defendant's support obligations and failure to pay as directed, this Lower Court entered four separate Orders, at Docket Numbers NS910896, NS914129, NS941711, and NS200000006, finding Defendant in contempt of Court. *See Attached Exhibit F, Orders entered on May* 2, *2005.* Each of these individual Orders states, "and now to wit, this 2nd day of May 2005, it is hereby Ordered that after hearing, the defendant is found in contempt of court for willfully failing to: pay support as ordered." *Id.* Therefore, this Lower Court did, in fact, find Defendant in contempt of court in all four of the instant cases. Accordingly, Defendant's first issue on appeal fails.

Defendant's second issue on appeal is whether this Lower Court abused its discretion in setting Defendant's purges at $835.70 at Docket Number NS910896, $760.64 at Docket Number NS914129, $568.24 at Docket Number NS941711, and $527.61 at Docket Number NS200000006, as this Lower Court determined Defendant has the present ability to pay these purges. The appellate court's scope of review when considering an appeal from an order holding a party in contempt of court is narrow: The Superior Court of Pennsylvania will reverse only upon a showing of an abuse of discretion. *Hyle v. Hyle,* 868 A.2d 601, 604 (Pa. Super. Ct. 2005);

Diamond v. Diamond, 792 A.2d 597, 600 (Pa. Super. Ct. 2002). The court abuses its discretion if it misapplies the law or exercises its discretion in a manner lacking reason. *Id.; See also Lachat v. Hinchliffe*, 769 A.2d 481, 487 (Pa. Super. Ct. 2001).

The purpose of a civil contempt order is to coerce the contemnor to comply with the court's order. *Id.; See Gunther v. Bolus*, 853 A.2d 1014, 1016 (Pa. Super. Ct. 2004), *appeal denied* 578 Pa. 709, 853 A.2d 362 (2004). Punishment for contempt in support actions is governed by 23 Pa.C.S. §4345, which provides:

> (a) General role.-- A person who willfully fails to comply with any order under this chapter, except an order subject to section 4344 (relating to contempt for failure of obligor to appear), may, as prescribed by general rule, be adjudged in contempt. Contempt shall be punishable by any one or more of the following:
>
> (1) Imprisonment for a period not to exceed six months.
> (2) A fine not to exceed $ 1,000.
> (3) Probation for a period not to exceed one year.
>
> (b) Condition for release.--An order committing a defendant to jail under this section shall specify the condition the fulfillment of which will result in the release of the obligor.

23 Pa.C.S. §4345.

In order to be found in civil contempt, a party must have violated a court order. *Hyle, supra*, at 604; *See Garr v. Peters*, 773 A.2d 183, 189 (Pa. Super. Ct. 2001). Accordingly, the complaining party must show, by a preponderance of the evidence, that a party violated a court order. *Id.; See Sinaiko v. Sinaiko*, 664 A.2d 1005, 1009 (Pa. Super. Ct. 1995). Additionally, the alleged contemnor may present evidence that he has the present inability to comply with the support Order and pay the arrearages. *Id.; See Barrett v. Barrett*, 470 Pa. 253, 264, 368 A.2d 616, 621 (Pa. 1977); *see also, Sinaiko*, 664 A.2d at 1009. When the alleged contemnor presents evidence that he is presently unable to comply, the court, in imposing coercive imprisonment for civil contempt, should set the purge at an amount the contemnor has the present ability to pay. *Id.* The court, moreover, must set the conditions for a purge in such a way as the contemnor has the present ability to comply with the order. *Id.* at 605.

Initially, in the instant matter, the evidence of record establishes that support Orders existed with respect to each of the four cases, as set forth in detail above, and this Lower Court found Defendant to be in civil contempt of each of these Orders for willfully failing to pay support as directed. Furthermore, at the time of the May 2, 2005 hearing, Defendant did not present any evidence that he is presently unable to pay the purges in the amounts of $835.70 at Docket Number NS910896, $760.64 at

Docket Number NS914129, $568.24 at Docket Number NS941711, and $527.61 at Docket Number NS200000006. In fact, Defendant raised no objection whatsoever to this Lower Court's imposition of purges in these amounts, equal to the total amount of Defendant's arrears at each of the four Docket Numbers. Although Defendant did not object to the purge amounts, and Defendant did not present evidence that he did not have the present ability to pay the purges, this Lower Court still evaluated the entire record in this matter, and reasonably determined that Defendant does have the present ability to pay these purges. The record in this case establishes that Defendant has worked numerous jobs since 1992. Over a period of several years, Defendant has been employed by Career Concepts, EMI, Better Baked Foods Inc., Dunn Tire, Adem Salvage, Exclusive Search, Modern Industries, Carrera Steel, TGI Fridays, Custom Engineering, and ITH Staffing. *See Attached Exhibit G, Defendant's employment history between February 10, 2000 and May 12, 2005.* Furthermore, during the periods of time Defendant was unemployed, Defendant was diligent about applying for and receiving unemployment benefits. A review of Defendant's payment history from 2001 through 2005 reveals that Defendant made payments, with a fair amount of consistency, because Defendant's wages were attached, or Defendant's unemployment compensation benefits were attached. Therefore, during this time period, Defendant was earning or receiving income regularly. Defendant did spend intermittent periods of time in prison on unrelated criminal convictions. However, these brief periods of incarceration probably did not seriously impact Defendant's earning capacity and income. Upon Defendant's releases from prison, Defendant consistently either obtained employment or applied for and received unemployment benefits.

Additionally, at the time of the May 2, 2005 support contempt hearing, this Lower Court had the benefit of reviewing recent assessments of Defendant's monthly net income. As previously set forth, on March 22, 2005, one day after Defendant had been served with the Contempt Petitions, Defendant filed Petitions for Modification of the Support Orders, at Docket Numbers NS941711 and NS200000006, requesting decreases in his active support obligations. Accordingly, on April 25, 2005, separate support conferences were conducted at both docket numbers. Subsequent to the conferences, an Interim Order of Court was entered, at Docket Number NS941711, stating that Defendant's monthly net income was assessed at $764.97, and directing Defendant to pay $91.26 per month for current support and $50.00 per month for arrears, in accordance with the guideline calculation relevant to this case. Furthermore, a Final Order of Court was entered at Docket Number NS200000006, stating that Defendant's monthly net income was assessed at $965.04, and directing Defendant to pay $91.26 per month for current support and $21.67 per month for arrears,

in accordance with the guideline calculation relevant to this case.[12]

Finally, in imposing Defendant's purges, this Lower Court found it very relevant that Defendant had previously paid a **lump sum** purge in the amount of $2,000.00 on January 14, 2004. As previously stated, Defendant paid this purge only after the undersigned judge had issued a bench warrant for his arrest and Defendant was facing the threat of incarceration. Defendant, therefore, did not spend any time in jail for his non-compliance with Judge Trucilla's November 12, 2003 Order. In this case, the undersigned judge imposed purges in amounts equal to the total amount of Defendant's arrears, which were $835.70 at Docket Number NS910896, $760.64 at Docket Number NS914129, $568.24 at Docket Number NS941711, and $527.61 at Docket Number NS200000006. Therefore, the total amount of Defendant's purges at all of the Docket Numbers is $2,692.19. The purge amount imposed by the undersigned judge is not much higher than the purge amount previously imposed by Judge Trucilla, which Defendant did, in fact, pay only one and a half years ago. Defendant previously demonstrated that he has the ability to pay a $2,000.00 purge; therefore, it is reasonable that Defendant is now capable of paying a purge in a comparable amount.

In conclusion, this Lower Court notes that the reason Defendant has not paid his purges at Docket Numbers NS910896, NS914129, NS941711, and NS200000006, which he does, in fact, have the present ability to pay, is because Defendant is presently incarcerated on unrelated criminal convictions.[13] In most cases, defendants are strongly motivated to pay their

[12] Defendant's monthly net income was assessed at different amounts with regard to Plaintiff #3's case, at Docket Number NS941711, and Plaintiff #4's case, at Docket Number NS200000006. With regard to Docket Number NS941711, at the time of the support conference, the parties contested the amount of Defendant's monthly support obligation. Therefore, after a conference before a support conference officer, Defendant's monthly net income was assessed at $764.97, based on Defendant's self-report that he had a minimum wage earning capability, and the accompanying support guideline calculation. With regard to Docket Number NS200000006, at the time of the support conference, the parties agreed to the amount of Defendant's monthly support obligation. At Docket Number NS20000006, in the original January 8, 2001 Support Order, Defendant was previously assessed as having a monthly net income of $965.04. Therefore, pursuant to the agreement of the parties, and since there existed no reason to adjust Defendant's monthly net income, Defendant's monthly net income remained $965.04.

[13] This Lower Court has taken judicial notice of existing docketing information in this Commonwealth, with regard to Defendant's criminal cases. Specifically, at criminal Docket Number 3694 of 2004, on May 13, 2005, Judge Cunningham sentenced Defendant to four months to twelve months of county incarceration. *See Attached Exhibit H.* Furthermore, on July 28, 2005, Defendant pled guilty, at criminal Docket Number 1924 of 2005, to one count of Theft by Deception, one count of Receiving Stolen Property, one count of Bad Checks, and one count of Forgery- Unauthorized Act in Writing. Defendant is presently awaiting sentencing, scheduled for September 22, 2005, at criminal Docket Number 1924 of 2005. *See Attached Exhibit I.*

purge so they will not have to serve an incarceration sentence. In fact, on January 14, 2004, Defendant was motivated to pay his $2,000.00 purge because he faced imprisonment. However, presently, since Defendant will remain incarcerated on his unrelated criminal convictions, regardless of whether or not he pays the instant purges in these matters, Defendant is not currently motivated to pay his purges. Therefore, even though Defendant has the present ability to pay his purges, he has not, in fact, paid them because he will remain imprisoned on his unrelated criminal convictions. Accordingly, Defendant's second issue on appeal fails.

Defendant's third issue on appeal is whether this Lower Court abused its discretion by imposing an incarceration sentence of six months at each of the four separate cases, pursuant to 23 Pa.C.S. §4345. As previously set forth, pursuant to 23 Pa.C.S. §4345,

> (a) General rule. -- A person who willfully fails to comply with any order under this chapter, except an order subject to section 4344 (relating to contempt for failure of obligor to appear), may, as prescribed by general rule, be adjudged in contempt. Contempt shall be punishable by any one or more of the following:
>
> (1) Imprisonment for a period not to exceed six months.
>
> (b) Condition for Release. -- An order committing a defendant to jail under this section shall specify the condition the fulfillment of which will result in the release of the obligor.

In the instant matter, at Docket Number NS910896, the undersigned judge sentenced Defendant to a term of incarceration of six months, with a purge in the amount of $835.70. At Docket Number NS914129, the undersigned judge sentenced Defendant to a term of incarceration of six months, run consecutively to Docket Number NS910896, with a purge in the amount of $760.64. At Docket Number NS941711, the undersigned judge sentenced Defendant to a term of incarceration of six months, run consecutively to Docket Number NS914129, with a purge in the amount of $568.24. Finally, at Docket Number NS200000006, the undersigned judge sentenced Defendant to a term of incarceration of six months, run consecutively to Docket Number NS941711, with a purge in the amount of $527.61. Accordingly, each of Defendant's sentences was proper, as each sentence did not exceed six months of imprisonment, pursuant to 23 Pa.C.S. §4345(a)(1). 23 Pa.C.S. §4345(a)(1) and (b) specifically permits a court to hold an individual in civil contempt of an order of court, and impose a sentence not to exceed six months, provided that the Court specifies the condition that will lead to the release of the defendant, such as a purge. In the instant matter, Defendant was found in civil contempt of *four* separate orders of court involving *four* entirely separate cases with *four* different Plaintiffs. Therefore, this Lower Court properly applied 23 Pa.C.S. §4345(a)(1) and (b) to each of the four separate cases in

which the undersigned judge found Defendant in contempt of court, and imposed sentences of six months of imprisonment, for each individual case, with reasonable purge amounts, based on Defendant's ability to pay. Furthermore, the total of the individual purge amounts, in this matter, were consistent with the prior total purge amount of $2,000.00, which Defendant had met previously and Defendant had served no time in prison. 23 Pa.C.S. §4345, moreover, states that contempt for failure to comply with a court order is punishable by a sentence of imprisonment not to exceed six months. The statute does not state that the six-month term of imprisonment must be divided among all of an individual defendant's support cases.

It is noted that on appeal, Defendant has apparently claimed that he cannot be sentenced to an *aggregate* term of incarceration, greater than six months, for all of his individual support cases. However, Defendant's interpretation of the statute presents serious practical problems. For example, assume a hypothetical defendant, with two entirely separate support cases, was previously found in contempt of one of the support orders and was sentenced to six months imprisonment. Assuming *arguendo* that Defendant's interpretation of the statute were correct, if a contempt petition was subsequently filed with respect to the hypothetical defendant's second support case, the judge would be left without the remedy, which exists under 23 Pa.C.S. §4345, of sentencing the defendant to a term of imprisonment. Certainly, the Pennsylvania Legislature did not intend for the statute to apply to some support cases, and not to others.

Furthermore, Defendant's interpretation of 23 Pa.C.S. §4345 is problematic in that defendants with only one support case would be treated differently than defendants with multiple support cases. Specifically, assuming *arguendo* that Defendant's interpretation of the statute were correct, a defendant who only had one support case would be subject to a maximum incarceration sentence of six months for the single case. In contrast, a defendant with, for example, two support cases, would be subject to a maximum incarceration sentence of only three months for one of the cases. A defendant who has only one support case should not be punished and treated more severely than a defendant who has multiple support cases. Defendants should face the same maximum incarceration sentence upon being found in civil contempt of each support order. Certainly, the Pennsylvania Legislature did not intend for defendants, who fail to pay support as ordered, to be treated differently based upon the number of separate support cases the defendant has.

Moreover, courts should not be precluded from imposing an incarceration sentence upon finding a defendant in civil contempt of each individual support order. Incarceration is an effective way of providing incentive to a defendant to comply with an order of court, which obligates the defendant to be a responsible parent and pay support to his or her children.

The ability of a court to incarcerate defendants who fail to pay their support obligations is very important in enforcing support orders, and in ensuring that the children, who are the focus of these orders, are adequately financially provided for. Finally, as previously set forth, Defendant has the present ability to pay his purges, and, therefore, he can be released from his incarceration sentence if he pays the purge amounts, for the instant support cases. Defendant's complaint regarding the consecutive nature of his sentences, at four separate docket numbers, would be nullified, if Defendant had simply paid the support when he was directed to do so. Furthermore, now, if Defendant pays the purges set by this Lower Court, which represent payments rightfully due to his children and to public assistance, as he previously did in the past, Defendant holds the key to his own incarceration and can release himself from the incarceration sentences imposed in the four instant cases, if he pays the purges. Defendant chose to parent three separate children, with three separate mothers, involving four separate households, and Defendant has the responsibility and must assume the consequences of his decisions. Accordingly, Defendant's third issue on appeal also fails.

Defendant's fourth and final issue on appeal is whether Defendant had the right to a jury trial, where none of his incarceration sentences, at any of the four docket numbers, exceeded six months. With regard to Pennsylvania criminal law, it is well established that,

> The United States and Pennsylvania Constitutions require that one accused of a 'serious offense' be given a jury trial. The decisions of the Supreme Court of the United States have established a fixed dividing line between petty and serious offense[s]: those crimes carrying more than six months sentence are serious and those carrying less are petty crimes. It is well settled, therefore, that no right to a jury trial exists at such trials when a sentence of six months or less is imposed. . .*Commonwealth v. Smith*, 868 A.2d 1253, 1257 (Pa. Super. Ct. 2005). (internal citations omitted).

23 Pa.C.S. §4345 permits the court to impose an incarceration sentence, with a purge, upon finding a defendant in civil contempt of a support order; however, pursuant to the express mandates of 23 Pa.C.S. §4345, that sentence cannot exceed six months. Therefore, since an incarceration sentence, with a purge, for a contempt of a court order cannot exceed six months, no provision exists, permitting defendants to have a jury trial in proceedings related to contempt of a support order, especially in view of Defendant's ability to be released from his incarceration sentences for the instant cases, upon paying his separate, individually assessed purges, based upon the amount of Defendant's arrearages in each case, as well as Defendant's present ability to pay.

