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Reports of Cases Decided in the Several Courts of Erie County for the Year 2015

XCVIII

ERIE, PA

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

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HONORABLE STEPHANIE DOMITROVICH ---------- Judge
HONORABLE WILLIAM R. CUNNINGHAM ---------- Judge
HONORABLE ELIZABETH K. KELLY---------- Judge
HONORABLE JOHN J. TRUCILLA ---------- Judge
HONORABLE JOHN GARHART ---------- Judge
HONORABLE DANIEL J. BRABENDER, JR. ---------- Judge
HONORABLE ROBERT A. SAMBROAK, JR. ---------- Judge
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FREDERICK S. SHARP, II

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION

CRIMINAL LAW & PROCEDURE / CRIMINAL OFFENSES / VEHICULAR CRIMES / TRAFFIC REGULATION VIOLATIONS / OPERATOR LICENSES

In order to sustain a suspension of operating privileges under 75 Pa.C.S. § 1547, the Department of Transportation must establish that: (1) the licensee was arrested for drunken driving by a police officer who had reasonable grounds to believe that the motorist was operating a motor vehicle while under the influence of alcohol; (2) the licensee was requested to submit to a chemical test; (3) the licensee refused to submit; and (4) the licensee was warned that refusal would result in a license suspension.

CRIMINAL LAW & PROCEDURE / CRIMINAL OFFENSES / VEHICULAR CRIMES / TRAFFIC REGULATION VIOLATIONS / OPERATOR LICENSES

A police officer with reasonable grounds to believe a licensee was operating a vehicle while under the influence initially has unfettered discretion under 75 Pa. Cons. Stat. § 1547(a) to request the licensee to submit to one of the following types of chemical tests: breath, blood, or urine.

CRIMINAL LAW & PROCEDURE / CRIMINAL OFFENSES / VEHICULAR CRIMES / TRAFFIC REGULATION VIOLATIONS / OPERATOR LICENSES

Once the police officer selects the type of alcohol test to be administered, the officer's discretion is curbed; if a breath test is chosen, the police officer must administer it twice; if a blood or urine test is chosen, it may only be administered once unless the police officer establishes a reasonable ground for requesting a second test.

CRIMINAL LAW & PROCEDURE / CRIMINAL OFFENSES / VEHICULAR CRIMES / TRAFFIC REGULATION VIOLATIONS / OPERATOR LICENSES

A second blood or urine test may be proper if the first test was inconclusive due to faulty equipment or faulty performance by the individual.

CRIMINAL LAW & PROCEDURE / CRIMINAL OFFENSES / VEHICULAR CRIMES / DRIVING UNDER THE INFLUENCE / BLOOD ALCOHOL & FIELD SOBRIETY / IMPLIED CONSENT / WARNING REQUIREMENTS

75 Pa. Cons. Stat. § 1547(b)(4) provides that a police officer must inform licensees of the consequences of refusal upon requesting that they submit to chemical testing; however, once a law enforcement officer provides the § 1547(b)(4) warning, the officer has done all that is legally required and need not provide the warning again in advance of a second test.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
NO. 11580 - 2013

Appearances: Chester J. Karas, Jr., Esq., Attorney for PA Dept. of Transportation
Kevin M. Kallenbach, Esq., Attorney for Plaintiff

OPINION

Domitrovich, J., September 4th, 2014

The instant matter is before this Trial Court on Frederick S. Sharp, II's appeal from the Pennsylvania Department of Transportation's (PennDOT's) suspension of Appellant's

Pennsylvania operating privileges, which were suspended pursuant to section 1547 of the Vehicle Code. Appellant raises two arguments to this Trial Court in support of his license suspension appeal, arguing first that the arresting officer did not have reasonable grounds for requesting Appellant to submit to a subsequent breath test after the initial chemical blood test produced an insufficient quantity of blood; and arguing second that the arresting officer was required to read the DL-26 Form again after requesting Appellant submit to the subsequent breath test. PennDOT argues the instant appeal should be dismissed and the suspension of Appellant's operating privilege should be reinstated.

The facts of this case are as follows: On April 23rd, 2013, Trooper David Guianen, Pennsylvania State Police, Girard Barracks, made contact with Appellant while traveling along Route 20 in Erie County, Pennsylvania. Appellant's vehicle had been travelling slowly down the side of the road when Trooper Guianen made contact. Upon making contact with Trooper Guianen, Appellant stated "he was lost and was looking for Interstate 90." Appellant further stated he had been drinking earlier in the evening. Trooper Guianen detected a strong odor of alcohol emanating from Appellant's vehicle. In addition, Trooper Guianen observed that Appellant's eyes were glassy and bloodshot, and Appellant's speech was slurred. Based on Trooper Guianen's observations of Appellant's demeanor, Trooper Guianen administered a preliminary breath test to Appellant, which indicated positive for the presence of alcohol in Appellant's bloodstream.[1] Appellant was placed under arrest and placed into a patrol vehicle. Appellant became agitated when placed under arrest. Trooper Guianen transported Appellant to the Pennsylvania State Police Barracks in Girard, Pennsylvania.

Upon arriving at the Pennsylvania State Police Barracks, Shawn Dinger, a West Lake Emergency Medical Technician (E.M.T.), was telephoned to assist with a chemical blood test. Trooper Guianen read Appellant the required Implied Consent, also known as the "O'Connell" warnings[2], from the Department's DL-26 Form. Appellant was given an opportunity to review the DL-26 Form, but Appellant refused to sign the form or read it to himself. Appellant did, however, consent and agree to submit to the chemical blood test requested by Trooper Guianen. Shawn Dinger attempted to draw a blood sample from Appellant's right arm, but only obtained a "small splash of blood." Mr. Dinger then attempted to draw a blood sample from Appellant's left arm and left hand, but Mr. Dinger could not obtain a significant blood sample. Based on his observations from prior chemical blood tests and believing that the blood sample amount drawn from Appellant would not be adequate to successfully complete the blood alcohol content analysis at the forensic lab, Trooper Guianen requested Appellant submit to a DataMaster DMT breathalyzer test, which was available on site at the Pennsylvania State Police Barracks. However, Appellant refused to submit to further testing. Although Trooper Guianen did not again read the DL-

[1] This Court notes the preliminary breath test was not administered in the instant case to establish Appellant's blood alcohol content (BAC) at the scene; rather, pursuant to 75 Pa. C. S. § 1547(k), the office properly used the preliminary breath test to assist him as a police officer in determining whether a licensee should be placed under arrest for operating a motor vehicle while under the influence of alcohol.

[2] See *Commonwealth of Pennsylvania, Department of Transportation, Bureau of Traffic Safety v. O'Connell*, 555 A.2d 873 (Pa. 1989).

26 Form, Trooper Guianen warned Appellant of the consequences of his refusal to submit to the requested test; however, Appellant still refused further testing.

Based on Appellant's refusal to submit to the breathalyzer test, the Pennsylvania Department of Transportation suspended Appellant's operating privileges for eighteen (18) months pursuant to section 1547 of the Vehicle Code.[3]

Appellant filed his license suspension appeal to the Court of Common Pleas on June 7th, 2013 and a hearing was scheduled before this Trial Court on July 30th, 2014. This Trial Court conducted a full hearing and thereafter requested both counsel submit Memoranda of Law. Both counsel have filed their respective Memorandum of Law, and the issues are now ripe for decision.

As stated above, the Appellant raises two questions for consideration by this Trial Court in support of his appeal and requests the suspensions imposed by PennDOT be quashed. In order to sustain a suspension of operating privileges under section 1547 of the Code, the Department of Transportation must establish that: (1) the licensee was arrested for drunken driving by a police officer who had reasonable grounds to believe that the motorist was operating a motor vehicle while under the influence of alcohol; (2) the licensee was requested to submit to a chemical blood, breath or urine test; (3) the licensee refused to submit to the requested test; and (4) the licensee was warned that refusal would result in a license suspension. *See Grogg v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing,* 79 A.3d 715, 718 (Pa. Commw. Ct. 2013). Appellant does not dispute that Trooper Guianen had reasonable grounds to believe that Appellant was operating a motor vehicle while under the influence of alcohol; therefore, the first prong has been satisfied. Furthermore, Appellant does not dispute that Trooper Guianen read the Department's DL-26 Form prior to the initial chemical test advising Appellant that refusal would result in suspension of his Pennsylvania operating privileges; therefore, the fourth prong has been satisfied.

Appellant's first issue is that Trooper Guianen did not have reasonable grounds for requesting Appellant to submit to a subsequent DataMaster DMT breathalyzer test after Appellant submitted to the initial chemical blood test and produced an insufficient quantity of blood. A police officer with reasonable grounds to believe a licensee was operating a vehicle while under the influence initially has unfettered discretion under 75 Pa. C. S. §1547(a) to request a licensee to submit to one of the following types of chemical tests: breath, blood, or urine. *Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing v. Penich,* 535 A.2d 296, 298 (Pa. Commw. Ct. 1988). Once the police officer selects the type of test to be administered, however, his or her discretion is curbed. *Id*. If a blood or urine test is chosen, it may only be administered once unless the police officer establishes a reasonable ground for requesting a second test. *Id.* For example, a second test may be proper if the first test was inconclusive due to faulty equipment or faulty performance by the individual. *Id.* Reasonable grounds exist if **a reasonable person in the position of the police officer, viewing the facts and circumstances as they appeared**

[3] Appellant's operating privileges were suspended for 18 months because he has a prior DUI conviction and, pursuant to 75 Pa. C. S. § 1547(b)(1)(ii), a suspension is increased from 12 months to 18 months if a licensee has a prior DUI conviction on their driving record.

to the arresting officer, could have reached the same conclusion. *See Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing v. Park*, 598 A.2d 578, 580 (Pa. Commw. Ct. 1991) [emphasis added]. If more than one test is requested, the police officer must offer sufficient evidence to establish the "reasonableness" of such a request. *Commonwealth of Pennsylvania, Department of Transportation v. McFarren*, 525 A.2d 1185 (Pa. 1987).

After placing Appellant under arrest for driving under the influence of alcohol, Trooper Guianen transported Appellant to the Pennsylvania State Police Barracks and requested Appellant submit to a chemical blood test. This request was within Trooper Guianen's discretion. See Penich, 535 A.2d at 298. Shawn Dinger stated that he attempted to take a blood sample from three areas on Appellant's body – one from Appellant's right arm, one from Appellant's left arm, and one from Appellant's left hand. After these three attempts, Mr. Dinger was only able to obtain a "small splash of blood." Trooper Guianen then requested Appellant submit to a DataMaster DMT breathalyzer test. Trooper Guianen reasoned that, based on his experience with chemical blood tests, the blood sample taken from Appellant was insufficient to render a complete analysis for Appellant's blood alcohol content. His reasoning is supported by the testimony of Neil Rerko, a forensic science technician employed by the Pennsylvania State Police Bureau of Forensic Services for fifteen (15) years. Mr. Rerko stated that, in order to conduct a complete analysis for blood alcohol content, at least two hundred (200) microliters of blood were required. Mr. Rerko recalled that the vial containing the blood sample taken from Appellant contained only several drops of blood, all of which were dried on the side of the tube, and was under the required two hundred (200) microliters. In his chemical testing report, Mr. Rerko indicated that the limited blood sample he received was not able to be analyzed due to inadequate sample size.

Based on the testimony of Trooper Guianen, a Pennsylvania State Police officer with experience regarding chemical blood tests, and Neil Rerko, a Pennsylvania State Police forensic science technician with experience in conducting chemical blood testing, this Court concludes Trooper Guianen's request that Appellant submit to a subsequent DataMaster DMT breathalyzer test was based on reasonable grounds. Both Trooper Guianen and Neil Rerko were able to recognize that the several dried drops of blood from Appellant's blood sample would not be an adequate amount to complete a blood alcohol content analysis. A reasonable person, observing the facts and circumstances as they appeared to Trooper Guianen, including three separate blood draw attempts and the difficulty in obtaining any blood at all, would have understood that such a small amount of blood would not have rendered a successful analysis and that further testing was required to determine Appellant's blood alcohol content on April 23rd, 2013. *See Park*, 598 A.2d at 580. Furthermore, as the DataMaster DMT breathalyzer was located in the same Pennsylvania State Police Barracks and would have been less intrusive than another blood test, Trooper Guianen's request would not have unduly inconvenienced Appellant. Therefore, this Court finds and concludes that Trooper Guianen had reasonable grounds for requesting Appellant submit to a subsequent DataMaster DMT breathalyzer test and that Appellant's first issue is without merit.

Appellant's second issue is that Trooper Guianen should have been required to read the

DL-26 Form, a.k.a. "O'Connell warnings," for a second time after requesting Appellant to submit to the subsequent breathalyzer test. Section 1547(b)(2) of the Vehicle Code reads:

2) "It shall be the duty of the police officer to inform the person that:
   i. The person's operating privilege will be suspended upon refusal to submit to chemical testing; and
   ii. If the person refuses to submit to chemical testing, upon conviction or plea for violating section 3802(a)(1), the person will be subject to the penalties provided in section 3804(c) (relating to penalties)."

75 Pa. C. S. §1547(b)(2). The law has always required that law enforcement officers must inform licensees of the consequences of a refusal to take the test so that licensees can make knowing and conscious choices. *See Commonwealth of Pennsylvania, Department of Transportation, Bureau of Traffic Safety v. O'Connell,* 555 A.2d 873, 877 (Pa. 1989). Therefore, these warnings have been memorialized on the Pennsylvania Department of Transportation's "Chemical Testing Warnings and Report of Refusal to Submit to Chemical Testing" form, commonly referred to as a DL-26 Form. The DL-26 Form states to licensees who have been arrested for driving under the influence of alcohol or controlled substances that the licensees have been arrested for driving under the influence; they have been requested to submit to a blood, breath, or urine test; and their refusal to submit to testing will result in their operating privileges being suspended for at least twelve (12) months.

Appellant argues that, although Trooper Guianen read the DL-26 Form to Appellant and gave Appellant the opportunity to inspect this Form prior to the initial chemical blood test, Trooper Guianen should have been required to read the DL-26 Form a second time prior to the requested breathalyzer test to inform Appellant that his refusal would result in suspension of his operating privileges. However, Appellant has not provided any statutory or case law that requires an arresting officer to read the DL-26 Form prior to **every** requested test. Section 1547(b) does not state that a police officer must inform a licensee about the consequences of refusal to submit to chemical testing prior to a second or subsequent chemical test. See 75 Pa. C. S. §1547(b). The Pennsylvania Commonwealth Court echoed this sentiment in *Trobovic v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing,* stating:

> "… a police officer must inform licensees of the consequences of refusal upon requesting that they submit to chemical testing … There is **no requirement that the warning be given if the officer again asks the licensee to submit to chemical testing** and we [the Court] refuse to read any such requirement into the section. The arresting officer may, in his discretion, provide a licensee who has refused chemical testing with a subsequent opportunity to assent. However, he is not then required to provide another warning of the consequences of refusal."

Trobovic, 553 A.2d 531, 533 (Pa. Commw. Ct. 1989) [emphasis added]. Once a law enforcement officer provides O'Connell warnings to a motorist, that law enforcement officer has done all that is legally required to ensure that the motorist has been fully advised of the consequences of refusing to submit to chemical testing. *See Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing v. Scott,* 684

A.2d 539, 546 (Pa. 1996).

Trooper Guianen stated that, upon arriving at the Pennsylvania State Police Barracks, he read the DL-26 Form to Appellant prior to the first chemical blood test and permitted Appellant the opportunity to read the DL-26 Form himself, which Appellant refused. However, Appellant did consent to the initial chemical blood test, which indicated that Appellant understood the consequences of refusal to submit to chemical testing. Appellant did not offer any testimony to indicate that he did not understand the consequences of refusal or otherwise did not make a knowing and conscious decision regarding acceptance or refusal to submit to testing. By his initial reading of the DL-26 Form, including all warnings therein, and Appellant's consent to the initial chemical blood test, Trooper Guianen performed his responsibility as codified in section 1547(b)(2) of the Vehicle Code and was under no further duty to re-read the DL-26 Form prior to the requested DataMaster DMT breathalyzer test. *See Scott*, 684 A.2d at 546. This Trial Court finds that Trooper Guianen was not required to read the DL-26 Form, a.k.a. "O'Connell warnings," a second time after initially reading the DL-26 Form, and then obtaining an inadequate amount of blood from Appellant to analyze. Therefore, this Trial Court concludes that Trooper Guianen reasonably requested Appellant submit to the subsequent breathalyzer test after the Emergency Medical Technician (E.M.T.) was unable to obtain more than a "splash" of blood from Appellant.

For all of the foregoing reasons, this Court enters the following Order:

ORDER

AND NOW, to wit, this 4th day of September, 2014, after a scheduled hearing, at which Frederick S. Sharp, II appeared and was represented by his counsel, Kevin M. Kallenbach, Esquire; and Chester Karas, Jr., Esq., appeared on behalf of the Commonwealth of Pennsylvania, Department of Transportation; and after consideration of the Memorandum of Law filed by each counsel and an independent review of the relevant statutory and case law and for all the reasons set forth above in this Trial Court's Opinion, it is hereby **ORDERED, ADJUDGED AND DECREED** that the said License Suspension Appeal is hereby **DISMISSED** as Department of Transportation has met all four prongs of its burden of proof, of which Appellant did not rebut, and the Department of Transportation is authorized to reinstate the suspension imposed by Notice dated May 10th, 2013 for eighteen (18) months based upon Appellant's refusal to submit to the subsequent breathalyzer test. This Court reserves to add further findings of fact and conclusions of law if necessary in the future.

BY THE COURT:
/s/ Stephanie Domitrovich, Judge

VILLAGE PUB, INC. T/A JIMMY Z'S TIME OUT TAVERN, Appellant
v.
PENNSYLVANIA LIQUOR CONTROL BOARD, Appellee

ADMINISTRATIVE LAW / LIQUOR LICENSE RENEWAL / JUDICIAL REVIEW

Renewal of a licensee's liquor license is not an automatic procedure; the Pennsylvania Liquor Code grants the Pennsylvania Liquor Control Board the authority to refuse to renew a liquor license under specified circumstances.

ADMINISTRATIVE LAW / LIQUOR LICENSE RENEWAL / JUDICIAL REVIEW

When considering the manner in which a licensed premises was being operated, the Liquor Control Board may consider activity that occurred on or about the licensed premises or in areas under the licensee's control if the activity occurred when the premises was open for operation and if there was a relationship between the activity outside the premises and the manner in which the licensed premises was operated.

ADMINISTRATIVE LAW / LIQUOR LICENSE RENEWAL / JUDICIAL REVIEW

The Liquor Control Board may consider all past violations of the Liquor Code in a renewal action, no matter how they occurred.

ADMINISTRATIVE LAW / LIQUOR LICENSE RENEWAL / JUDICIAL REVIEW

Licensees are strictly liable for violations of the Liquor Code that occur on the licensed premises.

ADMINISTRATIVE LAW / LIQUOR LICENSE RENEWAL / JUDICIAL REVIEW

A licensee can be held accountable for activity occurring off-premises where there is a causal connection between the licensed premises and the activity.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
MD 780-2013

Appearances: Frank Sluzis, Esquire, appearing on behalf of Appellant, James Zank, operator and sole shareholder of Village Pub, Inc., t/a Jimmy Z's Time Out Tavern
Michael J. Plank, Esquire, appearing on behalf of Appellee, Pennsylvania Liquor Control Board, Bureau of Licensing

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Domitrovich, J., July 15th, 2014

After thorough consideration of the entire record regarding Petitioner's request that this Court reverse the Pennsylvania Liquor Control Board's decision not to renew Appellant's liquor license, including, but not limited to, the testimony and evidence presented during the hearings held September 10, 2013 and June 10, 2014, as well as an independent review of the relevant statutory and case law and all counsels' submissions, including their proposed findings of fact and conclusions of law, this Trial Court hereby makes the following Findings of Fact and Conclusions of Law in support of affirming the Pennsylvania Liquor Control Board's decision not to renew Appellant's liquor license:

FINDINGS OF FACT

I. Factual and Procedural History

1. James Zank is the operator and sole shareholder of Village Pub, Inc., t/a/ Jimmy Z's Time Out Tavern (hereafter referred to as "Appellant"), located at 3406 Buffalo Road, Wesleyville Borough, Erie, Pennsylvania 16510. Mr. Zank has been the operator and sole shareholder since 1989.
2. The Pennsylvania Liquor Control Board (hereafter referred to as "Board") is an agency and instrumentality of the Commonwealth of Pennsylvania, located at 401 Northwest Office Building, Harrisburg, Pennsylvania 17124.
3. Appellant was required to file his license renewal application on or before June 1, 2013, at least sixty (60) days before the expiration of said license. *See 47 Pa. C. S. 4-470(a).*
4. On July 1, 2013, Appellant filed its application with the Board for renewal of Liquor License No. R-18662 with all of the supporting documents and appropriate filing fees; therefore, his renewal application was deemed untimely.
5. Appellant previously entered into a Conditional Licensing Agreement (hereafter referred to as "CLA") on December 1, 2010 for the license period effective August 1, 2009 through July 31, 2011, which placed the following conditions on Appellant:
    a. Appellant must become compliant with Responsible Alcohol Management provisions of Liquor Code within ninety (90) days, which includes new employee orientation, training for alcohol service personnel, manager/owner training, displaying of responsible alcohol service signage, and a certification compliance inspection by a representative of the Board's Bureau of Alcohol Education;
    b. Appellant must use eight (8) security cameras whenever the licensed premises is operating and retain the recordings of said security cameras for no less than 30 days;
    c. Appellant must employ at least one security guard, who must be present at the licensed premises on Friday and Saturday nights from 9:00 p.m. until closing and must be clothed in such a way as to make their status as security personnel readily apparent,
    d. Appellant must monitor the exterior of the premises by routinely patrolling the entire exterior of the premises and said patrols must be recorded and retained;
    e. Appellant must initiate and maintain regular monthly meetings with a representative of the Wesleyville Police Department for soliciting and implementing recommendations on how to orderly operate the establishment, unless the Wesleyville Police Department indicates said meetings are no longer necessary; Appellant must maintain records of said meetings; and
    f. Appellant must use a transaction scan device to scan the identification cards of all patrons purchasing alcoholic beverages. *See Respondent's Exhibit E, sub-Exhibit B-3, paragraph 6.*

6. On November 9, 2011, the Board renewed the CLA for the license period effective August 1, 2011 through July 31, 2013. *See Respondent's Exhibit E, sub-Exhibit B-4.*
7. The Board sent a letter, dated July 16, 2013, to Appellant stating its objection to the renewal of Appellant's liquor license, pursuant to 47 Pa. C. S. § 4-470, alleging Appellant had "abused his licensing privilege and would no longer be allowed to hold a liquor license based upon violations of the Liquor Code relative to Citation Numbers: 12-1302, 11-1528, 11-0918, 09-1744, 03-0514, 03-0134, 01-0183, 98-0535, 96-1033, and 93-0186, and three reported incidents of disturbance;" and Appellant "breached the Conditional Licensing Agreement by not becoming compliant with the Responsible Alcohol Management Agreement ("RAMP"), did not routinely scan identification cards for all patrons, did not routinely monitor and/or patrol the exterior of the premises, did not hold monthly meetings with Wesleyville Police Department, and did not have the eight required surveillance cameras to monitor activities on the premises." (*See Respondent's Exhibit E, sub-Exhibit B-2*).
8. The following are the adjudicated citations for which Appellant filed a Statement of Waiver, Admission, and Authorization, admitted facts via stipulation, or a hearing was conducted and the charges were sustained:
    a. Citation 12-1302, which was issued on August 29, 2012, contained three counts – one count of failure to break empty liquor bottles within twenty-four (24) hours; one count of failure to constantly and conspicuously expose restaurant liquor license; and one count of failure to adhere to the Conditional Licensing Agreement, sections 6(b), 6(e), and 6(f). Appellant executed a Statement of Waiver, Admission, and Authorization admitting to these charges. The Administrative Law Judge found that a Board officer on July 11, 2012 purchased alcohol from Appellant's bartender without being asked for identification. A second Board officer entered the establishment and observed nineteen (19) empty liquor bottles stacked behind the bar. The bartender stated the bottles had been there for seven (7) to ten (10) days. The officer also observed the liquor license was not visible as it was hidden behind a jersey for sale and an advertisement and, therefore, the liquor license not conspicuously exposed. The officer also observed only seven (7) security cameras. The officer met with the Wesleyville Chief of Police, who stated that Appellant had not made any effort to contact the Chief during December of 2011 or January, March, April, or May of 2012. Appellant was fined $900.00. (*See Respondent's Exhibit E, sub-Exhibit B-5*).
    b. Citation 11-1528, which was issued on September 9, 2011, contained one count of failure to adhere to the Conditional Licensing Agreement, sections 6(a) – (f). Based on Appellant's admissions in a "Stipulation of Fact" submitted by the parties, the Administrative Law Judge found that a Board officer on July 5, 2011 purchased alcohol without being asked for identification. The officer did not observe an identification scanning device anywhere and observed other patrons purchasing alcohol without being asked for identification. The

Administrative Law Judge also found that a Board officer on July 15, 2011 conducted surveillance outside the establishment and did not observe any individual clothed and readily apparent as a security person walk around the premises. The Administrative Law Judge also found that a Board officer on July 28, 2011 met with Mr. Zank and found insufficient new employee training, no proof of manager/owner training, and R.A.M.P. certification was not completed. The officer also observed only four (4) surveillance cameras. Mr. Zank stated he did not know why outside surveillance was not conducted. Mr. Zank did not have Minutes from his meetings with the Wesleyville Police. The officer spoke with the Wesleyville Chief of Police, who stated Mr. Zank had met with the Chief, but no other meetings were held since the CLA went into effect. Appellant was fined $750.00. (*See id.*).

c. Citation 11-0918, which was issued on May 27, 2011, contained two counts – one count of failure to maintain complete and truthful records covering the operation of the business for a period of two years and one count of failure to adhere to the Conditional Licensing Agreement, sections 6(a), (b), (c), and (f). Based on Appellant's admissions in a "Stipulation of Fact" submitted by the parties, the Administrative Law Judge found that Appellant on March 1, 2011 had not obtained R.A.M.P. certification. The Administrative Law Judge also found that Liquor Enforcement Officer Keys and a trainee on March 26, 2011 purchased alcohol without being asked for identification, nor were other patrons asked for identification before purchasing alcohol. Officer Keys did not observe an identification scanner on the premises. Officer Keys observed no one working as a security guard. Officer Keys, while interviewing Mr. Zank, was unable to see the feed for eight (8) security cameras, and video retention was set to ten (10) days. Officer Keys did not observe documentation for Appellant's R.A.M.P. certification. Mr. Zank did not attend owner/manager training and he did not conduct new employee orientation. The Administrative Law Judge also found that Officer Keys on March 30, 2011 met with the Wesleyville Chief of Police, who stated Mr. Zank had not contacted the Chief. The Administrative Law Judge also found that Appellant on April 4, 2011 had not received R.A.M.P. certification. Appellant was fined $750.00. (*See id.*).

d. Citation 09-1744, which was issued on July 24, 2009, contained one count of failure to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after closing. Appellant executed a Statement of Waiver, Admission, and Authorization admitting to the charge. The Administrative Law Judge found that a Board officer on April 19, 2009, at 1:45 a.m., entered the establishment and observed two (2) bartenders serving twenty (20) patrons. The officer left the premises at 2:37 a.m., with nine (9) patrons present, and conducted surveillance across the street. At 2:47 a.m., the officer observed two (2) patrons leave. At 2:49 a.m., the officer observed one (1) patron leave. At 2:56 a.m., the officer observed three (3) patrons leave. Appellant was fined $350.00. (*See id.*).

e. Citation 03-0514, which was issued on March 31, 2003, contained one count of failure to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after closing. Appellant executed a Statement of Waiver, Admission, and Authorization admitting to the charge. The Administrative Law Judge found that a Liquor Enforcement Officer on January 1, 2003, at 3:08 a.m., observed a male enter Appellant's establishment. At 3:10 a.m., the officer observed two (2) females and a male exit the premises, at which point the officer questioned them and found they were not employed at Appellant's establishment. Appellant was fined $300.00. (*See id.*).

f. Citation 03-0134, which was issued on February 7, 2003, contained one count that Appellant sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to a minor. Appellant executed a Statement of Waiver, Admission, and Authorization admitting to the charge. The Administrative Law Judge found that a male on December 31, 2002, at 11:00 p.m., entered Appellant's establishment and purchased a six-pack of beer without question about his age. The male placed the alcohol in his car, where two other males were waiting. The male returned to Appellant's establishment and purchased another six-pack of beer without question about his age. The male was stopped by a police officer with the alcohol in his car. It was determined that all three males in the vehicle were twenty (20) years of age. The driver admitted purchasing the alcohol at Appellant's establishment. Appellant was fined $1,250.00. (*See id.*)

g. Citation 01-0183, which was issued on February 2, 2001, contained two counts – one count of failure to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after closing and one count that Appellant permitted patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 2:30 a.m. Appellant executed a Statement of Waiver, Admission, and Authorization admitting to the charges. The Administrative Law Judge found that two Liquor Enforcement Officers on January 13, 2001, at 3:34 a.m., approached Appellant's premises and observed two (2) individuals seated at the bar in the premises. Upon entering, the officers observed four (4) individuals, two (2) of which were in possession of alcohol. The officers departed Appellant's establishment at 3:48 a.m. Appellant was fined $350.00. (*See id.*).

h. Citation 98-0535, which was issued on April 14, 1998, contained one count that Appellant sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to a minor. After hearing the testimony presented and upon review of the evidence submitted, the Administrative Law Judge found that three Board officers on February 13, 1998 entered Appellant's establishment in an undercover capacity and observed service of alcoholic beverages to approximately thirty (30) patrons. After conducting an open inspection of Appellant's premises, the officers identified two females

less than twenty-one (21) years of age. Appellant was fined $1,100.00. (*See id.*).

i. Citation 96-1033, which was issued June 3, 1996, contained one count that Appellant sold malt or brewed beverages in excess of 192 fluid ounces in a single sale to one person for consumption off-premises. Appellant executed a Statement of Waiver, Admission, and Authorization admitting to the charge. The Administrative Law Judge found that a Board officer on March 31, 1996, at 1:00 a.m., entered Appellant's establishment in an undercover capacity and observed an unidentified male tending bar. A female entered shortly after and stated she wanted to buy as much alcohol as she could for twenty-three dollars ($23.00). The bartender indicated to the female that she could buy two (2) cases of Milwaukee's Best for twenty-five dollars ($25.00). The female provided twenty-five dollars ($25.00) to the bartender, and the bartender returned with four (4) twelve-packs of beer. Appellant was fined $75.00. (*See id.*).

j. Citation 93-0186, which was issued on February 24, 1993, contained one count that Appellant sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to a minor. After hearing the testimony presented and upon review of the evidence submitted, the Administrative Law Judge found that a male on January 20, 1993, at approximately 11:30 p.m., entered Appellant's establishment and took a seat at a table. Between 11:30 p.m. that evening and 1:00 a.m. the following morning, the male consumed two (2) glasses of beer. At 1:00 a.m., several Board officers entered Appellant's establishment and conducted an open inspection. The officers observed the male among thirty-five (35) patrons and determined that the male was twenty (20) years of age. A one-day suspension of Appellant's liquor license was imposed. (*See id*.).

9. Thereafter, pursuant to 47 Pa. C. S. § 4-464, the Bureau scheduled a hearing to address Appellant's liquor license renewal application. Appellant received notice of that hearing by the Bureau's letter dated August 23, 2013. (*See Respondent's Exhibit E, sub-Exhibit B-6*).
10. The scheduled license renewal hearing occurred at the Homewood Suites by Hilton, 2084 Interchange Road, Erie, Pennsylvania 16501, on September 10, 2013 before hearing examiner, John A. Mulroy, at which James Zank, as operator and sole shareholder of Appellant, appeared and was represented by counsel, Eric J. Mikovch, Esq. and Scott L. Wallen, Esq. The Board was represented by its counsel, Michael J. Plank, Esq. (*See Respondent's Exhibit E*).
11. On November 20, 2013, the Board denied Appellant's application for renewal of its liquor license. (*See Respondent's Exhibit C*).
12. Appellant filed an appeal to the Board's denial of its application of renewal on November 22, 2013.
13. Board filed an Opinion in support of its Order on January 10, 2014. (*See Respondent's Exhibit A*).
14. A full de novo trial was held on June 10, 2014 in Courtroom G, Room 222, Erie

County Courthouse, Erie, Pennsylvania, before the undersigned judge, at which witnesses were presented, stipulations and exhibits were entered, and arguments were heard. James Zank, owner and sole shareholder of Appellant, appeared and was represented by counsel, Frank Sluzis, Esq. The Board was represented by its counsel, Michael J. Plank, Esq.