In the instant matter, as previously set forth, this Lower Court sentenced

Defendant, in accordance with the requirements of 23 Pa.C.S. §4345. The undersigned judge did provide Defendant with each individually assessed purge amount and did not sentence Defendant to a term of imprisonment of more than six months in each case. Rather, upon finding Defendant in contempt of four separate Support Orders at four separate Docket Numbers involving four separate cases, the undersigned judge sentenced Defendant to a term of imprisonment of six months, at each of the four instant cases, involving four different Plaintiffs. Therefore, since Defendant did not have the right to jury trial, this Lower Court did not inform Defendant that any such right existed. Accordingly, Defendant's fourth and final issue on appeal also fails.

For all of the foregoing reasons, all of Defendant's issues on appeal lack merit.

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

COMMONWEALTH OF PENNSYLVANIA

v.

DAVID ALAN KLEES

CRIMINAL PROCEDURE / CLOSING ARGUMENT

The length of closing arguments is left to the discretion of the trial court. Unless there is such an unreasonable limitation of time that effectively denies a defendant the right to summation, a criminal conviction should not be disturbed.

CRIMINAL PROCEDURE / CLOSING ARGUMENT

Where a matter is within the trial court's discretion, it is not sufficient to persuade the appellate court that it might have reached a different conclusion if, in the first place, charged with the duty imposed on the court below; it is necessary to go further and show an abuse of discretionary power. Such abuse is not merely an error of judgment; but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable or the judgment is the result of partiality, prejudice, bias or ill-will as shown by the evidence of record, discretion is abused.

CRIMINAL PROCEDURE / CLOSING ARGUMENT

The trial court's discretion is not abused where the court limited the defendant's closing argument to 93 minutes and, toward the end, told the defendant's counsel that he would need to "wrap it up in about ten minutes" and then gave him twenty minutes.

APPELLATE PROCEDURE / WAIVER OF CLAIMS

The appellant has waived his claim that the statute of which he was convicted violates his right to substantive and procedural due process when these claims are first made on appeal and also the defendant fails to aver an articulable challenge to the constitutionality of a statute.

CRIMINAL PROCEDURE / DRUG OFFENSES

The Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. §780-113 (a)(14), which prohibits the administration, dispensing, delivery, gifts, or prescription of any controlled substance by any practitioner or professional assistants unless done in good faith in the course of his professional conduct, within the scope of the patient relationship, and in accordance with treatment principals accepted by a responsible segment of the medical profession does not violate a defendant's rights to due process.

EVIDENCE / RELEVANCE

The evidence of a sexual relationship between the defendant and one of his patients, to whom he provided drugs and property, was admissible because it shed light on the defendant's motivations to commit a criminal act.

EVIDENCE / EXPERT TESTIMONY

Where the Commonwealth's medical expert gave detailed reasons why

the defendant's conduct was not in accordance with responsible practice for each of the defendant's eleven convictions, the convictions will not be overturned by taking the medical expert's testimony out of context. The jury was free to accept all, part, or none of the medical expert's testimony after cross-examination.

CRIMINAL PROCEDURE / SUFFICIENCY OF EVIDENCE

The defendant's mens rea to commit a criminal act was sufficiently demonstrated by the defendant's taped telephone conversations which easily establishes knowledge that he was violating the drug laws, by the defendant's knowledge that pharmacists were refusing to fill his prescriptions, and by complaints from the family of his patients and his own medical staff.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA NO. 258 OF 2004

Appearances: John Mir, Esq. for Klees
Daniel Brabender, Esq. for Klees
John Garhart, Esq., for the Commonwealth
Douglas Wright, Esq. for the Commonwealth

OPINION

On November 19, 2004, Appellant was convicted after a jury trial of eleven separate felony counts of prescribing medications in violation of the Controlled Substance, Drug, Device and Cosmetic Act (the Drug Act). Appellant has perfected a timely appeal. A Final Statement of Matters was filed on July 21, 2005. This Opinion is in response thereto. Each of the issues Appellant raises will be addressed seriatim.

WHETHER APPELLANT WAS DENIED THE RIGHT TO A SUMMATION

Appellant claims he "was denied a fair trial because the Court cut short, and basically did not allow defense counsel to complete the closing argument." Final Statement of Matters, Paragraph 1. Appellant's claim belies the record.

During voir dire, Appellant was made aware three potential jurors had travel plans. To Appellant's knowledge, one of the jurors had an airplane flight leaving on Friday, November 19, 2004 at 2:00 p.m. from the Erie International Airport. Two other potential jurors had non-refundable airline tickets for Saturday, November 20, 2004. Knowing this information, Appellant nonetheless selected these individuals to serve on the jury.

In reviewing scheduling matters during the course of the trial, there were various discussions with all parties, including Appellant, about concluding the trial prior to the three jurors leaving for vacations. In fact, prior to closing arguments, there were again discussions about the need

for one juror to leave by 1:00 p.m. that day for an airplane flight and that two jurors were going on vacation the next day. See Jury Trial Transcript (hereinafter J.T.) November 19, 2004 at p. 2. While Appellant is correct that there were no prior time limits placed on closing arguments, Appellant cannot deny knowledge that the closing arguments and jury instructions had to be concluded in time to allow one juror to be dismissed by 1:00 o'clock p.m. *Id.*

The record reflects the last day of the trial convened on November 19, 2004 at 9:32 a.m. and immediately began with Appellant's closing argument. *Id.* at p. 8. For purposes of this analysis, it is assumed that Appellant's closing argument began at 9:33 a.m. After well over one hour elapsed, this Court instructed Appellant's counsel "you need to wrap it up in about ten minutes," *Id.* at p. 45.

Appellant's counsel did not summarize Appellant's position in the next ten minutes. Instead of limiting Appellant's counsel to ten minutes, this Court waited until the fifteen minute mark to intercede. Specifically, Appellant's counsel was informed:

> THE COURT: Mr. Mir, it's now been fifteen minutes since I gave you ten minutes.
>
> MR. MIR: I'm sorry.
>
> THE COURT: I'll give you five minutes to wind it up. I'm sure you can do that.

J.T., November 19, 2004, pp. 55-56.

Appellant's counsel did conclude his closing argument in the ensuing five minutes. The result was that Appellant's counsel was given and utilized twenty minutes to summarize his position rather than the original ten minutes allotted. More importantly, the record reflects Appellant's closing argument finished at 11:06 a.m. *Id.* at p. 58 (the court recessed at 11:07 after a brief comment. Therefore it is fair to find Appellant's closing concluded at 11:06 a.m.). Appellant's closing argument lasted from 9:33 a.m. until 11:06 a.m., a total of ninety-three (93) minutes.

The Pennsylvania Supreme Court has held "the length of closing arguments is left to the discretion of the trial court. Unless there is such an unreasonable limitation of time that effectively denies a defendant the right to summation a criminal conviction should not be disturbed." *Commonwealth v. Brown*, 554 Pa. 406, 422, 676 A.2d 1178, 185 (1996). In the case sub judice, a total of ninety-three (93) minutes for a closing argument is not an unreasonable limitation of time. *See also Commonwealth v. Garcia*, 443 Pa. Super. 414, 661 A.2d 1338 (1995).

In *Garcia*, *supra*, the Pennsylvania Superior Court explained the legal burden of Appellant's challenge:

> "Where the discretion exercised by the trial court is challenged on appeal, the party bringing the challenge bears a heavy burden. . . [I] t is not sufficient to persuade the appellate court that it might have

> reached a different conclusion if, in the first place, charged with the duty imposed on the court below; it is necessary to go further and show an abuse of the discretionary power. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgement exercised is manifestly unreasonable, or [the judgment is] the result of partiality, prejudice, bias or ill-will, as shown by the evidence of record, discretion is abused. We emphasize that an abuse of discretion may not be found merely because the appellate court might have reached a different conclusion, but requires a showing of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support as to be clearly erroneous."

443 Pa. Super. at 426, 661 A.2d at 1394-95.

The record does not establish there was an abuse of discretion in limiting Appellant's closing argument to ninety-three (93) minutes. Although there were eleven counts for the jury to consider, each count involved the same crime. Hence Appellant only needed to address one provision of the Drug Act. Further, the Commonwealth's theory was similar as to each count, including the testimony of its expert. Thus Appellant's closing could have easily addressed the relevant issues within ninety-three (93) minutes.

Notably, at no prior time did Appellant's counsel ever indicate an intent to present a closing argument lasting more than ninety-three (93) minutes. Given the time constraints as known by Appellant's counsel, time limitations on closings could have been discussed ahead of time. Nevertheless, Appellant's counsel was given ninety-three (93) minutes to close to the jury. This was ample time to present Appellant's position in this case. The Commonwealth was held to the same time limitation. J.T., November 19, 2004 at p. 58.

Accordingly, Appellant was not denied the right to a summation.

WHETHER APPELLANT HAS WAIVED ANY CONSTITUTIONAL CHALLENGE TO THE DRUG ACT

Appellant contends that 35 Pa. C.S.A. §780-113(a)(14), of which he was convicted, violates his right to substantive and procedural due process under the Pennsylvania and federal Constitutions. Appellant has waived these claims for several reasons.

Appellant has failed to file any pre-trial or post-trial challenge to the constitutionality of the statute. Appellant's first constitutional claims are on appeal. Therefore, Appellant has waived these contentions. Pa. R.A.P. 302. *Cimaszewski v. Pa. Board of Probation and Parole*, 868 A.2d 416, 429 (Pa. 2005).

Appellant has also waived this challenge by failing to articulate an argument. Appellant simply avers "the statute in question effectively criminalizes, or punishes criminally, behavior which is non-criminal in

nature." Final Statement of Matters, Paragraph 2. Appellant's opinion may be that his behavior was not criminal, but the jury disagreed. Other than Appellant's opinion, it is unclear whether Appellant's argument is under the equal protection clause, a claim of vagueness or any other specific constitutional violation. Because Appellant does not aver an articulable challenge to the constitutionality of the statute, his claim is not reviewable. *Commonwealth v. Dowling*, 778 A.2d 683 (Pa. Super. 2001) ("When the trial court has to guess what issues an Appellant is appealing, that is not enough for meaningful review." *Id* at 686).

WHETHER THE DRUG ACT VIOLATES APPELLANT'S SUBSTANTIVE AND/OR PROCEDURAL DUE PROCESS RIGHTS

Appellant was convicted of violating this part of the Drug Act:

> "(a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:
>
> ...
>
> 14) The administration, dispensing, delivery, gift or prescription of any controlled substance by any practitioner or professional assistant under the Practitioner's direction and supervision unless done (i) in good faith in the course of his professional practice; (ii) within the scope of the patient relationship; (iii) in accordance with treatment principles accepted by a responsible segment of the medical profession."

35 PS §780-113(a)(14).

The constitutionality of this provision has already been established. The Superior Court has held:

> "The manifest purpose of this statute is to limit the dispensing of drugs by a physician to the bounds of his professional practice, and to prevent drug-pushing by doctors. That the first two subdivisions of this statute meet the requirements of due process should not be doubted. Congress has passed provisions similar to section 780-113(a)(14), *see* 21 U.S.C. §§802(20), 829(a), (b), and 841(a)(1) (1972), which federal courts have repeatedly upheld under attacks based on the fourteenth amendment. In *United States v. Jobe*, 487 F.2d 268 (10th Cir. 1973), cert denied, 416 U.S. 955, 94 S.Ct. 1968, 40 L.Ed.2d 305 (1974), a physician, under facts almost identical to the facts here, was convicted under the federal statutes. On appeal, the court held that the conviction was valid, and that the defendant's due process rights were not violated because the federal statutes proscribed the prescription of controlled substances unless for "a legitimate medical purpose" and "in the usual course of [the doctor's] professional practice." *United States v. Jobe, supra* at 269. *See also United States v. Collier*, 478 F.2d 268 (5th Cir. 1973); *United States v. Rosenberg*, 515 F.2d 190 (9th Cir.), cert. denied, 423 U.S. 1031, 96 S.Ct. 562, 46

> L.Ed.2d 404 (1975); Annot., 33 A.L.R. (Fed.) 220, 233-34 (1977) (the term "in the course of professional practice" is not to vague because it has been subject to frequent judicial construction). Nor is the constitutionality of section 780-113(a)(14) undermined by the third subsection requiring that the dispensing of controlled substances be "in accordance with treatment principles accepted by a responsible segment of the medical profession." In *Commonwealth v. Stoffan*, 228 Pa. Super. 127, 323 A.2d, 318 (1974), we held that this clause, which was then contained in another part of the Controlled Substance, Drug, Device and Cosmetic Act, was specific enough to provide a standard of conduct to which physicians could be held legally accountable. The fact that in 1974 the Act was amended to incorporate this clause into Section 780-113(a)(14) did not render it any less specific."

Commonwealth v. Possinger, 399 A.2d 1077,1079 (Pa. Super. 1979).

The Superior Court has also observed "the purpose of the Drug Act is to regulate the distribution of drugs, avoid abuse and ensure proper medical use". *Commonwealth v. West*, 392 A.2d 380, 382 (Pa. Super. 1978). *See also Commonwealth v. Larsen*, 682 A.2d 783 (Pa. Super. 1996). ("To hold otherwise would ignore the clear mandate of the legislature in requiring record keeping in controlled substance cases, with the obvious benefit of avoiding abuse, tracking sales and checking a patient's consumption." *Id* at 788).

Medical science and the law recognize the dangerous properties of certain medications and the need to control their distribution. The Drug Act categorizes these medications into Schedules based in part on their addictive qualities. Medical doctors are charged with the significant responsibility of dispensing medications consistent with medical protocol and diagnosis. The failure of a doctor to properly prescribe these medications can have disastrous consequences, including severe addiction and/or death. To ensure compliance, the Drug Act makes it a crime to violate this provision.

The criminalization of a doctor's conduct under this statute is no different than the regulation of behavior that could lead to death by the delivery of a controlled substance by a lay person, *see* 18 Pa. C.S. §2506(a), or by the operation of a motor vehicle, *see* 75 Pa. C.S.A. § 1532. In each scenario, the law identifies and punishes criminally those behaviors which could result in someone's death.[1]

Our criminal laws also punish a person for assaulting another. A doctor engaging in a course of practice which unnecessarily allows a patient to become or to stay addicted to powerful substances is a form of assaultive

[1] In fact, Erie County has seen a drastic increase and a record number of deaths from an overdose of prescribed medications.

behavior. Appellant's conduct with the eleven patients herein provides enlightening justification for holding doctors criminally liable.

Therefore, Appellant's challenge to the constitutionality of the statute is without merit.

WHETHER APPELLANT'S CONDUCT REGARDING BRENDA BREU WAS CRIMINAL

Appellant claims that his sexual relationship with Brenda Breu "does not rise to the level of a criminal act." Final Statement of Matters, Paragraph 3. Appellant was not prosecuted for his sexual relationship with Brenda Breu. Instead, Appellant was convicted because of his medical treatment (or lack thereof) for Brenda Breu.

The evidence of the sexual relationship between Appellant and Brenda Breu shed light on Appellant's motivation to commit a criminal act. Appellant's statements and demeanor as captured on the wiretapped conversations with Brenda Breu evince Appellant's knowledge of the criminal violations he was committing. For example, Appellant repeatedly expressed his concern about Agent Parker from the Attorney General's Office and the need to avoid any further scrutiny from law enforcement. There was no cause for such concerns if Appellant was not knowingly violating the law.

Appellant's allegation that another physician initially prescribed Percodan and Percoset for Brenda Breu is meaningless. Appellant was held accountable for what he did, regardless of another physician's initial prescription(s) for Breu.

WHETHER THE PARSING OF DR. JOHNSTON'S TESTIMONY MEANS THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE

Appellant cites four examples elicited on cross-examination of Dr. Craig Johnston, the Commonwealth's medical expert, to argue there was not an adequate factual foundation for his testimony and therefore the verdict was against the weight of the evidence. However, Appellant mischaracterizes the context and the content of Dr. Johnston's testimony.

Also, the jury had the benefit of Dr. Johnston's credentials and the basis for his opinions. It was for the jury to determine what weight to give the testimony of Dr. Johnston. In so doing, the jury could consider Dr. Johnston's qualifications and the basis for each of his opinions.

As part of his educational background, Dr. Johnston received a Bachelors and a Masters Degree in pharmacy. J. T. November 17, 2004 p. 150. Prior to going to medical school, Dr. Johnston worked as a pharmacist in a hospital and a retail pharmacy. He was also the Director of Pharmacy at Metro Health Center. *Id* at p. 150. Dr. Johnston is board-certified in family practice. *Id* p. 151. He has been practicing medicine for over twenty years and taught family practice medicine for thirteen years. *Id* at p. 153.

In rendering his opinions, Dr. Johnston relied on Appellant's medical charts, medical notes, the patient histories and prescriptions written by Appellant. For each of Appellant's eleven convictions, Dr. Johnston gave detailed reasons why Appellant's conduct was not in accord with responsible medical practice.