II. Testimony from the Administrative Hearing, September 10, 2013

A. Patrolman Shawn Garner, Wesleyville Borough Police Department

i. July 28, 2011 Incident

15. **It should be noted that this incident occurred before the dates specified in the July 16, 2013 objection letter and, because Appellant was not given ten (10) days' notice pursuant to 47 Pa. C. S. § 4-470, this Court will not consider this particular incident.**

ii. November 10, 2012 Incident

16. On November 10, 2012, around 1:30 a.m., Patrolman Garner observed a male seated on the sidewalk directly in front of Appellant's establishment, with his knees towards his head and his head almost between his legs. (*Id., page 37, lines 21-25 – page 38, lines 1-11)*.
17. Five minutes later, Patrolman Garner observed the male in the same position and was concerned about possible health issues or public intoxication. (*Id., page 38, lines 12-15*).
18. Appellant's establishment was open for business at the time of the incident. (*Id., page 38, lines 19-22*).
19. Patrolman Garner recognized the male, identified as David Baugh, from prior incidents. (*Id., page 39, lines 2-5*).
20. Mr. Baugh was severely intoxicated, had slurred speech, smelled heavily of alcohol, and had problems maintaining his balance. (*Id., page 39, lines 8-11*).
21. Patrolman Garner administered a portable breath test, but Mr. Baugh was not able to provide a sufficient breath sample after three attempts. (*Id., page 39, lines 22-25 – page 40, lines 1-9*).
22. Mr. Baugh was charged with public drunkenness. (*Id., page 40, lines 18-22*).
23. Patrolman Garner asked Mr. Baugh whether he had been inside Appellant's establishment, to which Mr. Baugh responded he had been inside Appellant's establishment and had recently consumed his last beverage. (*Id., page 41, lines 2-3*).
24. On cross examination, it was established Patrolman Garner did not walk into Appellant's establishment to ask why Appellant would serve an intoxicated person or to determine whether or not Mr. Baugh actually consumed his last drink inside Appellant's establishment. (*Id., page 45, line 1-9)*.
25. Patrolman Garner stated he was not called to the incident at Appellant's establishment, but only responded after personal observation. (*Id., page 45, lines 10-18*).

iii. December 23, 2012 Incident

26. On December 23, 2012, around 11:00 p.m., Patrolman Garner heard a loud noise outside the Wesleyville Police Department. (*Id., page 48, lines 1-10*).

27. Patrolman Garner opened the side door of the police station and observed a male and a female arguing. (*Id., page 49, lines 6-13*).
28. Patrolman Garner approached the male, who was leaving from the front of Appellant's establishment. (*Id., page 49, lines 23-24*).
29. The male, walking eastbound upon the sidewalk, punched two street signs. (*Id., page 50, lines 2-4*).
30. The male, identified as Anthony Bell, smelled heavily of alcoholic beverages. (*Id., page 50, line 13*).
31. Patrolman Garner did not charge Mr. Bell, who was very cooperative and apologetic. (*Id., page 50, lines 14-18*).
32. Both Mr. Bell and the female had been inside Appellant's establishment prior to the incident. (*Id., page 50, lines 20-23*).
33. On cross examination, Patrolman Garner stated he was not called to the incident at Appellant's establishment but only responded after personal observation. (*Id., page 52, lines 15-20*).
34. Patrolman Garner did not walk into Appellant's establishment to question the female as to the argument between herself and Mr. Bell. (*Id., page 54, lines 16-22*).

B. <u>James Zank, owner and proprietor, Village Pub, Inc., t/a Jimmy Z's Time Out Tavern</u>

35. James Zank has been the owner and sole shareholder of Village Pub, Inc., t/a Jimmy Z's Time Out Tavern for twenty-four (24) years. (*Id., page 61, lines 1-6*).
36. Paragraph Two of the July 16, 2013 letter states Appellant did not become compliant with the Responsible Alcohol Management Agreement, a program that requires RAMP certification for employees, visible signs for intoxicated persons, carding minors, etc. (*Id., page 62, lines 13-25*).
37. Paragraph Two of the July 16, 2013 letter states Appellant was not scanning identification cards of all patrons. (*Id., page 64, lines 2-4*).
38. Paragraph Two of the July 16, 2013 letter states Appellant was not monitoring the exterior of the premises by routine patrol at least once every hour. (*Id., page 65, lines 7-10*).
39. Paragraph Two of the July 16, 2013 letter states Appellant was not holding regular monthly meetings with the Wesleyville Police Department. (*Id., page 66, lines 18-20*).
40. Mr. Zank stated Appellant, Village Pub, Inc., t/a/ Jimmy Z's Time Out Tavern, has received a total of ten (10) citations between 1993 and 2012. (*Id., page 82, lines 16-22*).

III. <u>Testimony from De Novo Trial, June 10, 2014</u>

41. Edward Rickrode, a self-employed barber and current mayor of Wesleyville Borough, testified on behalf of Appellant. Mayor Rickrode stated he is familiar with Appellant's establishment and, from August 1, 2011 to September 2013, frequented the establishment at least once per week. During this time, he did not observe any disturbances inside or outside the establishment. Also, he stated his identification card was scanned every time he entered the establishment. Finally,

he stated he has known Mr. Zank for twenty (20) years or more and Mr. Zank is a patron in Mr. Rickrode's barbershop.

42. Paul Causgrove, a manager at the Barber National Institute, testified on behalf of Appellant. Mr. Causgrove stated he is familiar with Appellant's establishment and, from August 1, 2011 to September 2013, frequented the establishment at least once a month, during dinner or after basketball games. During this time, he did not observe any incidents of disturbances. Also, he stated his identification card was scanned every time he entered the establishment. Finally, he stated he has known Mr. Zank for twenty (20) years or more.
43. Kathy Benim, an x-ray technician, testified on behalf of Appellant. Mrs. Benim stated she is familiar with Appellant's establishment and, from August 1, 2011 to September 2013, frequented the establishment on Thursdays and weekends. During this time, she did not observe any incidents of disturbance. Also, she stated her identification card was scanned every time she entered the establishment. Finally, she stated she has known Mr. Zank for seventeen (17) years.
44. Terry Blakeney, a math professor at the Pennsylvania State University at Behrend, testified on behalf of Appellant. Mr. Blakney stated he is familiar with Appellant's establishment and, from August 1, 2011 to September 2013, frequented the establishment at least twice per week. During this time, he did not observe any incidents of disturbance. Also, he stated his identification card was scanned every time he entered the establishment. Finally, he stated he has known Mr. Zank for twenty-two (22) years.
45. Bonnie Fitzpatrick, a supervisor for the treasury department of Erie Insurance, testified on behalf of Appellant. Mrs. Fitzpatrick stated she is familiar with Appellant's establishment and, from August 1, 2011 to September 2013, frequented this establishment on weekends and during sporting events. During this time, she did not observe any incidents of disturbance. Also, she stated her identification card was scanned every time she entered the establishment. Finally, she stated she has known Mr. Zank for around twenty (20) years and had worked for him previously during that time.
46. Tami Kress, a manager at the Vargo Company, testified on behalf of Appellant. Mrs. Kress stated she is familiar with Appellant's establishment and, from August 1, 2011 to September 2013, frequented the establishment at least once per week. During that time, she did not observe any incidents of disturbance. Also, she stated her identification card was scanned every time she entered the establishment. Finally, she stated she attended birthday celebrations at the establishment and had no problem bringing her family to Appellant's establishment.
47. James Mantyla, President and Chief Executive Officer of Glenwood Alcohol Distributors, testified on behalf of Appellant. Mr. Mantyla stated he is familiar with Appellant's establishment and, from August 1, 2011 to September 2013, sold beverages to Appellant and frequented the establishment at least once per week. During that time, he did not observe any incidents of disturbance. Also, he stated his identification card was scanned every time he entered the establishment.
48. John Muroski, a manufacturing engineer with Ameridrives Coupling, testified

on behalf of Appellant. Mr. Muroski stated he is familiar with Appellant's establishment and, from August 1, 2011 to September 2013, frequented the establishment every day. During that time, he did not observe any incidents of disturbance. Also, he stated his identification card was scanned every time he entered the establishment.

49. John Muroski and James Zank entered into an Asset Purchase Agreement for the sale of Appellant's establishment for the sum of six hundred thousand dollars ($600,000.00) on September 9, 2013. (See Asset Purchase Agreement, Petitioner's Exhibit 1). Mr. Muroski has knowledge of Appellant's citation history and the Conditional Licensing Agreement in effect at the time. Mr. Muroski is of the opinion that the liquor license held by Appellant would be transferable with the citations attached, is in favor of the liquor license being renewed, and testified that without the liquor license, "the deal would not go forward." The sale and transfer of Appellant's liquor license is included in the Asset Purchase Agreement. *See Petitioner's Exhibit 1, paragraph 1.*

CONCLUSIONS OF LAW

Title 47 of the Pennsylvania Consolidated Statutes, also known as the Pennsylvania Liquor Code, governs the manufacturing, sale, and transportation of liquor, alcohol, and malt or brewed beverages in the Commonwealth of Pennsylvania. *See 47 Pa. C. S. § 1-104(c).* Specifically, Article IV of the Pennsylvania Liquor Code governs licenses and regulations pertaining to liquor, alcohol, and malt and brewed beverages.

Renewal of a licensee's liquor license is not an automatic procedure. *See U.S.A. Deli, Inc. v. Pennsylvania Liquor Control Bd.*, 909 A.2d 24 (Pa. Commw. Ct. 2006). Section 4-470(a.1) grants the Pennsylvania Liquor Control Board the authority to refuse to renew a liquor license under these circumstances:

1) If the licensee, its shareholders, directors, officers, association members, servants, agents or employees have violated any of the laws of this Commonwealth or any of the regulations of the board;
2) If the licensee, its shareholders, directors, officers, association members, servants, agents or employees have **one or more adjudicated citations** under this or any other license issued by the board or were involved in a license whose renewal was objected to by the Bureau of Licensing under this section;
3) If the licensed premises no longer meets the requirements of this act or the board's regulations; or
4) Due to the manner in which this or another licensed premises was operated while the licensee, its shareholders, directors, officers, association members, servants, agents or employees were involved with that license. When considering the manner in which this or another licensed premises was being operated, **the board may consider activity that occurred on or about the licensed premises or in areas under the licensee's control if the activity occurred when the premises was open for operation and if there was a relationship between the activity outside the premises and the manner in which the licensed premises was operated.** The board may take into consideration whether any substantial steps were taken to address the activity occurring on or about the premises.

47 Pa. C. S. § 4-470(a.1) [emphasis added]. The Commonwealth Court has upheld the Board's exercise of discretion under Section 4-470 and has stated that even one (1) past citation or violation may be sufficient to support a decision refusing a renewal application. *Hyland Enterprises, Inc. v. Pennsylvania Liquor Control Bd.*, 158 Pa. Commw. 283, 631 A.2d 789 (Pa. Commw. Ct. 1983). The Commonwealth Court has held that the Board may consider all past violations of the Liquor Code in a renewal action, no matter how they occurred. *Pennsylvania Liquor Control Bd. v. Bartosh*, 730 A.2d 1029 (Pa. Commw. Ct. 1999).

In the instant case, this Trial Court finds and concludes that the Board properly refused to renew Appellant's liquor license, in view of the following four distinct bases:

1. Breach of the Conditional Licensing Agreement ("CLA") by Appellant as a Basis for Nonrenewal

As indicated above, Appellant entered into a Conditional Licensing Agreement ("CLA") on December 1, 2010, during a previous renewal period. The provisions of the CLA required Appellant to: (1) become compliant with the Responsible Alcohol Management provisions of the Liquor Code; (2) have eight security cameras installed and keep recordings for 30 days; (3) employ one security guard on Friday and Saturday nights from 9:00 p.m. until closing; (4) monitor the exteriors by hourly patrols and keep records of said patrols; (5) initiate monthly meetings with Wesleyville Police Department; and (6) use a transaction scan device to scan patron's identification cards. *See Respondent's Exhibit E, sub-Exhibit B-3, paragraph 6.* Paragraph 7 of the CLA states that "[Appellant] understands that failure to adhere to this Agreement may result in citation(s) by the Bureau, and/or non-renewal of this license by the Board." *Respondent's Exhibit E, sub-Exhibit B-3, paragraph 7.* Furthermore, Paragraph 8 of the CLA states that "[Appellant] further understands that these terms will remain in effect both on the license and on the premises unless and until a subsequent agreement is reached with the Board rescinding these restrictions." *Respondent's Exhibit E, sub-Exhibit B-3, paragraph 8*. The Board renewed the CLA on November 9, 2011 for the license period effective August 1, 2011. *Respondent's Exhibit E, sub-Exhibit B-4.* As there were no subsequent agreements between Appellant and the Board to rescind the CLA, the provisions remained in effect.

Appellant has received three (3) separate citations on separate occasions for various violations of the CLA. The first citation for breach of the CLA provisions was Citation 11-0918. According to this citation, Appellant did not obtain R.A.M.P. certification; patrons' identification cards were not scanned prior to purchasing alcoholic beverages and no identification scanner was located on the premises; Appellant did not have a security guard working on the premises; Appellant did not have eight (8) functioning security cameras and the video retention was set to 10 days; and Appellant did not conduct hourly patrols of the premises. *See Respondent's Exhibit E, sub-Exhibit B-5.* These violations began as early as March 1, 2011, ninety (90) days after CLA was entered into. *See id.*

The second citation for breach of the CLA provisions was Citation 11-1528. According to this citation, patrons' identification cards were not scanned prior to purchasing alcoholic beverages and no identification scanner was located on the premises; Appellant did not have

a security guard working on the premises; Appellant did not obtain R.A.M.P. certification; Appellant did not have eight (8) functioning security cameras; Appellant did not conduct hourly patrols of the premises; and Appellant did not maintain minutes from meetings with Wesleyville Police Department. *See id.*

The third citation for breach of the CLA provisions was Citation 12-1302. According to this citation, patrons' identification cards were not scanned prior to purchasing alcoholic beverages; Appellant did not have eight (8) functioning security cameras; and Appellant did not hold regular monthly meetings with the Wesleyville Police Department during December of 2011 or January, March, April, and May of 2012. *See id.*

Appellant argues the date and time of the observations made in conjunction with the citations are "a mere snapshot in time and are not indicative of a genuine pattern of non-compliance." *Appellant's Memorandum of Law, page 2.* Appellant further argues "no evidence exists to establish that [Appellant] committed a willful and deliberate breach of the CLA." *Id.* However, as stated in paragraph 7 of the CLA entered into between Appellant and the Board, failure to adhere to the Agreement may result in citations and/or non-renewal of Appellant's license. *See Respondent's Exhibit E, sub-Exhibit B-3, paragraph 7.* Furthermore, Section 4-470 states:

> The board may enter into an agreement with the applicant concerning additional restrictions on the license in question. If the board and the applicant enter into such an agreement, such agreement shall be binding on the applicant. **Failure by the applicant to adhere to the agreement will be sufficient cause to form the basis for a citation under section 471 and for the nonrenewal of the license under this section.**

47 Pa. C. S. § 4-470 [emphasis added].

Considering the terms of the CLA in the instant case and the language of Section 4-470, and in view of that case law that a general pattern of non-compliance is clearly not required for non-renewal based on violations of a CLA, the only evidence required for non-renewal by the Board would be that there is a failure to adhere to the provisions of a CLA. In the instant case, this Trial Court finds that the three (3) adjudicated citations in the instant case clearly demonstrate Appellant's failure to comply with the provisions of the CLA. Therefore, this Trial Court concludes Appellant's breach of the CLA on three separate occasions provides a sufficient basis for non-renewal of Appellant's liquor license.

2. <u>Appellant's Citation History as a Basis for Nonrenewal</u>

Licensees are held strictly liable for violations of the Liquor Code that occur on the licensed premises. *Pennsylvania Liquor Control Bd. v. TLK,* 518 Pa. 500, 544 A.2d 931 (1988). As stated above, the Commonwealth Court has held that a single citation or violation of the Liquor Code may be sufficient to support a decision refusing a renewal application. *Hyland,* 158 Pa. Cmwlth. 283, 631 A.2d 789 (Pa. Commw. Ct. 1983). In deciding whether or not to renew a liquor license, the Board may consider the licensee's entire citation history to see if a pattern of activity has emerged which merits the non-renewal of the liquor license. *St. Nicholas Greek Catholic Russian Aid Society v. Pennsylvania Liquor*

Control Bd., 41 A.3d 953 (Pa. Commw. Ct. 2012).

In addition to the adjudicated citations for violations of the CLA, Appellant, in the instant case, has received nine[1] (9) adjudicated citations during its twenty-four (24) years in operation in Wesleyville, Pennsylvania as follows:

1) Citation 12-1302[2], issued August 29, 2012, one count failure to break empty liquor bottles and one count failure to constantly and conspicuously expose restaurant liquor license under transparent glass;
2) Citation 11-0918[3], issued May 27, 2011, one count failure to maintain complete and truthful records covering operation of licensed premises for two (2) years;
3) Citation 09-1744, issued July 24, 2009, one count failure to require patrons to vacate premises no later than one-half hour after closing;
4) Citation 03-0514, issued March 31, 2003, one count failure to require patrons to vacate premises no later than one-half hour after closing;
5) Citation 03-0134, issued February 7, 2003, one count sold/furnished alcoholic beverage to a minor;
6) Citation 01-0183, issued February 2, 2001, one count failure to require patrons to vacate premises no later than one-half hour after closing and one count allowing patrons to possess and/or remove alcoholic beverages after closing;
7) Citation 98-0535, issued April 14, 1998, one count sold/furnished alcoholic beverage to a minor;
8) Citation 96-1033, issued June 3, 1996, one count sold malt or brewed beverage in excess of one hundred ninety-two (192) fluid ounces in a single sale; and
9) Citation 93-0186, issued February 24, 1993, one count sold/furnished alcoholic beverage to a minor.

See Respondent's Exhibit E, sub-Exhibit B-5. These adjudicated citations, in the instant case, contain eleven (11) different violations, including, but not limited to, three (3) instances of sale of alcoholic beverage to a minor; three (3) instances of not requiring patrons to vacate premises after closing; and, as stated above, three (3) instances of not adhering to the provisions of the CLA. In addition to the numerous other violations, these adjudicated citations in the instant case demonstrate a pattern of non-compliance with the laws as set forth under the Pennsylvania Liquor Code. *See St. Nicholas*, 41 A.3d at 959. Furthermore, the Board was authorized, pursuant to Section 4-470(a.1), to refuse a renewal application since the licensee had "one or more adjudicated citations under this or any other license issued by the Board." *See 47 Pa. C. S. § 4-470(a.1)(2).* Therefore, this Trial Court concludes the Appellant's citation history provides a sufficient basis for non-renewal of Appellant's liquor license.

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[1] Citation 11-1528, issued on September 9, 2011, only contained one count of failure to adhere to the conditions of the CLA, and was discussed above.

[2] Citation 12-1302 also contained one count of failure to adhere to the conditions of the CLA and was discussed above.

[3] Citation 11-0918 also contained one count of failure to adhere to the conditions of the CLA and was discussed above.

3. Illegal Activity At or Near Appellant's Premises as a Basis for Nonrenewal

A licensee can be held accountable for activity occurring off-premises where there is a causal connection between the licensed premises and the activity. *Commonwealth v. Graver,* 461 Pa. 131, 334 A.2d 667 (1975). A licensee may be held accountable for non-Liquor Code violations (like those under the Crimes Code), if it can be established that there was a pattern of illegal activity on the licensed premises about which the licensee knew or should have known, and the licensee failed to take substantial steps to prevent such activity. *Philly International Bar, Inc. v. Pennsylvania Liquor Control Bd.,* 973 A.2d 1, 5 (Pa. Commw. Ct. 2008). The Commonwealth Court has held there is no magic number, type of incident, or span of time that constitutes a pattern of conduct to require the Board to refuse or renew a liquor license. *Paey Associates, Inc. v. Pennsylvania Liquor Control Bd.,* 78 A.3d 1187, 1199 (Pa. Commw. Ct. 2013).

In the instant case, two incidents of disturbance occurred on or about Appellant's premises, as indicated in the Trial Court's Findings of Fact above. The first incident occurred on November 10, 2012, around 1:30 a.m. At this time, Patrolman Garner observed a male seated on the sidewalk directly in front of Appellant's establishment. *See Findings of Fact, nos. 16-25, pages 8-9.* Appellant's establishment was open at the time. *See id.* Approximately five (5) minutes later, Patrolman Garner observed the male seated in the same position. *See id.* Patrolman Garner approached the male, who exhibited slurred speech and smelled heavily of alcohol. *See id.* Patrolman Garner recognized the male from previous encounters. *See id.* Patrolman Garner attempted to administer a portable breath test, but the male was unable to provide a sufficient sample. *See id.* Patrolman Garner asked the male if he had been inside Appellant's establishment, to which the male responded he had been inside and had recently consumed his last beverage. *See id.* The male was charged with public drunkenness. *See id*. Patrolman Garner was not called to the incident and did not interview anyone inside Appellant's establishment as to the incident.

The second incident in the instant case occurred on December 23, 2012, around 11:00 p.m. At this time, Patrolman Garner heard a loud noise outside the police station, located one (1) block from Appellant's establishment. *See Findings of Fact, nos. 26-34, pages 9-10.* Patrolman Garner stepped outside and observed a male and a female arguing near Appellant's establishment and that the male had punched two street signs. *See id*. Patrolman Garner approached the couple, who informed him that they had been in Appellant's establishment and were arguing. *See id.* The male smelled of alcoholic beverages, but was not charged as he was cooperative with Patrolman Garner. *See id*. Patrolman Garner was not called to the incident and did not interview anyone inside Appellant's establishment as to the incident.

These two incidents, which include, but are not limited to, public intoxication and verbal arguments, with the police involvement in these incidents, are sufficient to show a pattern of conduct on or about Appellant's premises. Although Appellant offered the testimony of several patrons of the establishment, who stated that they had not observed any incidents of disturbance on or about the premises, *see Findings of Fact, nos. 41-49, pages 11-12,* Appellant did not offer evidence of remedial measures. If Appellant would have followed the provisions of the Conditional Licensing Agreement, which included hourly patrols of the premises and the hiring of a security guard, Appellant would have known about the

disturbances and could have taken remedial measures, even if those measures were only to contact the police. Therefore, these illegal activities at or near Appellant's premises provide a sufficient basis for the Board's non-renewal of Appellant's liquor license.

4. Appellant's Late Filed Renewal Application as a Basis for Nonrenewal

Section 4-470 states that "all applications for renewal of licenses under the provisions of this article shall be filed with tax clearance from the Department of Revenue and the Department of Labor and Industry and requisite license and filing fees **at least sixty days before the expiration date of same**…" *47 Pa. C. S. § 4-470(a)* [emphasis added]. In the instant case, for the current renewal period of August 1, 2013 to July 31, 2015, Appellant had to file his license renewal application by June 1, 2013. Appellant did not file his license renewal application until thirty (30) days later, on July 1, 2013. His stated reason for late filing was that he "misplaced his license forms." *See Respondent's Exhibit E, sub-Exhibit B-1.*

Appellant in the instant case argues the Board accepted the late-filed renewal application, including all application fees and late-filing additional fees, and there was no evidence that the Board was prejudiced by the late-filed application. However, this Trial Court concludes that Appellant has held its liquor license since 1986, a span of time which encompassed numerous renewal periods, and demonstrated Appellant's prior understanding and familiarity with the renewal process. This history indicates Appellant was careless in filing his application for the current renewal period. Furthermore, Appellant's reason for the late filing, i.e. "Misplaced My License Forms," did not constitute a "reasonable cause" permitted under Section 4-470. *See 47 Pa. C. S. § 4-470.* Finally, "because of the peculiar nature of this business, one who applies for and receives permission from the Commonwealth to carry on the liquor trade assumes the **highest degree of responsibility** to his fellow citizens." *Commonwealth v. Koczwara*, 397 Pa. 575, 155 A.2d 825 (1959) [emphasis added]. By failing to file a renewal application form in a timely fashion, a relatively miniscule task, this Trial Court concludes Appellant failed to uphold his responsibility as a holder of a liquor license issued by the Commonwealth. Therefore, Appellant's late filed renewal application provides a sufficient basis for the Board's non-renewal of Appellant's liquor license.

For all of the foregoing reasons, this Court enters the following Order:

ORDER

AND NOW, to wit, this 15th day of July, 2014, after thorough consideration of the entire record regarding Petitioner's request that this Court reverse the Pennsylvania Liquor Control Board's decision not to renew Appellant's liquor license, including, but not limited to, the testimony and evidence presented during the hearings held September 10, 2013 and June 10, 2014, as well as an independent review of the relevant statutory and case law and all counsels' submissions, including their proposed findings of fact and conclusions of law, as well as stipulations of fact and exhibits, it is hereby **ORDERED, ADJUDGED AND DECREED** that the instant appeal is **DENIED** in light of this Trial Court's Findings of Fact and Conclusions of Law set forth above. The Order of the Pennsylvania Liquor Control Board denying Appellant's request to renew its liquor license is **AFFIRMED**.

BY THE COURT:
/s/ Stephanie Domitrovich, Judge

COMMONWEALTH OF PENNSYLVANIA

v.

KEVIN WEEKS

CRIMINAL PROCEDURE / TRAFFIC STOPS

Where a traffic stop would serve an investigatory purpose, a police officer need only have reasonable suspicion that a Vehicle Code violation occurred. Conversely, where a traffic stop would serve no investigatory purpose, an officer must have probable cause to believe that a Vehicle Code violation occurred.

CRIMINAL PROCEDURE / TRAFFIC STOPS

Section 3309(1) is a non-investigatable offense because a stop of the vehicle is not likely to yield evidence to aid in the officer's determination of whether defendant violated that section of the Vehicle Code and therefore, probable cause is required to support a constitutionally valid stop.

CRIMINAL PROCEDURE / SUPPRESSION OF EVIDENCE

Where a vehicle is driven outside the lane of traffic for a momentary period in a minor manner, probable cause does not exist to perform a traffic stop under Section 3309(1) of the Vehicle Code and therefore, the evidence must be suppressed.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION No. 2968 of 2014

Appearances: John B. Carlson, Esq., Attorney for Defendant
Matthew Cullen, Esq., Attorney for Commonwealth

OPINION

Connelly, P. J., February 17, 2015

The matter before the Court is pursuant to an Omnibus Pre-Trial Motion for Relief, filed by Kevin Weeks (hereinafter "Defendant"). The Commonwealth opposes. A hearing was held before the Court on this matter on January 26, 2015.

Statement of Facts

On September 7, 2014, at approximately 1:25 a.m., Defendant was arrested by Pennsylvania State Trooper Hryniszak following a motor vehicle stop on Route 215. *Def.'s Mot.* ¶ *2*. Trooper Hryniszak initiated the traffic stop after observing the Defendant's vehicle touch the center yellow-line[1] as well as the fog line[2] while traveling on the road. *Id.* Trooper Hryniszak also observed the Defendant's license plate "was protected by a clear, plastic cover." *Id*. Defendant asserts the evidence collected as a result of his stop and arrest should be suppressed as Trooper Hryniszak[3] lacked "probable cause"[4] to conclude that the [D]efendant was operating his vehicle in violation of the motor vehicle code." *Id.* at ¶ 6.

[1] The parties refer to this line alternatively as "double yellow" and "dotted yellow." *Comm.'s Resp, 1-2, Def.'s Br. in Supp. 1.*

[2] The Parties disagree as to whether the video shows the vehicle touching or crossing the fog line. *Def.'s Br. in Supp. 2, n.1.*

[3] Defendant's Motion and Brief in Support reference only Trooper Hryniszak but Commonwealth's Response references Troopers Hryniszak and Wingard. *Comm.'s Resp. 2*

[4] The Parties agree the proper standard in the instant case is "probable cause." *Def.'s Br. in Supp. 2, Comm.'s Resp. 1.*

Analysis of Law

Defendant asserts Trooper Hryniszak's "observations do not give rise to a probable cause to believe the [D]efendant was operating his vehicle in violation of [§] 3309(1)[5] of the Motor Vehicle Code[6] and thus, the evidence derived from the stop should be suppressed." *Def.'s Br. in Supp. 4-5.* The Commonwealth contends Defendant's "erratic and potentially dangerous" driving created the probable cause necessary to perform the vehicle stop. *Comm.'s Resp. 2.*

The Pennsylvania Superior Court has set forth:

> Where a vehicle stop has no investigatory purpose, the police officer must have probable cause to support it. . .The officer must be able to articulate specific facts possessed by him at the time of the questioned stop, which would provide probable cause to believe that the vehicle or the driver was in some violation of some provision of the Vehicle Code.

Commonwealth v. Enick, 70 A.3d 843, 846 n.3 (Pa. Super. 2013) appeal denied 85 A.3d 482 (Pa. 2014).

In the instant case, Defendant asserts Trooper Hryniszak's dashboard camera recorded:

> Defendant's driver's side tires briefly touch dotted-yellow line but do not cross over it during a period in time where there is no other traffic on the road and no safety hazards. . .Defendant brakes as he begins to round a right-hand bend in the road and while rounding the bend, [D]efendant's passenger side tires briefly touch the fog line but do not cross over it during a rural stretch of roadway at a point in time where there is no oncoming traffic or other safety hazards. . .

Def.'s Br. in Supp. 1-2.

The Commonwealth avers "[t]he video from the traffic stop clearly shows the [D]efendant's vehicle nearly crossed over the double-yellow line. The troopers also observed the [D]efendant's vehicle cross over the white fog line." *Comm.'s Resp. 1.* The Commonwealth contends "the [D]efendant's driving on the double yellow line and crossing over the white fog line was neither momentary nor minor. . .The MVR video clearly shows the [D]efendant driving on the center line for at least ten seconds." *Id. at 2.* Defendant concurs that his vehicle touched the yellow line for "7-10 seconds" but avers that it only touched the white fog line once and did not cross over it. *Def.'s Br. in Supp. 4.* Defendant asserts "these minor incidents occurred within a brief timeframe, over a very short distance, at a point when there was no other traffic on the roadway, and did not otherwise create a safety hazard." *Def.'s Br. in Supp. 4.*

The Pennsylvania Superior Court, relying on the reasoning in *Commonwealth v. Gleason,* 785 A.2d 983, (Pa. 2001) *superseded by statute*, 75 Pa. C. S. § 6308(b) (2004), and its subsequent cases, found an arrest was lawful and suppression unwarranted where:

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[5] "A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained the movement can be made with safety." *75 Pa. C.S.A §3309(1).*

[6] Defendant's Pre-Trial Motion for Relief is based upon the alleged illegality of the traffic stop as Trooper Hryniszak's testimony at the Preliminary Hearing established the other charges were not the basis for the stop. *Def. 's Br. in Supp. 5, n.3.*

> the transgressions observed by Officer Quinn were not 'momentary or minor,' . . . Appellee straddled the double yellow lines for a full two blocks in such a manner that oncoming traffic would be required to swerve to avoid Appellee's vehicle. Furthermore, Appellee repeatedly stopped his vehicle for an inordinate and inexplicable amount of time without the presence of traffic signals or stop signs. By coming to unexpected, complete stops in a lane of travel, particularly while shrouded in darkness, Appellee certainly created a clear hazard to himself and others.

Commonwealth v. Anderson, 889 A.2d 596, 601 (Pa. Super. 2005) (Gantman, J., concurring and dissenting). The Pennsylvania Superior Court found an officer had probable cause to pull over vehicle where "half of Enick's vehicle crossed over the double yellow centerline into an oncoming lane of traffic and remained there for three seconds." *Enick*, 70 A.3d at 848. The Superior Court in *Enick* stated:

> Our analysis here does not foreclose the possibility that a momentary and minor violation of § 3301 might, in a different case, be insufficient to establish probable cause for a vehicle stop . . .We simply wish to emphasize that in considering whether a Vehicle Code violation is momentary and minor, we must give due consideration to the language of the code provision at issue.

Id. The Superior Court reasoned:

> The vehicles in Gleason and Garcia were mere inches over the fog line or berm line - i.e., the vehicles swerved to the right - and out of the path of any oncoming traffic. The Gleason Court noted that the road was clear of other traffic when the defendant swerved a few inches outside fog line. . .Gleason is further distinguishable because, according to the Gleason Court, the defendant's actions posed no safety hazard. . .Here, Enick's driving plainly posed a safety hazard, with half of her vehicle protruding into an oncoming lane as Officer Rhyslop's vehicle approached from the opposite direction.

Id. See *Commonwealth v. Garcia*, 859 A.2d 820, 823 (Pa. Super. 2004) *superseded by statute*, 75 Pa. C. S. § 6308(b) (2004), ("Applying this 'momentary and minor' standard to the facts of this case, we find that probable cause is lacking. Officer DeHoff observed appellant drive over the right berm line of the road just two times. Each time the maneuver was in response to another car coming toward appellant in the opposite lane of traffic.")

The instant case sets forth allegations similar to those in *Gleason* and *Garcia* in that the Defendant's vehicle "nearly crossed over the double yellow line", for approximately ten (10) seconds and may have once crossed over the white fog line while taking a "sharp right-hand bend in the road." *Comm.'s Resp. 1-2, Def.'s Br. in Supp. 1-2.* Although the Commonwealth asserts the "tires were within inches of completely crossing the middle of the street" and "if oncoming traffic was on the roadway, it very easily could have been struck" neither of these events occurred. *Comm.'s Resp. 2.* Defendant states "[n]o cars go past either PSP or [D]efendant during the approximately 3:30 minutes preceding the stop." *Def.'s Br. in Supp. 2, n.2.*

Thus, as the record sets forth the Defendant's vehicle touched the yellow line for

approximately ten (10) seconds on one occasion and may have crossed the white fog line briefly on one occasion while no oncoming traffic or other hazards were present, the Court finds the events of September 7, 2014, as set forth by the parties to have been "momentary and minor" in nature. As the vehicle's violations of § 3309(1) were "momentary and minor", probable cause did not exist to perform the traffic stop. Therefore, Defendant's Pre-Trial Motion for Relief is granted.

ORDER

AND NOW, TO-WIT, this 17th day of February 2015, it is hereby **ORDERED** that Defendant's Omnibus Motion for Relief is **GRANTED** for the reasons set forth in the foregoing Opinion.

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

JUDY PATTISON, individually and Administratrix of the Estate of KENT PATTISON, Plaintiff

v.

UPMC HAMOT MEDICAL CENTER, LAUREN E DONATELLI-SEYLER, D.O. And GREAT LAKES SURGICAL ASSOCIATES, INC., Defendants

NO. 12667-2013

JUDY PATTISON, individually and Administratrix of the Estate of KENT PATTISON, Plaintiff

v.

UPMC HAMOT, LAUREN DONATELLI-SEYLER; PAUL MALASPINA; REGIONAL HEALTH SERVICES, INC. d/b/a GREAT LAKES SURGICAL SPECIALISTS, Defendants

NO. 12191-2014

CIVIL PROCEDURE / SCOPE OF DISCOVERY RELATING TO PHYSICAL AND MENTAL EXAMINATIONS OF PERSONS

A corpse is not a "person" for purposes of applying Pa.R.C.P. 4010 as such an extension of "person" does not serve the purpose of the rule.

CIVIL PROCEDURE / SCOPE OF DISCOVERY RELATING TO PHYSICAL AND MENTAL EXAMINATIONS OF PERSONS

Legal control of a corpse, specifically for purposes of applying Pa.R.C.P. 4010, is not held by an individual where the ability to exercise control over that corpse would require court approval.

CIVIL PROCEDURE / SCOPE OF DISCOVERY RELATING TO PHYSICAL AND MENTAL EXAMINATIONS OF PERSONS

Conducting a unilateral autopsy of a corpse without notice to the other party, where the cause of death of the corpse is in dispute, creates the possibility of spoliation, but does not definitively prove that spoliation exists.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION

Appearances: David L. Hunter, Esquire, Attorney for the Plaintiff
Peter W. Yoars, Jr., Esquire, Attorney for the Defendants

OPINION

Cunningham, William R., J.

The presenting matter is a Motion for Sanctions filed by the above-captioned Defendants at both docket numbers seeking to dismiss in its entirety Docket Number 12191 of 2014 based on an alleged violation of Pa. R.C.P. No. 4010. Specifically, the Defendants contend the Plaintiffs had an autopsy performed on Kent Pattison without notice to them, the result of which precludes the Defendants from their own examination of the original condition of Kent Pattison's corpse. The Defendants also argue that because of spoliation they are prevented from examining the original evidence. Alternatively, they seek the exclusion of any autopsy evidence at both docket numbers. For the reasons that follow, the Motion for Sanctions is **DENIED** without prejudice.

PROCEDURAL HISTORY

What has been identified as Action Number One is a lawsuit filed on September 17, 2013 against UPMC Hamot Medical Center, Lauren E. Donatelli-Seyler, D.O. and Great Lake Surgical Associates, Inc. at Docket Number 12667-2013. The Plaintiffs allege Dr. Donatelli-Seyler damaged a common bile duct while removing Kent Pattison's gall bladder during surgery on August 9, 2012. Following the gall bladder surgery, medical complications arose and an exploratory laparotomy was performed by Dr. Malaspina on Kent Pattison. On August 12, 2012, Kent Pattison died. The Certificate of Death attributes the cause of death to Cardiopulmonary Arrest with Sepsis and Intestinal Ischemia as secondary causes. There was no autopsy performed and Kent Pattison was buried on August 15, 2012.

The gravamen of the Plaintiff's Complaint was that Dr. Donatelli-Seyler should have converted the laparoscopic surgery to an open procedure to permit a full view of the decedent's anatomy. Her failure to do so resulted in a bile leak, peritonitis and death.

In her deposition, Dr. Donatelli-Seyler denied lacerating any of the decedent's organs or body parts. Separately, Dr. Malaspina testified in his deposition that any bile leak was not related to the cause of death.

Thus, a factual dispute arose during discovery as to whether a laceration of the bile duct occurred and what was the actual cause of death.

Without notice to the Defendants, on July 17, 2014 the Plaintiff presented a Motion in Orphans' Court to exhume the body of Kent Pattison. By Order dated July 17, 2014 by the Honorable Judge Robert Sambroak, the Plaintiff was authorized to exhume the remains of Kent Pattison for an autopsy to investigate and determine the cause of death.

On July 24, 2014, Cyril Wecht, M.D., performed the autopsy.

As a result of the autopsy findings, on August 8, 2014, Plaintiff filed Action Number 2 at Docket Number 12191-2014. The Complaint alleges that Dr. Donatelli-Seyler lacerated the hepatic duct and the "surgical misadventure" was not investigated by an open procedure. In addition, Dr. Malaspina ignored the patient's clinical changes and failed to address a bile leak in a timely manner. Further, based on the deposition testimony of Dr. Malaspina, the Complaint alleges the nursing staff at UPMC Hamot failed to timely notify on-call physicians when Kent Pattison's condition deteriorated.

APPLICABILITY OF Pa. R.C.P. 4010

The Defendants rely on these excerpts from Pa.R.C.P. No. 4010:

> (a)(1) As used in this rule "examiner" means a licensed physician…
>
> (2) When the … physical condition of a party, *or of a person in the custody or under the legal control of a party*, is in controversy, the court…may order the party to submit to a physical… examination by an examiner or to produce for examination the person in the party's custody or legal control.
>
> (3) The order may be made *only on motion* for good cause shown and upon *notice...to all parties*… .

Rule 4010(a)(1)-(3)(emphasis added by the Defendants).

The Defendants contend Rule 4010 is not restricted to situations where a party wishes to examine an opposing party. The Defendants argue Rule 4010 requires notification to all

parties any time a party seeks a physical examination. The Defendants' expansive reading of Rule 4010 would impose a duty on the Plaintiff to provide notice to all parties herein of Plaintiff's Motion in Orphans Court seeking approval of the autopsy of Kent Pattison. The Defendants cite no authority for their interpretation of Rule 4010. This Court finds their argument unpersuasive.

In analyzing the applicability of Rule 4010, consideration is given to whether the corpse of Kent Pattison is a "person" and if so, whether the corpse is "in the custody or under the legal control of a party." For the reasons that follow, a corpse is not a person for Rule 4010 purposes nor is Kent Pattison's corpse under the control or legal custody of any party in this case.

When read in its entirety, Rule 4010 was intended to protect the privacy interest of a living person. "Good cause and notice are intended to protect the parties against undue invasion of their rights to privacy." *Rule 4010 Explanatory Comment (2).*

Rule 4010 provides a mechanism for an opposing party to petition the Court upon good cause to authorize an examination. Any such petition requires "notice to the person to be examined… ." *Rule 4010(3).* Notice to the person to be examined provides an opportunity for that person to object to such an examination.

Rule 4010 provides additional rights to a party against whom an examination can be ordered. These rights include the right to have counsel or another representative present during the examination. *Rule 4010(4)(i).* The examiner's questioning of the person is limited to the matters within the scope of the examination. *Id.* There is a right to have a stenographic or audio recording of the examination, *Rule 4010(5)(i);* the right to have a copy of any written report produced by the examiner, *Rule 4010(5)(b)(1)*; and the right to all results of tests made, diagnosis and conclusions. *Id*. The Rule provides for the ability of a party to waive any of these rights. *Rule 4010(b)(2).*

Obviously all of the foregoing rights can be exercised by a living person. None of these rights can be exercised by a corpse. Hence, the corpse of Kent Pattison is not a "person" envisioned by Rule 4010.

Assuming arguendo the corpse of Kent Pattison is a person under Rule 4010, the corpse is not under the legal custody or control of a party herein.

At both docket numbers, Judy Pattison appears as a Plaintiff in her individual capacity and as the Administratrix of the estate of her late husband. Each role needs to be examined.

Most of the litigation involving the custody or legal control of the deceased spouse by the surviving spouse involves the question of reinterment. Such was the situation in the seminal case of *Pettigrew v. Pettigrew*, 207 Pa. 313, 56 A. 878 (1904). Pettigrew's widow sought court permission to reinter her late husband in another cemetery so that he could be buried next to his daughter who died after him. In analyzing which parties could assert a position on the question of reinterment, Chief Justice Mitchell clearly eliminated the representative of the estate:

> The duties of the executor or administrator terminate with the first interment, and on the question of removal, he is not a party in interest. The controversy, if there be one, must be between next of kin.

Pettigrew, supra, 56 A. at 878.

Thus, Judy Pattison, in her capacity as the Administratrix of the Estate of Kent Pattison, is not a party in interest on the question of reinterment after the original burial.

As the surviving widow of Kent Pattison, Judy Pattison has a legal interest in the corpse of her late husband on the question of reinterment. She is given a priority status among the next of kin. As more fully explained in *Pettigrew, supra:*

> The result of the full examination of the subject is that there is no universal rule applicable alike to all cases, but each must be considered an equity on its own merits, having due regard to the interest of the public, the wishes of the decedent, and the rights and feelings of those entitled to be heard by reason of relationship or association. Subject to this general result, it may be laid down: First. That the paramount right is in the surviving husband or widow, and, if the parties were living in the normal relations of marriage, it would require a very strong case to justify at court and interfering with the wish of the survivor. Secondly. If there is no surviving husband or wife, the right is in the next of kin in the order of their relation to the decedent, as children of proper age, parents, brothers and sisters, or more distant kin, modified, it may be, by circumstances of special intimacy or association with the decedent. Thirdly. How far the desire of the decedent should prevail against those of a surviving husband or wife is an open question, but as against remoter connections, such wishes, especially if strongly and recently expressed, should usually prevail. Fourthly. With regard to a reinterment in a different place, the same rules should apply, but with presumption against removal growing stronger with the remoteness of connection with the decedent, and reserving always the right of the court to require reasonable cause to be shown for it.

Pettigrew, supra, 56 A. at 880.

As a surviving spouse, Judy Pattison has a "paramount right" on the issue of the reinterment of her deceased husband. It is not an absolute right and can be balanced against the interests of other surviving family members. *See Leschey v. Leschey, et al. 3*74 Pa. 350, 97 A.2d 784 (Pa. 1953). Despite the priority given to the surviving spouse, the fact remains that judicial approval must be sought. The surviving spouse (or any other petitioning party) must establish "a reasonable cause for the removal of reinterment sought… ." *Id. at 791.*

A similar analysis was used by the Superior Court in a case involving a third autopsy at the request of a surviving widow. In *In Re: Martin T. Dillon, Deceased*, 449 Pa. Super. 559, 674 A.2d 735 (1996), the deceased husband died in 1976 from a shotgun blast to the chest. The shotgun belonged to the decedent's close friend, who subsequently married decedent's widow. The original coroner's investigation ruled the death an accident based on autopsy findings. In 1995, a different coroner had the decedent exhumed and re-autopsied. The coroner publicly announced the cause of death was changed to homicide. Subsequently, the widow and her children petitioned the court for a third autopsy. The Superior Court reversed the trial court and ordered the third autopsy based on the reasonable cause expressed by the widow, to-wit, her severe emotional distress and possible loss of future income.

The upshot of these cases is that a surviving spouse has standing to seek judicial approval for reinterment for purposes of relocation and/or an autopsy of a deceased spouse.

Importantly, the fact the surviving spouse has to seek judicial approval means the surviving spouse does not have legal custody or control of the corpse of the deceased spouse.

As a result, it means that Judy Pattison in her individual capacity in these two cases does not have the legal control or custody of her husband's remains. It follows that none of the parties in this case have legal custody or control of Kent Pattison's corpse.

On a different note, to follow the Defendants' interpretation of Rule 4010, every time a party in litigation sought a physical examination of himself or herself or of a party under his or her legal custody or control, notice would have to be given to all parties. This result is nonsensical and contrary to the privacy protections afforded by Rule 4010. Such a burden would eviscerate a party's privacy interest in his or her medical management.

Based on the foregoing analysis, this Court does not find a violation of Rule 4010 that would warrant sanctions.

SPOLIATION

Since the corpse of Kent Pattison is not a person subject to the provisions of Rule 4010, the question becomes what is the status of the corpse in this case. The obvious answer is the corpse of Kent Pattison is perhaps the most important piece of evidence in these cases. At the heart of the factual disputes in both of these cases is whether Dr. Donatelli-Seyler lacerated the body of Kent Pattison and what was the actual cause of death of Kent Pattison. Hence, it would seem an autopsy could best answer these questions.

Notably, all of the parties in the first lawsuit had an equal ability and opportunity to request an autopsy of Kent Pattison for a long period of time. This is not a case where the evidence is in the sole possession of one party.

Plaintiff seeks to justify her surreptitious autopsy because it is a party's right to conduct a private investigation without prior notice and/or approval of an opposing party. Plaintiff contends the private autopsy of Kent Pattison "is no different than the investigation of a car accident scene, a defective product, the scene of any accident from any tort or obtaining video surveillance of another party or location in controversy." *Plaintiff's Memorandum and Law in Response to Defendant's Motion for Sanctions, page. 6.* While it is true that a party in litigation is free to conduct a private investigation, the scenarios posed by the Plaintiff are easily distinguishable from a unilateral autopsy involving the most important piece of evidence. An autopsy is not the reconstruction of an accident scene or a private experiment. Instead, it is the direct handling of very important physical evidence relevant to both of these cases. As such, the better course for the Plaintiff would have been to notify the Defendants of her intent to do an autopsy so that arrangements could have been made to avoid any spoliation claim.

Because notice was not provided to the Defendants, the possibility of spoliation exists.

The Defendants argue that a full autopsy with certain anatomical body parts removed significantly alters the corpse from its original state and precludes the Defendants from viewing the corpse in its original state when removed from the casket. Thus, the Defendants invoke the spoliation doctrine to seek sanctions.

The "spoliation of evidence is the non-preservation or significant alteration of evidence for pending or future litigation." *Pyeritz v. Commonwealth,* 32 A.3d 687, 692 (Pa. 2011).

The Plaintiff counters that no evidence was destroyed or altered. Plaintiff offers

that representative pieces of body organs and tissues are preserved for examination by Defendants' experts at their convenience.

The body organs and tissues removed during Kent Pattison's autopsy are available for investigation by the Defendants. The Defendants also have the ability to conduct their own analysis of the body organs and tissues and/or request a second autopsy.

At this juncture, there is a factual dispute regarding the ability of the Defendants to view the preserved body organs and tissue and/or conduct a second autopsy. However, the record presently establishes only the possibility of spoliation. It is also possible the Defendants can examine the preserved body parts and/or do a second autopsy unimpeded by the first autopsy. Until the Defendants engage in such investigative measures, there is no way of knowing whether spoliation exists.

Accordingly, the Defendants request for sanctions based on the spoliation doctrine is **DENIED** as premature and without prejudice to submit same once there is a factual basis for it.

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

RICHARD RUTH, Complainant
v.
ELK CREEK TOWNSHIP, Respondent

WAIVER OF ATTORNEY WORK PRODUCT PRIVILEGE

The attorney work product privilege can be waived on a selective or limited basis. Such waiver does not render it a "public record" subject to disclosure under the Right-To-Know Law.

WAIVER OF ATTORNEY WORK PRODUCT PRIVILEGE

Selective or limited waiver occurs where a document protected by privilege is disclosed in a limited way such that the disclosure does not violate the core purpose of the privilege. Factors to consider in determining whether the waiver violates the purpose of the privilege include whether the disclosure prejudices or advantages any parties involved, what efforts were taken to keep the information contained.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 11117-2014

Appearances: Richard Ruth, Esquire, Attorney Pro Se
Timothy Wachter, Esquire, Attorney for Elk Creek Township

OPINION

The Complainant, Richard Ruth, Esquire, filed an appeal from the decision of the Office of Open Records denying his request for e-mail correspondence from the Elk Creek Township Solicitor to the Elk Creek Township Board of Supervisors. After an evidentiary hearing, the request for the Solicitor's e-mail under the Right-To-Know-Law is **DENIED**.

FINDINGS OF FACT

In 2012, the Elk Creek Township Supervisors received a complaint from the Emergency Management Department that West Thrasher Road was inaccessible through disuse, impeding a response to emergencies for nearby homes. The Township Supervisors sought the advice of the Township Solicitor on how to reopen the road which appears on the Township maps. The Township Solicitor responded with detailed legal advice in an e-mail marked "Confidential, Attorney Client privilege." It is this e-mail which is the subject of the present Right-To-Know request.

West Thrasher Road runs through property owned by Kenneth Rogers, who claims West Thrasher Road was abandoned by Elk Creek Township. Elk Creek Township Supervisors contend Elk Creek Township retains a property interest in West Thrasher Road.

In May of 2012, all three Elk Creek Township Supervisors met on West Thrasher Road. Several Township employees were at the site with a road grader, a backhoe and a dump truck loaded with gravel to open the road. A Township employee graded the site and dumped a load of gravel.

Shortly thereafter, Kenneth Rogers arrived and drove his pick-up truck in front of the road grader to block its access to West Thrasher Road. The Township Supervisors told

Rogers they were there to reopen the road. A Township employee drove the road grader around the pick-up truck.

Kenneth Rogers called his son, Brad Rogers, and told him to bring a tractor down to block a dump truck from entering the road with a second load of gravel.

To defuse what was becoming a volatile situation, the Pennsylvania State Police were called by Supervisor David Soltis. Pennsylvania State Police Trooper Linda Stevick responded to the call. The Supervisors informed Trooper Stevick they were opening the road pursuant to advice from their Township Solicitor. Trooper Stevick wanted to see proof the supervisors were acting on the advice of counsel.

None of the Elk Creek Township Supervisors had a copy of the Solicitor's e-mail at the site. Soltis and Supervisor Dimon went back to the Township building to secure a copy of the e-mail correspondence. However, the e-mail was kept in a locked filing cabinet at the Township building and neither supervisor had a key to the locked cabinet. The Township building was not yet open for the day, but Soltis and Dimon were able to secure a Township map and returned to the Thrasher Road site.

Soltis called the Township Secretary/Treasurer, Victoria Wintemute, who had a key to the filing cabinet in the Township building. Soltis directed her to go to the Township building and bring a copy of the Solicitor's e-mail to the site. Wintemute secured a copy of the e-mail and brought it to the Thrasher Road site.

Meanwhile, Trooper Stevick took measures to keep the parties at a distance from each other. During this time, Kenneth Rogers and Brad Rogers were located at least thirty feet away when Soltis showed Trooper Stevick the Solicitor's e-mail.

Soltis told Trooper Stevick the e-mail was a confidential communication from the Township Solicitor. Soltis did not hand Trooper Stevick the Solicitor's e-mail. Instead, Soltis kept the copy in his hand and held it up for Trooper Stevick to read. Soltis did not relinquish physical possession of the e-mail to Trooper Stevick.

The Supervisors kept their conversation with Trooper Stevick confidential. After showing Trooper Stevick the e-mail, Soltis put the document in his back pocket. The e-mail from the Township Solicitor was not shown or given to either Kenneth Rogers or Brad Rogers.

After Trooper Stevick concluded her conversation with the Supervisors, she met separately with Kenneth Rogers in her police cruiser. Rogers had a copy of the Township Code with him and explained his position regarding ownership of the road. The conversation between Rogers and Trooper Stevick was kept confidential from the Township Supervisors.

After talking with her supervisor, Trooper Stevick informed the parties the situation appeared to be a civil matter. She directed all parties to leave the site and settle their differences in civil court.

This matter then became the subject of a Declaratory Judgment action filed November 2, 2012, captioned *Elk Creek Township and Cranesville Borough v. Kenneth Rodgers* at Erie County Docket Number 13453 – 2012. Complainant, Richard Ruth, represents Kenneth Rogers in the civil suit.

Thereafter, Attorney Ruth filed a Right-To-Know request with Elk Creek Township. Among other requests, Attorney Ruth sought a copy of the Solicitor's e-mail which was shown to Trooper Stevick. The Township refused to release the Solicitor's e-mail stating it was protected by a privilege and therefore not a public document requiring disclosure.

On March 24, 2014, Attorney Ruth filed an appeal with the Pennsylvania Office of Open Records pursuant to 65 P.S. §§67.101, *et seq.* Attorney Ruth claimed the attorney-client privilege was waived when the Solicitor's e-mail was shown to the State Trooper.

The Pennsylvania Office of Open Records issued a Final Determination on April 16, 2014, denying the request for the e-mail, finding it was protected by attorney-client privilege:

> Notwithstanding the evidence presented by the Requester [Ruth], the Township has demonstrated that the attorney-client privilege has not been waived as to the requested e-mail due to an unidentified Township official's one-time presentation of the e-mail to a member of the PSP. The Township took reasonable steps to keep the e-mail confidential and the e-mail was only disclosed to law enforcement acting in their official capacity. Finally, the interest of fairness warrant (*sic*) maintaining the confidentiality of communication between counsel and client. Accordingly, the e-mail is protected by the attorney-client privilege.

Ruth v. Elk Creek Township, O.O.R. AP 2014-0465, April 16, 2014.

On April 22, 2014, Attorney Ruth filed an appeal with this Court from the final determination of the Pennsylvania Office of Open Records and a Request to Supplement the Record. The Request to Supplement the Record was granted and an evidentiary hearing was held on September 29, 2014.

DISCUSSION

Attorney Ruth argues he is entitled to the Solicitor's e-mail under the Right-to-Know law because the Township Supervisors waived the attorney-client privilege when Soltis showed the document to Trooper Stevick. Attorney Ruth contends the disclosure of the Solicitor's e-mail to the State Trooper was not an inadvertent showing, instead it was a deliberate act which occurred in the presence of all Supervisors at a pre-planned meeting.

The Township takes the position the Solicitor's e-mail is protected by the attorney-client and/or attorney work product privileges, therefore it is not a public record subject to disclosure under the Right-to-Know Law, 65 P.S. §101, *et seq.* The Township contends waiver principles do not apply to a document which is not a public record. If waiver applies, the Township argues there was no waiver since the Supervisors did not authorize the waiver at a public meeting with due notice. Further, the disclosure was inadvertent and does not amount to a waiver of the attorney-client privilege.

THE RIGHT-TO-KNOW LAW

The purpose of the Right-to-Know Law is to promote access to official government information in order to prohibit secrecy, to scrutinize public officials' action and to make them accountable for their actions. *Bowling v. Office of Open Records,* 990 A.2d 813 (Pa. Cmwlth. 2010). The Right-To-Know Law ("RTKL") requires a local agency to provide "public records" upon request. 65 P.S. §67.302(a).

Section 65 P.S. §67.102 of the RTKL defines a "public record" as:

> A record, including a financial record, of a Commonwealth or local agency that:
> (1) is not exempt under section 708;
> (2) is not exempt from being disclosed under any other Federal or State law or

regulation or judicial order or decree; or
(3) is not protected by a privilege.

The term "privilege" is defined in Section 102 as: "The attorney work-product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court incorporating the laws of this Commonwealth."

Section 305(a) of the RTKL provides that documents are presumed to be public records subject to disclosure. The presumption does not apply in three circumstances:

General rule.—A record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record. The presumption shall not apply if:
(1) the record is exempt under section 708;
(2) the record is protected by a privilege; or
(3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree.

Section 708(b)(17)(iv) of the RTKL provides that "[a] record that includes information made confidential by law" is exempt from disclosure. Records protected by privilege are exempt from disclosure.

It is the burden of Elk Creek Township to prove, by a preponderance of the evidence, that a document is exempt from public access because it contains privileged material. 65 P.S. §67.708(a)(1). It is the burden of the requestor to prove a waiver of a privilege. *Bagwell v. Pa. Dept. of Education,* 2014 WL 5490600 (Pa. Cmwlth. 2014).

ISSUES

There is no dispute the Solicitor's e-mail consists primarily of legal advice provided at the request of the Elk Creek Township Board of Supervisors in anticipation of possible litigation between Elk Creek Township and Kenneth Rogers. In fact, there is now litigation between these parties at Erie County Docket Number 13453-2012. The presenting issue is whether the Solicitor's e-mail is protected by a privilege and therefore not a public record subject to disclosure pursuant to 65 P.S. §67.102 (3).

There are two privileges to be considered in this case. The parties have focused largely on the attorney-client privilege disputing whether waiver can be considered, and if so, whether waiver occurred. This Court does not find the need to engage in an extensive analysis of this case under the attorney-client privilege since the more expansive privilege of the attorney work product remains in this case.

ATTORNEY WORK PRODUCT DOCTRINE

The attorney work product doctrine is found in Pa.R.C.P. 4003.3 and precludes "disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." The Explanatory Comment to Rule 4003.3 elaborates "(t)he rule is carefully drawn and means exactly what it says. It immunizes the lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, nothing more."

The rationale for the work product doctrine is that "attorneys need a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Commonwealth v. Kennedy,* 583 Pa. 208, 876 A.2d 939, 945 (Pa. 2005). Further, "(t)he underlying purpose of the work product doctrine is to guard the mental processes of an

attorney, providing a privilege area within which he can analyze and prepare his client's case." *Commonwealth v. Sandusky,* 70 A.3d 886, 898 (Pa. Super. 2013).

Attorney work product doctrine is applicable to RTKL requests and prevents disclosures of the "mental impressions, theories, notes, strategies, research and the like created by an attorney in the course of his or her professional duties, particularly in anticipation or prevention of litigation." *Levy v. Senate of Pa.* (*Levy III*), 94 A.3d 436, 443 (Pa. Cmwlth. 2014).

In the case sub judice, it is undisputed the solicitor's e-mail is a document protected by the attorney work product privilege. As such, it is not a public record subject to disclosure under the RTKL. However, there remains the issue of whether the Township can waive the attorney work product privilege and whether it did so in this case.

APPLICABILITY OF WAIVER

The Township argues that once a document is found to be privileged under the attorney work product doctrine, by definition it can never become a public record subject to disclosure under the RTKL. The establishment of the document as privileged ends the inquiry and renders the document inaccessible under the RTKL. As such, the doctrine of waiver is inapplicable.

This argument has its genesis in the case of *LeGrande v. Dept. of Corrections,* 920 A.2d 943 (Pa. Cmwlth. 2007), appeal denied, 593 Pa. 751, 931 A.2d 659 (Pa. 2007) which held that a Sentencing Manual constituted attorney work product and was not a public record despite its disclosure to third parties. This holding adopted the rationale of a ruling under the former RTKL in *LaValle v. Office of General Counsel,* 564 Pa. 482, 769 A.2d 449 (Pa. 2001) that reasoned: "…the character of the materials as work product serves not as an exception to the disclosure of material which would otherwise qualify as accessible, in which case waiver principles might be pertinent, but rather, as a definitional limitation upon what would be accessible in the first instance. We find that, where records are not the *type* of materials within the Act's initial purview, waiver principles cannot be applied to transform them into records subject to its coverage." *LaValle,* 769 A.2d at 460. (Italics in original).

Citing the above language in *LaValle*, the *LeGrande* Court held that "a waiver cannot transform a document, which is by definition not a public record, into a document that comports to the very same definition." *LeGrande,* 920 A.2d at 949.

The same analysis occurred in an unpublished Memorandum Opinion in *Rittenhouse v. The Board of Supervisors of Lower Milford Township,* (Pa. Cmwlth., No. 1630 C.D. 2011, filed April 5, 2012). In finding the doctrine of waiver inapplicable to privileged materials, the *Rittenhouse* Court stated:

> We believe the rationale set forth in LeGrande is equally applicable under the current version of the R.T.K. Law. Here under the new version of the R.T.K. Law the contested document is not one that would be otherwise accessible but for the work product privilege. As in the prior R.T.K. Law, the contested document at issue in this action is not within the purview of the R.T.K. Law in the first place.

Rittenhouse at p. 7.

The Township utilizes these cases to argue the Solicitor's e-mail is a document protected

by the work product privilege and is therefore not a public record to be disclosed or capable of being waived.

Most recently, the Commonwealth Court addressed the waiver of a privilege in *Bagwell v. Pennsylvania Dept. of Education, supra.* On the issue of whether waiver is applicable to a privileged document under the RTKL, the *Bagwell* Court held:

> Once attorney-client communications are disclosed to a third party, the attorney-client privilege is deemed waived… Similarly, our Supreme Court holds that the work product doctrine is not absolute but, rather, is a qualified privilege that may be waived… What constitutes a waiver with respect to work-product materials depends, of course, upon the circumstances.

Bagwell, supra, at p. 8.

The *Bagwell* Court did not appear to create a bright-line test which excluded waiver for a document protected by the attorney work product privilege. Conversely, the *Bagwell* Court refused to recognize the doctrine of subject matter waiver of the attorney work product privilege. Instead the *Bagwell* Court opted for the middle ground by invoking the doctrine of selective or limited waiver.

Pursuant to the selective/limited waiver doctrine, if a party limits the disclosure of a document protected by the work product privilege such that it does not violate the core purpose of the privilege, then waiver will not be found. The *Bagwell* Court cited as an example the limited disclosure of documents protected by the work product doctrine to the trial court and supervising judge of a grand jury proceeding in *Commonwealth v. Sandusky, supra.* "Under such circumstances, where the disclosure was very limited, the work product privilege remained intact and was not waived for other purposes." *Bagwell* at p. 10.

The *Bagwell* Court found the selective disclosure by the Department of Education of privileged documents by its agent at a grand jury hearing that discussed the same matters addressed in documents sought under the RTKL was not a subject matter waiver of the attorney-client and/or work product privileges.

As a result of *Bagwell*, this Court finds that the attorney-client and attorney work product privileges can be waived on a selective or limited basis.

WHETHER WAIVER OCCURRED

It appears from *Bagwell* that the analysis of whether waiver occurred depends on the circumstances of the case and involves the issue of fairness to the parties. The burden of proving waiver rests with the requestor, Attorney Ruth. In this case Attorney Ruth has not met his burden of proof regarding waiver under the attorney work product doctrine.

The Solicitor's e-mail is the prototype document contemplated under the attorney work product privilege. The document was marked confidential with an admonition to discuss its contents only in an executive session of the Township Supervisors. This document outlined the various options available to the Township Supervisors regarding the respective property rights to Thrasher Road. Further, the Solicitor's e-mail was prepared in anticipation of litigation with Kenneth Rogers, which litigation is now ongoing.

The disclosure of the Solicitor's e-mail to Trooper Stevick did not occur during an executive session of the Board of Supervisors or a duly authorized meeting of the Board. The failure of the Township Supervisors to confine their discussion of the Solicitor's e-mail

to an executive session does not mean waiver occurred. Further, the fact the Solicitor's e-mail was disclosed under circumstances not consistent with the Sunshine Act or the Second Class Township Code does not preclude a finding of waiver as suggested by the Township. To hold otherwise means the Supervisors would benefit by violating their Solicitor's advice, the Sunshine Act and the Second Class Township Code.

This Court has considered the safeguards taken by the Supervisors to prevent disclosure of the Solicitor's e-mail to Rogers, who was the anticipated adverse party.

The Solicitor's e-mail was housed in a locked cabinet for which the Supervisors did not have a key. The cabinet was in a private office. The Solicitor's e-mail was only shown one time to a person who was in law enforcement who requested to see it.

At the Thrasher Road site, the Supervisors guarded against disclosure of any information within the Solicitor's e-mail to Kenneth or Brad Rogers who were kept a distance away. At no time did the Supervisors relinquish physical possession of the Solicitor's e-mail to anyone.

The act of showing the Solicitor's e-mail to Trooper Stevick did not change the character of the document, i.e. it did not eliminate the legal advice provided therein. It remains the Solicitor's mental impressions and opinions which are immunized under Rule 4003.3.

The purpose of the disclosure to Trooper Stevick was to defuse a volatile situation. In fact, the result was the peaceable ending of a confrontation with the parties now participating in civil court to resolve their differences.

Importantly, disclosure to Trooper Stevick will not adversely affect the determination of the property rights of Kenneth Rogers nor will it affect his ability to defend the pending lawsuit. It is unlikely Trooper Stevick will be a witness in the litigation because Trooper Stevick cannot testify regarding the legal merits of the property claims of each party. In essence, the disclosure to Trooper Stevick permitted the preservation of the status quo to allow the matter to be resolved in civil court.

The disclosure to Trooper Stevick was not meant to use the Solicitor's e-mail as a sword or a shield in any litigation with Kenneth Rogers. *See Nationwide Mutual Insurance Company v. Fleming*, 605 Pa. 468, 992 A.2d 65 (Pa. 2010). In the heat of the moment, the Supervisors were not thinking of the legal nuances regarding waiver of the attorney-client privilege or attorney work product privilege. The Supervisors are unschooled in the evidentiary privileges under Pennsylvania law. Rightfully, they were more concerned with resolving the confrontation on Thrasher Road than they were about the possible waiver of the attorney work product privilege.

The Township did not gain an advantage in their present litigation with Kenneth Rogers by the disclosure to Trooper Stevick. The disclosure has no impact on the current litigation as it will not help the Township nor hurt Kenneth Rogers.

Based on the foregoing, this Court finds that it would be unfair to find waiver and require disclosure of a document which clearly contains the Solicitor's mental impressions and legal advice. The disclosure under these circumstances did not violate the core purpose of the attorney work product privilege. Finding no waiver herein does not offend or undermine the purpose of the RTKL. Hence, there was not a waiver of the attorney work product privilege.

CONCLUSION

The Solicitor's e-mail is a document protected by the attorney work product privilege. As such, it is not a public record subject to disclosure under the RTKL. While a party can waive the attorney work product privilege, there was no waiver in this case.

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

JILL McINTYRE

v.