Appellant's attempt to discredit Dr. Johnston by focusing only on four answers on cross-examination is unpersuasive. Each of Appellant's criticisms will now be reviewed.

Appellant first contends Dr. Johnston was not credible because he could not opine that the renewal of one prescription for Lorcet for Appellant's patient, Yvonne Green, was not in accord with acceptable medical practice. *See* Final Statement of Matters, Paragraph 4(a). It is true that when the cross-examination was narrowed to one prescription of Lorcet for Appellant's patient, Yvonne Green, Dr. Johnston could not conclude whether this prescription alone was acceptable medical practice. J.T. November 17, 2004 at p. 208. However, Appellant ignores the surrounding testimony. To get the proper context, the full excerpt is herein provided:

> Q. Well, now, why would you find it unusual that Dr. Klees was prescribing Lorcet if it's not a first visit with a patient? Would it be unusual if she had been seen by another doctor for a year and had chronic pain and had been taking Lorcet and Dr. Klees was simply continuing that medication, that would not be unusual, correct?
>
> A. Probably not unusual. I probably wouldn't have done it.
>
> Q. You probably wouldn't have done it. And no responsible physician would have done that?
>
> A. I can't say that but I probably wouldn't.
>
> Q. You can't read from that little sheet regarding that particular practice, can you, in all fairness, doctor?
>
> A. Would you repeat that.
>
> Q. You can't read from your sheet and state that opinion with regard to this particular practice, correct? You might not do this but you can't say - you can't render the opinion that you've been asked to by the Attorney General with regard to this Lorcet prescription under these circumstances?
>
> A. That's correct.
>
> Q. Okay. So you would change your testimony, is it safe to say?
>
> A. No.

J.T. November 17, 2004, pp. 207-208.

It is clear from this excerpt that Dr. Johnston testified that he "probably" would not have issued the prescription for Lorcet to Yvonne Green. Further, Dr. Johnston unequivocally testified that the possible validity of the Lorcet prescription did not change his professional opinion about Appellant's conduct. After all, Appellant wrote forty-nine (49) prescriptions for Yvonne Green. According to Dr. Johnston, the nature and volume of these prescriptions were not consistent with treatment principles accepted by a responsible segment of the medical profession.

In determining whether there was a "legally adequate factual foundation" laid for the opinion of Dr. Johnston, the record reflects that he gave an extensive explanation of his reasons for opining Appellant's care of Yvonne Green violated the statute. *See* J.T. November 17, 2004, pp. 155-160. The jury was free to accept all, some or none of Dr. Johnston's testimony.

Next, Appellant challenges Johnston's testimony regarding Appellant's patient, Sherry Ziroli, by averring "evidence indicated that at least twenty-two different physicians had supplied prescriptions to her." Final Statement of Matters, Paragraph 4(b). Accepting as true Appellant's averment, the result is the same because Dr. Johnston's testimony was based on Appellant's conduct.

The jury had the information regarding the twenty-two different physicians. The fact that Sherry Ziroli sought treatment from other sources does not render Appellant's care acceptable. If anything, it should have alerted Appellant to the possibility Ziroli was "doctor-shopping". Dr. Johnston provided in detail his analysis of the conduct of Appellant. J.T. November 17, 2004 pp. 160-164. Appellant was held accountable for his conduct and not that of other physicians.

Thirdly, Appellant claims that because Sheryl Jacobsen did not have insurance to pay for an MRI that Dr. Johnston should not be found credible. *See* Final Statement of Matters, Paragraph 4(c). Appellant's argument is illogical. The fact that Sheryl Jacobsen for financial reasons may not have undergone an MRI when requested by Appellant does not render proper the medical care provided by Appellant. To the contrary, for Appellant to continue to prescribe medications without objective evidence that possibly could be detected by an MRI was in part the basis for Dr. Johnston's opinion. In any event, Dr. Johnston set forth in detail his reasons why the care of Sheryl Jacobsen by Appellant was not in accordance with treatment principles accepted by a responsible segment of the medical profession. J.T. November 17, 2004, pp. 174-176.

Lastly, Appellant argues "Dr. Johnston admitted that medications are frequently prescribed without objective findings of pain. He acknowledged that he had prescribed Hydrocodone Tylenol with a negative MRI." Final Statement of Matters, Paragraph 4(d). Appellant misconstrues the context of the doctor's testimony. The full excerpt is as follows:

A. I think that's how physicians do things. They have - our practice is based in science. There's a practice of medicine but there's a basis of that we have to use to make decisions. And, you know, I've had people come in - I remember I was working the emergency room one night and this fellow came in, he had terrible pain in his teeth and he wanted me to prescribe narcotics and the most I would offer him was non-steroid anti-inflammatory medicine, and he argued that we had all kinds of discussions and finally he realized that he was not going to get a narcotic pain medicine from me and he walked out and we talked about football and he left. There was no pain at all. There was nothing on a physical exam. History was he had terrible pain but he didn't. And by the end of the visit, he admitted that he was trying to get medicines from me.

Q. Now, in this case, that was not the application of your instinct to any degree?

A. Well, he had no physical findings. You know, he said his tooth hurt. His tooth looked fine. I've seen abscessed teeth before and there was no redness, there was no swelling. So it's very difficult to believe someone like that. You know, if he would have had an abscess, I probably would have believed he had pain, but he didn't. There was no - based on my physical - he said he had pain and people come in with back pain all the time and they say that they have it. Now, that doesn't mean that they do.

Q. Now, if they don't have some objective - if there's not some objective finding, you will not give them medication?

A. No, no, I didn't say that at all. I would probably prescribe if I find, and that happens a lot. I had a patient come in, 30 year old female and had terrible back pain and I prescribed a like - I prescribed a non-steroidal anti-inflammatory medicine and sent her to physical therapy. She didn't get better. So at that point I - and she had no physical findings. Her physical exam was normal and I prescribed non-steroidal anti-inflammatory medicine. She didn't get better. Pain was terrible. So I prescribed one of the medicines that we talked about here, was Lortab, to go along with a non-steroidal anti-inflammatory, continued physical therapy. Didn't get better. I sent her to a neurosurgeon. I did an x-ray, did an MRI. MRI was normal. Sent her to a neurosurgeon and I called our - I called our neuroradiologist said how can this lady have this, and he said, well, you know, I don't know. So I sent her to the nurse. The nurse said put her in a brace and he'll see her in three months. Her physical exam changed. She had changes of a disk that she didn't have before. So I repeated the MRI. The MRI was again normal. I called a radiologist

> and asked how can this be, she has physical findings. Now he said, well, sometimes you can do these MRIs at different positions with weights and so I called a neurosurgeon, he said have her come down Thursday. Went down Thursday and he examined her and scheduled her for surgery. She had surgery the next week and she's in recovery now. But that's how you move with these. You do the physical exam and see the changes and then you make a move. I would not continue - I would not increase pain medication. That wasn't the answer. The answer was find the reason and then make her better.

J T . November 17, 2004, pp. 224 - 227.

When the full excerpt is read, the jury was free to accept Dr. Johnston's explanation of the progression of medical inquiries associated with prescribing pain medications. Under the protocol as testified to by Dr. Johnston, the jury could find Appellant's conduct was not in accordance with treatment principles accepted by a responsible segment of the medical profession.

Notably, on redirect examination, Dr. Johnston testified that none of the questions or answers during his cross-examination caused him to change any opinion rendered on direct examination. J.T. November 17, 2004, p. 235. While Appellant isolates certain parts of Dr. Johnston's testimony on cross-examination, the jury was free to consider Johnston's testimony as a whole. There was a substantial basis for the jury to find Dr. Johnston credible.

WHETHER APPELLANT'S OWN STATEMENTS AND CONDUCT ESTABLISH HIS MENS REA

Appellant alleges there was insufficient evidence that he possessed a criminal state of mind. See Final Statement of Matters, Paragraph 5. Appellant ignores his own conduct and statements as captured on tape.

The jury had the opportunity to hear Appellant's taped phone conversations with Brenda Breu. Appellant's demeanor, voice inflections and use of street vernacular easily established his knowledge that he was violating the drug laws. The tapes show the dark side of Appellant.

The objective evidence in the form of Appellant's medical charts and prescriptions establish that his behavior was not in accordance with treatment principles accepted by a responsible segment of the medical profession. To Appellant's knowledge, pharmacists were refusing to fill several of his prescriptions. J.T. November 12, 2004 pp. 122-126; J.T. November 15, 2004, pp. 53-54. Agent Parker personally visited with Appellant to discuss Appellant's prescription writing history. J.T. November 12, 2004, p. 149. Appellant attended a seminar for doctors presented by Agent Parker regarding behaviors of drug-seeking people. J.T. November 12, 2004 at p. 97.

Family members of Appellant's patients complained to Appellant about his prescriptions for their addicted family member. J.T. November 15,

2004, p. 52. Appellant's own medical staff expressed concerns to him about his prescription writing. *Id* pp. 67, 109, 119. Appellant was visited by an investigator of the Department of State, Bureau of Professional and Occupational Affairs based on concerns for Appellant's prescriptions. J.T. November 12, 2004, p. 148.

In sum, the record is replete with evidence that Appellant knowingly violated the Drug Act. His denial of a mens rea was not accepted by the jury nor supported by the record.

CONCLUSION

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

BY THE COURT:
/s/ **WILLIAM R. CUNNINGHAM, JUDGE**

IN THE MATTER OF THE ADOPTION OF K.D.M.C. AND D.D.C.

CIVIL PROCEDURE / LOCAL RULES

Local practice of presenting petition to voluntarily relinquish parental rights at commencement of hearing on petition for involuntary termination was not in violation of 23 Pa. C.S. § 2305 where opposing counsel was aware that parent intended to voluntarily terminate parental rights at least two weeks before hearing date.

Local practice allowed voluntary relinquishment petitions to be presented at the commencement of involuntary termination hearing by counsel for the parent, or by social service agency where it has prepared voluntary relinquishment petitions for pro se litigants.

Pennsylvania Rules of Court require that the Orphans' Court Rules be liberally construed to secure the just, speedy, and inexpensive determination of every action or proceeding to which they are applicable.

Where counsel for social service agency knew in advance that natural mother was going to file a petition to voluntarily relinquish parental rights, technical errors in filing of petition and scheduling of hearing did not infringe upon social service agency's substantive rights.

JUVENILE / TERMINATION OF PARENTAL RIGHTS

Social service agency must present reasonable basis for withholding its consent to a voluntary relinquishment petition.

It was unreasonable for social service agency to withhold its consent of voluntary relinquishment petition so as to support a finding of aggravating circumstances with regard to future dependency proceedings involving children not yet born.

Parental rights may be terminated voluntarily or involuntarily.

Voluntary and involuntary termination of parental rights results in ending the legal relationship between parent and child, and frees the child for adoption.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA 44 IN ADOPTION 2005

Appearances: Michael R. Cauley, Esq, on behalf of the Erie County Office of Children and Youth, Appellant
Matthew D. Urban, Esq., on behalf of the natural mother, Appellee
Karen L. Klapsinos, Esq., Guardian Ad Litem, representing the children, K.D.M.C. and D.D.C.

OPINION

Domitrovich, J. October 31, 2005

This matter arises from the appeal of the Office of Children and Youth, (hereinafter referred to as OCY) from this Lower Court's July 28, 2005

Decree, allowing the natural mother to relinquish voluntarily her parental rights and duties to an Agency, entered after a hearing. Specifically, in its Decree, this Lower Court stated that after consideration of the Petition for Voluntary Relinquishment of Parental Rights (hereinafter referred to as VR petition) of the natural mother, (hereinafter referred to as N.M.), this Lower Court found that N.M. had relinquished voluntarily forever all of her parental rights and duties to her minor children, K.D.M.C. and D.D.C., both of whom had been in the care of OCY for a minimum period of three days, pursuant to 23 Pa.C.S. §2501. On appeal, OCY has raised ten issues,[1] several of which are nearly indistinguishable from one another and/or contain overlapping arguments. Therefore, as a matter of efficiency, this Lower Court will combine and address OCY's ten issues as the following three issues: (1) whether OCY provided a reasonable basis for withholding its consent to N.M.'s Petition for Voluntarily Relinquishment of Parental Rights, where OCY indicated its refusal to consent was based upon its desire to apply aggravated circumstances to a possible future dependency proceeding involving

[1] Specifically, OCY raised the following issues on appeal: (1) "The Honorable Court erred in concluding that the Appellant had 'unreasonably withheld' its consent to the Voluntary Relinquishment Petition of the Appellee, mother;" (2) "The Honorable Court erred in entertaining the Appellee's Petition for Voluntary Relinquishment of Parental Rights as same had not been filed, of record, as of July 28, 2005;" (3) "The Honorable Court erred in entertaining the Appellee's Petition for Voluntary Relinquishment of Parental Rights as same had not been filed, of record, as required by Pa. R.C.P. 1007. As Appellee's Petition had not been 'filed' or otherwise properly commenced, the Honorable Court was without jurisdiction to entertain same;" (4) "The Honorable Court erred in granting Appellee's Petition for Voluntary Relinquishment of Parental Rights in the absence of the consent of the Agency as mandated by 23 Pa.C.S.A. 2501;" (5) "The Honorable Court erred in entertaining Appellee's Petition for Voluntary Relinquishment since the Hearing on the mother's Petition was held in violation of the requirement that such a Hearing on same 'shall not be less than ten days after filing of the Petition.' In this case, the Petition was not 'filed' until July 29, 2005;" (6) "The Honorable Court erred in entertaining the mother's Petition for Voluntary Relinquishment, which Petition did not contain the consent of the Appellant Agency, and where the Appellant Agency had not been properly served with the Petition in advance of the Hearing at which it was granted;" (7) "The Honorable Court erred in entertaining the Appellee's Petition for Voluntary Relinquishment or same was presented to the Court in violation of local Erie County Orphans' Court Rule 15.1.1;" (8) "The Honorable Court erred in granting the mother's Voluntary Relinquishment Petition as same was presented to the Court, without first having been filed, and in violation of local Erie County Civil Rule 440 requiring notice in advance to Appellant herein;" (9) "The Honorable Court erred in denying the Appellant a Hearing on its previously filed Involuntary Termination of Parental Rights Petition and/or by not following the procedure approved by the Superior Court of Pennsylvania *In Re: Adoption of A.M.B.* 812 A.2d 659 (2002);" and (10) "The Honorable Court erred in declining to hear the Appellant's Petition for Involuntary Termination of Parental Rights when said Petition was the only Petition that had been properly 'filed of record,' was the only Petition properly before the Court, and was the only Petition over which the Court had jurisdiction as of July 28, 2005."

N.M., and where N.M. was noticeably pregnant at the time of the termination of parental rights hearing; (2) whether this Lower Court erred by entertaining and granting N.M.'s signed and verified Petition for Voluntary Relinquishment of Parental Rights, presented according to customary local practice and procedure in Erie County, where the substantial rights of all of the parties in interest were preserved, and where the Guardian Ad Litem consents to mother's VR petition; and (3) whether this Lower Court erred by granting N.M.'s VR petition without hearing evidence and testimony concerning OCY's IVT petition, after considering the best interests and permanency of the children, and in accordance with the Pennsylvania Superior Court's decision in *In the Matter of the Adoption of A.J.B.*, 797 A.2d 264 (Pa. Super. Ct. 2002).

With regard to the relevant factual and procedural history of the instant case, K.D.M.C. was born on September 13, 2001, and is presently four years old. D.D.C. was born on September 25, 2003, and is presently two years old. N.M. is presently twenty-three years old, and is the natural mother of both children. The identities of the natural fathers of K.D.M.C. and D.D.C. are unknown.[2] On March 15, 2005, OCY filed its Petition for Involuntary Termination of the Parental Rights (hereinafter referred to as IVT petition) of N.M., as to both K.D.M.C. and D.D.C. OCY also filed a Citation and Notice, directing N.M. to appear for an IVT right to amend hearing, scheduled for May 2, 2005, in order to show cause why her parental rights as to K.D.M.C. and D.D.C. should not be terminated.