TONY RAY McINTYRE

PROTECTION FROM ABUSE / GENERALLY

The purpose of the Protection from Abuse Act (23 Pa. C. S. §6101 *et seq.*) is to protect victims of domestic violence.

PROTECTION FROM ABUSE / DEFINITIONS

In order for a plaintiff to qualify for relief under the Protection from Abuse Act, the defendant's actions must fall within at least one category of abuse as defined in the statute. Pursuant to §6102 of the Protection from Abuse Act, "abuse" is defined as one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological parenthood: (1) attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault or incest with or without a deadly weapon; (2) placing another in reasonable fear of imminent serious bodily injury; (3) the infliction of false imprisonment pursuant to 18 Pa. C. S. §2903 (relating to false imprisonment); (4) physically or sexually abusing minor children, including such terms as defined in Chapter 63 (relating to child protective services); or (5) knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury. The definition of this paragraph applies only to proceedings commenced under this title and is inapplicable to any criminal prosecutions commenced under Title 18 (relating to crimes and offenses).

PROTECTION FROM ABUSE / IMMINENT SERIOUS BODILY INJURY

While physical contact may occur, it is not a prerequisite for a finding of abuse under §6102(a)(2).

PROTECTION FROM ABUSE / IMMINENT SERIOUS BODILY INJURY

A victim need not wait for physical or sexual abuse to occur in order for the Protection from Abuse Act to apply. The goal of the Protection from Abuse Act is protection and prevention of further abused by removing the perpetrator of the abuse from the household and/or from the victim for a period of time.

PROTECTION FROM ABUSE / HEARINGS

§6107(a) of the Protection from Abuse Act provides that the plaintiff must prove the allegation of abuse by a preponderance of the evidence. The preponderance of evidence standard is defined as the greater weight of the evidence, i.e., to tip a scale slightly is the criteria or requirement for preponderance of the evidence. In conducting such an analysis, an appellate court defers to the credibility determinations of the lower court.

PROTECTION FROM ABUSE / EVIDENCE

The Pennsylvania Superior Court has stated that when analyzing an appeal challenging the evidence as insufficient to support a Protection from Abuse Order, the evidence is reviewed in the light most favorable to the petitioner… granter the petitioner the benefit of all reasonable inferences, in order to determine whether the evidence was sufficient to sustain the trial court's conclusion by a preponderance of the evidence.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION No. 17033-2014

Appearances: Douglas McCormick, Esq., Attorney for Tony Ray McIntyre, Appellant
Patrick Kelley, Esq., Attorney for Jill McIntyre, Appellee

Superior Court Memorandum published immediately following this opinion

OPINION

Domitrovich, J., May 22, 2014

This Protection From Abuse case is currently before the Superior Court of Pennsylvania on the appeal of Tony Ray McIntyre (hereinafter "Appellant") from this Trial Court's Order of March 21, 2014, in which after a full hearing, this Trial Court granted Jill McIntyre's (hereinafter "Appellee") Petition for a Final Protection From Abuse (hereinafter "PFA") Order.

The factual and procedural history of the case are as follows: On March 14, 2014, Appellee filed a Petition for Protection From Abuse. Appellee provided credible testimony at the temporary PFA hearing held before this Lower Court. On the basis of the testimony offered at the temporary hearing, this Lower Court granted Appellee the temporary relief requested in her Petition. Following the temporary hearing, a final PFA hearing was held before this Lower Court on March 21, 2014, at which Appellant appeared and was represented by Douglas McCormick, Esquire, and the Appellee appeared and was represented by Patrick Kelley, Esquire. This Lower Court finds the following facts from testimony at the final PFA hearing:

Appellee and Appellant have been married and living together for approximately five and a half years. (*Protection From Abuse Hearing Transcript*, p. 4, line 19 - p. 5, line 11; p. 55, line 22-23). Appellant is currently employed as a police officer for the City of Corry Police Department. (*Protection From Abuse Hearing Transcript,* p. 55, line 12-15). However, Appellant is not actively working as he is receiving workers' compensation due to injuries he sustained while on duty on August 23, 2013, when Appellant suffered two seizures and multiple facial fractures, which resulted in double vision, and Appellant was diagnosed with a traumatic brain injury. (*Protection From Abuse Hearing Transcript*, p. 55, line 12 - p. 56, line 23). Appellant is currently being treated by five (5) physicians, including the VA hospital, for his injuries and condition. (*Protection From Abuse Hearing Transcript,* p. 8, line 8 - p. 9, line 9; p. 56, line 24 - p. 57, line 1).

On February 25, 2014, Appellee was out of the residence taking Appellant's mother to an appointment when Appellee decided to return to the residence with Appellant's mother to retrieve something from her computer. (*Protection From Abuse Hearing Transcript*, p. 10, line 13-19; p. 61, line 2-3). Prior to arriving, Appellee inquired from Appellant for permission to do so via text message to his phone. Appellant confirmed this was okay. While at the residence, Appellee had difficulty with their printer, so she again texted Appellant requesting he come downstairs from the bedroom, where he was napping, to fix the printer. (*Protection From Abuse Hearing Transcript*, p. 10, line 12 - p. 11, line 4; p. 60, line 23 - p. 61, line 5). Appellant came "stomping down the stairs, banging things, banging the printer, banging the computer, acting angry." (*Protection From Abuse Hearing transcript*, p. 10, line 23-25). Appellant admitted he was annoyed by Appellant about being asked to fix the

printer at that time. (*Protection From Abuse Hearing Transcript,* p. 65, line 6-12).

After the printer was fixed, Appellant returned to the bedroom upstairs, and Appellee proceeded to take Appellant's mother to her home and then returned to the residence. (*Protection From Abuse Hearing Transcript,* p. 11, line 4-5; p. 65, line 13-14). Appellee related Appellant seemed calm when she entered, which scared her, but soon thereafter, the verbal altercations again began between the two of them due to Appellee bringing the Appellant's mother into the house, despite her asking for his permission prior to doing so. (*Protection From Abuse Hearing Transcript,* p. 11, line 5-8; p. 11, line 18 - p. 12, line 1; p. 67, line 10-14). During this altercation, Appellee noticed Appellant had torn her "posters, and pictures and articles" off of the wall where she had hung them. (*Protection From Abuse Hearing Transcript,* p. 11, line 9-18). In the past, Appellant has displayed physical signs of anger and violence when he kicked the doors in the residence, kicked Appellee's door to her vehicle and thrown a cell phone and his CPAP machine at the Appellee, breaking these items. (*Protection From Abuse Hearing Transcript,* p. 13, line 18 - p. 14, line 22).

Eventually this altercation ceased when Appellant returned upstairs to the bedroom to sleep, stating he was not feeling well. (*Protection From Abuse Hearing Transcript,* p. 34, line 13-18; p. 67, line 21-22). Appellee then contacted a mutual friend of Appellee and Appellant, who is a Cambridge Springs Police Officer, Kyle Allen Grill, (hereinafter "Grill"), due to Appellee being scared about the current situation explaining Appellant had become aggressive and angry. (*Protection From Abuse Hearing Transcript,* p. 34, line 20-25; p. 48, line 7-21). Grill has known Appellant for seven years through military service and met Appellee a few years after that time at a military function. (*Protection From Abuse Hearing Transcript,* p. 45, line 9-14). Based on the information received from Appellee, Grill advised Appellee that if she did not feel safe to leave the residence and telephone the police. (*Protection From Abuse Hearing Transcript,* p. 35, line 19-20, p. 51, line 11 - p. 52, line 3-5). In the meantime, Grill was on his way to their residence to assist. (*Protection From Abuse Hearing Transcript,* p. 35, line 1-2; p. 41, line 14-16). Upon arrival, Grill immediately proceeds upstairs to the bedroom where Appellant was located. Grill, perceiving Appellant to be asleep, returned downstairs to obtain more information from the Appellee about the situation. Upon hearing more of the story, Grill returned to the bedroom and woke Appellant up by knocking on the door frame and calling his name. Grill then asked Appellant as to what was going on, and Appellant replied he was not feeling well and did not currently want to talk about the situation. (*Protection From Abuse Hearing Transcript,* p. 41, line 21 - p. 44, line 5; p. 52 line 8-25; p. 69, line 1-8). Grill then returned downstairs and observed the crumpled articles that Appellee had re-taped onto the wall. (*Protection From Abuse Hearing Transcript,* p. 53, line 24 - p. 54, line 6).

Appellee called the Pennsylvania State Police reporting she was scared and was requesting to have Appellant removed from the residence. (*Protection From Abuse Hearing Transcript,* p. 12, line 2-13). Upon inquiry by the Pennsylvania State Police, Appellee confirmed Appellant kept a loaded gun in the residence. The Pennsylvania State Police then requested Appellee remove Appellant's loaded gun from the residence, if possible. (*Protection From Abuse Hearing Transcript,* p. 12, line 16-24; p. 35, line 25 - p. 36, line 6). Appellant possessing a gun in the residence had been a tense topic between the parties for some time as Appellee explained she is uncomfortable and fearful for her life of such

weapons. (*Protection From Abuse Hearing Transcript*, p. 9, line 14-23; p. 20, line 14-22). Appellee proceeded upstairs to the bedroom, where Appellant was sleeping, and she retrieved two bags from the closet. One bag contained the gun and the other bag contained knives. Appellant woke up and asked Appellee what she was doing. Appellee told him that she was "just grabbing something ... " and took the bags downstairs and left in her car. (*Protection From Abuse Hearing Transcript,* p. 12, line 16- p. 13, line 14; p. 79, line 14-18; p. 36, line 3 - 22; p. 69, line 8-13).

Grill observed this incident as he had followed Appellee upstairs and remained in the hallway. (*Protection From Abuse Hearing Transcript*, p. 43, line 14 - p. 44, line 5). Grill observed Appellant get up after Appellee took the bags and go into to the bathroom. (*Protection From Abuse Hearing Transcript,* p. 44, line 12-16; p. 69, line 11-16). Eventually, Appellee transferred the gun to Grill. (*Protection From Abuse Hearing Transcript*, p. 70, line 14-17).

Appellee returned to the residence that evening and slept in the same bed as the Appellant, but she moved out the next day on February 26, 2014. (*Protection From Abuse Hearing Transcript,* p. 13, line 17; p. 70, line 1-5). Following this time, Appellee received several "threatening" text messages from the Appellant. One message, that was admitted into evidence as Appellee's Exhibit 1, contained Appellant's apology for his verbal abuse upon the Appellee. Another text from the Appellant mentioned that there had been an opossum on the deck, but that he had "taken care of it," directly followed by a request to talk. Appellant perceived this text message as threatening and feared for her life as she assumed Appellant had utilized his gun to kill the opossum, knowing that Appellant was fearful of guns. (*Protection From Abuse Hearing Transcript*, p. 6, line 3 - p. 7, line 24; p. 17, line 25 - p. 20, line 22; p. 22 line 3-8; p. 73, line 23- p. 74, line 16). Appellant alleged these messages were purely meant to be informative. (*Protection From Abuse Hearing Transcript,* p. 72, line 6-7). The Appellee filed a pro se PFA petition on March 3, 2014, which was denied by the Honorable Elizabeth Kelly. (*Protection From Abuse Hearing Transcript,* p. 23, line 2-12). Several days later and after having an opportunity to speak with a domestic violence professional at Safe Journey, Appellee filed the instant PFA Petition against the Appellant, this time including more specific details of the incident and prior abuse. (*Protection From Abuse Hearing Transcript,* p. 26, line 21 - p. 27, line 25).

Following the final PFA hearing and based upon Appellee's credible testimony, this Lower Court granted Appellee's PFA Petition for a period of two (2) years. Appellant filed the instant Appeal on March 28, 2014. On March 31, 2014, this Lower Court promptly ordered Appellant to file his Concise Statements of Matters Complained of on Appeal within twenty-one (21) days. Appellant filed his Concise Statement on April 21, 2014.

In his Pa. R.A.P. 1925(b) Concise Statement of Matters Complained of on Appeal, Appellant raises the following issue: Whether the Trial Court erred in finding that the evidence was sufficient to establish that abuse occurred as defined in the Protection from Abuse Act and support an order of Protection from Abuse against the defendant.

The purpose of the Protection From Abuse Act (23 Pa. C.S. § 6101 *et. seq.*) (hereinafter referred to as "PFA Act") is to protect victims of domestic violence. In order for a plaintiff to qualify for relief under the PFA Act, the defendant's actions must fall within at least one category of abuse as defined in the statute. Under Section 6102 of the PFA Act, "abuse" is defined as one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological parenthood:

(1) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault or incest with or without a deadly weapon.
(2) Placing another in reasonable fear of imminent serious bodily injury.
(3) The infliction of false imprisonment pursuant to 18 Pa. C.S. § 2903 (relating to false imprisonment).
(4) Physically or sexually abusing minor children, including such terms as defined in Chapter 63 (relating to child protective services).
(5) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury. The definition of this paragraph applies only to proceedings commenced under this title and is inapplicable to any criminal prosecutions commenced under Title 18 (relating to crimes and offenses).

23 Pa.C.S.A. §6102.

"While physical contact may occur, it is not a prerequisite for a finding of abuse under §6102(a)(2) ... " *Fonner v. Fonner*, 731 A.2d 160, 163 (Pa. Super. Ct. 1999) (PFA granted when husband physically menaced wife without actual contact). *See also Commonwealth v. Snell*, 737 A.2d 1232, 1236 (Pa. Super. Ct. 1999) (PFA Extension granted when husband punched hand through window of wife's home in an attempt to enter while intoxicated and at a subsequent family picnic shouted at wife and had to be physically restrained while intoxicated). "[A] victim need not wait for physical or sexual abuse to occur in order for the [Protection from Abuse] Act to apply." *Fonner* at 163. "The goal of the Protection from Abuse Act is protection and prevention of further abuse by removing the perpetrator of the abuse from the household and/or from the victim for a period of time." *McCance v. McCance*, 908 A.2d 905, 908 (Pa. Super. Ct. 2006) (quoting *Viruet v. Cancel*, 727 A.2d 591, 595 (Pa. Super. Ct. 1999)).

Additionally, Section 6107(a) of the PFA Act provides that the plaintiff must prove the allegation of abuse by a preponderance of the evidence. 23 Pa.C.S.A. §6107(a). "[T]he preponderance of evidence standard is defined as the greater weight of the evidence, i.e., to tip a scale slightly is the criteria or requirement for preponderance of the evidence." *Raker v. Raker*, 847 A.2d 720, 724 (Pa. Super. 2004)(citing *Commonwealth v. Brown*, 567 Pa. 272, 283-84, 786 A.2d 961,967-68 (Pa. 2001)). In conducting such an analysis, the Superior Court defers to the credibility determinations of the lower court. *Miller*, 665 A.2d at 1255 (citing *Alfred v. Braxton*, 659 A.2d 1040 (Pa. Super. Ct. 1995)). The Pennsylvania Superior Court has stated that when analyzing an appeal challenging the evidence as insufficient to support a PFA order, the evidence is reviewed "in the light most favorable to the petitioner ... granting her the benefit of all reasonable inferences, [in order to] determine whether the evidence was sufficient to sustain the trial court's conclusion by a preponderance of the evidence." *Miller*, 665 A.2d at 1255 (pa. Super. Ct. 1995) (citing *Snyder v. Snyder*, 629 A.2d 977 (Pa. Super. 1993)).

As previously stated, the parties appeared before this Lower Court in regard to Appellee's request for a final PFA to be entered against Appellant. At the March 21, 2014, PFA hearing,

both parties admitted they have been married for the past five and a half (5 ½) years and are still currently married. Appellee was seeking a PFA against Appellant due to a series of physical outbursts in their past and a threatening text message from the Appellant who knew about appellee's fear of guns.

At the March 21, 2014, PFA hearing and in her Petition, Appellee credibly stated that based on the past incidents of Appellant's physical anger, the loaded gun being brought into the house and the text messages from Appellant, she was in reasonable fear of imminent serious bodily injury. (*Protection From Abuse Hearing Transcript,* p. 14-15). Specifically, Appellee explained incidents in the past where Appellant had displayed physical signs of anger and violence when he kicked the doors in the residence, kicked Appellee's door to her vehicle and threw a cell phone and his CPAP machine at the Appellee, breaking these items. (*Protection From Abuse Hearing Transcript,* p. 13-14). More recently was the incident on February 25, 2014, as explained above, which caused the Appellee to telephone the Pennsylvania State Police and remove the Appellant's loaded gun from the residence. Following this incident on February 25, 2014 and after Appellee left the residence; Appellant continually text messaged the Appellee. (*Protection From Abuse Hearing Transcript,* p. 6). One text message in particular, sent March 1, 2014, that caused the Appellant to reasonably be in fear of imminent serious bodily injury was where the Appellant had relayed to Appellee that there was an opossum on their back deck acting strangely in the daylight, so he "took care of it." This same text message also contained a request by Appellant to talk with Appellee. Appellee interpreted the text message to mean that Appellant had used his gun to shoot and kill the opossum, as that is what had previously occurred on their property when their neighbor shot and killed another opossum. (*Protection From Abuse Hearing Transcript,* p. 18-19, 71-72). Furthermore, Appellant knew Appellee was deathly afraid of guns based on the agreement they originally had regarding Appellant keeping his work gun in the residence. (*Protection From Abuse Hearing Transcript,* p. 9). Appellee repeatedly explained she was afraid for her life, of Appellant's actions and his anger towards the Appellee. (*Protection From Abuse Hearing Transcript,* p. 15,20,22,32).

Lastly, Appellant admitted in one text message to the Appellant, which read into evidence during the hearing, that he had been verbally abusive to Appellee in the past. (*Protection From Abuse Hearing Transcript,* p. 73-74). Any person in Appellee's position receiving these messages would be in reasonable fear of serious imminent bodily injury. Therefore, this Lower Court properly found Appellant's conduct fit within the definition of abuse under the PFA Act in that Appellant placed Appellee in reasonable fear of imminent serious bodily injury. Thus, this Lower Court properly entered the PFA Order against Appellant for two (2) years.

As stated previously, this Trial Court found Appellee's testimony was very credible, and Appellant's disturbing behavior and messages placed Appellee in reasonable fear of imminent serious bodily injury. Thus, for all of the foregoing reasons, this Lower Court requests that the March 21, 2014 Order granting Appellee's PFA be affirmed.

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

FOR THE BENEFIT OF LAUREL A. HIRT

REASONABLENESS OF A CORPORATE TRUSTEE'S FEES

Where a trust instrument signed by the settlor specifies a trustee's compensation, the trustee is entitled to that compensation.

REASONABLENESS OF A CORPORATE TRUSTEE'S FEES

Where a corporate trustee is selected out of a competitive market and the trustee's fees were considered in its selection, those fees are presumed reasonable.

REASONABLENESS OF A CORPORATE TRUSTEE'S FEES

In determining the reasonableness of a corporate trustee's fees, the risks and duties associated with the trust corpus must be considered, including exposure to liability, restraints on alienability, extent and nature of duties associated with the position, industry standards, and market value of the trust. Where those risks and duties are atypical from other trusts of a similar nature, a flexible component fee structure based on the market value of the trust corpus may be reasonable to adequately compensate the corporate trustee. Conversely, payment of a corporate trustee based on services rendered or a flat fee tied to the book value of the trust corpus is generally insufficient, in part because the book value can seldom be a valid measurement of the true value of the trust corpus.

COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION No. 205-2013 (Formerly No. 161-2012)

Trust under Agreement of HENRY ORTH HIRT, SETTLOR
Restated DECEMBER 22, 1980

Appearances: Margaret E.W. Sager, Esq., Attorney for Trustee, Sentinel Trust Company, L.B.A.
Dorothy A. Davis, Esq. and Christopher Farrell, Esq., Attorneys for Trustee, Elizabeth A. Vorsheck
Lawrence G. McMichael, Esq. and Roger Richards, Esq., Attorneys for Trustee, Susan Hirt Hagen
Jennifer A. Savage, Esq., Attorney for Trustee, Sarah Hagen
Nicolas Centrella, Esq., Attorney for Trustee, Laurel A. Hirt
John T. Brooks, Esq., Attorney for Laurel A. Hirt

OPINION

CUNNINGHAM, WILLIAM R., J.

On September 11, 2013, a "Second and Intermediate Account" (Second Account) covering the time period of January 1, 2012 through April 30, 2013 was filed by the trustees.

On December 21, 2013, the beneficiary Laurel A. Hirt (Ms. Hirt), filed an Objection to the Second Account (Objection) alleging the fees paid to the corporate trustee, Sentinel Trust Company (Sentinel) were excessive and unreasonable.

Sentinel and the other two co-trustees filed Responses to the Objection. By Order dated May 2, 2014, Ms. Hirt's Objection was limited to the trust in which she was a beneficiary for the time period in question. A Joint Stipulation of Facts was filed on August 1, 2014 by the parties. An evidentiary hearing was held on November 3, 2014. Thereafter, the parties filed supporting Briefs on February 19, 2015.

Upon consideration of the evidence, arguments and the law, this Court finds that Sentinel's fee structure is binding and the fees charged by Sentinel in the Second Account are reasonable. Accordingly, the Objection of Laurel A. Hirt to the Second Account is **DISMISSED.**

I. SENTINEL'S FEE STRUCTURE

There is no need to reiterate the long history of these trusts given the detailed stipulation of facts by the parties (which is appreciated by this Court). Ms. Hirt's trust is one of three trusts birthed from the trust created by her grandfather, H.O. Hirt, the founder of the Erie Indemnity Company (Erie Indemnity). The present beneficiaries of the other two trusts from H.O. Hirt are Ms. Hirt's sister, Elizabeth Vorsheck (Vorsheck), and Ms. Hirt's aunt, Susan Hirt Hagan (Hagan). Vorsheck and Hagan serve as the two individual trustees for Ms. Hirt's trust along with Sentinel as the corporate trustee.

Sentinel customized its fee structure into four components to meet its fiduciary responsibilities within an historical realm of familial litigation involving the H.O. Hirt trusts. The two primary components of Sentinel's fee structure are a base fee and an hourly fee. The base fee consists of the greater of $250,000 or 14 basis points of the value of Class B shares held by the trust. The Class B shares are the voting shares of Erie Indemnity, a Fortune 500 Company, and these shares are not publicly traded. Class A shares of Erie Indemnity are publicly traded. The value of Class B shares fluctuate with the market value of Class A shares on a conversion ratio of 1 share of Class B equaling 2400 shares of Class A stock. Thus built into the base fee is a financial incentive for the corporate trustee to act in the best interests of Erie Indemnity so that the value of Class A and B shares increases.

The second component of Sentinel's fee structure is an hourly charge for the time spent working on the business of the trust. There is a sliding scale of hourly rates for various employees. The hourly component creates the flexibility Sentinel needs when litigation flares up, which has frequently occurred among the Hirt descendants. If Sentinel has to respond to litigation involving its role, then Sentinel is in a position to be reimbursed for its additional time. The hourly rate component permits Sentinel to charge a lower base fee as the hourly rates provide a mechanism to respond to unexpected developments.

The other two components of Sentinel's fee structure are reimbursement for identified expenses (e.g. legal, accounting and consultant) and an Errors and Omissions policy. These components are not the focus of Ms. Hirt's Objection.

Sentinel's fees are computed as a whole and then divided among the three trusts. Fifty percent of the fees are assessed to the Hagan trust while twenty-five percent is assessed to the Vorsheck and Hirt trusts. The subject of Ms. Hirt's Objection is Sentinel's fees charged to Ms. Hirt's trust in the amount of $182,656.03 for the time period of January 1, 2012 to December 31, 2012.[1] *See Exhibit S-3 at p.6.* This figure is the sum total of the four components of Sentinel's fee structure and is the approximate equivalent of 18 basis points of the value of Ms. Hirt's trust corpus. Of this total compensation, the base fee and the hourly charges amounted to $151,130.84 or 14.75 basis points of Ms. Hirt's trust corpus. For this same time period, Ms. Hirt received a distribution from the income of her trust in the amount of $205,946.28.

[1] This figure does not include the first quarter of 2013 because the fees are accrued but not paid until the subsequent account period. This means the corporate trustee fees are paid on a calendar year basis.

II. SENTINEL'S FEE STRUCTURE IS BINDING

Pennsylvania law states: "if a trust instrument or written fee agreement signed by the settlor or anyone who is authorized by the trust instrument to do so specifies a trustee's compensation, the trustee is entitled to the specified compensation." 20 Pa. C.S. §7768(b).

H.O. Hirt intended for the corporate trustee to be paid when he provided: "the corporate Trustee shall be entitled to receive annual compensation for its services hereunder in accordance with its schedule in effect when the services are performed, but not in excess of such compensation as would be approved by a court of competent jurisdiction." *Trust Agreement, Article 4.05; see Exhibit S-7.*

Sentinel proffered its fee structure which this Court approved in making Sentinel's appointment. Sentinel has not raised or changed its fee structure since its appointment effective January 1, 2006. Sentinel rightfully felt throughout 2012 it was in its seventh year of doing business with Ms. Hirt's trust under the terms of its fee structure. All of the Accounts for the three trusts from 2006 through 2011 using Sentinel's fee structure received judicial approval without a formal objection by any party, including Ms. Hirt.

The parties have stipulated that Sentinel's fees for the Second Account were computed in accordance with Sentinel's fee structure. *Joint Stipulation, Paragraph 40.*

Consistent with Pennsylvania law and the settlor's expressed intent, there was a binding fee structure in place for the corporate trustee for the time period of the Second Account. Accordingly, Sentinel is entitled to be paid consistent with its fee structure. However, the question remains whether Sentinel's fees are not excessive in the eyes of a reviewing court.

III. SENTINEL MET ITS BURDEN OF PROVING REASONABLENESS OF ITS FEES

Sentinel bears the burden to prove its fees are reasonable. *In re Ischy Trust*, 415 A.2d 37 (Pa. 1980). There are a host of factual and legal reasons to find that Sentinel has met its burden of proving its fees for the Second Account are reasonable.

A. Sentinel's Fees are Presumed Reasonable.

Sentinel "is entitled to compensation that is reasonable under the circumstances." 20 Pa. C.S. §7768(a). Further, trustee compensation "at levels that arise in a competitive market shall be presumed to be reasonable in the absence of compelling evidence to the contrary." *Id.* at (e).

The parties recall the nationwide search from 1999 to 2005 for a corporate trustee. The search became a heated competition among three factions of the Hirt family for the appointment of the faction's candidate. Sentinel was appointed after a protracted process that included close scrutiny of the fee structures of each candidate. The selection of Sentinel included the recognition of the appropriateness of its fee structure.

Sentinel's fee structure clearly arose from an intensely competitive process involving candidates drawn from the open market and therefore it has a presumption of reasonableness. Ms. Hirt did not present any compelling evidence to the contrary.

B. The Risks And Duties Of The Corporate Trustee

This Court finds credible the testimony of Jeffrey Osmun, JD, an expert on corporate trustee compensation. Attorney Osmun has a deep history in the corporate trustee field.

According to Attorney Osmun, the business decision of whether to accept a trusteeship

involves a cost benefit/risk reward analysis, with compensation to cover not only the services rendered, but also the risks involved. It is the latter component, the exposure to risks and liability, which Ms. Hirt overlooks in her Objection.

The H.O. Hirt trusts are not typical within the trust industry and pose a challenging set of demands and corresponding risks. The nature of the trust corpus and the duties imposed upon the corporate trustee create significant risk factors that must be built into any reasonable fee structure for the corporate trustee.

The three trusts collectively own 2,340 Class B shares of Erie Indemnity, which is 76% of the Class B shares issued. Importantly these shares represent the controlling votes for a Fortune 500 company. The value of these shares, including the value of the control of the board for Erie Indemnity, creates a significant exposure of liability for the corporate trustee which factors into the reasonableness of Sentinel's fees.

The nature of the trust corpus also presents an atypical risk to the corporate trustee because there is only one asset, the Class B shares, with restrictions on alienability. This trust does not present the opportunity for diversification of its assets to spread the risk of loss across different economic sectors. If problems arise in the insurance business, or if Erie Indemnity does not perform well in its field, the trustees are at a greater risk of surcharge than if the trust assets were in diverse investments. These circumstances must be factored into Sentinel's fee structure.

H.O. Hirt placed the corporate trustee at the crossroads of all decisions affecting the trusts, with each decision adding to the liability exposure of the corporate trustee. He expected the corporate trustee to be familiar with the business of Erie Indemnity and to always act to keep it in the best of health. These demands require the corporate trustee to be well-informed on all matters affecting Erie Indemnity so that the controlling bloc of Class B shares is properly voted. The fate of Erie Indemnity is the fate of the corporate trustee with all of the parallel risks of corporate litigation.

H.O. Hirt vested the decision to sell Class B shares with the corporate trustee because these shares cannot be sold or exchanged without the affirmative vote of the corporate trustee. The trust cannot be terminated nor any part of the trust corpus distributed without the affirmative vote of the corporate trustee. *Trust Article 4.04, Exhibit S-7*. These provisions impose a continual burden on the corporate trustee to make an informed decision about whether and when to sell/exchange any or all of the Class B shares. These responsibilities create additional liability for the corporate trustee to the beneficiaries and to all stakeholders in Erie Indemnity and must be factored into Sentinel's fee structure.

The corporate trustee is positioned to be the tiebreaking vote in the event there are disputes among individual trustees or with beneficiaries. The corporate trustee is expected to be the calm voice of reason to settle family disputes. Throughout its tenure, including the time period challenged by Ms. Hirt, Sentinel has established productive, working relationships among the various Hirt descendants. There is certainly a value for this service provided by Sentinel to be reflected in its fees.

The period of peace since Sentinel began its service in 2006 does not preclude the present request for a surcharge. Ms. Hirt certainly has the right to challenge the reasonableness of Sentinel's fees via the present Objection. However, she is seeking monetary relief from Sentinel which requires the time and resources of Sentinel to respond and the possibility of

refunding money from its coffers. Hence, Sentinel is exposed to the constant demand for a surcharge by the descendants of H.O. Hirt. The history of familial litigation involving these trusts is well known to all the parties herein.

The public record also reflects a Writ of Summons filed by Ms. Hirt on December 19, 2014 against all three trustees and each board member of Erie Indemnity for an alleged "Breach of Fiduciary Duty." The merits of this litigation are left for another day, but it is a continuing example of the litigation risks facing the corporate trustee that can be justifiably factored into its fees.

In sum, the trust-specific duties established by the settlor for the corporate trustee create additional risks which are real and legitimate factors in assessing the reasonableness of Sentinel's fees. This Court accepts the conclusions of Attorney Osmun that Sentinel's fees for the Second Account period of Ms. Hirt's trusts are reasonable based on the duties and risks of the engagement.

C. The Market Value Fee Risk

In setting compensation for a trustee, consideration can be given to "the market value of the trust and may determine compensation as a fixed or graduated percentage of the trust's market value." 20 Pa.C.S. §7768(d). This Pennsylvania statute embraces what common sense suggests, to-wit, that market value is the fairest basis to compensate for the risks involved in the trusteeship.

Sentinel accepted a risk when it agreed to base its fee alternatively on the value of Class B shares. The base fee provides a distinct incentive for Sentinel to discharge its fiduciary responsibilities in a manner that keeps Erie Indemnity in good health, thereby increasing the market value of the Class A stock and Sentinel's base fee. Importantly, the trust corpus and dividends also grow which is a direct benefit to the trust beneficiaries. Of course, the opposite is also true. If the market value of the Class A shares declines, so does the benefit to Sentinel and the beneficiaries. Under this arrangement, the trustee and the beneficiaries share the risks and rewards of the trust assets in the marketplace.

It is common within the trust industry to tie a trustee's compensation to the fair market value of the trust assets. The risk assumed by Sentinel in coupling its base fee to a percentage of the trust's value in the open market is a valid indicator of a reasonable fee.[2]

D. The Approval Of Sentinel's Fees By The Co-Trustees

Another relevant factor in determining the reasonableness of Sentinel's fees is the position of the co-trustees Vorsheck and Hagan. These two trustees work alongside Sentinel and are familiar with the quantity and quality of the services provided by Sentinel. Vorsheck and Hagan are the beneficiaries under the other H.O. Hirt trusts and together are paying 75% of Sentinel's fees. Thus, these two trustees know what Sentinel does for the trusts and have a financial interest to ensure that Sentinel's fees are reasonable.

Vorsheck and Hagan agree that Sentinel's fee structure is reasonable and have approved the fees for Sentinel that are the subject of Ms. Hirt's Objection. Vorsheck and Hagan

[2] By contrast, one of Sentinel's competitors for this engagement was Wachovia, whose fee structure gave it the option to base its fee on the Consumer Price Index (CPI) or the value of Class A stock, which meant there was no downside risk to Wachovia as it could receive an increased fee based on the CPI when Erie Indemnity was doing poorly in the marketplace.

recognize the risks and intangible factors that are subsumed within Sentinel's fees that Ms. Hirt overlooks.

E. Sentinel's Fees Within Industry Standards

The President and C.E.O. of Sentinel, D. Fort Flowers, testified that the base fee Sentinel charges to Ms. Hirt's trust is the smallest percentage of basis points for any trust which Sentinel serves. According to Mr. Flowers, Sentinel's fees for serving as trustee of the Hirt trusts are about seventy (70) percent less than its standard fee schedule. *See Exhibits S-5 and S-6.* One of the reasons Sentinel could charge a lower base fee is that some of the risk factors it faces are addressed in the other three components of its fee structure, particularly its hourly rate component.

Attorney Osmun corroborated the testimony of Mr. Flowers by opining that Sentinel's fees are at the lower end of industry standards. For the Second Account, Sentinel's total fees amount to 18 basis points of the market value of the trust corpus. From 2006 through 2012, Sentinel's total annual fees have ranged from 18 basis points to 27 basis points. *Joint Stipulation, Exhibit C.* Most large institutional trustees will not serve as a corporate trustee for less than a fee of 25 basis points of the market value of the trust assets. By comparison, Sentinel's fees are reasonable.

To its credit, Sentinel deferred its compensation from 2006 to 2010 when the income from the trust was not sufficient to pay the corporate trustee fees. Sentinel treated its fees as an accrued receivable. Sentinel's decision to defer its compensation meant it decided to forego a sale of Class B shares as authorized by a Voting Trust Agreement approved by this Court and affirmed by the Superior Court in 2004.[3] Sentinel's patience in deferring its fees allowed the trust corpus to remain at full value to the benefit of all trust beneficiaries.

IV. MS. HIRT'S OBJECTION

Ms. Hirt did not present any evidence to rebut the presumption of reasonableness of Sentinel's fees. Ms. Hirt did not adduce any evidence to establish what constitutes a reasonable fee for the Second Account. Ms. Hirt never identified what amount of Sentinel's fees is excessive.

The focus of Ms. Hirt's Objection is on the base and hourly fees of Sentinel. Ms. Hirt does not tender any specific objection to the reimbursement of identified expenses or the premium for the Errors and Omissions policy.

In her Objection, Ms. Hirt argues that the base fee charged by Sentinel has created a windfall benefit for Sentinel because of the increased market value of Class A shares. Ms. Hirt maintains that Sentinel's fees should be "decoupled" from the share price of Class A stock because Sentinel allegedly influences the election of directors who approve buyback policies that inflate the market price of Class A shares. *Objection, Paragraphs 11-12.* There was no factual or legal support adduced in support of any of Ms. Hirt's contentions.

Ms. Hirt's attack on Sentinel based on its allegedly improper role in electing members to the Erie Indemnity board of directors who approved stock buyback plans lacks ammunition. As Ms. Hirt knows, Erie Indemnity engaged in stock buyback plans on multiple occasions

[3] Ms. Hirt was the appellant before the Superior Court in that matter.

before Sentinel became the corporate trustee. It is not uncommon for a publicly traded corporation to buy its stock in the marketplace.

There was no evidence presented that Erie Indemnity buying its Class A stock during Sentinel's tenure caused any artificial growth in the value of Class A stock between 2006 and 2012. There is no evidence that the buyback policies of Erie Indemnity, when in effect, overrode all other market factors in determining the price of Class A shares.

There was no evidence presented that Sentinel engaged in any activities that inappropriately influenced the election of the directors for the Erie Indemnity board or that Sentinel packed the board with directors who favored buyback policies.

All trust decisions must be made by a majority of trustees. For Ms. Hirt's argument to prevail there must be proof that Vorsheck and/or Hagan were part of Sentinel's fee inflating agenda in voting for directors. It is not in the financial interests of Vorsheck or Hagan nor consistent with their fiduciary responsibilities to vote for directors of Erie Indemnity whose conduct will be detrimental to the beneficiaries. All votes for director candidates of Erie Indemnity, whether the candidate was proposed by Sentinel or a board member, received the unanimous approval of the three Hirt trustees thereby eviscerating Ms. Hirt's allegation about Sentinel's board-packing scheme.

There was also no evidence presented by Ms. Hirt of any misfeasance or malfeasance by Sentinel that would have caused its fees to be improper or excessive. This is not a case where Sentinel is charging for the time and resources spent correcting one of its errors. By contrast, there is ample evidence that Sentinel acted during its tenure to keep Erie Indemnity in the best of health.

The only testimony Ms. Hirt proffered was her own. Ms. Hirt is a bright person and certainly knowledgeable about the family trusts and Erie Indemnity. However, when the dust settled, what remained was her uncorroborated opinion that three other fee structures are better options.

Ms. Hirt contends that Sentinel's fee structure should be tied to the book value of Erie Indemnity Company instead of the market value of Class A shares. Alternatively, she suggests the corporate trustee should be paid on a services rendered basis or for a flat fee. None of these alternatives were mentioned in Ms. Hirt's Objection and therefore her testimony was a form of ambush at trial, which alone is valid reason to disregard her suggestions.

The lack of merit is a better reason to reject these alternatives. Ms. Hirt did not present any evidence that her proffered fee structures were accepted or utilized in the corporate trustee field. Ms. Hirt did not identify any corporate trustee willing to meet the atypical risks posed by the Hirt trusts on any of her proffered fee structures.

Ms. Hirt argues it is wrong that Sentinel's base fee increased during a time period when the book value of Erie Indemnity decreased. For that reason, Ms. Hirt believes the base fee should be tied to the book value and not the market value of the trust corpus. Rather than decouple Sentinel's base fee from the value of Class A shares, Ms. Hirt now wants to recouple it to a different measurement.

Her argument is flawed because book value can seldom be a valid measurement of the true value of the trust corpus and thus it cannot realistically compensate for the risks assumed by the corporate trustee. It does not make economic sense for a corporate trustee

to base its fee on accounting principles disconnected to the true market value of the trust corpus. The reality is that the marketplace, which involves a willing seller and buyer, is recognized in the corporate trustee field and in Pennsylvania law as a favored basis for determining compensation. See 20 Pa. C.S. §7768(d); *see also Estate of Schwenk*, 490 A.2d 428,432 (Pa. 1985).

Ms. Hirt's services rendered or flat fee proposals are unrealistic as they do not account for the atypical risks facing the corporate trustee. The history of litigation within these trusts, combined with the external risks associated with Erie Indemnity, makes it infeasible for a corporate trustee to work on a services rendered or flat fee basis.

One last concern of Ms. Hirt needs to be addressed. Ms. Hirt posits that Sentinel's "compensation has multiplied within several years with no additional duties or responsibilities. This compensation represents a windfall for Sentinel and a waste of trust assets." *Objection, Paragraph 11*.

Sentinel's fees have not "multiplied within several years." In fact, Sentinel's total fees for 2012 are less than its first year of service in 2006. Sentinel's hourly fees have decreased every year thus its hourly fees for 2012 are the lowest amount in Sentinel's seven years of service.

The other components of Sentinel's fees have fluctuated based on a variety of factors, some of which are out of Sentinel's control. To the extent Sentinel's base fee has increased because of the increase in value of Class B stock, that is a reward for a risk Sentinel took. The downside risk is that Sentinel's fees could decline with any drop in value of Class B shares. While the duties and responsibilities of Sentinel may not have changed significantly, neither has the risks and liabilities Sentinel faces. In fact, Sentinel's liability exposure increases as the market value of the trust corpus increases. To date, this arrangement has worked well for the beneficiaries because the value of the trust corpus has increased and dividends distributed to the beneficiaries.

CONCLUSION

Time has proven the viability of Sentinel's fee structure. The inherent flexibility of its fee structure allows Sentinel to meet the unique duties and demands H.O. Hirt placed on the corporate trustee. It is prudent, and likely the only way to retain a suitable trustee, to factor into the fee structure the risks and liability facing the corporate trustee. It is sensible to tie Sentinel's base fee to the market value of the trust assets thereby creating a financial incentive for the corporate trustee that so far has worked for the trust beneficiaries. Ms. Hirt's alternative fee structures are not a realistic fit for these atypical trusts.

For all of the reasons stated, Sentinel's fees for the Second Account are reasonable and affirmed by the accompanying order.

ORDER

AND NOW, to-wit, this 23rd day of March, 2015, for the reasons set forth in the accompanying Opinion, it is hereby ORDERED as follows:

I) Consistent with the express intent of H.O. Hirt, Sentinel "shall be entitled to receive annual compensation for its services hereunder in accordance with its schedule in effect when the services are performed, but not in excess of such compensation as would be approved by a court of competent jurisdiction." Trust

Agreement, Article 4.05.

II) The Objection of Laurel A. Hirt to the Second and Intermediate Account is **OVERRULED.**

III) Sentinel's fees for the Second and Intermediate Account are reasonable and hereby approved.

IV) The Second and Intermediate Account for Ms. Hirt's trust is confirmed absolutely, with all balances to be paid forthwith in accordance with the schedule of distribution set forth by the trustees.

V) The trustees are released from liability for all matters relating to Sentinel's fee structure and/or its fees from January 1, 2006 to December 31, 2012.

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

EDSON R. ARNEALT, Plaintiff

v.

MTR GAMING GROUP, INC. and PRESQUE ISLE DOWNS, INC., Defendants

RIGHT TO JURY TRIAL / UNJUST ENRICHMENT

A claim for a jury trial does not create a right for a jury trial. Therefore, consent to withdraw a demand for a jury trial is only required where a right to a jury trial already exists. Pa.R.C.P. §1007.1(a).

RIGHT TO JURY TRIAL / UNJUST ENRICHMENT

Where a statute does not confer the right to a jury trial for a type of claim, the determination of whether a party has that right is based on whether the type of action existed at the time the Pennsylvania Constitution was adopted and whether a common law basis existed for that type of claim.

RIGHT TO JURY TRIAL / UNJUST ENRICHMENT

A claim for monetary damages based on unjust enrichment has a basis in common law, even where it does not arise from the breach of contract. Therefore, such a claim vests of right to a jury trial.

RIGHT TO JURY TRIAL / UNJUST ENRICHMENT

Invoking the equitable concepts of fairness and justness does not convert a legal claim into an equitable claim.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 11589-2012

Appearances: John F. Mizner, Esq., Attorney for Plaintiff
Christopher J. Sinnott, Esq., Attorney for Defendants
Henry F. Siedzikowski, Esq., Frederick P. Santarelli, Esq., and Krista K. Beatty, Esq., Attorneys for Defendants
Narciso A. Rodriguez-Cayro, Esq., Attorney for Defendants

OPINION

Cunningham, William R., J.

The presenting matter is a Motion to Strike Jury Demand filed by the Defendants. At issue is whether the Plaintiff has a right to a trial by jury on a claim for unjust enrichment. The Defendants' Motion is untimely and the issue is waived. On the merits, the Plaintiff's claim has a basis in common law and was triable by a jury prior to the adoption of the 1790 Constitution of Pennsylvania. Thus the Plaintiff is entitled to a jury trial and the Defendants' Motion is **DISMISSED**.

PROCEDURAL HISTORY

Plaintiff filed this lawsuit seeking to recover monetary damages in the form of attorney fees incurred to secure a gaming license which allegedly made possible the renewal of the Defendants' gaming license in Pennsylvania. The Plaintiff has filed a single cause of action for unjust enrichment.

The original Complaint was filed on April 27, 2012 and included a demand for a jury trial. After the lifting of a Stay Order entered while federal litigation was pending between the parties, the Defendants filed an Answer and New Matter on April 10, 2013 which also

included a demand for a jury trial. There followed a flurry of activity involving Preliminary Objections, discovery disputes, Motions for a Protective Order and Motions for Summary Judgment.

On August 6, 2014, an Order was entered denying the Motion for Summary Judgment filed by each party. The Defendants filed the present Motion to Strike Jury Demand and Confirm Bench Trial on August 18, 2014.

CONSENT TO WITHDRAW DEMAND IRRELEVANT

The Plaintiff argues the Defendants' Motion should be denied summarily pursuant to Pa.R.C.P. 1007.1(c)(1) which provides a demand for a jury trial "may not be withdrawn without the consent of all parties who have appeared in the action." Plaintiff does not consent to the withdrawal of his demand for a jury trial nor does he consent to the withdrawal of the Defendants' demand for a jury trial. Accordingly, Plaintiff believes the matter is resolved.

Plaintiff's argument is unpersuasive. The fact a party made a demand for a jury trial does not vest the party with a right to a jury trial.

Plaintiff overlooks the initial language of Pa. R.C.P. 1007.1(a) which states, "any action in which the right to a jury trial exists, that right shall be deemed waived unless a party files and serves a written demand for a jury trial not later than twenty days after service of the last permissible pleading." Hence, the demand for a jury trial set forth in Pa. R.C.P. 1007.1 assumes the existence of a right to a jury trial but does not vest a party with the right to a jury trial.

Notably, "no Rule shall be construed to confer a right to trial by jury where such right does not otherwise exist." *Pa. R.C.P. 128(f).* For the provisions of Pa. R.C.P. 1007.1 to apply, a party must have a right to a jury trial to demand it. In this case, the Defendants dispute the Plaintiff's right to a jury trial. Thus, the provisions of Rule 1007.1 cannot be used by the Plaintiff to defeat the Defendants' Motion.

WAIVER

Discovery is now closed and the dispositive motions were denied on August 6, 2014. This case is now positioned for trial. The present Motion to Strike Jury Demand and Confirm Bench Trial was filed nearly twenty-eight (28) months after the Plaintiff's demand for a jury trial and over sixteen (16) months since the Defendants' demand for a jury trial. Throughout this twenty-eight (28) month time period, virtually every pleading filed by the Plaintiff included a demand for a jury trial.

By failing to object to the Plaintiff's Demand for a Jury Trial while maintaining a demand for a jury trial throughout the pre-trial phase of this case, the Defendants have attempted to lure the Plaintiff into an illusory belief there will be a jury trial. In fairness to the Plaintiff, the manner in which this case was prepared through discovery was undertaken with a view towards the presentation of the case before a jury. The Plaintiff claims prejudice because of the expenses incurred with the expectation this case would be decided by a jury. The Plaintiff also contends that his pre-trial strategies would have been different if there were a bench trial instead of a jury trial.

Separately, this matter presents the anomalous situation in which the Defendants are objecting to a jury trial despite the Defendants' own demand for a jury trial. The Defendants explain their demand for a jury trial was only filed to preserve their ability to have a jury trial if any eventual theory of recovery for the Plaintiff crystallized into a claim permitting

a jury trial. The Defendants' explanation is unmoving since the Defendants retained the ability to demand a jury trial up to twenty (20) days after service of the last permissible pleading. *See Rule 1007.1(a).*

Given the posture of this case, coupled with the inherent and actual prejudice to the Plaintiff, this Court finds the Defendants' Motion to Strike Plaintiff's Demand for Jury Trial is untimely and/or waived.

WHETHER THERE IS A RIGHT TO A JURY TRIAL FOR PLAINTIFF'S CLAIM

The Defendants contend the Plaintiff's cause of action for unjust enrichment is a claim in equity for which there is no right to a jury trial. The Defendants' argument relies on an outdated view of the procedural treatment of civil claims.

The concept of unjust enrichment as employed for centuries in the Commonwealth of Pennsylvania has various permutations based on the diverse circumstances in which it has been used. The concept of unjust enrichment does not fit neatly into the box of an equity claim for which there is no right to a jury trial nor does it have to under current pleading requirements.

Modern jurisprudence at the federal and state level long ago abandoned the classification of various civil claims. The result is that trial courts in Pennsylvania possess general jurisdiction to exercise powers over law and equity in a single type of civil action. Accordingly, "there shall be a "civil action" in which shall be brought all claims for relief heretofore asserted in (1) the action of assumpsit, (2) the action of trespass, and (3) the action in equity. Note: the procedural distinctions between the forms of action in assumpsit, trespass and equity are abolished." *Pa. R.C.P. 1001(b).* The attempt by the Defendants to limit the analysis to simply an inquiry of whether unjust enrichment is a claim in equity truncates the necessary analysis.

In Pennsylvania, there is not a statute creating a right to a jury trial for a claim of unjust enrichment. In the absence of a statutory right to a jury trial, "the next inquiry is whether the particular cause of action existed at the time the Pennsylvania Constitution was adopted. Finally, if the cause of action and a right to jury existed at that time, then the inquiry is whether a common law basis existed for the claim." *Advanced Tel Sys. v. Com-Net Prof'l Mobile Radio, LLC,* 100 ¶ 34, 846 A.2d 1264,1275-76 (Pa. Super. 2004).

The Pennsylvania Constitution was originally adopted in 1790. Prior to its adoption, by Pennsylvania statute, "the common law and such of the statutes of England as were in force in the province of Pennsylvania on May 14, 1776 and which were properly adapted to the circumstances of the inhabitants of this Commonwealth shall be deemed to have been in force in this Commonwealth from and after February 10, 1777." *1 Pa.C.S.A. §1503(a).* This statute incorporated the common law of England into the common law of Pennsylvania as of 1777, which preceded the adoption of the 1790 Constitution of Pennsylvania.

The claim of unjust enrichment has a basis in the common law of England and Pennsylvania prior to the adoption of the 1790 Constitution of Pennsylvania. Various forms of unjust enrichment appeared in common law centuries ago. In *Lampleigh v. Braithwaite* (1615) 80 ENG. Rep. 255 (K.B.), a cause of action on a quasi-contract was recognized by a promise to pay after the performance of a requested service.

More prominently, in the often-cited case of *Moses v. MacFerlan,* (1760) 2 BURR. 1005, 97 ENG. Rep. 676 (K.B.), it was held:

> If the Defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the Plaintiff's case, as it were upon a contract (quasi ex contractu) as the Roman law expresses it.

Id. 2 BURR. 1008, 1012.

In *Moses v. MacFerlan, supra*, there was no express or written contract. Instead, the Plaintiff was seeking a monetary refund based on the "ties of natural justice and equity" *Id. Moses v. MacFerlan* has long been recognized in Pennsylvania as a common law form of unjust enrichment claim. *See e.g., Lee v. Gibbons*, 14 Serg. and Rawle 105, 111 (1826); *Hertzog v. Hertzog*, 29 Pa. 465, 468 (1857).

Historically, a lawsuit brought in assumpsit was triable by a jury at common law. *Grossman Bros. v. Goldman*, 85 Pa. Super. 205, 206-07 (1924). Notably, *Moses v. MacFerlan* involved a jury trial. As employed in this case, unjust enrichment is a form of an assumpsit action because the Plaintiff seeks to create an implied contract between the parties.

The Plaintiff alleges he was considered by the Pennsylvania Gaming Commission to be a principal of the Defendants. As a principal, the Plaintiff's licensure purportedly cleared a path for the renewal of the Defendants' gaming license. Plaintiff contends that had he not expended considerable sums for attorney fees to receive his license, the Defendants' gaming license would not have been renewed. Accordingly, Plaintiff argues he conferred a benefit on the Defendants and it is unjust for the Defendants to retain the benefit without reimbursing the Plaintiff for the attorney fees.

Importantly, the nature of the remedy the Plaintiff seeks is for monetary damages and not an equitable form of relief. To shed light on this distinction, the following is instructive:

> Restitution claims for money are usually claims "at law." So are restitution claims for replevin and ejectment. On the other hand, restitution claims that may require coercive intervention or some judicial action that is historically "equitable," may be regarded as equitable claims. For example, if the defendant fraudulently obtained title to Blackacre from the plaintiff, the plaintiff might ask the court to declare a "constructive trust," the upshot of which would be to order the defendant to reconvey Blackacre to the plaintiff. Such a claim is restitutionary and also historically regarded as equitable.
>
> If the same plaintiff merely asked for the money value of Blackacre or the sums gained by the defendant in selling that famous property, then the claim could still be restitutionary but it would now be a claim at law.

Dan B. Dobbs, Law of Remedies: Damages - Equity - Restitution, 370 (1993).

In this case, the Plaintiff does not seek any relief requiring coercive action by the Court against the Defendants. The Plaintiff is not seeking an equitable remedy in the form of a constructive trust, stockholders derivative action, injunction, receivership or fiduciary accounting. Instead, the Plaintiff is requesting reimbursement for attorney fees, which is a legal claim entitling Plaintiff to a jury trial.[1]

[1] In asserting a cause of action for unjust enrichment under Pennsylvania law, the Plaintiff must establish:
(1) benefits conferred on defendant by plaintiff;
(2) appreciation of such benefits by defendant; and
(3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.
Mitchell v. Moore, 729 A.2d 1200, 1204 (Pa. Super. 1999).

The Plaintiff may invoke equitable concepts of fairness and justness in his case in chief. However, the need for these considerations does not make the Plaintiff's claim solely an equitable one for which there is no right to a jury trial. As aptly stated, "a naked reference to equity or the use of equity does not convert a legal claim into an equitable one." *Dastgheib v. Genentech, Inc.*, 457 F. Supp.2d 536, 545 (E.D. PA. 2006).

The resolution of the issues presented in this case are easily within the ken of a lay jury. The jury's verdict does not require an esoteric knowledge of the law. For centuries, jurors in Pennsylvania have been asked to decide a diverse range of issues involving equity, justice and fairness. In this case, a jury can appropriately decide whether the Plaintiff conferred a benefit on the Defendants and whether it is unjust for the Defendants to retain the benefit.

CONCLUSION

The Defendants' Motion is untimely and the issue waived. The Plaintiff's cause of action existed prior to the adoption of the Pennsylvania Constitution in 1790 with an attendant right to a jury trial at common law. Accordingly, the Defendants' Motion to Strike the Plaintiffs Demand is **DENIED.**

ORDER

AND NOW, to-wit, this 22nd day of October, 2014, for the reasons set forth in the accompanying Opinion, the Motion to Strike Jury Demand as filed by the Defendants is hereby **DENIED**.

The Motion to Set Pre-Trial Deadlines as filed by the Defendants is hereby **GRANTED** as follows:

The Plaintiff's Pre-Trial Narrative shall be filed on or before January 9, 2015.

The Defendant's Pre-Trial Narrative shall be filed on or before February 9, 2015.

All pre-trial Motions shall be filed on or before March 15, 2015.

This case shall be tried during the April, 2015 term of court.

BY THE COURT:
/s/ William R. Cunningham

MICHAEL DIMATTIO, EILEEN TIGHE, DREW CARLIN, NADIA CARLIN, Appellants
v.
MILLCREEK TOWNSHIP ZONING HEARING BOARD, Appellee
v.
TOWNSHIP OF MILLCREEK, Intervener

SPOT ZONING

A party has standing to appeal a rezoning ordinance, even when he/she does not own property contiguous to a subject property, when they are affected by the rezoning and opposed the rezoning at the municipal level. 53 P.S. §10908(3).

SPOT ZONING

The power to enact and amend zoning ordinance rests with a local municipality and it is not the role of a court to substitute its judgment for the municipality. Accordingly, a rezoning ordinance may only be overturned where the party challenging the rezoning ordinance establishes there has been an abuse of discretion or an error of law.

SPOT ZONING

Spot zoning exists where a small parcel of land is set apart from surrounding land without any reasonable basis, despite indisputable similarities between the subject property and the surrounding properties.

SPOT ZONING

A zoning reclassification of a parcel to a classification different than the surrounding areas in and of itself does not automatically mean spot zoning has occurred. Consideration of the differences in classification, the nature of the property, the nature of the surrounding properties and the actual changes that will result from the rezoning can affect the determination.

SPOT ZONING

A municipality is not bound by a comprehensive development plan and as a result, such a plan is not a basis through which a zoning ordinance can be challenged or invalidated.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 12963-2014

Appearances: Richard Perhacs, Esq., Attorney for Appellee
Evan Adair, Esq., Attorney for Intervener

OPINION

Cunningham, William R., Judge

The presenting matter is a land use appeal challenging the enactment of a rezoning ordinance. Because there was not an abuse of discretion or an error of law in the passage of the rezoning ordinance, the appeal is denied.

PROCEDURAL BACKGROUND

On June 3, 2014, the Millcreek Township Board of Supervisors (Intervener) passed Ordinance 2014-7 changing the zoning classification of a parcel of land bearing Millcreek Township Map Index Number 608-055 and Erie County Tax Index Number (33)185-554-026 (subject property) from a mix of RR Rural Residential and R-1 Single Family Residential classifications to an R-2 Low Density Residential classification.[1] Appellants

[1] While not named as a Defendant, Millcreek Township Board of Supervisors was granted leave to intervene since it passed the ordinance being challenged herein.

filed an appeal to the Millcreek Zoning Hearing Board (Appellee) seeking to invalidate Ordinance 2014-7 (rezoning ordinance). Upon the denial of their appeal, Appellants filed the present appeal requesting the same relief.

STANDING TO CHALLENGE THE REZONING ORDINANCE

The subject property fronts on Golf Club Road, which is a continuation of Old Zuck Road. The only means of ingress and egress for the subject property is through Old Zuck Road from its intersection with Zimmerly Road. Appellants live in homes in the 5600 and 5700 block of Old Zuck Road, locations which are north of the subject property approximately six-tenths of a mile and three-quarters of a mile. Two of the Appellants live near the intersection of Old Zuck Road and Zimmerly Road while the other two Appellants live closer to the subject property and have three young children.

Since Old Zuck Road is the only means of access to the subject property, Appellants are affected by the rezoning of the subject property. Appellants were given notice of the proposed rezoning of the subject property before the Millcreek Township Planning Commission and the Millcreek Township Board of Supervisors. Appellants appeared before both of these municipal bodies and expressed their objections to the rezoning of the subject property. Hence, Appellants have opposed the rezoning of the subject property at every municipal opportunity.

Accordingly, Appellants are aggrieved parties who have standing to challenge the rezoning ordinance despite the fact their properties are not contiguous to the subject property. See 53 P.S. §10908(3).

APPELLANTS' OBJECTIONS

Appellants are concerned about the possible impact of the development of the subject property on traffic for Old Zuck Road, for the safety of the residents on Old Zuck Road and a potential decrease in property values. Appellants expressed these concerns to the Millcreek Township Planning Commission. Appellants' objections were likely a factor when the owners of the subject property withdrew a prior request for a zoning re-classification to R-4, which is more expansive in land uses than R-2, R-1 and RR. Thereafter, when the owners of the subject property submitted a second request for rezoning, this time to an R-2 classification, the Millcreek Township Planning Commission recommended the denial of this request. Likewise the Erie County Department of Planning recommended the denial of the request for R-2 zoning.

Despite the opposition of these two planning bodies, by a unanimous vote the Intervener passed the rezoning ordinance amending the classification of the subject property to R-2. In the ensuing appeal, by a unanimous vote Appellee denied Appellants' request to invalidate the rezoning ordinance.

STANDARD OF REVIEW

Understandably, Appellants want to maintain the underdeveloped tranquility of the neighborhood. To do so, however, requires Appellants to impose their will upon the owners of the subject property. Appellants seek to prevent the owners of the subject property from developing it beyond the restrictions of RR and/or R-1. It becomes the responsibility of the Intervener to balance the interests of the owners of the subject property with the interests of nearby landowners, as well as the township as a whole, in making a zoning decision.

The inherent power to enact or amend zoning ordinances rests with the local municipality.

53 P.S. §10601, et seq. The passage of a zoning ordinance is fundamentally a legislative act of the municipality. It is not the role of a court to substitute its judgment for the municipality in determining zoning classifications. It is the burden of the party challenging the rezoning ordinance to establish its passage was an abuse of discretion or an error of law.

ISSUES ON APPEAL

Appellants present three issues in this appeal. First, Appellants argue the rezoning ordinance is unconstitutional because it is discriminatory spot zoning. Next, Appellants contend the development of the subject property will have a negative impact on the public health, safety, morals and general welfare. Lastly, Appellants seek to invalidate the rezoning ordinance because it is inconsistent with the Intervener's long range zoning plan. Each of these arguments will be addressed seriatim.

A. Spot Zoning

The Pennsylvania Supreme Court has described spot zoning as the "unreasonable or arbitrary classification of a small parcel of land, dissected or set apart from surrounding properties, with no reasonable basis for the differential zoning." *Penn Street, L.P., v. East Lampeter Township Zoning Hearing Board*, 84 A.3d 1114, 1121 (2014). Among the requisite elements of spot zoning are the indisputable similarities between the subject property and its adjoining properties and the lack of any rational or reasonable basis to treat the subject property differently. As the Pennsylvania Supreme Court posed it, the question is "whether the parcel in question is being singled out for treatment unjustifiably differing from that of similar surrounding land, thereby creating an island having no relevant differences from its neighbors." *Appeal of Mulac*, 210 A.2d 275, 277 (1965).

In the case sub judice, the analysis begins with a look at whether a reclassification from R-1 to R-2 creates the possibility of spot zoning. In most respects, the differences between the two zoning classifications are not significant. The developmental restrictions for properties in R-2 are similar to those in R-1 in terms of setbacks, maximum building heights, maximum lot coverage and minimum lot widths.

There are differences between the R-2 and R-1 classifications in density restraints. R-1 classifications are restricted to single family dwellings or a group residence serving up to six residents. R-2 classifications allow single family homes, two family dwellings or a group residence serving twelve residents. Apartment complexes, high rise buildings and commercial uses are not permitted in R-1 or R-2.

If public water and sewer services are available, the maximum density of development in an R-1 classification is 4.25 dwelling units per acre versus 6 units per acre in an R-2 classification. If public water or sewer is not available, both R-1 and R-2 classifications mandate larger lot sizes resulting in lower density in each classification.

Both R-1 and R-2 are characterized as "Low Density" classifications and there are not such drastic differences that a re-classification from R-1 to R-2 alone would create spot zoning. It is much harder to establish spot zoning from R-1 to R-2 than it would be from a reclassification from R-1 to R-4. Nonetheless, the possibility of spot zoning exists so the next factors to consider are the size and density of the subject property with its R-2 classification.

The subject property consists of 24.186 acres of vacant, undeveloped land. The rezoning of a parcel the size of the subject property does not single it out for treatment unjustifiably different from the surrounding properties or the properties of Appellants, who live over

one-half mile away on lots much smaller than the subject property.

Applying the density restrictions of R-1 and R-2 does not result in unjustifiable treatment for the subject property. The density of the subject property is first determined by the amount of developmental acreage within it. At most, about one-half of the subject property can be developed.

According to Appellants' Exhibit 12, there are four separate areas within the subject property designated as undevelopable wetlands. The largest wetlands is on the western part of the subject property identified as "A". There is a discrepancy in computing the acreage of A: on the survey it is described as 9.276 acres while in the summary of property highlights it is described as 4.843 acres. The other three wetlands, noted as B, C, and D respectively, together consist of .794 of an acre. Appellants use the lower figure for A to argue there are 5.637 acres of wetlands while the Appellees and Intervener use the larger figure for A to conclude there are 10.070 acres of wetlands. To the naked eye viewing the survey, the wetlands appear to be much closer to 10 acres than 5.637 acres.

Nonetheless, using these two figures means approximately twenty-five to forty percent of the subject property is not developable because of wetlands. The varying sizes and locations of the four wetland areas means the subject property is not neatly arranged for full development. In addition, the infrastructure requirements and topographical impediments reduce the amount of the acreage that can be developed on the subject property. Appellants contend there are about twelve acres of developable land on the subject property. While Appellants' number is the most optimistic pre-development possibility, it will be used to consider the resulting density.

Because of its unique characteristics, the 24 acres of the subject property is reduced by half to 12 acres for development. This means there are at least 12 acres that will remain uninhabitable consistent with the wishes of Appellants. More importantly, it means that what differences exist in the density requirements between R-1 and R-2 are diluted by fifty percent because 12 acres of development are spread over 24 acres.

Applying the density differences of R-1 and R-2 classifications over 12 acres, with the other 12 acres remaining undeveloped, does create a sufficient disparity with the adjoining properties tantamount to spot zoning. As found by Appellee, "(b)oth R-1 and R-2 constitute low density residential uses, in one case single family dwellings and in another, townhouses or duplexes. They are not fundamentally inconsistent with each other and locating them in proximity to each other certainly reflects a rational planning result." *Adjudication, September 25, 2014*, p.2.

Another factor in determining spot zoning is whether the subject property is similar to its surrounding properties. According to Appellants, the combined length of Golf Club Road and Old Zuck Road to its intersection with Zimmerly Road is approximately one mile and consists of sixteen single family residences, a private school and a public golf course. Appellants contend the subject property is similar to its surrounding properties in terms of large lot sizes and topographical features including wooded lots, hills, creeks and ravines. All of the surrounding properties in Millcreek Township have RR or R1 classifications and are used as single family homes with the notable exceptions of the golf course and school. However, these similarities do not mean the rezoning of the subject property created an "island" within Millcreek Township.

The bulk of road frontage for the subject property is on Golf Course Road across from a

public golf course. The western border of the subject property is also limited by the public golf course. Its eastern border is the I-79 interstate highway. Its southern border is the boundary line separating Millcreek Township from Summit Township, thus only three of its borders are in Millcreek Township. At most the subject property could be argued to be a "peninsula" within Millcreek Township.

Importantly this is not a case where the peninsula is surrounded by single family homes. To the contrary, none of the adjoining properties have a single family residence; the nearest residence is approximately two-tenths of a mile to the north. The adjoining property to the east can never contain single family homes because of the interstate highway. The parcels to the north and west of the subject property consist of a public golf course owned by Millcreek Township. Most, if not all, of the southern border is with Summit Township.

As a result, this is not a case where the rezoning of the subject property caused disparate treatment for similar properties. In fact, before and after its rezoning, the subject property was fundamentally different from its adjoining properties. The subject property is unique in its neighborhood because no other property on Old Zuck Road or Golf Course road is bounded by the constraints facing the subject property.

The rezoning of the subject property does not create an island or a peninsula constituting spot zoning. Because of its location, size and unique developmental challenges, the subject property was not singled out for zoning treatment which is unjustifiably different from its surrounding golf course, interstate highway and Summit Township. This is not a situation where apartment complexes, high rise developments or commercial uses are occurring in the middle of a residential neighborhood, particularly since there are no homes surrounding the subject property.

Based on the record, the decision to rezone the subject property was not arbitrary or unreasonable.