Accordingly, on May 2, 2005, an IVT/right to amend hearing was held before this Lower Court, at which N.M. stated she wanted to pursue IVT proceedings in this matter, and she did not want to provide consent to the adoption of K.D.M.C. and D.D.C., at that time. (N.T. 5/2/05 p.4). Therefore, an involuntary termination of parental rights proceeding, pursuant to local Erie County procedure, in this matter, was scheduled for a full trial at a later date, in order to provide time to appoint a Guardian Ad Litem to represent the interests of K.D.M.C. and D.D.C. at the next hearing, and in order to provide N.M. with an opportunity to obtain counsel and have the benefit of the advice of counsel. Subsequently, on May 1, 2005, N.M. filed an Application for a Court-Appointed Attorney. Accordingly, on May 11, 2005, the Honorable Elizabeth Kelly, President Judge, appointed Matthew Urban, Esq. to represent N.M. in this matter. Additionally, Karen Klapsinos, Esq. was appointed as Guardian Ad Litem and counsel

[2] It is noted that on July 28, 2005, the undersigned judge entered separate Orders involuntarily terminating the parental rights of John Doe as to K.D.M.C. and of John Doe as to D.D.C., after OCY presented evidence that it had properly published notification of the termination of parental rights hearing, as to both John Does with regard to each child, and where neither father appeared at said hearing. (N.T. 7/28/05 pp.44-47). No one alleging to be the father of either child filed an appeal from either or both of these Orders.

for the children. Subsequently, OCY served N.M. with a second Citation and Notice, directing her to appear for a hearing, scheduled for July 28, 2005, in order to show cause why her parental rights, as to K.D.M.C. and D.D.C., should not be terminated.

In early June of 2005, shortly after Attorney Urban had been appointed to represent N.M., Attorney Urban met with N.M. for the first time. (N.T. 7/28/05 p.24). During this meeting, N.M. indicated to Attorney Urban that she wanted to voluntarily relinquish her parental rights to K.D.M.C. and D.D.C. (N.T. 7/28/05 p.24). Therefore, it is undisputed that Attorney Urban had given Attorney Cauley at least several weeks notice orally that N.M. planned to file a VR petition in this matter, as is the custom in Erie County. (N.T. 7/28/05 pp.26-27). In fact, Attorney Urban contacted Attorney Cauley in early June of 2005 to inform him of N.M.'s intent to present a VR petition. (N.T. 7/28/05 pp.26-27). However, Attorney Cauley informed Attorney Urban that OCY refused to consent to her VR petition. (N.T. 7/28/05 pp.26-27).

On July 28, 2005, this Lower Court was assigned to hear the instant case within a block of time, during which it would address any VR petitions, as is customary practice, and/or OCY's IVT petition. In Erie County, it is customary practice for any VR petitions to be presented at the commencement of the IVT hearing by counsel for the parent, or by OCY where it has prepared VR petitions for *pro se* litigants. Therefore, at the beginning of the instant hearing, in accordance with this custom, Attorney Urban, on behalf of N.M., presented this Lower Court with a prepared Petition for Voluntary Relinquishment of Parental Rights, signed by N.M., as he had done so approximately one month prior thereto. (N.T. 7/28/04 p.5). However, Attorney Cauley, on behalf of OCY, refused to consent to N.M.'s VR Petition. Attorney Urban stated that N.M. wanted to pursue voluntary relinquishment proceedings because she believed voluntary relinquishment served the best interests of her children. (N.T. 7/28/05 p.4). Furthermore, the Guardian Ad Litem had joined in with N.M.'s VR petition, and provided her consent to said petition, in the best interests of K.D.M.C. and D.D.C. (N.T. 7/28/04 p.5). Therefore, Attorney Urban requested a ruling, with regard to N.M.'s Petition, at that time. (N.T. 7/28/04 p.4).

Accordingly, the undersigned judge requested that Attorney Cauley articulate a reasonable basis for OCY's refusal to consent to N.M.'s VR petition. (N.T. 7/28/05 p.5). Attorney Cauley clearly indicated that OCY opposed N.M.'s petition because OCY wanted to obtain a finding of aggravated circumstances, with regard to N.M., in order to bolster OCY's position with regard to a potential future IVT proceeding concerning a child with whom N.M. was noticeably pregnant at the time of the termination of parental rights hearing. (N.T. 7/28/05 pp.7-8). Attorney Cauley acknowledged that the Juvenile Dependency Court had entered

a finding of aggravated circumstances in the instant case, involving K.D.M.C. and D.D.C., but that this finding was predicated entirely on the basis that N.M. failed to maintain substantial and continuing contact with those children, and, therefore, only applicable to K.D.M.C. and D.D.C. (N.T. 7/28/05 p.7). Moreover, Attorney Cauley stated that the finding of aggravated circumstances, with regard to K.D.M.C. and D.D.C., "is not applicable to the child, for example, that the mother is currently pregnant with and due to deliver in October...And, therefore, I don't have the benefit of the prior aggravated circumstance finding in connection with that case if that case comes into dependency court...That factors into our opposition to the mother's request to voluntarily relinquish her rights today." (N.T. 7/28/05 p.7).

Furthermore, near the middle of the voluntary termination of parental rights hearing, Attorney Cauley elaborated upon OCY's proffered rationale for withholding its consent to N.M.'s VR Petition. Specifically, Attorney Cauley argued the following:

> Now, as we stand here today, Your Honor I'm aware that that lady is due to deliver yet another child. The Agency believes that we have concerns for that child based on this woman's history and her lack of ability to parent children, and there may be a possibility that that child will come under the authority of the Juvenile Court, as we are entitled, as Judge Tamilia himself noted in *A.M.B.*, 'Aggravated circumstances is an appropriate consideration in the event that kid comes into our care...' We cannot be precluded, according to his opinion, from seeking that finding in this termination case by a mother who comes in on the last day at the last minute and says, oh, I know I was - I know I didn't do anything, but I don't want to bear the reasonability for that. I want to voluntarily relinquish my rights. (N.T. 7/28/05 pp.18-21).

Subsequently, Attorney Urban provided this Lower Court with legal argument in favor of granting N.M.'s VR petition. Initially, Attorney Urban stated that he and N.M. had ample opportunity to discuss her case, and N.M. had decided that she wants to provide K.D.M.C. and D.D.C. with permanency at this time. (N.T. 7/28/05 pp.8, 22). N.M. recognized that K.D.M.C. and D.D.C. are currently living in a stable, loving home, and are well cared for by their foster parents. (N.T. 7/28/05 p.9). Moreover, N.M. wanted to voluntarily relinquish her parental rights in order to allow K.D.M.C. and D.D.C. to be adopted. (N.T. 7/28/05 p.9). In fact, N.M. indicated she was willing to waive her right to an appeal, in this matter. (N.T. 7/28/05 p.9).

Attorney Urban then argued that the Pennsylvania Superior Court's decision in *In the Matter of the Adoption of A.J.B.*, 797 A.2d 264 (Pa. Super. Ct. 2002) (hereinafter referred to as *A.J.B.)* provides the appropriate and relevant standard to apply to the instant matter. (N.T. 7/28/05 pp.9-10;

21-22). In *A.J.B.*, the Pennsylvania Superior Court held that it was improper for an Agency to withhold its consent to a Petition for Voluntary Relinquishment in order to improve its position with respect to a possible future termination of parental rights proceeding. (N.T. 7/28/05 pp.9-10). Furthermore, Attorney Urban stated that the Pennsylvania Superior Court found that the Orphans' Court had the discretion to hear a Petition for Voluntary Relinquishment, even where OCY did not provide its consent. (N.T. 7/28/05 p.10). Attorney Urban argued that the reasonableness standard, as clearly set forth by the Pennsylvania Superior Court in *A.J.B.*, must be applied to OCY's refusal to consent to N.M.'s VR petition. (N.T. 7/28/05 p.22). Moreover, Attorney Urban accurately indicated that OCY had not articulated a reasonable basis for withholding its consent to N.M.'s VR petition; rather OCY was "trying to essentially play God" by withholding its consent for the purpose of improving its position with regard to a potential future case that may or may not arise depending upon whether N.M. gives birth to her unborn child (N.T. 7/28/05 pp.22-23). Therefore, Attorney Urban argued that OCY should not be permitted to withhold its consent to N.M.'s Petition for Voluntary Relinquishment in order to bolster its position with regard to a potential, future IVT proceeding, concerning a child or children who do not presently exist, and, moreover, this Lower Court had the discretion to hear and make a ruling on the VR Petition, despite OCY's refusal to consent. (N.T. 7/28/05 p.10).

Subsequently, Attorney Cauley noted to this Lower Court that N.M.'s VR petition had not yet been filed of record. (N.T. 7/28/05 p.10). Rather, Attorney Urban presented N.M.'s signed Petition to this Lower Court at the commencement of the termination of parental rights hearing, as is the custom and policy in Erie County, even where OCY prepares a VR Petition for a *pro se* litigant.[3] (N.T. 7/28/05 p.11). OCY acknowledges this is the common procedural practice, in Erie County, for OCY or the attorney for the parent to present the unfiled, VR petition at the time scheduled for the IVT hearing. (N.T. 7/28/05 p.11). Specifically, the undersigned judge recognized this local practice by stating,

> [Attorney Urban's] doing exactly what all counsel do, they do not file the VR out of deference to the Court. They want the Court to make the ruling. If I rule against him, then of course he would file it. If I rule in favor of him in that case, I file the paperwork to make sure it's done in the best interests of the child or children. So his

[3] It is noted that in Erie County, where counsel for a parent or where OCY prepares a VR petition for a *pro se* litigant, generally, counsel and OCY do not file the VR petition prior to the hearing. Rather, the parent usually waives the right to have his or her VR petition filed ten days in advance of the hearing date, pursuant to 23 Pa.C.S §2503(a), since this is a right that is designed to protect the parents who decide to relinquish, and not to protect OCY, as OCY has recognized on several occasions.

> filing it or not filing is not anything that I would pay any particular attention to because in Erie they just bring the paperwork to Court. They want to make sure that their client wants to actually VR up until the last minute. (N.T. 7/28/05 p.11).

Attorney Urban also explained why it is not the policy in Erie County to file VR petitions prior to the date scheduled for the termination of parental rights hearing. Specifically, Attorney Urban stated that past clients have indicated to him that they want to voluntarily relinquish their parental rights, but subsequently change their minds. (N.T. 7/28/05 p.27). Attorney Urban indicated that he does not want to file a VR petition that is signed and verified by the client, have the client subsequently decide she does not want to voluntarily relinquish her parental rights, which is commonplace, and then have an outstanding VR petition that is filed of record, to which his client no longer consents, visibly, on the record, while the IVT petition is pending, causing potential prejudice to his client. (N.T. 7/28/05 pp.27-28).

Additionally, as previously set forth, the record establishes that although N.M.'s VR petition was not filed of record at the time of the termination of parental rights hearing, Attorney Cauley admitted he had received notice well in advance that N.M. intended to present a VR petition at the time of the hearing. Furthermore, N.M. implicitly waived the ten-day waiting period, codified at 23 Pa.C.S. §2503(a), at the time of the hearing. Attorney Urban was appointed to represent N.M. on May 11, 2005, and subsequently met with N.M. for the first time in early June of 2005. (N.T. 7/28/05 p.24). During this meeting, N.M. indicated to Attorney Urban that she wanted to voluntarily relinquish her parental rights to K.D.M.C. and D.D.C. (N.T. 7/28/05 p.24). Therefore, Attorney Urban contacted Attorney Cauley in early June of 2005 to inform him that N.M. planned to file a VR petition in this matter; however, Attorney Cauley informed Attorney Urban that OCY would not consent. (N.T. 7/28/05 pp.26-27). In fact, at the time of the VR hearing, Attorney Cauley agreed "it's been at least a couple weeks" since he had spoken with Attorney Urban regarding N.M.'s desire to voluntarily relinquish her parental rights. (N.T. 7/28/05 p.26).

Moreover, Attorney Cauley argued that the Pennsylvania Superior Court's holding in *In the Matter of the Adoption of A.M.B.*, 812 A.2d 659 (Pa. Super. Ct. 2002), (hereinafter referred to as *A.M.B.*) was applicable to the case at hand. (N.T. 7/28/05 p.13). Specifically, Attorney Cauley indicated that in *A.M.B.*, the Pennsylvania Superior Court affirmed the Orphans' Court decision to terminate involuntarily a mother's parental rights, after hearing both the IVT petition and the VR petition, where the mother had done virtually nothing during the dependency period to attempt to remedy the conditions that caused the removal and adjudication of the

children. (N.T. 7/28/05 p.13).

However, the undersigned judge properly noted that *A.M.B.* was procedurally dissimilar from the instant case. (N.T. 7/28/05 p.14). Specifically, in *A.M.B.*, the Orphans' Court heard testimony concerning the IVT petition, made findings of fact based upon conclusive evidence that involuntary termination was appropriate, and subsequently granted OCY's IVT petition, and denied mother's VR petition. (N.T. 7/28/05 p.14).

Moreover, the undersigned judge indicated that since OCY had failed to articulate a reasonable basis for withholding its consent to N.M.'s VR petition, this Lower Court had the discretion to grant N.M.'s VR petition, without receiving evidence or hearing testimony concerning OCY's IVT petition, in accordance with the holding in *A.J.B.* (N.T. 7/28/05 p.14). This Lower Court determined that the children's best interests, permanency, and stability, sought by OCY, would be best served by the Court's acceptance of N.M.'s VR petition, where, based on experience, this Lower Court believed it to be unlikely that any party would appeal this determination or would be successful in an appeal of this determination, thereby delaying OCY's permanency goals for K.D.M.C. and D.D.C.

Nevertheless, Attorney Cauley insisted that OCY had a right to have testimony and evidence concerning the IVT petition heard. (N.T. 7/28/05 p.14). Despite his failure to articulate a reasonable basis for withholding his consent to N.M.'s VR petition, and despite his failure to cite any support for his argument that he is entitled to a hearing on his IVT petition, Attorney Cauley requested that this Lower Court permit OCY to place all of its evidence and testimony on the record, and subsequently make a determination as to whether it will grant OCY's IVT petition, or N.M.'s VR petition. (N.T. 7/28/05 p.15).

Finally, Attorney Klapsinos, Guardian Ad Litem for the children, stated she agreed with Attorney Urban, that this Lower Court should permit N.M. to relinquish voluntarily her parental rights as to K.D.M.C. and D.D.C. (N.T. 7/28/05 p.5). As Guardian Ad Litem, Attorney Klapsinos further stated that with regard to what is in the best interests of K.D.M.C. and D.D.C., there is no difference between granting a VR petition versus granting an IVT petition. (N.T. 7/28/05 p.28). The goal for the children, in the instant case, of providing permanency and stability, would be better accomplished via N.M.'s voluntary relinquishment. (N.T. 7/28/05 pp.5, 29).

Moreover, upon the conclusion of oral argument, the undersigned judge determined that OCY had failed to articulate a reasonable basis for withholding its consent to N.M.'s VR petition. (N.T. 7/28/05 p.37). Therefore, this Lower Court conducted a thorough colloquy of N.M., with regard to her VR petition, during which N.M. orally verified her intention to relinquish forever her parental rights and duties as to K.D.M.C. and D.D.C. (N.T. 7/28/05 pp.37-42). Subsequently, this Lower Court entered an Order, granting N.M.'s VR petition, as OCY had failed to articulate a

reasonable basis for withholding consent, and as this Lower Court was satisfied that N.M.'s voluntary relinquishment was in the best interests of K.D.M.C. and D.D.C. (N.T. 7/28/05 p.43). According, following the hearing, on July 28, 2005, the undersigned judge entered a Decree Allowing Relinquishment of Parental Rights and Duties to an Agency,[4] stating the following:

> AND NOW, To-Wit: This 28th day of July, 2005, upon consideration of the foregoing Petition for Voluntary Relinquishment of Parental Rights and after a hearing of the supporting testimony, the Court, being satisfied that said Petition has been properly executed; that the facts averred therein are true and correct; that [N.M.] has voluntarily relinquished forever all parental rights and duties to [K.D.M.C. and D.D.C.] a minor under the age of eighteen (18) years, who has been in the care of an approved agency for a minimum period of three (3) days, and that the prayer of the Petition should be granted;
>
> NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED that custody of [K.D.M.C. and D.D.C.], minor children, be and hereby is transferred to Erie County Office of Children and Youth, an approved agency, and that all parental rights and duties of N.M. are hereby terminated. Said agency is hereby authorized to give consent to the adoption of said minor children without further consent of, or notification to, the aforesaid mother.

Additionally, it is noted that on July 28, 2005, the undersigned judge entered separate Decrees, terminating involuntarily the parental rights of John Doe as to K.D.M.C., pursuant to 23 Pa.C.S. 2511(a)(1), and terminating involuntarily the parental rights of John Doe as to D.D.C., pursuant to 23 Pa.C.S. 2511(a)(1). On August 15, 2005, OCY filed its Notice of Appeal from this Lower Court's July 28, 2005 Order, granting the Petition for N.M. to relinquish voluntarily her parental rights as to K.D.M.C. and D.D.C.