B. The Public Health, Safety, Morals and General Welfare of the Community

Appellants allege the Intervener did not adduce any evidence that the rezoning of the subject property promotes public health, safety, morals and general welfare. However, in light of the finding that spot zoning does not exist in this case, the issue of whether the rezoning ordinance serves the public health, safety, morals and general welfare of the municipality is not reached.

A zoning ordinance is presumed to be valid. *Mahoney v. Township of Hampton*, 651 A.2d 525, 526 (Pa. 1994). Further, "if the validity of the ordinance is debatable, the legislative judgment is allowed to control." *Sharp v. Zoning Hearing Bd of Township of Radnor,* 157 Pa. Com. 50, 63 (1993). Appellants' allegation alone, in the absence of spot zoning, is not a basis for relief since this Court cannot substitute its judgment on whether the legislative discretion exercised by the municipality serves the public health, safety, morals or general welfare.

As observed by the Pennsylvania Supreme Court, "what serves the public interest is primarily a question for the appropriate legislative body in a given situation to ponder and decide. And, so long as it acts within its constitutional power to legislate in the premises, courts do well not to intrude their independent ideas as to the wisdom of the particular legislation. Specifically, with respect to zoning enactments, judges should not substitute their individual views for those of the legislators as to whether the means employed are likely to serve the public health, safety, morals or general welfare." *Bilbar Construction Co. v. Easttown Township Board of Adjustment,* 141 A.2d 851, 865 (1958).

In this case there is no basis to find the rezoning ordinance unconstitutional, thus the presumption of its validity has not been overcome by Appellants. Accordingly, judicial deference is given to the legislative discretion exercised by the Intervener in passing the rezoning ordinance. *Langmaid Lane Homeowners Ass'n Appeal*, 77 Pa. Com. 53, 465 A.2d 72 (1983).

C. Comprehensive Plan

Appellants' Exhibit 37 is titled Millcreek Township Future Land Use Plan Map (hereafter Comprehensive Plan). By color coding the Comprehensive Plan shows the subject property as "Parks and Recreation." Appellants contend the rezoning of the subject property has to be vacated because it is not consistent with the Comprehensive Plan. This argument is legally untenable for several reasons.

It is uncontroverted the subject property is privately owned. Absent an eminent domain taking, a government entity cannot compel private property to become a park. Likely for that reason, Millcreek Township does not have a zoning classification of "Parks and Recreation."

The prior classification of the subject property as R-1 permitted single family homes or group homes, both of which are inconsistent with a designation as "parks and recreation". Hence, even if Appellants succeeded in this appeal, the subject property would still be inconsistent with the Comprehensive Plan.

In making zoning determinations, a municipality is not bound by its comprehensive plan. A zoning ordinance cannot be challenged or invalidated on the basis it is inconsistent with a comprehensive plan. 53 P.S. §10303(c). The law recognizes that a comprehensive plan is a fluid vision taken as a snapshot in time and subject to revision as circumstances change. Therefore, Appellants reliance on Exhibit 37 cannot be a basis for invalidating the rezoning of the subject property.

CONCLUSION

Appellants bear a heavy burden of proof because merely restating their reasons why the ordinance should not have passed is not enough to prevail on appeal. Appellants' arguments had sufficient merit to create debate about whether the rezoning ordinance should be passed within the legislative arena of the local municipality. However, once it was passed, the debate is over and Appellants have a loftier mountain to climb to establish the rezoning ordinance is unconstitutional spot zoning.

Based on this record the Millcreek Township Board of Supervisors did not commit an error of law or abuse its discretion in rezoning the subject property to R-2. While this Court is empathetic to the concerns expressed by the Appellants, the law requires the denial of their challenge to the rezoning ordinance.

ORDER

For the reasons set forth in the accompanying Opinion, the appeal is DENIED.

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

ALEX C. MOFFETT, Plaintiff

v.

ANDREA M. MOFFETT, Defendant

CHILD CUSTODY AND RELOCATION

The court's primary consideration in child custody matters is the best interest of the child.

CHILD CUSTODY AND RELOCATION

Relocation occurs when a change in a residence of the child would significantly impair the ability of the nonrelocating party to exercise custodial rights.

CHILD CUSTODY AND RELOCATION

In determining whether to grant relocation, a court must consider both whether the relocating parent having custody is in the best interest of the child and 10 additional factors, including the nature of the ties the child has to her current residence, the impact of the relocation, the feasibility of preserving relationship between the child and nonrelocating parties, the child's preference, whether the relocation will enhance the general quality of life, the motivation of the parties in seeking or opposing relocation, and present or past abuse and risk of it continuing.

CHILD CUSTODY AND RELOCATION

The party proposing the relocation has the burden to establish that the relocation is in the best interest of the child, but each party has the burden to establish the integrity of the party's motives in relation to their position on the relocation.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
FAMILY DIVISION - CUSTODY NO. 12358-2013

Appearances: Bruce Sandmeyer, Esq., for the Plaintiff
Patrick W. Kelley, Esq., for the Defendant

MEMORANDUM OPINION

Brabender, J., April 16, 2015

The matter is before the Court on the Request for Adversarial Hearing and Petition for Relocation filed by the Defendant, Andrea M. Moffett, the child's mother. The Plaintiff is Alex C. Moffett, the child's father. The child is Alauna Moffett, who is two years old, born January 1, 2013. The mother wants to relocate with the child to Las Vegas, Nevada. After a hearing on April 1, 2015, the Court finds it is in the child's best interests to award the mother continued primary physical custody; to grant the mother's relocation request; and to establish a suitable schedule of partial physical custody for the father.

BACKGROUND

The parties were married. Following the child's birth, the parties lived together for seven (7) months until early August, 2013, when they separated following a domestic violence incident. During the incident, the father, while intoxicated, bit the mother on the left side of the mother's face, bruising it badly.

Since August, 2013, the child has been in the mother's primary care.

Pursuant to the initial custody Order of April, 2014, the mother was awarded primary

physical custody, and the father was awarded partial physical custody on Monday, Wednesday, and Friday, from 3:00 p.m. to 8:00 p.m. The next custody Order of November, 2014, expanded the father's custodial time to include Sundays from 3:00 p.m. to 8:00 p.m., and Tuesdays and Thursdays by mutual agreement. This is the current Order.

The father has been physically abusive toward the mother. The mother has displayed physical aggression toward the father during custody exchanges. At times, the mother has refused to release the child to the father's care. The mother testified the father takes the mother to court at every opportunity. The mother testified the numerous occasions the father served the mother with legal papers at her former place of employment was a reason the mother's employment at her last job was terminated. The mother testified the conflict between the parties was extreme, but has mellowed somewhat in the past month or two.

Numerous Contempt Petitions and Petitions for Special Relief have been filed by the parties, highlighting the high degree of conflict between them.[1]

The mother's Petition for Special Relief filed in June, 2014, concerned an incident which occurred while the child was in the father's care. The incident involved a dispute between a paternal aunt and a cousin, where the cousin pulled out a gun and waived it back and forth in the child's presence. No harm to the child occurred. The ensuing custody Order directed the father to exercise all periods of partial custody at the father's residence, and to supervise the child at all times when the child was in the father's care. The father testified the cousin was recently sentenced concerning criminal charges which arose from the incident.

On December 9, 2014, the mother filed a Relocation Notice, advising of the mother's intent to relocate with the child to Las Vegas, Nevada. The mother proposed the mother and the child would reside with the mother's maternal aunt, Ann Flagella, age 44; a maternal cousin, Samantha Brutto, age 27; and a child, Kaleah Huston, age 7. The mother advised she wanted to relocate due to a career opportunity. The mother proposed the mother would return with the child to Erie, Pennsylvania, every three months for the child to spend one week with the father. The mother proposed the child would spend one month with the

[1] On June 5, 2014, the mother filed a Petition for Special Relief, alleging a gun was pointed at the child during an incident that occurred while the child was in the father's care. An Amended Consent Order was entered, whereby the father agreed to exercise his periods of custody at a specific address, and the child would remain under the father's constant supervision when in the father's care.

On June 5, 2014, the father filed a Contempt Petition. On June 12, 2014, the father filed a Petition for Special Relief. In both Petitions, the father alleged the mother withheld the child from the father. On July 1, 2014, the Court dismissed with prejudice both Petitions. The Court directed the parties to abide by the existing custody Order.

On October 13, 2014, the mother filed a Petition for Contempt. A Contempt Hearing was scheduled for November 5, 2014.

On October 16, 2014, the father filed a Contempt Petition. The hearing on the father's Contempt Petition was scheduled for November 5, 2014.

On October 20, 2014, upon the father's oral Motion for Special Relief, the Court directed the mother to follow the schedule established by the Order of April 8, 2014. The Court issued a 72-Hour Bench Warrant for the arrest of the mother for consideration of contempt for non-compliance with the custody Order.

On November 6, 2014, the Court entered Orders relative to the parties' pending Contempt Petitions, finding neither party in contempt.

On December 29, 2014, the father filed the most recent Petition for Contempt, alleging the mother was not complying with the current Order. A hearing on the Contempt Petition was scheduled for February 3, 2015. On January 23, 2014, the Court permitted the father to amend the Contempt Petition to allege the mother left the jurisdiction without the father's consent. On February 5, 2015, the Court determined the mother was not in contempt.

father during the summer, and the child would spend all major holidays with both parents in Erie.

On December 15, 2014, the father timely filed a Counter Affidavit objecting to the proposed relocation. On December 16, 2015, the father filed a Modification Petition, further objecting to the proposed relocation.

In February, 2014, the mother requested an Adversarial Hearing regarding the relocation request. On February 20, 2014, the Court directed the Custody Order of November 14, 2014 was to remain the status quo.

The child did not attend the de novo hearing on April 1, 2015.

DISCUSSION

The Mother

The mother is 23 years old. She resides with the child in Erie, Pennsylvania. The mother is unemployed and is living off her savings. She last worked at a local bar/restaurant. She is approximately 15 credits short of receiving an Associate Degree. The child's maternal grandmother and a maternal aunt reside in Erie. The mother does not have significant involvement with other extended family members.

The mother is actively engaged in parenting the child, and ensures the child's needs are met on a regular, consistent basis.

The Father

The father resides in Erie, Pennsylvania, with his girlfriend; the father's 10 year-old son, Alex; and the girlfriend's child. The father testified he has two other children: a daughter, who is eight or nine years old; and a son, who is four years old with special needs, who resides in Florida.

The father testified he is employed in maintenance at a local barber shop.

The father exercised custodial time pursuant to the current Order for approximately four months, until March, 2015. The mother testified the father currently exercises partial physical custody approximately 15 hours per week.

When the child is in the father's care, the father performs parental duties sufficient to meet the child's needs.

The father pays child support for the child.

The father admitted that in February, 2015, he told a support conference officer the father started a business performing live sex shows on the internet, and did one show before being criminally charged in December, 2014. The father testified the charges are pending.

The Child

The child is two years old. No special needs were identified. The child does not attend day care. The child, at this age, is not actively involved in the community.

The Mother's Relocation Request

The mother wants to relocate to Las Vegas, Nevada, because her maternal aunt, Ann Flagella, who has extensive experience in the entertainment industry and operates an entertainment production company in Las Vegas, has offered the mother permanent, full time-employment in Las Vegas at $60,000.00 per year. The mother wants to improve the quality of her life and that of the child, and believes this employment opportunity will

permit her to do so.

The position offered to the mother is that of Executive Assistant, assisting with publicity and payroll for an entertainment tour. Training for the position, flexible work hours, and flexible work conditions will be supplied. Flagella will also provide temporary housing for the mother and child in Flagella's six-bedroom residence.

Flagella offered the mother the position because she has two openings to fill; she is familiar with the mother's qualifications; she believes the mother can suitably perform the job duties; and she wants to first make the opportunity available to a family member in order to assist her family. Flagella first mentioned the job opportunity to the mother in November, 2014, and subsequently flew the mother to Las Vegas to engage in further discussions. The mother subsequently asked the father for permission to relocate with the child. The father opposed the request.

If the relocation request is granted, the mother and child would reside with Flagella, and Samantha Brutto, the mother's cousin, and Brutto's two children, ages seven and three.

Brutto has been employed by Flagella in Las Vegas as a personal assistant since October, 2014. Brutto formerly resided in Erie. Brutto's position is flexible, and will permit Brutto to provide babysitting/day care assistance to the mother as needed. There are also suitable daycare facilities in the area.

The mother, Flagella, and Brutto have close relationships with one another.

The mother testified she wants to accept the position because it is a full-time, permanent position at a significant rate of pay; the mother wants to leave behind violence in Erie, as demonstrated by the incident involving the paternal relative who pulled a gun and pointed it in the child's direction while the child was in the father's care; and the mother wants to achieve her potential. In sum, the mother believes her life, and the life of the child, will be improved by the relocation.

If relocation is permitted, the mother proposes to facilitate the child's relationship with the father by traveling to Erie with the child once every three months, and remaining in the Erie area for one week each time, to afford the father custodial time with the child. The mother also proposes she would travel with the child to Erie for one month each summer. The mother also proposes she would travel with the child to Erie as many additional times as possible, including holidays. The mother proposes she would provide equipment to allow the father to communicate with the child and attend the child's medical appointments via electronic means or the internet. The mother's proposals for travel to Erie with the child are feasible, based on the salary the mother would receive.

The father testified he opposes the relocation request because he had regular contact with the child prior to the initial custody Order of April, 2014; the father has actively parented the child; and the father has provided assistance to the mother with regard to the child. The father also testified he believes the child would miss the father; relocation would negatively impact the father-child relationship; and the mother is looking for a "hand-out".

LEGAL STANDARDS

Under the Custody Act, 23 Pa.C.S.A. §§5321-5340, the court's primary consideration in child custody matters is the best interest of the child. *23 Pa.C.S.A. §§5323(a); 5328.* The Custody Act requires the court to determine the best interest of the child utilizing the factors set forth at §5328(a)(1 through 16) in ordering any form of custody. *23 Pa.C.S.A.*

§§5323(a); 5328.

The Court must also consider ten relocation factors in determining whether to grant a proposed relocation. *23 Pa.C.S.A. §5337(h)(1 through 10).* "Relocation" is defined as "[a] change in a residence of the child which significantly impairs the ability of a nonrelocating party to exercise custodial rights." *23 Pa.C.S.A. §5322(a); See also C.M.K. v. K.E.M.*, 45 A.3d 417, 421 (Pa.Super. 2012). The proposed change of residence from Erie, Pennsylvania to Las Vegas, Nevada involves a relocation within the contemplation of §5322(a).

The party proposing the relocation has the burden of establishing that the relocation will serve the best interest of the child as shown under the relocation factors. *23 Pa.C.S.A. §5337(h); 23 Pa.C.S.A. §5337(i)(1).* Each party has the burden of establishing the integrity of that party's motives in either seeking the relocation or seeking to prevent the relocation. *23 Pa.C.S.A. §5337(i)(2).*

CONCLUSIONS AND ANALYSIS

Utilizing the relevant best interest factors at 23 Pa.C.S.A. §5328(a)(1 through 16), and the relocation factors at 23 Pa.C.S.A. § 5337(h)(1 through 10), the Court concludes it is in the child's best interests to award the mother primary physical custody, and to grant the mother's request to relocate with the child.

The mother established it is in the child's best interests to primarily reside with the mother and for the mother to retain primary physical custody, pursuant to the best interest factors at 23 Pa.C.S.A. § 5328(a)(1 through 16). The mother established the proposed move is in the child's best interests pursuant to the relocation factors at 23 Pa.C.S.A. §5337(h)(1 through 10).

Each party established the integrity of their motives in seeking to relocate and in opposing the relocation request. The mother genuinely believes her life and the life of her child will be improved if she relocates with the child to Las Vegas, Nevada. The mother, currently unemployed, has an offer of employment at a significant salary in Las Vegas through a maternal aunt. Suitable housing for the mother and child is available at the aunt's residence. Babysitting is available through an adult cousin, who resides with the maternal aunt. There are also daycare facilities in the area. The mother has a close relationship with the maternal aunt and the mother's adult cousin. The mother wants to relocate to improve her economic situation and hence, that of the child. The mother established the integrity of her motives in seeking relocation with the child.

The father's objections to relocation include the father's beliefs the move will have a detrimental impact on the relationship between the father and the child, and the child will miss the father, thus relocation is not in the child's best interests. In this respect, the father established the integrity of his motives in opposing relocation.

BEST INTEREST FACTORS

Utilizing the relevant best interest factors at 23 Pa.C.S.A. §5328(a)(1 through 16) the Court finds it is in the child's best interests to award the mother continued primary physical custody. The mother has been the child's primary custodian since the parties separated, for nearly three-fourths of the child's life. The father does not seek primary physical custody. **§5328(a)(1) Which party more likely to encourage and permit frequent and continuing contact between child and another party.** On the whole, this factor is neutral, and does not favor either party. The parties are frequently at odds with one another. Since the initial

custody Order of April, 2014, multiple Contempt Petitions and Petitions for Special Relief have been filed.

§5328(a)(2) Present and past abuse by party or household member, any continued risk of harm to child or abused party and which party can better provide adequate physical safeguards and supervision. No evidence of physical abuse by either party as to the child was introduced. The parties' relationship is marred by domestic violence. The father was physically abusive toward the mother. The parties separated on August 2, 2013, after the father bit the mother on the left side of her face, causing significant bruising. The police were called, though no charges were filed. The mother has been physically aggressive toward the father during custody exchanges.

§5328(a)(3) Parental duties performed by each party. Each parent performs parental duties sufficient to satisfy the child's physical and emotional needs, when the child is in that parent's care. Since the parties separated in August, 2013, the child has been in the mother's primary care, and the mother is the person who has most consistently performed routine parental duties. When the child is in the father's care, he performs parental duties on behalf of the child. The father has not sought modification of an order to include overnight physical custody. This factor favors the mother.

§5328(a)(4) Need for stability and continuity in child's education and family and community life. As with all children, the child needs stability in her life. Following termination of the mother's employment, the child ceased going to day care. The child, only two years old, is not yet actively involved in the community.

§5328(a)(5) Availability of extended family. The child has a relationship with a maternal grandmother and, to a lesser extent, with "Aunt Lisa", both of whom reside locally. The child does not have significant relationships with other extended family members.

§5328(a)(6) Child's sibling relationships. The mother testified the child has four paternal half-siblings. The father testified he has three other children: Alex, a 10 year-old son, who resides with the father; a daughter, age eight or nine; and a four year-old son with special needs who resides in Florida. When the child is in the father's care, the child has some contact with Alex. There is a significant difference in age between Alex and the child. No evidence was adduced about the child's relationships with the paternal half-siblings.

§5328(a)(7) Well-reasoned preference of child, based on child's maturity and judgment. The child is young, at two years old. The child did not attend the hearing and was not interviewed by the Court.

§5328(a)(8) Attempts of parent to turn child against other parent, except if domestic violence where reasonable safety measures are necessary to protect child. There is no evidence either parent has attempted to turn the child against the other parent.

§5328(a)(9) Which party more likely to maintain loving, stable, consistent and nurturing relationship with child adequate for child's emotional needs. The Court believes the mother is person most likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for her emotional needs. The mother has been the child's primary caregiver for the vast majority of the child's life, since the parties separated in August, 2013.

§5328(a)(10) Which party more likely to attend to child's daily physical, emotional, developmental, educational and special needs. No special needs were identified. The

child is not yet school-age. As the mother is the person who has most regularly attended to the child's daily physical, emotional, and developmental needs since the parties' separation, the Court believes the mother is the party most likely to continue attending to these needs. The father does not request primary physical custody.

§5328(a)(11) Proximity of residences of parties. Currently, the parties reside in Erie, and proximity of residence is not an issue. However, the mother has petitioned for permission to relocate with the child to Nevada. The relocation factors will be addressed below.

§5328(a)(12) Availability to care for child or ability to make appropriate child care arrangements. The mother has the availability to care for the child or the ability to make appropriate child care arrangements. The father is employed. Currently, the mother is not employed, and thus has greater availability to personally care for the child. However, the mother has petitioned for permission to relocate with the child, in significant part due to an offer of employment. The relocation factors will be discussed below. Following the domestic incident in approximately June, 2014, when a paternal cousin pulled out a gun and waived it back and forth in the child's presence while the child was in the father's care, the court directed the father to exercise all periods of custodial time at the father's residence, and to supervise the child at all times when in the father's care.

§5328(a)(13) Level of conflict between the parties and willingness and ability to cooperate with one another. Effort to protect child from abuse by party not evidence of unwillingness/inability to cooperate. In general, the level of conflict between the parties is high, though the mother testified the level of conflict has decreased in recent months. The parties have demonstrated difficulty in communicating regarding custody matters, and in cooperating with one another.

§5328(a)(14) History of drug or alcohol abuse of party or member of party's household. The parties denied a history of substance abuse. The incident of August, 2013, when the father bit the mother on the face, occurred while the father was intoxicated.

§5328(a)(15) Mental and physical condition of party or member of party's household. No evidence was introduced about a mental or physical condition of a party or member of a party's household that would interfere with the performance of child care duties.

§5328(a)(16) Any other relevant factor. There are none at this time.

RELOCATION ANALYSIS

Utilizing the relevant relocation factors at 23 Pa.C.S.A. §§5337(h)(1 through 10), the Court finds it is in the child's best interests to grant the relocation request.

§5337(h)(1) Nature, quality, extent of involvement and duration of child's relationship with party proposing to relocate and with nonrelocating party, siblings and other significant persons in child's life. The mother has been the child's primary custodian since the parties separated, for nearly three-fourths of the child's life. The mother has consistently performed parental duties on behalf of the child. The father testified he had regular contact with the child up to the initial custody Order of April, 2014. Pursuant to the initial Order, the father was awarded partial physical custody on Monday, Wednesday, and Friday, from 3:00 p.m. to 8:00 p.m. The next custody Order of November, 2014, expanded the father's custodial time to include Sundays from 3:00 p.m. to 8:00 p.m., and Tuesdays and Thursdays by mutual agreement. This is the current Order. The father

has not had overnight visitation since the initial custody Order. The father does not seek primary physical custody. The mother testified the father currently exercises custodial time approximately 15 hours per week. The child has a relationship with the maternal grandmother, and an aunt, both of whom reside locally. When the child is in the father's care, the child has some contact with a paternal half-sibling, Alex, who is ten years old. There is a significant difference in age between Alex and the child. The two other paternal half-siblings do not reside with the father. One of the half-siblings has special needs and resides in Florida. No evidence was adduced about the child's relationships with the paternal half-siblings.

§5337(h)(2) Age, developmental stage, needs of child and likely impact of relocation on child's physical, educational and emotional development, taking into consideration any special needs of child. The child is young, at age two. No special needs were identified. Given the child's age, and the absence of special needs, it is not anticipated relocation would negatively impact the child's physical or educational development. It is anticipated relocation will have some emotional impact upon the child. The mother and child will initially reside with Ann Flagella, the mother's maternal aunt; Samantha Brutto, the mother's adult maternal cousin; and Brutto's two children. Flagella, the mother, and Brutto have positive, supportive relationships. It is anticipated the mother's supportive living environment will minimize the emotional impact upon the child. It is anticipated the willingness of the mother to facilitate visitation with the father will minimize the emotional impact. It is anticipated the derivative benefits the child will receive from the benefits to the mother from relocation, will minimize the emotional impact.

§5337(h)(3) Feasibility of preserving relationship between nonrelocating party and child through suitable custody arrangements, considering logistics and financial circumstances of parties. It will be feasible to preserve the child's relationship with the father through suitable custody arrangements, considering logistics and financial circumstances. The father has never been awarded overnight physical custody. The mother credibly testified the father does not fully exercise the current physical custody periods available to him. The mother is willing to return to Erie once every three months for one week, during which the father may exercise physical custody. The mother will also make the child available for partial physical custody for one month during the summer, and on major holidays. The mother's employment opportunity will provide the mother with the financial means to provide transportation for herself and the child to facilitate visitation periods with the father.

§5337(h)(4) Child's preference, taking age and maturity of child into consideration. The child, age two, did not attend the *de novo* hearing.

§5337(h)(5) Whether there is established pattern of conduct of either party to promote or thwart relationship of child and other party. Neither party submitted evidence of this.

§5337(h)(6) Whether the relocation will enhance general quality of life for party seeking relocation, including, but not limited to, financial or emotional benefit or educational opportunity. Relocation will enhance the general quality of the mother's life. The mother will be employed by Ann Flagella, a maternal aunt with whom the mother has a positive relationship. Flagella is willing to train the mother, and provide her with flexible

work conditions. The mother will receive a salary of $60,000.00, a significant salary for the mother's age, current education, and experience. The mother is currently unemployed. Through the offered employment, the mother has an opportunity to better her life, and the life of the child. The mother will also emotionally benefit from distancing herself from a contentious relationship with the father, who has been physically abusive to the mother.

§5337(h)(7) Whether relocation will enhance general quality of life for child, including but not limited to, financial or emotional benefit or educational opportunity. It is anticipated the child will receive derivative benefits from the emotional and financial benefits the mother will receive from relocation.

§5337(h)(8) Reasons and motivation of each party for seeking or opposing the relocation. As indicated previously, the parties have met their respective burdens of proof in seeking and opposing the relocation. The mother wishes to improve the quality of her life and that of the child. The mother believes the employment opportunity with Flagella in Las Vegas will enable her to accomplish these goals. The father wishes to maintain a relationship with the child, and believes relocation will negatively impact the relationship.

§5337(h)(9) Present and past abuse committed by a party or member of party's household and whether there is a continued risk of harm to child or abused party. The parties have a dysfunctional relationship. The father has been physically abusive with the mother. On one occasion, he bit her on the left side of the face, causing significant bruising. The father testified the mother has been physically aggressive with the father during custody exchanges. There is no evidence either party has been abusive toward the child.

§5337(h)(10) Any other factor affecting the best interest of child. There are no other applicable factors.

CONCLUSION

It is in the child's best interest to award the parents shared legal custody. It is in the child's best interest to award the mother primary physical custody, and grant the mother's request to relocate with the child from Erie, Pennsylvania, to Las Vegas, Nevada. The father shall be granted partial physical custody consistent with the accompanying Order.

ORDER

AND NOW, to-wit, this 16th day of April, 2015, following a *de novo* hearing, and upon consideration of the best interests of the child, it is hereby **ORDERED** the mother's request to relocate with the child is **GRANTED**. The following custody Order shall remain in effect until further Order:

1. The parents shall share the legal custody of the child. The name and birth date of the child is as follows:

Alauna Moffett, born January 1, 2013

2. The mother shall have primary physical custody of the child, who shall reside with the mother. The mother shall be permitted to relocate with the child to Las Vegas, Nevada. The relocation shall occur no sooner than May 1, 2015.

3. Prior to relocation: The parties shall follow the schedule established by the Order of November 14, 2014. However, per that Order, the parties may amend the schedule by mutual agreement.

4. Following relocation: The father shall have partial physical custody as follows:

a. School Year: During the school year, the mother shall return with the child to Erie, Pennsylvania, every three months, at the mother's expense, for a one-week/seven-day period. Over the seven-day period the child is in Erie, the father may exercise partial physical custody on a daily basis for up to eight hours, from 10:00 a.m. until 6:00 p.m. The parties, by mutual agreement, may adjust the times of custody exchanges. Unless otherwise mutually agreed upon, the receiving party shall be responsible for custody exchanges. The mother shall give the father reasonable advance notice of the mother's plans for travel to Erie, to allow the father to plan for custodial time with the child.

b. Summer: During the summer, the mother shall return with the child to Erie, Pennsylvania, for one continuous four-week period, at the mother's expense. During this period, the father may exercise physical custody for up to four days per week, for up to eight hours per day. The parties shall reach agreement regarding the father's custody days, and the times when custody exchanges shall occur. Unless otherwise mutually agreed upon, the receiving party shall be responsible for custody exchanges. The mother shall give the father reasonable advance notice of the mother's plans for travel to Erie, to allow the father to plan for custodial time with the child.

c. The Holiday Schedule: Unless the mother is otherwise in Erie with the child, the holiday schedule shall be as follows. The mother shall give the father reasonable advance notice of the mother's plans for travel to Erie for Holidays, to allow the father to plan for custodial time with the child.

1. Thanksgiving: During even years, the mother shall travel with the child to Erie for at least four days for Thanksgiving and the weekend immediately following Thanksgiving. Each full day the child is in Erie, the father may exercise physical custody for up to six hours per day; each partial day the child is in Erie, the father may exercise physical custody for up to three hours per day. The parties shall reach agreement regarding the times of custody exchanges. Unless otherwise mutually agreed upon, the receiving party shall be responsible for custody exchanges.

2. Christmas: During odd years, the mother shall travel with the child to Erie for at least four days over the Christmas Holiday. Each full day the child is in Erie, the father may exercise physical custody for up to six hours per day; each partial day the child is in Erie, the father may exercise physical custody for up to three hours per day. The parties shall reach agreement regarding the times of custody exchanges. Unless otherwise mutually agreed upon, the receiving party shall be responsible for custody exchanges.

3. Easter: During even years, the mother shall travel with the child to Erie, Pennsylvania, for at least four days over the Easter Holiday. Each full day the child is in Erie, the father may exercise physical custody for up to six hours per day; each partial day the child is in Erie, the father may exercise physical custody for up to three hours per day. The parties shall reach agreement regarding the times of custody exchanges. Unless otherwise mutually agreed upon, the receiving party shall be responsible for custody exchanges.

5. **ALL HOLIDAY SCHEDULES SHALL SUPERSEED ANY OTHER PARTIAL CUSTODY OR VISITATION SCHEDULE UNLESS MUTUALLY AGREED UPON OTHERWISE.**

6. The mother shall facilitate regular telephone contact between the father and the child, at reasonable hours, taking into consideration the difference in time zones. Facebook, other social media, and e-mail may be used at the parties' election to facilitate communication between the father and child.

7. Each parent shall plan a birthday celebration for the child on one of their regularly scheduled custody days near the child's birthday.

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

9. Each parent is entitled to receive directly from schools, health care providers, or other relevant sources, information concerning the child. The mother shall supply to the father all authorizations necessary for the father to communicate with, and receive information directly from the child's medical, educational, and other providers. The father shall be responsible for returning the authorizations to the providers.

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

11. Each parent shall encourage the child to comply with the custody arrangement and foster in the child a positive view of the other.

12. This custody arrangement may be modified by agreement of the parties when required for the best interest of the child. The term "mutual agreement" contemplates good faith discussions by both parents to reach an agreement as to specific dates and times of partial custody or visitation, and the unilateral determination of one party to deny contact shall be viewed as a violation of this provision.

13. If not already done, the parties shall attend the "Children Cope With Divorce" seminar.

14. **NOTIFICATION OF OBLIGATIONS PRIOR TO RELOCATION.** Relocation is a change in the child's physical residence which significantly impairs the ability of a non-relocating party to exercise custody of the child. Relocation of the child shall not occur unless either (1) every individual with custody rights consents to the relocation; or (2) the court approves the relocation. For a full understanding of your rights and obligations regarding relocation, you must refer to Section 5337 of Pennsylvania's Domestic Relations Code. Nevertheless, as a general course of action, the following applies:

I. **Any party proposing relocation must:**

A. At least 60 days prior to relocation, send notice of the proposed relocation, *via certified mail, return receipt requested*, to every individual with custody rights to the child.

1. The notice shall include the address of the new residence; new mailing address; names and ages of individuals who will live in the new residence; home telephone number of the new residence (if available); name of the new school district and school; date of the proposed relocation; the reasons for the proposed relocation; a proposed custody schedule; any other information deemed appropriate and a warning that failure to file an objection to the relocation within 30 days after receipt of the notice will foreclose the non-relocating party from objecting to the

relocation.

2. If, subsequent to serving the notice of relocation, you become aware of information regarding the relocation that you did not previously have, you must promptly inform every individual who received notice of the relocation.

B. With the notice of relocation, you must *provide a counter-affidavit.* A form counter-affidavit is provided in the Domestic Relations Code (23 Pa.C.S.A. Section 5337).

C. If a timely objection to relocation is not filed, you must, prior to relocation, file: (1) an affidavit of notice; (2) proof of service that proper notice was given (the return receipt with the addressee's signature); (3) a copy of the full notice sent; (4) a petition to confirm the relocation and modify any existing custody order; and (5) a proposed order.

II. **Any party objecting to relocation must, within 30 days of receipt of the notice of relocation:** (1) complete and file with the court a verified counter-affidavit; and (2) serve a copy of the counter-affidavit on the other party *via certified mail, return receipt requested.* Failure to file a timely counter-affidavit to the relocation will preclude you from objecting to the relocation.

15. Jurisdiction of the aforementioned child and 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 and Enforcement Act, 23 Pa.C.S.A. Section 5401 et seq.

16. **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/ **Daniel J. Brabender, Jr., Judge**

COMMONWEALTH OF PENNSYLVANIA
V.
JUSTIN R. JOHNSON, DEFENDANT

EVIDENCE SUPPRESSION / CANINE SNIFF OF A VEHICLE

Only reasonable suspicion, not probable cause, is required for a canine sniff of a vehicle.

EVIDENCE SUPPRESSION / CANINE SNIFF OF A VEHICLE

The presence of a canine unit at a scene prior the existence of reasonable suspicion does not impact the validity of a search, as the existence of reasonable suspicion is assessed independent of the preparative steps of the officers.

EVIDENCE SUPPRESSION / CANINE SNIFF OF A VEHICLE

A warrantless search of the passenger area of a vehicle incident to a recent occupant's arrest is constitutional if the police have reason to believe the vehicle contains evidence relevant to the crime of arrest.

EVIDENCE SUPPRESSION / CANINE SNIFF OF A VEHICLE

A court must assess what facts were known to the officers at the time the search was conducted to determine if they had reason to believe the vehicle contained such evidence, and not what was ultimately found or subsequently discovered facts.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION NO. 2848 OF 2014

Appearances: Wayne G. Johnson, Jr., Esq., Attorney for Defendant

MEMORANDUM OPINION

Cunningham, William R., J. April 10, 2015

The present matter is a Motion to Suppress filed by the Defendant, Justin R. Johnson. After an evidentiary hearing and the submission of briefs, the Motion to Suppress is **DENIED.**

FACTUAL FINDINGS

On July 23, 2014, Detective Adam Hardner of the Millcreek Police Department was conducting surveillance near the Defendant's residence at the Granada Apartments with four other police officers. *Suppression Hearing Transcript, March 2, 2015 ("N.T."), pp. 5-7.* A canine unit was also present. *N.T. pp. 13, 17.* Prior to that day, Detective Hardner obtained an arrest warrant for the Defendant, which charged him with two counts of delivery of a controlled substance, two counts of possession of a controlled substance, and one count of possession of drug paraphernalia. *N.T. p. 7.* The charges arose out of two separate transactions when the Defendant allegedly sold crack cocaine to Detective Hardner. *N.T. pp. 7-8.*

Earlier on July 23, 2014, Detective Hardner requested an informant, with whom he had previously worked and found reliable, contact the Defendant to order a quantity of crack cocaine. *N.T. pp. 12-13.* The informant agreed to do so and made arrangements with the Defendant to make the drug sale that day. *N.T. p. 12.* The police were originally going to follow the Defendant to the meeting with the informant and conduct a "buy bust," meaning the Defendant would be arrested immediately after consummating the sale. *N.T. pp. 12-13.*

However, upon learning from the informant that the Defendant may be in possession of a black semiautomatic handgun, Detective Hardner decided to act on the existing arrest warrant prior to the sale to ensure the safety of all involved. *N.T. p. 13.*

When the Defendant left his apartment complex driving a brown Ford Explorer, the officers conducted a traffic stop to execute the arrest warrant. *N.T. p. 9.* The Defendant was in the driver's seat and Mary Powell, who also sold Detective Hardner crack cocaine on two occasions, was in the passenger seat. *N.T. p. 9-10.* Pursuant to the arrest warrant, the officers ordered the Defendant out of the car and took him into custody. *N.T. p. 10.* Mary Powell was arrested based on the prior offenses committed in Detective Hardner's presence. *N.T. p. 10.* The Defendant and Ms. Powell were briefly searched, placed in a marked police car, and transported to the Millcreek police department. *N.T. pp. 10, 15, 18.*

A canine walk-around search of the Ford Explorer was conducted and the canine alerted that contraband was in the vehicle. *N.T. p. 13.* Based on the canine's positive indication, the arrests of the passengers, the belief that the Defendant was on his way to conduct a drug sale and possibly armed, the officers searched the interior of the vehicle and discovered a black semi-automatic handgun underneath the front passenger seat. *N.T. pp. 14-15.*

Unbeknownst to the officers on the scene, a search of the Defendant at the police station yielded a plastic baggie containing cocaine that had been hidden in his shoe. *N.T. pp. 14-15.*

CONCLUSIONS OF LAW

A. Canine Search

While probable cause is required to conduct a canine sniff of a person, reasonable suspicion is sufficient to conduct a canine sniff of a vehicle. *Commonwealth v. Rogers*, 849 A.2d 1185, 1191 (2004). Reasonable suspicion exists where an officer can articulate specific observations which, in conjunction with reasonable inferences derived from those observations, led him reasonably to conclude, in light of his experience, that criminal activity is afoot. *Commonwealth. v. Caban*, 60 A.3d 120, 127 (Pa.Super. 2012). To determine whether an officer had reasonable suspicion at the time of the search, a court must look at the totality of the circumstances and any reasonable inferences that the officer may have drawn in light of his experience. *Id.* As a result, even a combination of innocent facts, when taken together, may constitute reasonable suspicion permitting further investigation by a police officer. *Commonwealth v. Kemp*, 961 A.2d 1247, 1255 (Pa.Super. 2008).

The Defendant argues that the higher standard of probable cause is required for a canine search of a vehicle, citing the recent Pennsylvania Supreme Court decision in *Commonwealth v. Gary*, 91 A.3d 102 (2014). There is no language in *Gary* stating that anything more than reasonable suspicion, as articulated in *Rogers*, is required to conduct a canine search of a vehicle. While the Supreme Court did find that the canine search was based on probable cause, the Supreme Court did not indicate that reasonable suspicion would not have been sufficient. Instead, the canine search was a factual predicate on which the Supreme Court based its analysis of the exigency requirement. The argument that *Gary* raised the standard required to conduct a canine search is inconsistent with the holding in *Gary*, which removed the exigency requirement to conduct a warrantless search of a vehicle.

The canine sniff of the Defendant's vehicle is valid, as the facts available to the officers at the time of the search were sufficient to meet the probable cause standard, and therefore

surpass the standard of reasonable suspicion. A police officer has probable cause to conduct a search when the facts available to him would warrant a person of reasonable caution to believe that contraband or evidence of a crime is present. *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). A fluid concept, probable cause exists where there is a fair probability that the reasonable, prudent person would act. *Id*.

The officers initiated a traffic stop in order to execute an arrest warrant for charges related to the possession and intent to deliver controlled substances. Detective Hardner knew that the Defendant and Mary Powell sold crack cocaine to him. The officers were aware that the Defendant was on his way to conduct a sale of crack cocaine and was likely armed. The informant's information had previously proven reliable and led to arrests and convictions of other drug dealers.

Detective Hardner has been a detective for over eight years. *N.T. p. 4.* He has been part of the special investigations unit, which primarily investigates narcotics, for over two years. *N.T. pp. 4-5.* He has had numerous occasions to make arrests for drug-related offenses and has attended a week long narcotics school for training. *N.T. p. 5.* Viewing the circumstances through Detective Hardner's experience, there was probable cause for the search.

The Defendant argues that the presence of the canine unit at the scene prior to the traffic stop being initiated negates the validity of the search. This argument is unpersuasive. When and from where the canine unit was summoned does not impact the validity of the search, as the police still have to establish the legal justification for any search. Once the officers determined that a search was warranted, the sniff occurred. The same search would have occurred, albeit with a delay, if the officers had to call in the canine unit from another location because the facts known to the officers at the time of the search were sufficient to meet the required standard.

Therefore, the canine sniff of the vehicle was a valid search.

B. Search Incident to Lawful Arrest

The gun was discovered pursuant to an independent and valid search incident to the lawful arrest of the Defendant. A warrantless search of the passenger area of a vehicle incident to a recent occupant's arrest is constitutional if, *inter alia*, the police have reason to believe that the vehicle contains "evidence relevant to the crime of arrest." *Arizona v. Gant*, 556 U.S. 332 (2009).

Here, the police searched the interior of the Ford Explorer soon after the Defendant's arrest based on the belief that the vehicle contained evidence relevant to the crime of arrest. The Defendant was arrested on charges relating to the possession and delivery of crack cocaine. At the time of the arrest, the arresting officers believed the Defendant was on his way to sell crack-cocaine to an informant. As such, it is reasonable to believe the Defendant would have controlled substances on his person or in his car.

After nothing was found on the Defendant's person contemporaneous with his arrest, the officers reasonably believed the Defendant's car contained controlled substances. This fact, in addition to the positive indication by the canine, supported the belief that the evidence of the crime of possession of a controlled substance would be located in the car. The fact that cocaine was found on the Defendant when he was searched at the police department

has no bearing on the belief that evidence would be found in the car because the officers at the scene were unaware of its discovery at the station. Similarly, the fact that a weapon, not drugs, was found as a result of the search has no effect on its validity. The facts known to the officers prior to the search are the same regardless of what the search yielded. The discovery of the gun was therefore a product of a valid and legal search.

CONCLUSION

The canine search of the Defendant's car was based on probable cause, which subsumes the standard of a reasonable suspicion of criminal activity. The search of the passenger area was an independently valid search incident to arrest based on the reasonable belief that the vehicle the Defendant was driving at the time of his arrest contained evidence related to the crime of arrest.

For the reasons stated herein, the Defendant's Motion to Suppress is **DENIED**.

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

LEE O'DONNELL, PAUL ELLINGTON and MARCY ELLINGTON, Appellants
v.
MILLCREEK TOWNSHIP ZONING HEARING BOARD, Appellee
TOWNSHIP OF MILLCREEK, Intervenor

Editor's Note: Reprinted with revisions from the Court.

STATUTORY INTERPRETATION

A statute should be construed, if possible, to give effect to all its provisions, and the intention of its drafters, which can be determined based on "the object to be attained" or "the consequences of a particular interpretation.". See 1 P.C.S.A. §1921(a)(b).

STATUTORY INTERPRETATION

Statutory words should not be interpreted in isolation, rather with reference to the context in which they appear.

STATUTORY INTERPRETATION

Common sense and practicality should be considered when interpreting a statute, both in construing the intent of the drafters and in the outcome of the specific interpretation.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 10062 OF 2015

Appearances: L.C. TeWinkle, Esq. for the Appellants
Richard Perhacs, Esq. for Millcreek Township Zoning Hearing Board
Evan Adair, Esq. for Township of Millcreek

OPINION

Cunningham, William R., J.

The presenting matter is a land use appeal challenging Appellee's denial of a building permit to the Appellants. For the following reasons, the appeal is **GRANTED**.

BACKGROUND

Appellants own Lot 10 of the Baer Beach Subdivision, a duly approved subdivision recorded in Erie County Map Book 8, page 110. The subdivision plots two rows of residential lots on each side of a road known as Lake Front Drive. The common address for Appellants' property is 3272 Lake Front Road, Erie, Pennsylvania ("subject property").

The subject property is located in the Lake Front Overlay District which is governed by Millcreek Township Zoning Ordinance §5.06.1 ("the Ordinance"). The Ordinance provides:

5.06.1 The Lakefront Overlay District, generally, shall encompass lands in Millcreek Township along the shore of Lake Erie and extending inward (as its width) a distance of 250 feet.

5.06.2 Maximum height of a front row dwelling shall not exceed twenty feet (20').

5.06.3 In each additional row of dwellings, the maximum allowed height may be increased by five feet (5'), to a maximum height of thirty-five feet (35') in developments having four or more rows of dwellings.

> **5.06.4 In the case of a single row of dwellings,** the maximum height shall not exceed thirty-five feet (35'). For there to be a single row of dwellings, there shall be no dwellings within 200 feet measured from the back of the dwelling landward. Millcreek Township Zoning Ordinance §5.06.1 (*Emphasis Added)*.

Appellants were denied a building permit by Millcreek Township to renovate the subject property to a height of thirty feet. Appellants appealed to Appellee seeking the issuance of a building permit because their property is in a "single row of dwellings" allowing for a height of up to thirty-five feet. Alternatively, Appellants sought a variance of the height requirements. The appeal was denied on December 10, 2014 and an Opinion was issued by Appellee on December 29, 2014.

In its Opinion, Appellee found the subject property was not in a single row of houses pursuant to Section 506.4 because there was a home within a 200 feet arc east of the subject property. Hence, Appellee found the applicable height requirement was twenty feet pursuant to Section 506.2. Appellee also found there was no basis to grant a variance from the height requirement.

This appeal followed.

STANDARD OF REVIEW

When a court does not take additional evidence into consideration, its review of a zoning hearing board decision is limited to a determination of whether the board abused its discretion or committed an error of law. *Zoning Hearing Bd. of Sadsbury Twp. v. Bd. of Sup'rs of Sadsbury Twp.*, 804 A.2d 1274, 1278 (Pa. Commw. Ct. 2002). A zoning hearing board has abused its discretion only if its findings are not supported by substantial evidence, meaning evidence a reasonable mind might accept as adequate to support a conclusion. *Rittenhouse Row v. Aspite*, 917 A.2d 880 (Pa.Commw. Ct. 2006). A court may not substitute its own judgement for that of the authorities who enacted the legislation and must defer to the board's decision regarding determinations on credibility and the weight to give evidence as long as there is substantial evidence to support it. *Sadsbury Twp,* 804 A.2d at 1278.

ISSUES ON APPEAL

Appellants raise two issues on appeal. Appellants first claim the term "landward" within Section 506.4 was wrongfully interpreted by the Zoning Board. Appellants argue landward must be measured perpendicular to the water, or directly behind the subject property. Since there are no dwellings within 200 feet behind the subject property, Appellants contend it is part of a single row of dwellings and thus the limit on its height is thirty-five feet.

Assuming *arguendo* Section 506.4 was correctly interpreted, Appellants assert a variance should be granted allowing Appellants to undertake the proposed renovations. Appellants argue the topography of the property and the township's drainage ditch create flooding issues which requires a variance.

Appellee's interpretation of Section 506.4 was an abuse of discretion and an error of law. Given the substantial evidence the subject property is part of a single row of houses, coupled with the arbitrary interpretation of the term landward, Appellants request for a building permit is warranted. The issue of a variance is moot.

A. INTERPRETATION OF THE ORDINANCE

A statute should be construed, if possible, to give effect to all its provisions, and the intention of its drafters. See 1 P.C.S.A. §1921(a). When the words of a statute are not explicit, the intent can be determined based on, *inter alia*, "the object to be attained" or "the consequences of a particular interpretation." 1 P.C.S.A. §1921(b). Statutory words should not be interpreted in isolation, rather with reference to the context in which they appear. *O'Rourke v. Commonwealth*, 778 A.2d 1194, 1201 (2001). Perhaps most importantly, common sense and practicality must be utilized in interpreting a statute. *Commonwealth v. Trippett*, 932 A.2d 188, 194 (Pa. Super. 2007); *Capital Acad. Charter Sch. v. Harrisburg Sch. Dist.*, 934 A.2d 189, 193 (Pa. Commw. Ct. 2007). These rules of construction apply equally to municipal ordinances.

In the case at bar, common sense, practicality and the evidentiary record do not support Appellee's definition of a "single row of dwellings" in Section 506.4. A consequence of Appellee's particular interpretation of "landward" is that the object of the Ordinance was not applicable and/or served.

As drafted, Section 506.4 causes more problems than it solves. Section 506.4 attempts to define a "single row of houses" by limitation stating "there shall be no dwellings within 200 feet measured from the back of the dwelling landward." The crux of the problem facing Appellee was the use of the word landward by the drafters.

Landward is undefined in the Ordinance. The use of landward for directional purposes is nonsensical since all of the properties in question are already on land. Into this void the Appellee, apparently in a matter of first impression, defines landward to be an arc of 200 feet extending east and west of the subject property. There is nothing in the record to explain or justify Appellee's expansive interpretation of landward to deny Appellants building permit.

In its ordinary, common usage landward means toward land in a direct line. It is generally used when determining a direction from a body of water toward land, not when describing a direction while already on land as in the instant matter. It is difficult to envision a usage of landward when the parties are already on land. Applied to this case, landward can only mean to go inland, away from the body of water. As such, landward means moving in a perpendicular line directly behind the subject property.

Appellee proffers no historical use of the word landward that describes it as an arc, let alone an arc of 200 feet in an east or west direction. If the drafters of the Ordinance intended there to be an arc, this three letter word could have been utilized. Appellee's interpretation is also based on arbitrary terms which should have been decided before Appellants paid for a building permit and the costs associated with the appeal process.

Among the arbitrary decisions made by Appellee was the point of origin for the measurement of 200 feet. Section 506.4 does not identify what part of the back of the dwelling to measure. Further, it does not state whether it is the current dwelling or a proposed dwelling. After all, it is possible that a proposed dwelling may be closer to or farther from existing dwellings in the second row.

Nor does Section 506.4 establish the end point of the 200 feet measurement. Logically the end point would be the nearest point of the rear dwelling. Left unanswered is what part of the rear dwelling constitutes the nearest point. There are several possibilities including whether it is an enclosed or unenclosed part of the rear dwelling.

Appellee uses its arc interpretation of landward to determine there is a dwelling within 200 feet of the subject property, namely the property owned by Gerald and Shirley Brookhauser at 3263 Lake Front Drive (hereafter "Brookhausers). It is unclear from the record how Appellee determined the distance between the subject property and the Brookhausers as there are several distances referenced.

After some confusion, Appellee's solicitor ultimately directed the measurement be taken from the closest point of the proposed building to the closest point of the Brookhauser structure. *Hearing Record ("H.R.") pp. 70-71.* This directive seems vague and perhaps explains why there were varying results.

Appellee's Brief describes the distance as 50 feet which may be based on the use of a Google map. Doug Prozan, a property owner in the Baer Beach subdivision, originally testified the distance was over 200 feet. *H.R. p. 9.* Appellants later submitted a statement from Mr. Prozan, who walked off the distance as 33 and 1/3 paces or roughly 100 feet. *H.R. p. 87.* This result is over 100 feet less than his testimony and double the Appellee's figure.

These wide discrepancies cannot be explained on the basis of this record nor is the Appellee's method of calculation helpful to future applicants for a building permit. At best these uncertainties render arbitrary Appellee's interpretation of Section 506.4.

Based on the common usage of the word landward, coupled with the arbitrary and confusing application of Appellee's interpretation, Appellee committed an error of law in using its expansive interpretation of landward to deny Appellants' building permit.

B. PURPOSE OF THE ORDINANCE

When seeking a definition of a single row of dwellings, consideration has to be given to the object or purpose of the Ordinance. One of the main purposes of establishing height requirements in the Ordinance is to ensure that homes sitting back from Lake Erie, behind other dwellings, maintain a view of the lake. The Ordinance limits the height of houses that sit on the lake front, lest they block the view of dwellings that sit behind those on lake front lots. This purpose is certainly laudable, but was not applicable to or served by Appellee's denial of Appellants' building permit.

The initial error Appellee and Millcreek Township make is the assumption that because the Baer Beach subdivision as recorded plots two rows of lots, one on each side of Lake Front Drive, there cannot be a single row of houses where the subject property is situate. This assumption ignores the substantial, indeed the overwhelming evidence that all lots west of the Brookhausers and across from the subject property do not have houses and are in fact unbuildable for topographical and/or zoning reasons.

Doug Prozan, a recent board member of the Baer Beach Association, testified all of the lots south of the subject property are owned by Baer Beach Association and are not buildable. *H.R. p. 9.* Kevin Farr, representing professional surveyor David Laird Associates, testified that two of the lots across from the subject property are designated as parking areas "and the other lot that is actually lot 39 has a buffer and setback requirements in your current zoning ordinance that it wouldn't be able to be built upon." *H.R. p. 6.*

One of the Appellants, Lee O'Donnell, testified the lots across from the subject property are not buildable for topographical reasons: "…and there is nobody behind me as you can see there. I mean there was years past, but, you know, the wall, the dirt came down and took

everybody out, so you can't build there anymore." *H.R. p. 10.*

The testimony of these three witnesses is corroborated in part by the picture at *H.R. p. 37.* There is no evidence of any type in this record rebutting these witnesses.

The only possible dwelling within any 200 feet arc of the subject property is the Brookhausers. The hearing record is devoid of any objection by the Brookhausers to Appellants' project. To the contrary, Appellants submitted a letter dated October 30, 2014 from the Brookhausers stating they have no concerns about Appellants' renovations. *H.R. p. 88.*

A review of the pictures submitted by Appellants establish why the Brookhausers have no concerns because in fact Appellants' proposed renovations cannot alter the Brookhausers' western view of the lake. Appellants' immediate neighbors to the east and west have built two story dwellings, with heights of 32 and 35 feet respectively. *H.R. p.10.* These heights already block the Brookhausers' view to the west. In fact, these adjoining properties dwarf the subject property. *See Picture at H.R. p. 56, (comparing the height difference of the three properties).*

Appellant Lee O'Donnell testified the Brookhausers believe they have a "beautiful view" from their patio to the east of their property and are not concerned about the view to the west. The Brookhausers' patio can be seen in the picture at *H.R. p. 64.* Ms. O'Donnell also presented a picture (which is not identified by Exhibit number) to Appellee showing the Brookhausers currently have "absolutely no view" of the lake toward the subject property. *H.R. p. 10.*

Appellants' neighbor to the immediate east, Dr. William Kowalski at 3268 Lake Front Drive, testified that he is "totally" in favor of Appellants' building permit because "it will be an enhancement to the whole area. We see no complication with it." *H.R. p. 8.*

Appellants' neighbor to the immediate west, Robin Scheppner, via letter and through her representative Randall Farabaugh, supports approval of Appellants' building permit.[1] *H.R. p. 11.*

There was no evidence in this record that Appellee's interpretation of the word landward as applied to the facts of this case serves the purpose of the Ordinance. All of the evidence points to one conclusion: Appellants' renovations will not and cannot ever cause any further obstruction to the view of the lake by property owners on the south side of Lake Front Drive, including the Brookhausers.

This case is not about the "happy coincidence" as described in Appellee's Opinion. *H.R. p. 3.* Likewise, this case is not about a race to build wherein a first row owner can be in a single row of homes provided the first row is built before the second row as suggested by Millcreek Township. *Intervenor Brief, p. 4.*

Instead, the analysis of this case has to be on the actual facts. The reality is that there are no dwellings or buildable lots in the second row of the Baer Beach Subdivision whose view of the lake will be adversely affected by Appellants' proposed project.

[1] Other nearby neighbors, Carol Perkins and Doug Prozan, testified in favor of Appellants renovations because it will enhance the rebirth of the neighborhood. These considerations, while true, are not relevant to the issues on this appeal.

CONCLUSION

In fairness to Appellee, the drafters of Section 506.4 put Appellee in a difficult spot. Nonetheless, Appellee's interpretation of landward is without support or justification in the record and constitutes an error of law and an abuse of discretion. The result reached by Appellee did not satisfy the purpose of the Ordinance because Appellants' proposed renovations cannot alter the lake view of any property owner within a 200 feet arc. There is more than substantial evidence in the record establishing the subject property is located in a single row of dwellings with a height restriction of 35 feet. The question of whether Appellants need a variance is moot.

It is respectfully suggested that Millcreek Township use its legislative authority to amend Section 506.4 to provide lakefront residents with a workable standard of what constitutes a single row of houses so that homeowners can know the rules before applying for a building permit.

ORDER

And now, this 29th day of June, 2015, for the reasons set forth in the accompanying Opinion, the appeal is **GRANTED** and provided Appellants otherwise meet all requirements, Millcreek Township shall issue a building permit to Appellants forthwith. Appellants' Motion to Open the Record is **DENIED** as moot.

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

KATHLEEN K. ORRIS, now BUCKSBEE, Appellee

v.

PAUL E. ORRIS, Appellant

CIVIL PROCEDURE / MODIFICATION OF ORDERS

Generally, except as otherwise provided or prescribed by law, a trial court upon notice to the parties may modify or rescind any order within thirty (30) days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed.

FAMILY LAW / OPENING / MODIFYING DECREE OF DIVORCE

As it pertains to modifications to Final Divorce Decrees, a motion to open a decree of divorce or annulment may be made only within the period limited by 42 Pa. C. S. § 5505 (relating to modification of orders) and not thereafter.

FAMILY LAW / OPENING / MODIFYING DECREE OF DIVORCE

A Motion to Open or Vacate Divorce Decree may lie where it is alleged that the decree was procured by intrinsic fraud or that there is new evidence relating to the cause of action which will sustain the attack upon its validity. A Motion to Vacate a Decree or Strike a Judgment alleged to be void because of extrinsic fraud, lack of jurisdiction over the subject matter or a fatal defect apparent upon the face of the record must be made within five years after entry of the final decree. Intrinsic fraud relates to a matter adjudicated by the judgment, including perjury and false testimony, whereas extrinsic fraud relates to matters collateral to the judgment which have the consequence of precluding a fair hearing or presentation of one side of the case.

CIVIL PROCEDURE / MODIFICATION OF ORDERS

Although 42 Pa. C. S. §5505 gives a trial court broad discretion, a trial court may consider a request for reconsideration only if the motion is filed within thirty (30) days of the entry of the disputed Order.

FAMILY LAW / OPENING / MODIFYING DECREE OF DIVORCE

The Pennsylvania Superior Court has held that since 42 Pa. C. S. §5505 applies to divorce decrees, after the expiration of thirty (30) days, a trial court loses its broad discretion to modify, and the divorce decree can be opened or vacated only upon a showing of extrinsic fraud, lack of jurisdiction over the subject matter, a fatal defect apparent on the face of the record or some other evidence of extraordinary cause justifying intervention by a trial court.

FAMILY LAW / OPENING / MODIFYING DECREE OF DIVORCE

It is clear that a trial court may not modify a divorce decree if more than thirty (30) days have passed after the entry or the decree, in the absence of extrinsic fraud or other extraordinary causes.

FAMILY LAW / OPENING / MODIFYING DECREE OF DIVORCE

A motion to open a decree of divorce because of a mistake of fact must be made "within thirty days after entry of the decree and not thereafter."

FAMILY LAW / MISTAKE OF FACT

An averment that a mistake was made in evaluating marital property does not present an adequate reason for opening the divorce decree. Such a mistake is not equivalent to new evidence that will sustain an attack on the validity of the decree. Any other rule would

permit repeated assaults on divorce decrees whenever a party believed a marital asset had been improperly valued. As the trial court observed, the parties "entered into an equitable agreement with the advice of counsel and that it did not predict every eventuality is no basis for modification."

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION No. 14281 - 2009

APPEARANCES: Andrea G. L. Amicangelo, Esq., on behalf of Kathleen K. Bucksbee, Appellee
Daniel P. Marnen, Esq., on behalf of Paul E. Orris, Appellant

OPINION

Domitrovich, J., April 27, 2015

This matter is currently before the Pennsylvania Superior Court on the appeal of Paul E. Orris (hereafter referred to as "Appellant") from this Trial Court's Memorandum Opinion and Order dated January 26th, 2015. In its Memorandum Opinion and Order dated January 26th, 2015, after consideration of oral argument held January 5th, 2015 and Memoranda of Law provided by the parties' counsel after oral argument and review of statutory and case law, this Trial Court dismissed Appellant's Motion for Special Relief Pursuant to Pa. R. Civ. P. 1920.43 and Request for Preliminary Injunction as this Trial Court concluded it did not have jurisdiction to open, modify or vacate the parties' Final Divorce Decree and Marital Settlement Agreement as more than thirty (30) days had passed since the entry of the Final Divorce Decree and Marital Settlement Agreement and Appellant did not definitively plead extrinsic fraud, lack of jurisdiction over the subject matter or a fatal defect apparent on the face of the record, pursuant to 42 Pa. C. S. §5505, which would have allowed this Trial Court to open, modify or vacate the parties' Final Divorce Decree and Marital Settlement Agreement.

A. Procedural History

Kathleen K. Orris, now Bucksbee (hereafter referred to as "Appellee") filed a Complaint for Divorce, which included one count of divorce pursuant to §3301(c) or (d) of the Pennsylvania Divorce Code and one count of equitable distribution, by and through her counsel, Joseph P. Conti, Esq., on September 22nd, 2009. A copy of Appellee's Complaint for Divorce was personally served on Appellant via hand delivery on September 25th, 2009, and an Affidavit of Service was filed on September 29th, 2009.

Appellee filed a Motion for Special Relief on October 14th, 2009. By Order of Court dated October 14th, 2009, Judge William R. Cunningham granted Appellee's Motion for Special Relief and prohibited Appellant from removing, transferring, selling, pledging, encumbering, withdrawing, dissipating or otherwise using assets, monies and benefits Appellant may have.

Appellee filed a Motion for Special Relief on May 26th, 2011. By Order of Court dated May 26th, 2011, this Trial Court granted Appellee's Motion for Special Relief and restrained Appellant from severing the timber from the land of the marital residence and selling the timber on the open market and authorized Scott W. Seibert, Certified Forester ACF, to enter upon the land of the marital residence for the purpose of conducting a timber appraisal on behalf of Appellee.

Appellee filed a Motion for Appointment of a Master on May 22nd, 2014. By Order of Court

dated May 23rd, 2014, Ralph R. Riehl III, Esq., was appointed as Divorce Master. Appellee filed her Income and Expenses statements and Inventory on June 20th, 2014. Appellant filed his Income and Expense Statement and Inventory and Appraisement on June 30th, 2014. A settlement conference took place on July 22nd, 2014, at which the parties entered into a mutually agreed-upon Marital Settlement Agreement. The Final Divorce Decree, including the incorporated Marital Settlement Agreement, was entered by Judge Elizabeth K. Kelly on August 6th, 2014.

On November 25th, 2014, Appellant, by and through his counsel, Daniel P. Marnen, Esq., filed a Motion for Special Relief Pursuant to Pa. R. Civ. P. 1920.43 and Request for Preliminary Injunction. Appellee filed her Answer/New Matter to Appellant's Motion for Special Relief Pursuant to Pa. R. Civ. P. 1920.43 and Request for Preliminary Injunction on December 1st, 2014. Appellant filed a Reply to Appellee's New Matter on December 12th, 2014. A hearing on Appellant's Motion for Special Relief Pursuant to Pa. R. Civ. P. 1920.43 and Request for Preliminary Injunction was held on January 5th, 2015, at which Appellee's counsel, Andrea G. L. Amicangelo, Esq., raised the issue of whether this Trial Court has jurisdiction to hear and exercise authority on Appellant's Motion for Special Relief Pursuant to Pa. R. Civ. P. 1920.43 and Request for Preliminary Injunction. By Order of Court dated January 5th, 2015, the parties' respective counsel filed Memoranda of Law regarding whether this Trial Court has jurisdiction to hear and exercise authority on Appellant's Motion for Special Relief Pursuant to Pa. R. Civ. P. 1920.43 and Request for Preliminary Injunction. After reviewing the parties' Memoranda of Law and relevant statutory and case law, this Trial Court entered its Memorandum Opinion and Order dismissing Appellant's Motion for Special Relief Pursuant to Pa. R. Civ. P. 1920.43 and Request for Preliminary Injunction as this Trial Court concluded it did not have jurisdiction to open, modify or vacate the parties' Final Divorce Decree and Marital Settlement Agreement.

Appellant filed his Notice of Appeal to the Pennsylvania Superior Court on February 25th, 2015, appealing this Trial Court's Memorandum Opinion and Order dated January 26th, 2015. This Trial Court filed its 1925(b) Order on February 26th, 2015. Appellant filed his Statement of Matters Complained of on Appeal on March 15th, 2015.

B. Issues Raised by Appellant

In his Statement of Matters Complained of on Appeal, Appellant raises one (1) issue: whether this Trial Court erred as a matter of law in dismissing Appellant's Motion for Special Relief Pursuant to Pa. R. Civ. P. 1920.43 and Request for Preliminary Injunction, pursuant to 42 Pa. C. S. §5505, where Appellant alleges "possible new evidence or proof of extraordinary circumstances due to a mistake of fact presented during the divorce settlement negotiations."

After a thorough review of relevant statutory and case law, this Trial Court finds Appellant's argument is without merit and will address said argument as follows:

1. **This Trial Court properly dismissed Appellant's Motion for Special Relief Pursuant to Pa. R. Civ. P. 1920.43 and Request for Preliminary Injunction as this Trial Court concluded it did not have jurisdiction to open, modify or vacate the parties' Final Divorce Decree and Marital Settlement Agreement.**

Generally, except as otherwise provided or prescribed by law, a trial court upon notice to the parties may modify or rescind any order within thirty (30) days after its entry, notwithstanding

the prior termination of any term of court, if no appeal from such order has been taken or allowed. *See 42 Pa. C. S. §5505*. As it pertains to modifications to Final Divorce Decrees, a motion to open a decree of divorce or annulment may be made only within the period limited by 42 Pa. C. S. § 5505 (relating to modification of orders) and not thereafter. *See 23 Pa. C. S. §3332*. Furthermore,

> The Motion to Open or Vacate Divorce Decree may lie where it is alleged that the decree was procured by intrinsic fraud or that there is new evidence relating to the cause of action which will sustain the attack upon its validity. A Motion to Vacate a Decree or Strike a Judgment alleged to be void because of extrinsic fraud, lack of jurisdiction over the subject matter or a fatal defect apparent upon the face of the record must be made within five years after entry of the final decree. Intrinsic fraud relates to a matter adjudicated by the judgment, including perjury and false testimony, whereas extrinsic fraud relates to matters collateral to the judgment which have the consequence of precluding a fair hearing or presentation of one side of the case.

See id. Although 42 Pa. C. S. §5505 gives a trial court broad discretion, a trial court may consider a request for reconsideration only if the motion is filed within thirty (30) days of the entry of the disputed Order. *Hayward v. Hayward,* 808 A.2d 232, 235 (Pa. Super. 2002).