The Erie County Office of Children and Youth's first issue on appeal is whether OCY provided a reasonable basis for withholding its consent to N.M.'s Petition for Voluntarily Relinquishment of Parental Rights, where OCY indicated its refusal to consent was based upon its desire to apply aggravated circumstances to a possible future dependency proceeding involving N.M., and where N.M. was noticeably pregnant at the time of the termination of parental rights hearing. The Court's standard in reviewing an appeal from an order relating to termination

[4] It is noted that once this Lower Court granted the VR petition. OCY's IVT petition became moot. (N.T. 7/28/05 p.45). *See In the Matter of the Adoption of A.M.B.*, 812 A.2d 659, 662, 667 (Pa. Super. Ct. 2002), stating. "In the final analysis, only the court can determine the efficacy of either of the [IVT or VR] petitions, and finding in favor of one excludes the other."

of parental rights is to determine whether the record is free from legal error and whether the factual findings are supported by the evidence. *In the Matter of the Adoption of A.J.B.*, 797 A.2d 264, 266 (Pa. Super. Ct. 2002); *In the Matter of the Adoption of A.M.B.*, 812 A.2d 659, 662, 667 (Pa. Super. Ct. 2002). Parental rights in Pennsylvania can be terminated voluntarily or involuntarily. 23 Pa. C.S.A. §§2501-2513. Both procedures have the same ultimate result, of ending the legal relationship between parent and child, and of freeing the child for adoption. *A.M.B., supra* at 666. "Parental relinquishment and involuntary termination are, however, mutually exclusive and a determination must be made as to which and when one or the other applies. This is a judicial function in which the judge exercises discretion in conformity with the facts and the law." *Id.* "Only the court can determine the efficacy of either of the petitions, and finding in favor of one excludes the other." *Id.* at 667.

There are two recent Pennsylvania Superior Court Opinions, addressing the issue of the decision of an Orphans' Court to grant a parent's VR petition instead of the Agency's IVT petition, or vice versa. Specifically, those two cases are *In the Matter of the Adoption of A.J.B.*, 797 A.2d 264, 265 (Pa. Super. Ct. 2002) and *In the Matter of the Adoption of A.M.B.*, 812 A.2d 659 (2002). However, *A.J.B.* and *A.M.B.* are distinguishable on procedural grounds. In *A.M.B.*, the Pennsylvania Superior Court did not upset its *A.J.B.* decision; rather, the *A.M.B.* Court determined that the procedural posture of *A.J.B.* was different from that of *A.M.B.* *A.M.B., supra* at 664. Specifically, in *A.M.B.*, the Pennsylvania Superior Court stated,

> In *A.J.B.*, the orphans' court considered only the petition for voluntary relinquishment and granted it, whereas in this case, the court considered both the voluntary relinquishment and the involuntary termination petitions, and granted the Order requested by OCY after conclusive evidence and findings of fact that involuntary termination was appropriate. *A.M.B., supra* at 664.

The instant case proceeds from the same procedural posture as that of *In the Matter of the Adoption of A.J.B.*, and proceeds from a different procedural posture as that of *In the Matter of the Adoption of A.M.B.* Therefore, *A.J.B.* provides the legal standards that are relevant to the case at hand. Accordingly, this Lower Court will set forth the background of *A.J.B.*, which parallels that of this case. In *A.J.B.*, the Erie County Office of Children and Youth pursued involuntarily termination of parental rights proceedings with regard to the natural mother of the minor child, A.J.B. *In the Matter of the Adoption of A.J.B.*, 797 A.2d 264, 265 (Pa. Super. Ct. 2002). At the commencement of the IVT trial, however, the mother orally indicated to the Orphans' Court that she desired to voluntarily relinquish her rights to A.J.B., in the child's best interests. *Id.* OCY objected to mother's oral request to voluntarily relinquish her rights on the basis that

mother did not have a VR petition, or the consent of OCY, pursuant to 23 Pa.C.S §2501(b), which were prerequisites to the voluntary relinquishment of parental rights. *Id.* The Orphans' Court then granted mother leave to file a VR petition, which she filed on December 29, 2000. *Id.* Mother subsequently filed an Amended VR petition on February 12, 2001. *Id.*

Accordingly, in *A.J.B.*, on March 1, 2001, the Orphans' Court conducted a hearing, at which OCY stated that it would not consent to the VR petition, and it did not have to proffer a reasonable basis for its refusal to consent. *Id.* OCY also argued that it was entitled to a full IVT trial. *Id.* Finally, OCY claimed that its refusal to consent to mother's VR petition was justified because of the following: (1) A.J.B. had been abused; (2) A.J.B. was the second child removed from mother's care and custody; (3) mother had failed to comply with the court ordered treatment plan; (4) mother might be pregnant;[5] and (5) if the Orphans' Court terminated involuntarily mother's parental rights, this would impact OCY's obligation to provide services in potential future dependency cases involving mother. *Id.* at 265-66. OCY, moreover, refused to consent to mother's VR petition on the basis that it preferred to terminate involuntarily mother's parental rights, to obtain a finding of aggravated circumstances with regard to mother, in order to bolster its position in potential, future dependency and/or Orphans' Court proceedings involving mother. *Id.* at 267. Following this hearing, on March 16, 2001, the Orphans' Court denied OCY's request for a hearing on its IVT Petition, and denied OCY's Motion to Dismiss the VR petition. *Id.* at 266. Furthermore, the Orphans' Court granted mother's VR petition. *Id.* at 266 n.6. Subsequently, OCY filed its Notice of Appeal to the Pennsylvania Superior Court. *Id.* at 265.

In *A.J.B.*, on appeal, the Erie County Office of Children and Youth argued to the Pennsylvania Superior Court that the Orphans' Court had erred by utilizing a reasonableness standard in assessing OCY's refusal to consent to the VR petition. *Id.* at 267. OCY claimed that pursuant to 23 Pa.C.S. §2501, Agency consent to a voluntary relinquishment is required. In dismissing OCY's claim, the Superior Court referred to the Pennsylvania Supreme Court's opinion, *In the Adoption of Hess*, 608 A.2d 10 (Pa. 1992). In that case, the Pennsylvania Supreme Court stated that the Adoption Act clearly indicates that the Court's concern is the best interests of the child, and not the will of the Agency. *Hess, supra* at 14. The Pennsylvania Supreme Court went on to state,

> The Act makes clear that the court has the final burden of determining whose consent is necessary. The language of 23 Pa.C.S. §2713(2) provides that 'the court, in its discretion, may dispense with

[5] The Pennsylvania Superior Court noted that mother did, in fact, give birth to another child in October of 2001.

> consents other than that of the adoptee to a petition for adoption when. . . the adoptee is under 18 years of age and has no parent living whose consent is required'. . .Accordingly, it seems clear that if the court determines that the agency's consent is being withheld unreasonably, the court may dispense with the requirement of §2711(a)(5) that the agency consent to the adoption. *Id.*

Therefore, the Pennsylvania Superior Court found that a decision by OCY to withhold its consent to a Petition for Voluntary Relinquishment is subject to a standard of reasonableness. *A.J.B., supra* at 266-267; *see also, In the Interest of J.F.*, 862 A.2d 1258, 1259 (Pa. Super. Ct. 2004). "The agency must weigh all of the factors before determining whether to deny or grant its consent; [however] [u]ppermost in the agency's consideration must be the best interests of the child." *In the Interest of J.F.*, 862 A.2d 1258, 1261 (Pa. Super. Ct. 2004). Nevertheless, the "courts cannot cede unlimited discretion to any governmental agency, and certainly not to a child protective agency. All governmental agencies must act reasonably. It is for the courts to review an agency's action to determine if its action was reasonable." *Id.* Accordingly, it is the obligation of the Orphans' Court to independently review the decision of OCY to withhold its consent to a VR petition. *Id.* at 1259. Moreover, the voluntary termination of one's parental rights involves monumental significance to both the parent and the child, and, therefore, elemental due process demands that OCY act reasonably. *Id.* at 1262.

The *A.J.B.* Court indicated that the Erie County Office of Children and Youth had conceded that its reason for refusing to consent to the VR petition was because it preferred to terminate involuntarily mother's parental rights, so that mother would be subject to a finding of aggravated circumstances with regard to any future dependency proceedings involving other children. *A.J.B., supra* at 267. The Pennsylvania Superior Court noted, "a finding of aggravated circumstances in future proceedings would allow OCY and the Orphans' Court to decline to make reasonable efforts to reunite the family and the Agency would be relieved of the burden of providing services to the mother." *Id.* at 267-268. Moreover, the Pennsylvania Superior Court determined that OCY's position was "clearly self-serving" and "fail[ed] to consider the best interests of A.J.B." *Id.* at 268.

Additionally, the Pennsylvania Superior Court noted that since OCY had assumed custody of *A.J.B.* since November 9, 1999, and since OCY had filed a Petition to terminate involuntarily mother's parental rights, OCY had provided implicit consent to the permanent termination of the parent's rights to the child, pursuant to 23 Pa.C.S. §2501(b). *Id.* at 268; *In the Matter of J.F., supra* at 1262.

Finally, the Pennsylvania Superior Court stated that there is "a strong public policy interest that is served by dispensing with the requirement of an agency's consent to a voluntary relinquishment petition under

the circumstances of a case such as this." *Id.* When a parent does not feel that she can parent a child, it would be imprudent for the Court to place impediments in the way of voluntary relinquishment of parental rights. *Id.* For example, if the Orphans' Court permitted the Agency to withhold its consent to a VR petition because it wanted to apply aggravated circumstances to a future dependency proceeding, a parent might refrain from voluntarily relinquishing her parental rights under the proper circumstances, because she fears OCY's opposition or she fears the consequences in a future proceeding. *Id.* A parent's decision not to voluntarily relinquish her parental rights could result in tragic consequences if OCY were not successful in terminating involuntarily the parent's rights. *Id.* The child may face removal from a stable, pre-adoptive home, and may be returned to a home where he or she faces abuse or neglect. *Id. See also attached Exhibit A,* the Pennsylvania Superior Court's unpublished Memorandum Opinion in *In the Matter of the Adoption of J.W.L.*, 1454 WDA 2001, filed on April 22, 2002, where the Pennsylvania Superior Court based its Opinion, reversing the Erie County Orphans' Court Order denying mother's VR petition, on the *A.J.B.* case. In *J.W.L.*, the Pennsylvania Superior Court stated, "because the facts and issues on appeal in the instant action are identical to those in *In the Matter of the Adoption of A.J.B., supra,* we find that case controlling in this matter." Exhibit A, p.7.

In the instant matter, at the time of the July 28, 2005 termination of parental rights hearing, Attorney Cauley, on behalf of the Erie County Office of Children and Youth, clearly stated that OCY refused to consent to N.M.'s VR petition because OCY wanted to have the benefit of a finding of aggravated circumstances which it could apply to a potential future proceeding involving the termination of N.M.'s parental rights as to a child that had not yet been born. In response to questioning by the undersigned judge, concerning what reasonable basis OCY had to withhold consent to voluntary relinquishment, Attorney Cauley indicated that OCY was concerned about N.M.'s ability to care for the child with whom she was pregnant at the time of the termination of parental rights trial, OCY believed it was possible that child would eventually come under the authority of the Juvenile Court, and OCY wanted the benefit of applying a finding of aggravated circumstances, in the event termination proceedings commenced with regard to that unborn child.

As previously set forth, it is well established that OCY must present a reasonable basis for withholding its consent to a VR petition. However, in the instant matter, this Lower Court conducted an independent review of OCY's decision to withhold consent, and found that OCY had failed to provide a reasonable basis. Pursuant to the Pennsylvania Superior Court's holding in *A.J.B.,* it was unreasonable for OCY to withhold its

consent to N.M.'s VR petition on the basis that it preferred to terminate involuntarily mother's parental rights, so that mother would be subject to a finding of aggravated circumstances with regard to any future dependency proceedings involving other children who have not yet been born. It was unreasonable for OCY to withhold its consent to N.M.'s VR petition in order to bolster its position with regard to a possible future termination of parental rights hearing. Elemental due process requires that OCY act reasonably in withholding its consent to a VR petition, and in this case, as in *A.J.B.*, which is very similar to the instant case, OCY acted unreasonably. OCY's position was clearly self-serving, and failed to consider the best interests of K.D.M.C. and D.D.C.

In this case, N.M. did not want to proceed to an IVT trial, and was willing to relinquish voluntarily her parental rights as to K.D.M.C. and D.D.C. As noted by the Guardian Ad Litem for the children, voluntarily relinquishment serves these children's best interests equally well as an involuntary termination. Moreover, this voluntary relinquishment is certain to result in adoption, whereas the outcome of an IVT trial is uncertain. Neither this Lower Court, nor OCY, can presume that OCY would prevail in an involuntary termination of parental rights trial. Assuming *arguendo* that this Lower Court permitted OCY to pursue an involuntary termination, instead of accepting N.M.'s VR, if OCY did not prevail, and N.M. later decided not to voluntarily relinquish then the permanency goals of K.D.M.C. and D.D.C. would not be served, contrary to the children's best interests. *See*, *generally*, *In the Matter of the Adoption of A.J.B.*, 797 A.2d 264, 268 (Pa. Super. Ct. 2002). OCY's proffered reason for withholding consent to N.M.'s VR petition, moreover, was clearly self-serving, and failed to consider the parental rights of K.D.M.C. and D.D.C. These children's best interests are not served where OCY exerts its authority over a natural mother who is clearly trying to act in the best interests of K.D.M.C. and D.D.C.

Additionally, with regard to OCY's claim, "The Honorable Court erred in granting Appellee's Petition for Voluntary Relinquishment of Parental Rights in the absence of the consent of the Agency as mandated by 23 Pa.C.S.A. 2501," OCY provided implicit consent to accept custody of K.D.M.C. and D.D.C. *See A.J.B.*, *supra* at 268. 23 Pa.C.S. §2501 states that where a parent petitions to voluntarily relinquish her parental rights, "the consent of the agency to accept custody of the child until such time as the child is adopted shall be required." In the instant matter, OCY had assumed custody of K.D.M.C. and D.D.C. throughout the dependency phase of this case, and, furthermore, OCY had filed a Petition to terminate involuntarily N.M.'s parental rights. In accordance with the holding of the Pennsylvania Superior Court in *A.J.B.*, OCY provided implicit consent to the permanent termination of N.M.'s parental rights as to K.D.M.C. and D.D.C., and OCY provided implicit consent to accept custody of these children. *Id.* at 268; *In the Matter of J.F.*, *supra* at 1262. Therefore, this

Lower Court did not err by granting N.M.'s VR petition, where OCY failed to provide a reasonable basis for withholding its consent. Accordingly, OCY's first issue on appeal fails.

The Erie County Office of Children and Youth's second issue on appeal is whether this Lower Court erred by entertaining and granting N.M.'s signed and verified Petition for Voluntary Relinquishment of Parental Rights, presented according to customary local practice and procedure in Erie County, where the substantial rights of all of the parties in interest were preserved, and where the Guardian Ad Litem consents to mother's VR petition. In *A.J.B.*, on appeal, the Erie County Office of Children and Youth made several allegations that the Orphans' Court had erred by refusing to grant its motion to dismiss mother's voluntary relinquishment petition, because mother failed to strictly comply with several procedural requirements, as set forth in the Pennsylvania Orphans' Court Rules. *In the Matter of the Adoption of A.J.B.*, 797 A.2d 264, 266-268 (Pa. Super. Ct. 2002). Specifically, OCY claimed that mother's VR petition contained the following defects: (1) the Petition had not been signed or verified by mother; (2) the Petition did not contain A.J.B.'s birth certificate; (3) the Petition did not join OCY; and (4) the Petition did not contain a consent by OCY to accept custody of *A.J.B.* *Id.* at 265.

In dismissing OCY's claim, the Pennsylvania Superior Court stated that Rule 2.1 of the Orphans' Court Rules provides, "the rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties in interest." *Id.* at 268; Pa. Sup. Orph. Ct. 2.1. In *A.J.B.*, all of the errors contained in mother's VR petition, involved errors of Pennsylvania Orphans' Court procedure, which did not affect the substantial rights of the parties. Therefore, the Pennsylvania Superior Court stated that since Pa. Sup. Orph. Ct. 2.1 provides for liberal construction of the rules, the Orphans' Court did not commit reversible error by granting mother's VR petition, despite its procedural defects. *Id.* at 269.

Similarly, in the instant case, the Erie County Office of Children and Youth raised six separate allegations that this Lower Court erred by granting N.M.'s VR petition, where N.M. failed to strictly comply with provisions of the Pennsylvania Orphans' Court Rules, Pennsylvania Rules of Civil Procedure, the Erie County Local Rules, and the Adoption Act.[6] All six of these issues essentially allege that this Lower Court

[6] Specifically, those six separate allegations are as follows: (1) "The Honorable Court erred in entertaining the Appellee's Petition for Voluntary Relinquishment of Parental Rights as same had not been filed, of record, as of July 28, 2005;" (2) "The Honorable Court erred in entertaining the Appellee's Petition for Voluntary Relinquishment of Parental Rights as same had not been filed, of record, as required by Pa. R.C.P. 1007. As Appellee's Petition had not been 'filed' or otherwise properly commenced, the Honorable Court was without

erred by entertaining and granting N.M.'s VR petition where it had not been properly submitted to the Erie County Court Administrator for a hearing date, where it had not been properly filed in the Erie County Office of the Register of Wills, and where OCY had not received proper notice that a VR petition, in this matter, had been filed. Since all of OCY's claims, alleging that this Lower Court erred by entertaining and granting N.M.'s VR petition, despite its procedural defects, involve an overlapping analysis based on the same set of facts, in the interest of conciseness and to avoid being redundant, this Lower Court will address all of these claims together.

Initially, as previously set forth, with regard to OCY's claim that N.M.'s VR petition did not contain the consent of the Agency, this Lower Court found that OCY had provided implicit consent to the permanent termination of N.M.'s parental rights as to K.D.M.C. and D.D.C., in their best interests, and OCY provided implicit consent to accept custody of these children, as set forth in greater detail above.

To the extent that OCY claims that this Lower Court erred by entertaining and granting N.M.'s VR petition, where said petition did not fully comply with the Pennsylvania Rules of Orphans' Court, these claims fail. As previously set forth, in *A.J.B.*, the Pennsylvania Superior Court determined that pursuant to Rule 2.1 of the Pennsylvania Orphans' Court Rules, the Court should liberally construe the Rules to secure the just, speedy, and inexpensive determination of the action or proceeding, provided that the error or defect of procedure does not affect the substantial rights of the parties. In the instant matter, at the time of the July 28, 2005 hearing, this Lower Court found that this case presented a situation where the liberal construction of the Rules of Orphans' Court was necessary in order to secure the just, speedy, and inexpensive determination of this action. Moreover, this is the same procedure consistently followed and accepted by OCY where OCY drafts a VR petition for a *pro se* parent.

6 continued

jurisdiction to entertain same;" (3) "The Honorable Court erred in entertaining Appellee's Petition for Voluntary Relinquishment since the Hearing on the mother's Petition was held in violation of the requirement that such a Hearing on same 'shall not be less than ten days after filing of the Petition.' In this case, the Petition was not 'filed' until July 29, 2005;" (4) "The Honorable Court erred in entertaining the mother's Petition for Voluntary Relinquishment, which Petition did not contain the consent of the Appellant Agency, and where the Appellant Agency had not been properly served with the Petition in advance of the Hearing at which it was granted;" (5) "The Honorable Court erred in entertaining the Appellee's Petition for Voluntary Relinquishment or same was presented to the Court in violation of local Erie County Orphans' Court Rule 15.1.1;" and (6) "The Honorable Court erred in granting the mother's Voluntary Relinquishment Petition as same was presented to the Court, without first having been filed, and in violation of local Erie County Civil Rule 440 requiring notice in advance to Appellant herein."

See Attached Exhibit B, transcript of an unrelated proceeding, which provides one illustration of many cases where OCY counsel has prepared and consented to procedurally imperfect VR petitions, pp.2-4, 9, 16. As set forth in detail below, this Lower Court found that OCY's counsel recognized, on the record, that he had received ample notice that N.M. intended to present a VR petition at the time scheduled for the termination of parental rights hearing, this Lower Court found that it is common practice in Erie County for attorneys to present unfiled VR petitions at the time of the termination of parental rights hearing, and this Lower Court found that OCY was aware of this practice, and has condoned it repeatedly in the past. Therefore, this Lower Court determined that the procedural defects in N.M.'s petition did not affect the fundamental rights of any of the parties, and, more importantly, N.M. waived the ten-day period by providing a voluntary and intelligent relinquishment of her parental rights. Obviously, the purpose of the ten-day rule is to ensure mother had time to consider her decision to relinquish voluntarily her parental rights, and to withdraw said petition if she changed her mind. This rule, moreover, does not apply to OCY.

In addition, to the extent that OCY claims that this Lower Court erred by accepting N.M.'s VR petition, including OCY's claim that this Lower Court erred by entertaining N.M.'s VR petition as it had not been filed, pursuant to Pa. R.C.P. 1007, where said VR petition did not fully comply with the Pennsylvania Rules of Civil Procedure, these claims also fail. Pursuant to Pa. R.C.P. 1007, an action may be commenced by filing with the Prothonotary a praecipe for a writ of summons or a complaint. However, like the Orphans' Court Rules, the Pennsylvania Rules of Civil Procedure also provide a rule of construction, stating that the courts should liberally apply the Rules, under certain circumstances. Specifically, Pa. R.C.P. 126 states, "the rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties." As previously set forth, in *A.J.B.*, the Pennsylvania Superior Court held that since the Pennsylvania Legislature intended the Pennsylvania Orphans' Court Rules to be construed liberally, it was not error for the Orphans' Court to entertain her VR petition, which contained procedural defects that did not affect the fundamental rights of the parties. This holding can reasonably be extended to the Pennsylvania Rules of Civil Procedure, which also contain a provision, stating that the Rules of Civil Procedure should be construed liberally. As previously set forth, in the instant matter, at the time of the July 28, 2005 hearing, this Lower Court found that the liberal construction of the Rules of Civil Procedure was necessary in order to secure the just, speedy and inexpensive

determination of this action. Specifically, as set forth in detail below, OCY received ample notice that N.M. intended to present a VR petition, and it is common practice in Erie County for attorneys, including OCY's counsel, to present unfiled VR petitions at the time of the termination of parental rights hearing, and OCY was aware of this practice, and has condoned it repeatedly in the past. *See Attached Exhibit B, transcript of an unrelated proceeding, which provides one illustration of many cases where OCY counsel has prepared and consented to procedurally imperfect VR petitions, pp.2-4, 9, 16.* Therefore, this Lower Court determined that the procedural defects in N.M.'s petition did not affect the fundamental rights of any of the parties.

Finally, to the extent that OCY claims that this Lower Court erred by failing to comply with Rule 15.1.1 and Rule 440 of the Erie County Local Orphans' Court Rules, these claims also fail. Although the Erie County Local Orphans' Court Rules do not contain a Rule of construction, stating that the Court may liberally construe the Rules under certain circumstances, the Erie County Local Orphans' Court Rules also do not contain any provision indicating that the Court should strictly construe the Rules. Furthermore, the local Orphans' Court Rules are designed to be integrated and consistent with the Pennsylvania Orphans' Court Rules. *See* Pa. Sup. Orph. Ct. 1.2, stating that the judicial districts of the Commonwealth may adopt local rules regulating practice and procedure; however, those rules shall not be inconsistent with the Pennsylvania Orphans' Court Rules. Therefore, Erie County is proscribed from adopting any local Rule, stating that the Rules are to be strictly construed. Accordingly, it is reasonable to deduce that the Erie County Local Rules, like the Pennsylvania Orphans' Court Rules, should be liberally construed to secure the just, speedy, and inexpensive determination of an action or proceeding, provided that the error or defect of procedure does not affect the substantial rights of the parties. Moreover, in the instant matter, this Lower Court found that this case presented a situation where the liberal construction of the Erie County Local Orphans' Court Rules was necessary in order to secure the just, speedy and inexpensive determination of this action, as OCY received ample notice that N.M. intended to present a VR petition, it is common practice in Erie County for attorneys to present unfiled VR petitions at the time of the termination of parental rights hearing, and OCY was aware of this practice, and has condoned it repeatedly in the past, as set forth in detail below. *See Attached Exhibit B, transcript of an unrelated proceeding, which provides one illustration of many cases where OCY counsel has prepared and consented to procedurally imperfect VR petitions, pp.2-4, 9, 16.* Additionally, the errors or defects in N.M.'s VR petition did not affect the substantial rights of the parties.

In the instant matter, although OCY was not officially served with

N.M.'s boilerplate, standard, VR petition until the time of the hearing, OCY received ample notice that N.M. intended to present said petition at that time. Specifically, at the July 28, 2005 hearing, Attorney Urban stated that he had contacted Attorney Cauley in early June of 2005 to inform him that N.M. planned to file a VR petition in this matter, at which point Attorney Cauley stated he would not consent to said petition. Furthermore, Attorney Cauley agreed that it had been at least a couple of weeks since he had spoken with Attorney Urban regarding N.M.'s desire to voluntarily relinquish her parental rights. Therefore, although N.M. did not formally serve OCY with her VR petition, in strict compliance with the rules, until the time of the hearing, OCY was placed on notice that N.M. intended to present a VR petition, well in advance of the time scheduled for the hearing. Therefore, OCY's right to receive notice, in advance of the hearing, of any petition that will be presented at the hearing, was not abrogated in this case. Rather, OCY received adequate notice, well in advance of the hearing, that N.M. intended to present a VR petition. Therefore, this Lower Court found that OCY's substantial rights were not affected by this defect in procedure.

Furthermore, as previously set forth, it is common practice in Erie County for parents' attorneys not to file VR petitions prior to the commencement of the termination of parental rights hearing. Parents, in these cases, are faced with the emotionally tumultuous decision of deciding whether to pursue a trial to fight to maintain their rights and duties toward their children, or to relinquish their parental rights and provide unselfishly for their children's best interests of stability and permanency which the children deserve and are entitled to, as soon as possible. Attorney Urban, who has represented other parents before this Lower Court, credibly and reasonably stated that he has represented clients, in the past, who have indicated they wanted to voluntarily relinquish their parental rights, and subsequently have changed their minds. This Lower Court recognized that attorneys for parents are reluctant to file a VR petition until they are certain their client consents to it, which often does not occur until after the voluntary relinquishment colloquy is conducted. This is a good practice for attorneys for parents to abide by. As the Pennsylvania Superior Court has recognized, the relinquishment of parental rights is of monumental importance to both the parents and the children involved, and, therefore, a parent's decision to relinquish their parental rights is typically not made without regretful, confused feelings which may lead them to eventually change their decision.

Moreover, OCY is abundantly aware that the policy in Erie County, with regard to voluntary relinquishment petitions, is for a parent's attorney to present the VR petition for the first time at the commencement of the termination of parental rights hearing, after providing OCY with

verbal notice of the parent's intent to present said petition. OCY has implicitly consented to this procedure on an uncountable number of prior occasions. OCY attorneys routinely appear before this Orphans' Court, and consent to VR petitions that are unfiled, in the best interests of the children, and furthermore, OCY attorneys routinely prepare and present to the Orphans' Court VR petitions, signed by *pro se* parents in the presence of caseworkers only, and without the benefit of their own counsel. *See Attached Exhibit B, transcript of an unrelated proceeding, which provides one illustration of many cases where OCY counsel has prepared and consented to procedurally imperfect VR petitions, pp.2-4, 9, 16.* OCY is behaving in a patently contradictory, inconsistent, and hypocritical manner, by raising the issue of proper VR filing procedure on appeal, after OCY has accepted and subscribed to this procedure time and time again in voluntary relinquishment proceedings, where OCY consents to procedurally imperfect VR petitions and where OCY prepares and presents procedurally imperfect VR petitions to the Orphans' Court. Accordingly, the issues OCY raised on appeal, related to errors in scheduling, filing, and notice, regarding N.M.'s own VR petition, prepared by her own counsel, fail, as the substantial rights of the parties were not infringed upon by the decision of this Lower Court to liberally construe the Rules, in order to effectuate the just, speedy, and inexpensive determination of this matter, in the best interests of the children, and in the interest of advancing OCY's goal of providing these children with permanency and stability as soon as possible.

Furthermore, it is noted that OCY's specific claim that N.M. should have obtained a hearing date from the Erie County Office of Court Administration, on which to have her VR petition heard, fails to take into consideration the reality of court scheduling in Erie County. Block scheduling makes it impossible for attorneys for parents to obtain a date and time, other than the date and time already scheduled for the IVT trial, on which to present a VR petition. In Erie County, generally the only block of time available for a hearing on a VR petition, is the time that is already scheduled for the IVT trial. Therefore, even if Attorney Urban had presented N.M.'s VR petition to the Office of Court Administration prior to the date of this hearing, said petition would have been scheduled to be heard at the same time as the IVT petition. Therefore, OCY's substantial rights were not infringed upon by Attorney Urban's actions, since the hearing on N.M.'s VR petition would have been held at the same time as the hearing on OCY's IVT petition.

Finally, OCY's claim that this Lower Court erred by entertaining and granting N.M.'s VR petition, where said petition had not been filed ten days prior to the hearing date, pursuant to 23 Pa.C.S. §2503(a), also fails. 23 Pa.C.S. §2503 states, "upon presentation of a petition [for voluntary

relinquishment],...the court shall fix a time for hearing which shall not be less than ten days after filing of the petition. The petitioner must appear at the hearing." The purpose of this rule, however, is to protect the rights of the parent who has decided to voluntarily relinquish his parental rights. As previously set forth, the voluntary relinquishment of parental rights is of monumental significance, and parents who decide to relinquish should do so only after serious consideration. Furthermore, OCY has conceded, on several occasions, that the right articulated in 23 Pa.C.S. §2305 is designed to protect the parents, and may be waived, either implicitly or explicitly, by the parents. *See Attached Exhibit B, transcript of an unrelated proceeding, which provides one illustration of many cases where OCY counsel has prepared and consented to procedurally imperfect VR petitions, pp.2-4, 9, 16.*

This Rule is designed, essentially, to provide parents with a ten-day waiting period between deciding to relinquish their parental rights, and following through with a hearing on their VR petition. In the instant matter, the undisputed evidence of record establishes that N.M. decided well in advance of the July 28, 2005 hearing that she wanted to voluntarily relinquish her parental rights to K.D.M.C. and D.D.C. Although N.M.'s counsel did not officially file her VR petition prior to the hearing, in order to protect his client from potential prejudice in the event she later changed her mind, more than a month elapsed between the time she decided to relinquish her parental rights, and the time of the July 28, 2005 hearing. At the time of the hearing, N.M. clearly articulated her unambiguous and consistent intent to relinquish her parental rights, and, therefore, implicitly waived her right to the ten-day time period, provided for at 23 Pa.C.S. §2503. Therefore, at the time of the termination of parental rights hearing, this Lower Court found that the fundamental purpose of 23 Pa.C.S. §2503, of providing parents who relinquish with ample time to reflect and consider that decision, was served in this case. N.M.'s substantial rights were not infringed upon by this Lower Court's liberal construction of this Rule, as she voluntarily consented to waive the ten-day period. Furthermore, the substantial rights of OCY were not infringed upon by this Lower Court's acceptance of N.M.'s implicit waiver of the ten-day period, as this 23 Pa.C.S. §2501 was not designed to protect OCY.

Therefore, in the instant matter, none of OCY's substantial rights were affected by this Lower Court's liberal construction of the procedural Rules, with regard to N.M.'s VR petition. Furthermore, none of N.M.'s substantial rights were affected by this Lower Court's liberal construction of these Rules. Accordingly, OCY's claim challenging this Lower Court's liberal construction of the Rules with regard to the procedural defects concerning N.M.'s VR petition, where these errors did not affect the substantial interests of the parties, also fails.

The Erie County Office of Children and Youth's third and final issue on appeal is whether this Lower Court erred by granting N.M.'s VR petition

without hearing evidence and testimony concerning OCY's IVT petition, after considering the best interests and permanency of the children, and in accordance with the Pennsylvania Superior Court's decision in *In the Matter of the Adoption of A.J.B.,* 797 A.2d 264 (Pa. Super. Ct. 2002). On appeal, OCY raised two allegations that this Lower Court erred by not hearing testimony and evidence concerning OCY's IVT petition.[7] In *A.J.B.*, OCY claimed that the Orphans' Court erred by refusing to grant a hearing on its IVT Petition. *Id.* at 269. In dismissing OCY's claim, the Pennsylvania Superior Court initially noted that OCY had failed to cite any support for its argument that it was entitled to a separate hearing on its IVT Petition. *Id*. The Pennsylvania Superior Court also indicated that OCY had an opportunity to present evidence regarding why it believed mother's parental rights should be terminated involuntarily at the time of the hearing on mother's VR petition. *Id.* Therefore, the Superior Court found no merit to OCY's claim that the Orphans' Court erred by denying its request for a separate hearing on its IVT Petition.

In the instant matter, the only support OCY cited for the proposition that it was entitled to a full hearing on its IVT petition is the Pennsylvania Superior Court case, *In the Matter of the Adoption of A.M.B.* 812 A.2d 659 (2002). Specifically, OCY claimed this Lower Court erred by not hearing all evidence and testimony concerning both the VR and the IVT petitions, and then making a determination as to these petitions, in accordance with *In the Matter of the Adoption of A.M.B.* 812 A.2d 659 (2002). In *A.M.B.*, the Orphans' Court utilized its discretion to hear all testimony and evidence concerning both the VR and IVT petitions, prior to ruling on one over the other. In this case, however, this Lower Court utilized its discretion and did not hear evidence and testimony concerning the IVT petition, but rather granted N.M.'s VR petition, in accordance with the procedure that was approved and affirmed by the Pennsylvania Superior Court in *In the Matter of the Adoption of A.J.B.,* 797 A.2d 264, 266-268 (Pa. Super. Ct. 2002).

As previously set forth, *A.J.B.* and *A.M.B.* are distinguishable on procedural grounds. In *A.M.B.*, the Pennsylvania Superior Court did not upset its *A.J.B.* decision; rather, the *A.M.B.* Court determined that the procedural posture of *A.J.B.* was different from that of *A.M.B. A.M.B.*, *supra* at 664. Specifically, the Pennsylvania Superior Court stated,

---

[7] Specifically, OCY claimed, "the Honorable Court erred in denying the Appellant a Hearing on its previously filed Involuntary Termination of Parental Rights Petition and/or by not following the procedure approved by the Superior Court of Pennsylvania *In Re: Adoption of A.M.B.* 812 A.2d 659 (2002);" and "the Honorable Court erred in declining to hear the Appellant's Petition for Involuntary Termination of Parental Rights when said Petition was the only Petition that had been properly 'filed of record,' was the only Petition properly before the Court, and was the only Petition over which the Court had jurisdiction as of July 28, 2005."

In *A.J.B.*, the orphans' court considered only the petition for voluntary relinquishment and granted it, whereas in this case, the court considered both the voluntary relinquishment and the involuntary termination petitions, and granted the Order requested by OCY after conclusive evidence and findings of fact that involuntary termination was appropriate. *Id.*

No Pennsylvania case law, including *A.M.B.*, requires the Orphans' Court to conduct a hearing concerning both the VR petition and the IVT petition, and subsequently make a determination concerning which petition to grant. Rather, *A.J.B.* provides Orphans' Courts with the option of granting the VR petition without hearing testimony or evidence on the IVT petition, where OCY fails to present a reasonable basis for withholding its consent to the VR petition. And, in turn, *A.M.B.* provides Orphans' Courts with the option of hearing testimony and evidence on both the VR petition and the IVT petition, and subsequently dispose of the petitions. In this case, this Lower Court found that OCY had failed to present a reasonable basis for refusing to consent to N.M.'s VR petition, and found it reasonable to grant N.M.'s VR petition without hearing testimony and evidence concerning OCY's IVT petition, in accordance with *A.J.B.* As previously set forth, granting N.M.'s VR petition absolutely serves the best interests and the permanency goals for K.D.M.C. and D.D.C. In contrast, it is uncertain as to whether or not OCY would prevail on its IVT petition, causing the stability of these children to remain in doubt. Therefore, this Lower Court did not err in granting N.M.'s VR petition without hearing testimony and evidence concerning OCY's IVT petition, as this conformed to the precedent set in *A.J.B.*, and as this determination ensured the permanency and stability of K.D.M.C. and D.D.C., in their best interests.

For all of the foregoing reasons, OCY's appeal lacks merit.

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

COMMONWEALTH OF PENNSYLVANIA

v.

MICHAEL A. FINCHIO

CRIMINAL PROCEDURE / PRETRIAL PROCEDURE / HABEAS CORPUS

The Commonwealth's evidence at a preliminary hearing must be sufficient to establish a probable cause to believe that a crime has been committed and that the defendant is the one who committed the crime. A court will not grant a petition for habeas corpus relief where the defendant does not submit for review a transcript of the preliminary hearing.

CRIMINAL PROCEDURE / PRETRIAL PROCEDURE / SUPPRESSION MOTIONS

There are three levels of interaction between police and citizens; mere encounters (or requests for information), investigative detentions, and an arrest or custodial detention. A mere encounter does not require any level of suspicion, an investigative detention must be supported by reasonable suspicion, and an arrest or custodial detention must be supported by probable cause.

Where the defendant makes a right-hand turn from the left lane, squeals his tires, and pulls his vehicle to a position on the side of the road straddling the fog line, the court finds credible the trooper's account that he was simply attempting to determine if the defendant needed assistance and therefore the interaction with the defendant constituted a mere encounter which did not require any level of suspicion. The observation of drugs, drug paraphernalia and the defendant's physical condition was not illegally obtained and constituted probable cause for the arrest.

CRIMINAL PROCEDURE / DUI / JUDICIAL REVIEW

It is the duty and right of the courts to invalidate legislation which conflicts with the constitution. This power must be exercised cautiously and any lawfully enacted statute commands a presumption of constitutionality. A statute must be upheld unless it clearly, palpably, and plainly violates the constitution and any doubts are to be resolved in favor of the legislation.

CRIMINAL PROCEDURE / DUI / EQUAL PROTECTION

Equal protection analysis under both the federal and state Constitutions recognizes three types of governmental classification. The first classification relates to fundamental rights or suspect traits and requires strict scrutiny of the legislative action. Classifications which are not suspect but are sensitive or important must be justified by an important governmental interest and the classification must be substantially related to the achievement of that objective. Classifications which are neither suspect nor sensitive and which do not impact upon fundamental or important rights will be sustained so long as they are rationally related to a legitimate governmental interest.

The DUI statute enacted in 2003, effective February 1, 2004, 75 Pa.C.S.A. §3802, is appropriately analyzed under the intermediate level of

The protection of the public from persons operating vehicles with unacceptable levels of alcohol in their system is an important governmental interest and the statute is substantially related to the achievement of the governmental objective. Therefore, the DUI statute does not violate the equal protection clause of either the United States or the Pennsylvania Constitutions.

CRIMINAL PROCEDURE / DUI / VAGUENESS/OVER-BREADTH

A statute is void for vagueness where it fails to provide reasonable standards by which a person may gauge conduct. A criminal statute must define the offense with sufficient definiteness that ordinary people can understand what is prohibited and arbitrary and discriminatory enforcement is not encouraged. The rules of statutory construction are applicable in determining the intent of the legislature. The DUI statute, 75 Pa.C.S.A. §3802, clearly delineates the prohibited acts and is not unconstitutionally vague.

A statute is over-broad if it punishes constitutionally protected activity as well as illegal activity. The current version of the DUI statute is over-broad as it punishes constitutionally protected activity as well as illegal activity and because it fails to require proof of the defendant's blood level at the time of driving.

CRIMINAL PROCEDURE / DUE PROCESS / PRESUMPTION

The burden is on the government to prove every fact necessary to establish the commission of a crime beyond a reasonable doubt and this burden never shifts. A statute which creates a presumption relieving the Commonwealth from the obligation of proving beyond a reasonable doubt that the driver had the requisite level of alcohol in his or her system at the time of driving is violative of the due process clause of the federal and state constitutions.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION NO. 241 OF 2005

Appearances: John P. Garhart, Esq., District Attorney's Office
Stephen E. Sebald, Esq., Counsel for Defendant

OPINION

This matter comes before the Court on Defendant's Omnibus Pre-trial Motion for Relief.

I. HISTORY OF THE CASE

At approximately 9:40 p.m. September 16, 2004, Trooper Mark Stevick ("Stevick") of the Pennsylvania State Police, was on routine patrol traveling north on Route 19 towards Waterford Township in Erie County. Stevick eventually stopped at the intersection of Route 19 and Route 97 along side the Defendant.[1] The Trooper next heard tires squealing and saw the

[1] At the intersection, the road divides into a left and right turn lane with an island between. The Defendant was in the left turn lane while Officer Stevick was in the right turn lane.

Defendant turn right onto Route 97. Stevick also turned right onto Route 97.

After traveling a short distance, Stevick noticed that the Defendant had pulled his vehicle to the side of the road, which straddled the fog line.[2] Believing the Defendant needed assistance, Stevick pulled his vehicle behind the Defendant and turned on his cruiser lights.[3] He approached the vehicle and asked the Defendant if there was a problem. As he was making this inquiry, Stevick illuminated the interior of the vehicle and noticed a small baggie and pipe located at the Defendant's feet. The baggie appeared to contain marijuana. Additionally, the Defendant had difficulty retrieving his driver's license and registration and displayed physical signs of intoxication (slurred speech, swaying and the strong odor of alcohol).

As a result, the Defendant was placed under arrest and transported to the Millcreek Hospital. A blood alcohol test was conducted at 10:38 p.m. The result was a BAC of .19%.

The Defendant was charged with three offenses: (1) DUI: Highest Rate of Alcohol, 75 Pa.C.S.A. §3802 (c); (2) Drug Possession of a small amount of Marijuana, 35 Pa.C.S.A. §780-113(a)(31)(I); and (3) Possession of Drug Paraphernalia, 35 Pa.C.S.A. §780-113(a)(32). Defendant filed an Omnibus Pre-Trial Motion for Relief on March 31, 2005. An evidentiary hearing was conducted on May 4, 2005. Subsequently, the parties filed briefs.

II. LEGAL DISCUSSION

A. DEFENDANT'S PETITION FOR A WRIT OF HABEAS CORPUS

For a defendant to be held for trial, the Commonwealth must produce sufficient evidence at the preliminary hearing to establish a prima facia case: i.e., probable cause to believe that a crime has been committed and it is probable that the defendant committed the offense. *Commonwealth v. Hock*, 728 A.2d 943, 945 (Pa. 1999); *Commonwealth v. McBride*, 595 A.2d 589, 591 (Pa. 1991).

The Defendant has not submitted a transcript of the preliminary hearing to this Court for review. Therefore, the Court will not conduct a preliminary hearing de novo and the Defendant's petition for habeas corpus relief will be denied.

B. DEFENDANT'S SUPPRESSION MOTION

The Defendant argues that Stevick stopped his vehicle without probable cause in violation of the Fourth Amendment of the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution. He states that all evidence was illegally seized under a fruit

[2] That part of the highway ascends a hill with a narrow berm area.

[3] The Defendant testified that he pulled over because he saw the cruiser lights flashing.

of the poisonous tree doctrine, and therefore should be suppressed.

The Pennsylvania Supreme Court recognizes three levels of interaction between citizens and the police that may implicate constitutional concerns. They are described as follows:

> The first is a "mere encounter" (or request for information), which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. See, *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319 (1983); *Florida v. Bostick,* 501 U.S. 429, 111 S.Ct. 2382 (1991). The second, an "investigative detention" must be supported by reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. *See, Berkemer v. McCarthy,* 468 U.S. 420, 104 S.Ct. 3138 (1984); *Terry v. Ohio,* 391 U.S. 1, 88 S.Ct. 1868 (1968). Finally, an arrest or "custodial detention" must be supported by probable cause. See, *Dunaway v. New York,* 442 U.S. 200, 99 S.Ct. 2248 (1979); *Commonwealth v. Rodriguez,* 614 A.2d 1378 (Pa. 1992).

Commonwealth v. Ellis, 662 A.2d 1043, 1047-48 (Pa. 1995) (footnote omitted); see also *Commonwealth v. Polo,* 759 A.2d 372, 375 (Pa. 2000) (citing *Commonwealth v. Mendenhall,* 715 A.2d 117 (Pa. 1998)).

In this case, the Court finds credible Trooper Stevick's account that he pulled off the road behind the Defendant's stopped vehicle to determine if the Defendant needed assistance. This constituted a "mere encounter". As part of this interaction Stevick lawfully observed the drugs, drug paraphernalia, and the Defendant's physical condition. This evidence constituted probable cause for the arrest. *Ellis*, supra, at 1049; see also *Commonwealth v. Johonoson*, 844 A.2d 556, 562-63 (Pa.Super. 2004); *Commonwealth v. Johnson*, 833 A.2d 755, 760-62 (Pa.Super. 2003). Therefore, Stevick's actions did not violate either the Fourth Amendment of the United States or Article 1 Section 8 of the Pennsylvania Constitution.

C. DEFENDANT'S CONSTITUTIONAL CHALLENGE TO 75 PA.C.S.A. § 3802(C)

The Defendant challenges the constitutionality of Pennsylvania's Driving Under the Influence law (DUI), 75 Pa.C.S.A. **§** 3802. This statute was approved September 30, 2003 and became effective on February 1, 2004.[4] The DUI law, *inter alia*, contains several new alcohol related

[4] Former versions of DUI statute (75 Pa.C.S.A. §3731) are relevant to this inquiry. The 1996 version of the statute provided, in part:

(A.1) PRIMA FACIA EVIDENCE - -

(1) It is prima facie evidence that:

(i) an adult had 0.10% or more by weight of alcohol in his or her blood at the time of driving, operating or being in actual physical control of the movement of any

categories: general impairment BAC 0.08% but less than 0.10%, high rate of alcohol (0.10% but less than 0.16%), and highest rate of alcohol (0.16% or higher).

The Defendant argues that the DUI statute violates the due process clause of the Fifth Amendment to the United States Constitution, the Equal Protection Clause of the Fourteenth Amendment, and Article 1 Section 9 of the Pennsylvania Constitution because: (1) it creates a mandatory, irrebuttable presumption that relieves the Commonwealth of its burden of proof; (2) it punishes non-criminal, innocent behavior; and (3) it is void for vagueness and overbroad.

THE SCOPE OF LEGISLATIVE AND JUDICIAL AUTHORITY IN CASES OF CONSTITUTIONAL DIMENSION

The Pennsylvania General Assembly is vested with "the power to make, alter and repeal laws." *Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108,121-122 (Pa.Cmwlth. 1998); see Pa.Const. Article 2, § 1. However, it is the judiciary's role to ultimately interpret the Constitution.

---

[4] continued

vehicle if the amount of alcohol by weight in the blood of the person is equal to or greater than 0.10% at the time a chemical test is performed on a sample of the person's breath, blood or urine;

(ii) a minor had 0.02% or more by weight of alcohol in his or her blood at the time of driving, operating or being in actual physical control of the movement of any vehicle if the amount of alcohol by weight in the blood of the minor is equal to or greater than 0.02% at the time a chemical test is performed on a sample of the person's breath, blood or urine; and

(iii) a person operating a commercial vehicle had 0.04% or more by weight of alcohol in his or her blood at the time of driving, operating or being in actual physical control of the movement of the commercial vehicle if the amount of alcohol by weight in the blood of a person operating a commercial vehicle is equal to or greater than 0.04% at the time a chemical test is performed on a sample of the person's breath, blood or urine.

(2) For the purposes of this section, the chemical test of the sample of the person's breath, blood or urine shall be from a sample obtained within three hours after the person drove, operated or was in actual physical control of the vehicle.

This was an amendment necessitated by the Pennsylvania Supreme Court's decision in *Commonwealth v. Barud*, 681 A.2d 162 (Pa. 1996). That case struck down an earlier version of the statute [75 Pa.C.S.A. §3731(a)(5)] that provided, in part:

(a) Offense defined.-A person shall not drive, operate or be in actual physical control of the movement of any vehicle:

(5) if the amount of alcohol by weight in the blood of the person is 0.10% or greater at the time of a chemical test of a sample of the person's breath, blood or urine, which sample is:

(i) obtained within three hours after the person drove, operated or was in actual physical control of the vehicle; or

(ii) if the circumstances of the incident prevent collecting the sample within three hours, obtained within a reasonable additional time after the person drove, operated or was in actual physical control of the vehicle.

Zemprelli v. Daniels, 436 A.2d 1165, 1169 (Pa. 1981); see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). Furthermore, "statutory effort[s] must not offend" the Constitution, "which binds both the legislature and the courts." *Ieropoli v. AC&S Corporation*, 842 A.2d 919, 932 (Pa. 2004).

Chief Justice John Marshall formulated the basic premise of judicial review in the *Marbury* case. There he stated:

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Marbury, supra, at 78,73-74; see also *Commonwealth v. DeFrancesco*, 393 A.2d 321, 328 (Pa. 1978). It is the duty of the courts to invalidate legislation repugnant to the Constitution. *Commonwealth v. Stern*, 701 A.2d 568, 571-572 (Pa. 1997) (citing *Zemprelli*, supra, at 1169).

The power of the judicial review must be exercised cautiously. As the Pennsylvania Supreme Court has stated:

> There can be no change to statutory law when there has been no amendment by the legislature and no prior decision by this Court. Only the legislature has the authority to promulgate legislation. Our role is to interpret statutes as enacted by the [General] Assembly. We affect legislation when we affirm, alter, or overrule our prior decisions concerning a statute or when we declare it null and void, as unconstitutional. Therefore, when we have not yet answered a specific question about the meaning of a statute, our initial interpretation does not announce a new rule of law. Our first pronouncement on the substance of a statutory provision is purely a clarification of existing law.

Commonwealth v. Eller, 807 A.2d 838, 844 (Pa. 2002) (citing *Fiore v. White*, 757 A.2d 842 (Pa. 2000)). Further:

> The power of 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. 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.

Commonwealth v. Smith, 732 A.2d 1226, 1235-1236 (Pa.Super. 1999) (*citing Finucane v. Pennsylvania Marketing Bd.*, 582 A.2d 1152, 1154 (Pa. Cmwlth. 1990)). "The right of the judiciary to declare a statute void, and to arrest its execution, is one which, in the opinion of all courts, is coupled with responsibilities so grave that it is never to be exercised except in very clear cases." *Smith*, supra, at 1235 (citing, *Erie & North-East Railroad*

Co. v. Casey, 26 Pa. 287, 300- 301 (1856)).

The examination of any lawfully enacted statute begins with the proposition that the act commands a presumption of constitutionality and should be upheld unless it clearly, palpably, and plainly violates the constitution. *Commonwealth v. Williams,* 733 A.2d 593, 603 (Pa. 1999); *Commonwealth v. Barud,* 681 A.2d 162, 165 (Pa. 1996). Any doubts are to be resolved in favor of sustaining the legislation. *Commonwealth v. Blystone,* 549 A.2d 81, 87 (Pa. 1988); see also 1 Pa.C.S. § 1922(3); *Commonwealth v. Hendrickson,* 724 A.2d 315, 317 (Pa. 1999). Furthermore, a court may presume the General Assembly did not intend a result that is absurd, impossible of execution or unreasonable. *Commonwealth v. Wituszynski,* 784 A.2d 1284, 1288 (Pa. 2001); see also *Commonwealth v. Ludwig,* 874 A.2d 623, 628 (Pa. 2005); *Barud,* supra.

DOES THE STATUTE VIOLATE THE DEFENDANT'S RIGHT TO EQUAL PROTECTION OF THE LAWS?

The right to equal protection of the law under the Fourteenth Amendment guarantees that all persons similarly situated shall be treated alike. *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251 (1971); *F.S. Royster Guano v. Virginia,* 253 U.S. 412, 40 S.Ct. 560 (1920). Where there are distinctions drawn between classifications of persons, they must be reasonably justified. *Laudenberger v. Port Authority of Allegheny County,* 436 A.2d 147, 155 (Pa. 1981); *Adler v. Montefiore Hospital Association of Western Pennsylvania,* 311 A.2d 634, 643 (Pa. 1973).

When addressing an equal protection challenge, the court must ascertain the appropriate degree of scrutiny to which the challenged act is to be subjected. Equal protection analysis recognizes three types of governmental classification, each of which calls for a different standard of scrutiny. The appropriate standard of review is determined by examining the nature of the classification and the rights thereby affected. *Zablocki v. Redhail,* 434 U.S. 374, 98 S.Ct. 673 (1978); *Weber v. Aetna Casualty and Surety Co.,* 406 U.S. 164, 92 S.Ct. 1400 (1972); *James v. Southeastern Pennsylvania Transit Authority,* 477 A.2d 1302, 1305-06 (Pa. 1984).

In the first type of case, where the classification relates to who may exercise a fundamental right or is based on a suspect trait such as race or national origin, strict scrutiny is required. *Plyler v. Doe,* 457 U.S. 202, 102 S.Ct. 2382 (1982); *San Antonio School District v. Rodriquez,* 411 U.S., 93 S.Ct. 1278 (1973); *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029 (1972). When strict scrutiny is employed, a classification will be invalid unless it is found to be necessary to the achievement of a compelling state interest. *San Antonio School District v. Rodriquez,* supra; *Eisenstadt v. Baird,* supra; *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817 (1967).

The second type of case involves a classification which, although not suspect, is either sensitive or important but not fundamental. *Fischer v. Department of Public Welfare,* 502 A.2d 114 (Pa. 1985); see generally

Rostker v. Goldberg, 453 U.S. 57, 101 S.Ct. 2646 (1981); *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102 (1979); *Reed v. Reed*, supra. Such a classification must serve an important governmental interest and be substantially related to the achievement of that objective. *Pickett v. Brown*, 462 U.S. 1, 103 S.Ct. 2199 (1983); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225 (1975); *Reed v. Reed*, supra.

The third type of situation involves classifications which are neither suspect nor sensitive or rights which are neither fundamental nor important. Such classifications will be valid as long as they are rationally related to a legitimate governmental interest. E.g.: *Hodel v. Indiana*, 452 U.S. 314, 101 S.Ct. 2376 (1981); *Foley v. Connelie*, 435 U.S. 291, 98 S.Ct. 1067 (1978); *Commonwealth v. Bell*, 516 A.2d 1172, 77-78 (Pa. 1986).

Pennsylvania law in this area is coextensive with its federal counterpart. *Bell*, supra, at 1178; see also *Commonwealth v. Bullock*, 868 A.2d 516, 524-25 (Pa.Super. 2005).

Section 3802 falls into the second category. At its core, the basis for its enactment is the protection of the public from those persons who operate motor vehicles with unacceptable levels of alcohol in their systems. Therefore, it does not violate the equal protection provisions of either the United States or Pennsylvania Constitutions.[5]

IS THE STATUTE VAGUE OR OVERBROAD?

Statutory limitations on a citizen's individual freedoms are reviewed by courts for substantive authority and content, *Ludwig*, supra, at 628 (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). "A statute may be deemed to be unconstitutionally vague if it fails in its definiteness or adequacy of statutory expression. This 'void-for-vagueness doctrine', implicates due process notions that a statute must provide reasonable standards by which a person may gauge his [or her] future conduct, i.e., notice and warning." *Commonwealth v. Heinbaugh*, 354 A.2d 244, 246 (Pa. 1976); *Ludwig*, supra, at 628 (citing *Smith v. Goguen*, 415 U.S. 566, 572 (1974)); see also *Barud*, supra.

A criminal statute must 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. *Ludwig*, supra, at 628. The factors to be considered in determining whether a statute is impermissively vague are: (1) the statutory language; and (2) the legislative history and purpose of the legislature in enacting the statute. *Id.* at 629.

[5] Scientific studies have verified evidence of partial impairment at 0.02% BAC and statistically significant impairment at 0.04% BAC. See *Driver Characteristics and Impairment at Various BAC.* National Highway Traffic Safety Administration. DOT HS 809 075 (August 2000), p. 2; see also *Relative Risk of Fatal Crash Involvement By BAC, Age and Gender,* National Highway Traffic Safety Administration, DOT HS 809 050 (April, 2000).

In determining the intent of the legislature, the rules of statutory construction apply. See 1 Pa.C.S.A. § 1921 et seq. Courts will look at the language used and if the words are free and clear from all ambiguity, the letter of the statute shall not to be disregarded under the pretext of pursuing the spirit of the law. See 1 Pa.C.S.A. § 1921(b). However, when the words of the legislature are not explicit, then other factors are to be considered as prescribed by 1 Pa.C.S.A. § 1921(c). Furthermore, penal provisions must be strictly construed in favor of the defendant and against the Commonwealth. 1 Pa.C.S.A. § 1928(b)(1). See also *Ludwig,* supra, at 630.

The new DUI statute clearly delineates the prohibited acts and therefore is not unconstitutional for vagueness.

Turning to the Defendant's overbreadth argument, this Court is guided by the Pennsylvania Supreme Court's analysis in *Commonwealth v. Barud,* supra. In *Barud,* the Court was asked to determine whether 75 Pa.C.S.A. §3731(a)(5) (see footnote 4) violated the substance of due process guarantees of the United States and Pennsylvania Constitutions. The Supreme Court noted:

> A statute is "overbroad" if by its reach it punishes constitutionally protected activity as well as illegal activity. *Grayned v. City of Rockford,* 408 U.S. 104, 114, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972); *Commonwealth v. Stenhach,* 356 Pa.Super. 5, 25, 514 A.2d 114, 124 (1986), *appeal denied,* 517 Pa. 589, 534 A.2d 769 (1987). The language of the statute in question literally encompasses a variety of protected lawful conduct. *Id. See Adler v. Montefiore Hospital Association of Western Pennsylvania,* 453 Pa. 60, 311 A.2d 634 (1973), *cert denied,* 414 U.S. 1131, 94 S.Ct. 870, 38 L.Ed.2d 755 (1974), *quoting, NAACP v. Alabama,* 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed.2d 325 (1969) ("'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'") (citations omitted).

Barud, supra, at 165-66.

In finding that the statute was overbroad, the court noted:

> First, without requiring any proof that the person actually exceeded the legal limit of .10% at the time of driving, the statute sweeps unnecessarily broadly into activity which has not been declared unlawful in this Commonwealth, that is, operating a motor vehicle with a BAC below .10%. [...] Indeed, the most glaring deficiency of §3731(a)(5) is that the statute completely fails to require any proof that the accused's blood alcohol level actually exceeded the legal limit *at the time of driving.* Rather, the statute criminalizes a blood alcohol level in excess of the legal limit up to three hours *after* the last instance

> in which the person operated the motor vehicle and without any regard for the level of intoxication at the time of operation.

Id. at 166.

The new statute is remarkably similar to §3731(a)(5). As such, it is overly broad because: (1) it punishes constitutionally protected activity as well as illegal activity; and (2) fails to require any proof of the accused's blood alcohol level at the time of driving. See *Commonwealth v. Duda,* Crim. Docket No. 13158-2004 (Allegheny, 2005).[6]

DOES THE STATUTE VIOLATE THE DEFENDANTS DUE PROCESS RIGHTS BY CREATING AN IRREBUTTABLE OR CONCLUSIVE PRESUMPTION?

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall ... be deprived of life, liberty, or property without due process of law...." U.S. Const. amend. V. The Pennsylvania Constitution provides in relevant part: "Nor can an accused be deprived of this life, liberty or property unless by the judgment of his peers or the law of the land." Pa. Const. art. I, § 9.

The Pennsylvania Constitution guarantees the same rights. See *Heinbaugh,* supra, at 246 (citing *United States v. Powell,* 423 U.S. 87, 96 S. Ct. 316 (1975)); *Commonwealth v. Scott,* 878 A.2d 874, 878 (Pa. Super. 2005); *Commonwealth v. Barud, supra.*

The Pennsylvania Supreme Court discussed the distinction between inferences and presumptions in *Commonwealth v. Shaffer,* 288 A.2d 727 (Pa. 1972):

> A rebuttable presumption is a means by which a rule of substantive law is invoked to force the trier of fact to reach a given conclusion, once the facts constituting its hypothesis are established, absent contrary evidence. An inference is no more than a logical tool enabling the trier of fact to proceed from one fact to another, if the trier believes that the weight of the evidence and the experimental accuracy of the inference warrant so doing. A rebuttable presumption forces the defendant to come forth or suffer inevitable defeat on the issue in controversy. An inference, on the other hand, does not put the defendant in such a position. It does not shift the burden of going forward with the evidence, for the trier of fact can reject the inference in whole or in part. Moreover, an inference does not shift the burden of persuasion or relieve the Commonwealth of the burden of proving every essential element of the alleged offense beyond a reasonable doubt.
>
> *Id.* at 735.

[6] In *Commonwealth v. Duda*, Judge David Cashman found the new DUI statute unconstitutional. This Court finds his rationale persuasive. That case is currently on appeal to the Pennsylvania Supreme Court (Docket No. 24 WAP 2005). See also *Commonwealth v. Barud,* supra, at 165-166.

In *Commonwealth v. Turner,* 317 A.2d 298, 300 (Pa. 1974), the Pennsylvania Supreme Court noted:

> The value of such a standardized inference is that it permits the fact-finder to rely upon precedent to find the relationship between the proved facts and the fact to be inferred rather than to rely solely on their collective experience.

Id. at 300; see also *Packel* & *Poulin,* § 306 (West, 1987).

In *Commonwealth v. Sloan,* 607 A.2d 285 (Pa.Super. 1992), the Superior Court further stated:

> As in *Morissette [v. United States,* 342 U.S. 246, 72 S.Ct. 240 (1952)] and [*United States v.] United States Gypsum Co.,* [438 U.S. 422, 98 S.Ct. 2864 (1978)], a conclusive presumption in this case would 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,' and would 'invade [the] fact-finding function' which in a criminal case the law assigns solely to the jury. The instruction announced to David Sandstrom's jury may well have had exactly these consequences. Upon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and 'ordinary consequences' of defendant's action), Sandstrom's jurors could reasonably have concluded that they were directed to find against defendant on the element of intent. The State was thus not forced to prove 'beyond a reasonable doubt. . . every fact necessary to constitute the crime. . . charged,' 397 U.S. [358], at 364 [90 S.Ct. 1068, 1073, 25 L.Ed.2d 368], and defendant was deprived of his constitutional rights as explicated in *Winship.*
>
> A presumption which, although not conclusive, had the effect of shifting the burden of persuasion to the defendant, would have suffered from similar infirmities. If Sandstrom's jury interpreted the presumption in that manner, it could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was shifted to the defendant to prove that he lacked the requisite mental state. Such a presumption was found deficient in *Mullaney v. Wilbur,* 421 U.S. 684 [, 95 S.Ct. 1881] (1975).

Id. at 288-89 & 291-92 (Pa.Super. 1992) (quoting *Sandstrom v. Montana*, 442 U.S. 510, 524, 99 S.Ct. 2450, 2459 (1979)); see also *Watkins v. Prudential*, 173 A. 644 (Pa. 1934); *Commonwealth v. MacPherson*, 752 A.2d 384, 389 et seq. (Pa. 2000).

In criminal cases due process requires that the government prove every fact necessary to constitute the crime beyond a reasonable doubt. *In re Winship,* 397 U.S. 3358, 363, 90 S. Ct. 1068 (1970). The burden of

proof never shifts. It is the continuing presumption of innocence that is the basis for this requirement. *Commonwealth v. Cosnek,* 836 A.2d 871, 875 (Pa. 2003) (citations omitted).

In 1996, following the *Barud* decision, the General Assembly amended §3731 to include subsection 3731 (A.1). See footnote 4. That amendment provided that certain BAC levels at the time of testing were *prima facie* evidence of the BAC level at the time of driving, if the chemical test was conducted on a sample of the person's breath, blood or urine which was obtained within three (3) hours after the person drove, operated or was in actual physical control of the vehicle. The amendment insured that the burden of proof did not shift from the Commonwealth to the Defendant. The Defendant was free to introduce competent evidence to rebut the inference and overcome the Commonwealth's *prima facie* case. *Commonwealth v. Murray,* 749 A.2d 513, 520-521 (Pa.Super. 2000); see also *Commonwealth v. Yarger,* 648 A.2d 529 (Pa. 1994).

When one compares the former version of the DUI law with the current statute, one notices a glaring omission from §3802, i.e. any reference to the term *"prima facie evidence",* The omission renders portions of §3802 unconstitutional under both the federal and state constitutions because like its predecessor §3731(a)(5), it relieves the Commonwealth from the obligation of proving beyond a reasonable doubt that the driver had the requisite level of alcohol in his or her system at the time s/he was driving or operating the vehicle.

III. CONCLUSION

The Pennsylvania legislature has consistently attempted to deal with the problem of alcohol or drug impaired drivers whose harm to society is well-documented. However, in its latest attempt to redefine the DUI statute, it has created a law that on its face is constitutionally defective. Therefore, this Court shall grant the defendant's Omnibus Pretrial Motion.[7]

ORDER

AND NOW, this 9th day of November 2005, for the reasons set forth in the accompanying opinion, it is hereby **ORDERED** that:

(1) the Defendant's Petition For Writ of Habeas Corpus is hereby **DENIED;**

(2) the Defendant's Motion To Suppress (unlawful motor vehicle stop) is hereby **DENIED**.

(3) the Defendant's Motion To Dismiss on the ground that 75 Pa.C.S.A. §3802(a)(2), (b), (c), (e), (f)(1)(2) and (g) are unconstitutional is hereby **GRANTED**.

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

[7] To the extent that this Court may not have addressed some of the Defendant's arguments, it finds that it is unnecessary to do so in light of its determination of those issues which are discussed in this opinion.