The Pennsylvania Superior Court has held that since 42 Pa. C. S. §5505 applies to divorce decrees, after the expiration of thirty (30) days, a trial court loses its broad discretion to modify, and the divorce decree can be opened or vacated only upon a showing of extrinsic fraud, lack of jurisdiction over the subject matter, a fatal defect apparent on the face of the record or some other evidence of extraordinary cause justifying intervention by a trial court. *Egan v. Egan,* 759 A.2d 405, 407 (Pa. Super. 2000). Therefore, it is clear that a trial court may not modify a divorce decree if more than thirty (30) days have passed after the entry or the decree, in the absence of **extrinsic fraud** or **other extraordinary causes.** *See id.*

Appellant's Motion for Special Relief Pursuant to Pa. R. Civ. P. 1920.43 and Request for Preliminary Injunction concerns the value of several acres of timber on the parties' marital property. During the parties' divorce settlement negotiations before the Divorce Master, Ralph R. Riehl III, Esq., the timber was assessed an estimated value of $130,000.00, based upon the walk-through appraisal of Scott W. Seibert, Certified Forester ACF. *See Letter to Appellee from Scott W. Seibert, C.F., dated June 20th, 2011*. The value of the timber, as estimated by Mr. Seibert and accepted by both parties, was incorporated into the parties' Marital Settlement Agreement, which in turn was incorporated into the parties' Final Divorce Decree, as follows:

> There's presently timber on the property, and you have received through discovery an expert report as prepared by Scott Seibert, and that has been listed as having a marital value of $130,000. The understanding is that [Appellee] will receive the value of that timber and that she will have the opportunity to do so by hiring Mr. Seibert or anyone else to make the arrangements necessary to market and to ultimately hire someone to clear it and sell it and receive the fee for it…

See Transcript of Settlement Conference, July 22, 2014, pg. 10, line 24 – pg. 11, line 9. In his Motion for Special Relief Pursuant to Pa. R. Civ. P. 1920.43 and Request for Preliminary

Injunction, Appellant alleges that, several months after the settlement conference before Divorce Master Ralph R. Riehl III, Esq., Appellant discovered the timber allegedly had a new value in excess of $500,000.00, and further argued if Appellee was allowed to remove and sell the timber on the marital property, she would receive a windfall and, therefore, would allegedly be unjustly enriched in the amount of $370,000.00.

However, Appellant did not plead extrinsic fraud or other extraordinary cause in his Motion for Special Relief Pursuant to Pa. R. Civ. P. 1920.43 and Request for Preliminary Injunction, nor did Appellant definitively raise extrinsic fraud or other extraordinary cause during the hearing on January 5th, 2015. There were no additional pleadings claiming fraud or misrepresentation on the part of Appellee or the timber appraiser, Scott W. Seibert, C.F., nor were there are no pleadings claiming other extraordinary causes resulting from the after-acquired information; rather, Appellant only conveys his "surprise" in discovering the current value of the timber and his displeasure with Appellee receiving more than he believed the parties had settled on prior to the entry of the Final Divorce Decree.

Furthermore, although Appellant's counsel did argue some misrepresentations regarding the value of the timber at the January 5th, 2015 hearing, *see Transcript of Motion for Special Relief Hearing, January 5th, 2015, pg. 7, lines 16-23;* Appellant's claim of mistake of fact or fraud fails for three significant reasons. First, Appellant had every opportunity to review and act upon the appraisal letter from Scott W. Seibert, C.F., as it was provided to Appellant. *See id, pg. 8, lines 2-3.* According to the appraisal letter, Scott W. Seibert, C.F., clearly stated he was only conducting a walk-through appraisal, taking into consideration total acreage of the marital property, concentration of timber in certain areas, and types of timber located within those concentrations, and ultimately concluded the value of the timber to be estimated at $130,000.00. *See Letter to Appellee from Scott W. Seibert, C.F., dated June 20th, 2011.* Appellant and his counsel had the opportunity to inquire as to Mr. Seibert's methodology in conducting the appraisal during the three (3) years Appellant had control of the marital property or employ his own appraisal expert in those three (3) years, yet failed to take either action. *See Transcript of Motion for Special Relief Hearing, pg. 16, lines 5-13.* Furthermore, the testimony provided at the January 5th, 2015 hearing indicated Appellant was in control of the marital property and had three (3) years prior to the settlement conference to acquire his own independent appraisal of the timber, and, again, Appellant failed to do so. *See id., pg. 8, lines 2-11; pg. 9, lines 3-9, 14-16; pg. 10, lines 8-12.* Finally, Appellant's counsel wavered on the issue of fraud or mistake of fact after questioning by this Trial Court:

> THE COURT: But what you would call [Mr. Seibert] for is for him to say things have changed? He didn't lie, right, you're all agreeing?
> MR. MARNEN: I agree he didn't lie.
> THE COURT: He did not lie. He did not present any false reporting?
> MR. MARNEN: No.
> THE COURT: So you're not saying he's not competent.
> MR. MARNEN: No, I'm not saying that.
> THE COURT: And you're not attacking his methodology in the sense that what he did was not what's generally accepted before all foresters in regular appraising, because he is a certified forester.

MR. MARNEN: Well, the methodology might be under attack, Your Honor, because this appraisal – I don't know what a walk-through appraisal is.
THE COURT: So that's what this is all about. I'm just trying to figure out. It's all about the methodology, right?
MR. MARNEN: Yeah.

See id., pg. 25, line 25 – pg. 26, line 21. Therefore, there were no definitive pleadings of extrinsic fraud or other extraordinary circumstances in Appellant's Motion for Special Relief Pursuant to Pa. R. Civ. P. 1920.43 and Request for Preliminary Injunction or during the January 5th, 2015 hearing. In the absence of a definitive pleading of extrinsic fraud or other extraordinary circumstances, this Trial Court did not have jurisdiction to open, modify or vacate the parties' Final Divorce Decree and Marital Settlement Agreement and properly dismissed Appellant's Motion for Special Relief Pursuant to Pa. R. Civ. P. 1920.43 and Request for Preliminary Injunction.

The instant divorce action bears striking resemblance to the case of *Holteen v. Holteen*, 605 A.2d 1275 (Pa. Super. 1992). In *Holteen*, the parties agreed, as part of a Property Settlement Agreement, that Appellant husband would convey the parties' marital residence to Appellee wife. Appellee wife offered an appraisal value of the marital residence in the amount of $150,000.00, while Appellant husband offered appraisals between $117,500.00 and $162,500.00. Six months after the entry of a Final Divorce Decree, Appellee wife sold the marital residence for $300,000.00. Appellant husband filed a petition to open the decree on grounds that the agreement to convey the home to the wife was based on a mutual mistake of fact. Appellee wife filed a petition for summary judgment, which the trial court granted. Appellant husband appealed the trial court's grant of summary judgment. The Pennsylvania Superior Court affirmed the trial court's grant of summary judgment, stating a motion to open a decree of divorce because of a **mistake of fact** must be made "within thirty days after entry of the decree and not thereafter." *See id.* at 605 A.2d at 1276. The Superior Court also concluded the motion lacked any substantive merit, holding:

> [The] averment that a mistake was made in evaluating the marital home does not present an adequate reason for opening the divorce decree. Such a mistake is not equivalent to new evidence that will sustain an attack on the validity of the decree. Any other rule would permit repeated assaults on divorce decrees whenever a party believed a marital asset had been improperly valued. As the trial court observed, the parties "entered into an equitable agreement with the advice of counsel and that it did not predict every eventuality is no basis for modification."

Id. In the instant divorce action, the parties, Kathleen K. Orris, now Bucksbee, and Paul E. Orris, entered into a Marital Settlement Agreement with the sound advice of counsel and in the presence of the Divorce Master Ralph R. Riehl III, Esq. At the time of the settlement conference, the parties relied upon the valuation of the timber as estimated by Scott W. Seibert, C.F. Appellant's current argument, i.e. a mistake of fact concerning the valuation of the timber that occurred during the settlement conference, does not provide an adequate reasoning for opening, modifying or vacating the parties' Final Divorce Decree and Marital Settlement Agreement, nor is it equivalent to new evidence that would allow this Trial Court to open, modify or vacate the parties' Final Divorce Decree and Marital Settlement

Agreement. *See id.* Finally, as stated in *Holteen*, a motion to open, modify or vacate a Final Divorce Decree based upon mutual mistake of fact must be presented within thirty (30) days of the entry of said divorce decree. *See id.* As the parties' Final Divorce Decree was entered on August 6th, 2014 and Appellant's Motion for Special Relief Pursuant to Pa. R. Civ. P. 1920.43 and Request for Preliminary Injunction was filed on November 25th, 2014, almost four (4) months after the entry of the Final Divorce Decree, said Motion was untimely and this Trial Court properly dismissed the Motion as this Trial Court lacked jurisdiction to hear or exercise authority on said Motion.

C. Conclusion

For the foregoing reasons, this Trial Court finds the instant Appeal is without merit.

Respectfully submitted by the Court:
/s/ Stephanie Domitrovich, Judge

R. L. R., Plaintiff/Appellee

v.

S. P. S., Defendant/Appellant

FAMILY LAW / CHILD SUPPORT, STANDARD OF REVIEW

The standard of appellate review of child support matters has not changed; a review court must apply an *abuse of discretion* standard. "Abuse of discretion" 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 result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused.

FAMILY LAW / CHILD SUPPORT, STANDARD OF REVIEW

A support order will not be disturbed on appeal unless the Trial Court failed to consider properly the requirements of the Rules of Civil Procedure Governing Actions for Support, Pa. R. Civ. P. 1910.1 *et seq.*, or abused its discretion in applying these Rules.

APPELLATE PROCEDURE / GENERALLY

Chapter 17 of the Pennsylvania Rules of Appellate Procedure governs the effects of appeals, supersedeas, and stays.

APPELLATE PROCEDURE / GENERALLY

Rule 1701 of the Pennsylvania Rules of Appellate Procedure states that after an appeal is taken or review of a quasi-judicial order is sought, the trial court or other government unit may no longer proceed further in the matter.

APPELLATE PROCEDURE / CLARIFICATION/MODIFICATION OF ORDER

A trial court or other government unit has the limited authority after an appeal or review of a quasi-judicial order to take action necessary to preserve the status quo; correct formal errors in papers relating to the matter; cause the record to be transcribed, approved, filed and transmitted; grant leave to appeal *in forma pauperis;* grant supersedeas; and take other actions permitted by the Rules of Appellate Procedure.

APPELLATE PROCEDURE / CLARIFICATION/MODIFICATION OF ORDER

Subdivision (b)(1) of Pa. R. A. P. 1701 sets forth the obvious authority of the lower court or agency under these rules to take appropriate action to preserve the status quo and to clarify or correct an order or verdict. Examples of permissible corrections are "non-substantial technical amendments to an Order, changes in the form of a decree, and modification of a verdict to add pre-judgment interest."

APPELLATE PROCEDURE / CLARIFICATION/MODIFICATION OF ORDER

Where an adjudicator's action does not require the exercise of discretion, the computation is a clerical matter based on the face of the record and no fact finding is required, the amendment to an order under appeal is allowed. Such actions have no effect on the appeal or petition for review and cannot prompt a new appealable issue.

APPELLATE PROCEDURE / CLARIFICATION/MODIFICATION OF ORDER

A trial court may modify or rescind any order within thirty days after its entry, if no appeal has been taken; however, once a notice of appeal is filed, this Trial Court cannot take further action in the matter, pursuant to Pa. R. A. P. 1701(a). However, this rule must be read in conjunction with the inherent power of a trial court to amend its records, to correct mistakes of the clerk or other officer of the court, inadvertencies of counsel, or supply defects or omissions in the record, even after the lapse of the thirty day time limit.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
PACSES No. 921113743 Docket No. NS201300044 1341 & 1645 WDA 2014

Appearances: Isaac W. Pineo, Esq., on behalf of S. P. S., Appellant
R. L. R., *Pro Se,* Appellee

OPINION

Domitrovich, J., October 14th, 2014

This Child Support case is currently before the Superior Court of Pennsylvania on the appeal of S. P. S. (hereafter referred to as "Appellant") from this Trial Court's Final Order dated July 15, 2014, wherein the child support obligation for the parties' minor child, X. S. (DOB 8/21/09) of $546.35 per month, plus $24.06 per month for arrears, was established based on Appellant's stipulated current monthly net income of $3,093.38 at the time of the *de novo* hearing and this Trial Court's finding of Appellee's current monthly net income of $1,601.79 as a part-time personal trainer for the elderly and a part-time bartender, and was appropriate after review of Appellant's and R. L. R.'s (hereafter referred to as "Appellee") updated 2014 monthly net income information and her credible testimony and the evidence presented. Appellant further appealed this Trial Court's Clarification Order dated August 21, 2014, which corrected the Erie County Domestic Relations two computer clerical errors within the Interim Order dated effective April 10, 2014, but signed by this Trial Court contemporaneously with the Final Order dated July 15, 2014, as the parties' monthly net incomes were accidentally pulled by the computer from the Final Order of the year 2013 and defaulted into the Interim Order dated effective April 10, 2014. By the Clarification Order dated August 21, 2014, Appellant's monthly net income was thereby correctly stated at the updated 2014 monthly net amount of $3,093.38, rather than the 2013 monthly net amount of $2,455.38, and Appellee's monthly net income was correctly stated at the updated 2014 monthly net amount of $1,601.79, rather than the 2013 monthly net amount of $2,171.05. Overall, the final result – the $546.35 for Appellant's monthly child support obligation – remained the same as this Trial Court had used initially the correct figures for the monthly child support calculations.

A. Factual and Procedural History

The factual and procedural history of this case is as follows: Appellee, *pro se,* initially filed a Complaint for Support – New Complaint on January 11, 2013 requesting an Order be entered against Appellant and in favor of Appellee on behalf of the minor child, X. S. (DOB 8/21/09) for reasonable child support, medical coverage, and child care expenses. By Order of Court dated January 15, 2013, Appellee and Appellant were directed to appear at the Erie County Domestic Relations Office for a conference hearing on February 11, 2013 at 9:00 a.m. The conference was held on February 11, 2013 to address Appellee's Complaint for Child Support. Appellant appeared and was represented by Jennifer B. Hirneisen, Esquire, on behalf of Appellant's then-counsel, Kimberly A. Oakes, Esquire. Appellee, *pro se,* failed to appear and failed to contact the Domestic Relations Office to explain her absence. The conference officer recommended, due to Appellee's failure to pursue the Complaint for Support, the Complaint should be dismissed. By Order of Court dated February 11, 2013, Appellee's Complaint for Support was dismissed, and court costs were assessed to Appellee and said case was closed.

Appellee, *pro se*, filed a second Complaint for Support – New Complaint on March 13, 2013 requesting an Order be entered against Appellant and in favor of Appellee and the minor child for reasonable child support, medical coverage, and day care expenses. By Order of Court dated March 15, 2013, Appellee and Appellant were directed to appear at the Erie County Domestic Relations Office for a support conference hearing on April 4, 2013 at 1:15 p.m. The conference was held on April 4, 2013 to address Appellee's Complaint for Support. After an agreement was reached between Appellant and Appellee, the Final Order of Court dated April 4, 2013 was entered as follows based on Appellant's 2013 monthly net income of $2,455.38 and Appellee's 2013 monthly net income of $2,171.05: Appellant would pay child support in the amount of $175.94 per month for one minor child, which would include child care, insurance premium adjustment, and 50/50 custody; Appellant additionally would remit $24.06 per month towards arrears; Appellant would continue to provide medical coverage for the minor child through his employment; and the Order would be effective March 13, 2013, the date of filing, but the Order of Court was signed April 4, 2013. It is important to note that this Order of Court dated April 4, 2013 calculated the monthly child support obligation using Appellee's monthly net income of $2,171.05 and Appellant's monthly net income of $2,455.38, which were appropriate at that time for the parties' 2013 income in March of **2013**.

This instant appeal before the Pennsylvania Superior Court involves Appellee filing a Petition for Modification of the Existing Support Order, almost a year later on March 6, 2014, requesting an increase in child support as her reported income had decreased and alleging Appellant had additional income he did not report. Appellee also requested Appellant pay a portion of the day care expenses and correct an issue with the health insurance Appellant had provided. By Order of Court dated March 7, 2014, Appellee and Appellant were directed to appear at the Domestic Relations Office for a conference on March 31, 2014 at 1:30 p.m. By Order of Court dated March 19, 2014, the above-referenced conference was rescheduled to April 9, 2014. On April 10, 2014, the Conference Officer's Summary of Trier of Fact was filed (See Exhibit C) through the Domestic Relations Office, whereby the child support obligation of $546.35 per month, plus $24.06 per month for arrears for a total support obligation of $570.41 per month, and was derived from Appellee's monthly net income of $1,601.79 and Appellant's monthly net income of $3,093.38[1]. The initial Interim Order *per curiam* with the effective date of April 10, 2014 was then entered.[2]

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[1] This Court notes that, due to a computer clerical error, the Interim Order dated April 10th, 2014 incorrectly and mistakenly stated Appellee's monthly net income as $2,171.05, rather than $1,601.79, and Appellant's monthly net income as $2,455.38, rather than $3,093.38. These clerical errors were present at the time the *per curiam* Interim Order was initially entered on April 10, 2014 by the Domestic Relations Office; moreover, the current monthly child support obligation was correctly stated as $546.35 per month on this Interim Order as well as within the Conference Officer's Summary of Trier of Fact. However, as soon as the clerical errors were discovered by the Domestic Relations Office, this Trial Court immediately clarified and corrected the computer clerical errors concerning the monthly net incomes of the parties without substantially or substantively affecting the final result - the monthly child support obligation of $546.35.

[2] The Interim Order dated effective April 10, 2014 correctly reflected the said monthly child support obligation amount of $546.35, plus a monthly arrears payment of $24.06, for a total monthly child support obligation of $570.41; however the computer pulled by accident the parties' previous year's monthly net incomes and reflected these amounts, although these 2013 monthly net incomes were not used to derive the $546.35 per month for child support.

On April 28, 2014, Appellant filed a Demand for a *de novo* hearing before the undersigned trial judge, alleging Appellee was under-reporting her income, she was receiving money in tips that was not accounted for, and she was voluntarily under-employed and should be assessed income-based on full-time employment. By Order of Court dated April 30, 2014, Appellee and Appellant were directed to appear before this Trial Court for a *de novo* hearing on June 5, 2014 at 3:00 p.m. On May 27, 2014, Appellant's counsel, Isaac W. Pineo, Esq., filed a Motion to Continue, citing counsel's unavailability for the *de novo* hearing, which was granted by this Trial Court on May 30, 2014. By Order of Court dated June 3, 2014, the above-referenced *de novo* hearing was rescheduled to July 11, 2014. On July 11, 2014, this Trial Court heard testimony from both parties and admitted evidence requested by the parties during a full *de novo* hearing, at which Appellee appeared *pro se* and Appellant appeared with his counsel, Isaac W. Pineo, Esq. By Order of Court dated July 15, 2014, the Interim Order dated April 10, 2014, with the monthly child support obligation of $546.35, was made final and the monthly child support obligation of $570.41, which included an arrears amount of $24.06, remained intact as the appropriate amount for Appellant to pay in monthly child support.

Appellant filed his Notice of Appeal to the Pennsylvania Superior Court, appealing the Final Support Order dated July 15, 2014, and his Statement of Matters Complained of on Appeal on August 13, 2014. This Trial Court filed its 1925(b) Order on August 13, 2014.[3] This Trial Court filed a Clarification Order on August 21, 2014, wherein the Court explained that two computer clerical errors were made through the Domestic Relations Office, and this Trial Court procedurally corrected only the monthly net incomes stated on the Interim Order dated April 10, 2014, consistent with the monthly net incomes from which the monthly child support Order of $546.35 was derived.[4] Appellant filed a second Notice of Appeal to the Pennsylvania Superior Court, appealing this Trial Court's Clarification Order dated August 21, 2014, on September 12, 2014. Appellant filed a second Statement of Matters Complained of on Appeal on September 29, 2014.

B. Issues Raised by Appellant

In his first Pa. R.A.P. 1925(b) Concise Statement of Matters Complained of on Appeal, Appellant complains the appropriate child support obligation is $214.59 per month, although he based his figures on the two computer clerical errors, the incorrect 2013 monthly net incomes for the parties, instead of the 2014 updated monthly net incomes and also based on his incorrect application of the "Substantial or Shared Physical Custody Adjustment" pursuant to Rule 1910.16-4 of the Pennsylvania Rules of Civil Procedure. In his second Pa. R.A.P. 1925(b) Concise Statement of Matters Complained of on Appeal, Appellant complains this

[3] Pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), this Trial Court directed Appellant file a Concise Statement of Errors Complained of on Appeal by Order of Court dated August 13, 2014, even though Appellant filed his Concise Statement prior to this Court's 1925(b) Order.

[4] This Trial Court notes that, although the monthly net incomes on the Interim Order dated April 10, 2014 were clarified and corrected, all other aspects of the Interim Order, including the monthly child support obligation of $546.35, were correct and remained in full force and effect, and this Trial Court notes that the initial 2014 Interim Order before the *de novo* hearing also had the mistaken 2013 monthly net incomes added and that the parties could have seen that these amounts on the *per curiam* Interim Order were inconsistent with the 2014 Summary of Trier of Fact.

Trial Court was without continuing jurisdiction to make any necessary procedural changes to the Interim Order dated April 10, 2014, although as this Interim Order remained on the record before the demand for *de novo* hearing with these two patent computer errors, the parties did not request to correct these errors; therefore, this Trial Court, after the *de novo* hearing and after being notified by the Domestic Relations Office of these two clerical errors, corrected these two errors immediately, which did not affect the final result – the monthly child support obligation amount of $546.35, plus $24.06 per month for arrears for a total monthly child support obligation of $570.41 – because this Trial Court used the correct monthly net incomes for these child support calculations. Appellant argues said changes to the Interim Order were made after an appeal had been taken, and he claims directly affected the "substance" of his appeal and, therefore, he considers the changes as substantive, rather than clerical as stated by this Trial Court.

After a thorough review of relevant statutory and case law, this Trial Court finds both of Appellant's arguments are without merit and will address each argument as follows.

1. This Trial Court did not abuse its discretion in entering its Final Order dated July 15th, 2014, whereby the child support in the amount is $546.35 per month was established, and in contemporaneously signing the Interim Order with the effective date of April 10th, 2014, the date of filing the Petition for Modification.

The standard of appellate review of child support matters has not changed; a review court must apply an *abuse of discretion* standard. *Ball v. Minnick*, 648 A.2d 1192, 1196 (Pa. 1994). "Abuse of discretion" 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 result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused. *See Ashbaugh v. Ashbaugh*, 627 A.2d 1210, 1213 (Pa. Super. 1993). A support order will not be disturbed on appeal unless the Trial Court failed to consider properly the requirements of the Rules of Civil Procedure Governing Actions for Support, Pa. R. Civ. P. 1910.1 *et seq.*, or abused its discretion in applying these Rules. *Ball*, 648 A.2d at 1196.

During the full *de novo* hearing on July 11, 2014, this Trial Court heard testimony and received evidence. Appellant's counsel, Isaac W. Pineo, Esq., stipulated and confirmed that Appellant's net income is $3,093.38 per month, as taxes are not applicable to disability income. *Transcript of De Novo Hearing, July 11, 2014, pg. 5, lines 10-12, 18-20.* Appellee R. L. R. indicated to this Trial Court she is employed as a part-time personal trainer for the elderly and her service included nutritional counseling, program writing, and hands-on personal training and spends nine (9) hours per week training her elderly clients at their homes and eleven (11) hours per week training her elderly clients at her home, for a total of twenty (20) hours per week at $17.50 per hour. *Transcript, pg. 6,* lines 8-23. Appellee further indicated she is employed as a part-time bartender at the Avonia Tavern and works Wednesday evenings and every other Sunday evening between six (6) to twelve (12) hours per week. *Transcript, pg. 7, line 23 – pg. 8, line 11.* Appellee estimated her total hours of work per week between twenty-eight (28) and thirty-two (32) hours. *Transcript, pg. 8, lines 12-14.* During cross-examination, Appellee stated her average monthly gross income from personal training is $1,500. *Transcript, pg. 19, lines 19-22.* Appellee also confirmed her average monthly gross income from the Avonia Tavern is $605.93. *Transcript, pg. 23, lines*

4-14. Appellee stated that with her part-time personal training, her summers are busier than her winters as she primarily works with elderly individuals, who she refers to as "snowbirds." *Transcript, pg. 25, lines 21-25.* Appellee estimated her expenses to be $340 per month for groceries, $1,030 per month for mortgage, $99 per month for sewage/garbage, $65 per month for electricity, $20 per month for internet, $45 per month for her cell phone, $200 per month for auto insurance, $160 per month for gas, $228 per month for child care, $98 per month for heat, and $25 per month for clothes for minor child, Xander, which Appellee agreed totaled $2,321 per month for total expenses. *Transcript, pg. 33, line 2 – pg. 38, line 6.* Appellee stated she has late fees, is one and a half months behind on her mortgage, and is frequently behind and not getting her bills paid. *Transcript, pg. 38, lines 7-8, 16-17.* In his closing argument, Attorney Pineo once again stipulated to Appellant's net income of $3,093.38 per month. *Transcript, pg. 39, lines 23-24.* Attorney Pineo indicated the parties share physical custody of the minor child, X. S., and referenced Rule 1910.16-4, which allows for a reduction in Appellant's monthly child support obligation because Appellant has custody of the minor child at least 40% of the time.[5] *Transcript, pg. 42, line 22 – pg. 43, line 4.* In her closing argument, Appellee stated that her summers are busier because her clients, "snowbirds," have returned to Erie County; she struggles very hard through the winter; it takes her all summer to get caught up on her bills; and she has no disposable income. *Transcript, pg. 45, lines 19-24.* This Trial Court also received into evidence Appellee's income 2012 tax records and her current paystubs from the Avonia Tavern. Based on Appellant's counsel's stipulation as to Appellant's monthly income, Appellee's credible testimony of her monthly income and expenses, and the evidence received, this Trial Court accepted Appellant's stipulated monthly net income is $3,093.38 and found Appellee's monthly net income is $1,601.79. Therefore, this Trial Court found the Interim Order dated April 10, 2014, wherein a monthly child support obligation of $546.35 was established, was appropriately calculated pursuant to the Pennsylvania Rules of Civil Procedure using the 2014 monthly net incomes found by this Trial Court and entered a Final Order dated July 15, 2014. When the Interim Order was made final, this Trial Court was not aware that the computer mistakenly indicated the parties' 2013 monthly net incomes instead of the parties' updated 2014 net incomes, although the appropriate 2014 monthly net incomes were used in the calculations with the computer

Appellant alleges, pursuant to Pennsylvania Rule of Civil Procedure 1910.16-3, the parties' guideline monthly child support obligation should be $933.00 per month, based upon figures that do not appear on the record for the parties' monthly incomes in 2014. Appellant alleges an unstipulated amount of Appellee's 2013 monthly net income of $2,171.05 and alleges an unstipulated amount of Appellant's 2013 monthly net income of $2,455.38, providing a combined monthly net income of $4,626.43. Appellant further alleges his share of this guideline monthly child support obligation is $494.49, which represents 53% of $933.00.

Finally, Appellant alleges, based upon the "Substantial or Shared Physical Custody Adjustment" of Pa. R. Civ. P. 1910.16-4, his percentage of the guideline monthly child support obligation should be reduced by 30% as both parties share equal custody of the minor child; therefore, Appellant alleges his share of the guideline child support obligation is

[5] This Trial Court acknowledged the parties share custody of the minor child and provides Appellant an appropriate reduction for Appellant in considering the monthly child support obligation.

23% of $933.00, or $214.59 per month, based upon the parties' 2013 monthly net incomes, instead of the appropriate monthly net incomes for 2014.

Appellant's arguments rests upon the procedurally defective Interim Order dated April 10, 2014, which, due to computer clerical errors in the Erie County Domestic Relations computer system, incorrectly reflected Appellant's 2014 monthly net income as $2,455.38 and Appellant's 2014 monthly net income as $2,171.05 instead of the proper 2014 monthly net amount of $3,093.38 for Appellant as stipulated by Appellant's counsel and the proper 2014 monthly net amount of $1,601.79 for Appellee as this Trial Court had found after the full *de novo* hearing on July 11, 2014. According to the Domestic Relations personnel, in an e-mail attached hereto as Exhibit A, when the calculations were performed on the Pennsylvania Child Support Program computer system (hereafter referred to as "PACSES") for the instant case, the calculations were not saved in the system before the conference officer generated the Order into "Forms Workspace," the area in PACSES where the conference officer can add conditions onto a New Order, an Interim Order, or a Modified Order. If a conference officer does not save the current calculations into PACSES before sending a New, Interim, or Modified Order, the most recent incomes saved in PACSES default into the current Order. Prior to the Interim Order dated April 10, 2014, a Final Order dated **April 4, 2013** existed in PACSES for the instant case and according to said Final Order, Appellant's 2014 monthly net income was mistakenly reflected as $2,455.38 and Appellee's 2014 monthly net income was mistakenly reflected at $2,171.05. Therefore, because the conference officer inadvertently did not save the most recently calculated incomes for the Interim Order dated April 10, 2014, i.e., $3,093.38 monthly net income per month for Appellant and $1,601.79 monthly net income per month for Appellee, the 2013 monthly net incomes reflected on the Final Order dated April 4, 2013 were incorporated by default into the procedurally defective Interim Order dated April 10, 2014. These two computer clerical errors, caused solely within the PACSES system, were not within this Trial Court's control and do not amount to an abuse of discretion by this Trial Court. In fact, the Conference Summary of Trier of Fact, drafted by the conference officer following the April 9, 2014 support conference and made readily available to both parties and counsel, clearly stated the correct amounts of the most recent monthly incomes reported by the parties reflecting a 2014 monthly net income of $3,093.38 for Appellant and a 2014 monthly net income of $1,601.79 for Appellee. (See Exhibit C). Furthermore, the incorrect 2013 monthly net incomes reflected in the Interim Order as 2014 monthly net incomes were not made on the date of the Final Order dated July 15, 2014; rather, these incorrect monthly net incomes were reflected in the Interim Order on the date of April 10, 2014. Following the support conference hearing on April 9, 2014, the Erie County Domestic Relations Office entered the Interim Order *per curiam*, i.e., without reference to a specific judge, as is custom in Erie County. Following the *de novo* hearing on July 11, 2014, this Trial Court entered its Final Order dated July 15, 2014, whereby this Interim Order was made Final, without this Trial Court having knowledge of the procedurally defective Interim Order at the time as to the incorrect monthly net incomes were reflected, but continued to state the correct monthly child support obligation. However, Appellant was privy to the procedurally defective Interim Order, as Appellant and Appellee who were present at the April 9, 2014 support conference and would have subsequently received the procedurally defective Interim Order, and would have been aware of the incorrect 2013

monthly net incomes placed on the Order, which then Appellant and his counsel or the Appellee could have made this Trial Court aware of at the time of the *de novo* hearing. Finally, Appellant's counsel himself affirmed Appellant's net income at the beginning of the *de novo* hearing, stating:

> THE COURT: I first want to start off, does anyone – do you stipulate as to Defendant's income? Because everything seems to focus on Plaintiff's income.
> MR. PINEO: That's correct. He gets paid in a very systematic way through the Department of Corrections, and the $3,093 is active.
> THE COURT: Is that correct, ma'am?
> R. L. R.: I guess so, yes, to my knowledge.
> THE COURT: So are you going to stipulate to that so we're not going to litigate that today?
> R. L. R.: Yes.
> THE COURT: How much is it, Attorney Pineo? I have $3,093.38?
> MR. PINEO: That's correct.

Transcript, pg. 5, lines 7-20.

In addition, although the monthly net incomes reflected on the Interim Order dated April 10, 2014 were incorrect, the current monthly child support obligation of Appellant was calculated correctly as confirmed by the computer system in the Erie County Domestic Relations Office in the e-mail dated August 19, 2014. (See Exhibit A). According to the calculations performed in PACSES by the support conference officer following April 9, 2014 support conference hearing, attached hereto as Exhibit B, Appellant received non-taxable disability net income in the amount of $3,093.38 per month. Appellee received wages in the gross amount of $605.93 per month and also received self-employment gross income of $1,368.75 per month, which equaled $1,974.68 of total gross income per month. However, Appellee's total gross monthly income is taxed in the following amounts: $62.21 in state taxes, $22.71 in local taxes, $37.57 in FICA taxes, $45.45 in Medicare taxes, $48.21 in federal taxes, and $156.74 in SECA taxes, which equals $372.89 in total taxes per month. By subtracting Appellee's total monthly tax obligation of $372.89 from her total gross monthly income of $1,974.68, Appellee's total net income is $1,601.79 per month. Adding both parties' monthly net incomes equals a total net income of $4,695.17 per month. Pursuant to Rule 1910.16-3 of the Pennsylvania Rules of Civil Procedure, a total monthly net income of $4,695.17 corresponds to a guideline amount of $939.00 per month. As Appellant is responsible for approximately 65.88% of the total monthly net income, he is responsible for 65.88% of the guideline amount of $939.00, which would equal $618.61 per month[6]. After a decrease of $186.48 for substantial or shared custody[7] and an increase of $114.22 for child care expenses[8], the current child support obligation is $546.35 per month. After including $24.06 per month towards arrears, Appellant is responsible for a total monthly

[6] See PA R. Civ. P. 1910.16-4, "Part I. Basic Child Support"

[7] See id., "Part II. Substantial or Shared Physical Custody Adjustment"

[8] See PA R. Civ. P. 1910.16-6(a).

child support obligation of $570.41 per month, which is correctly reflected on the Interim Order dated April 10, 2014.

Appellant's argument regarding a reduction in his monthly child support obligation for "Substantial or Shared Custody," pursuant to Rule 1910.16-4 of the Pennsylvania Rules of Civil Procedure, also fails as Appellant incorrectly states the procedure of this particular section of Rule 1910.16-4. Appellant argues his percentage of the guideline child support obligation should be reduced by 30% because the parties share 50/50 custody; however, Appellant is incorrect because after proper calculation, Appellant is only entitled to a 19.86% reduction for the parties' 50/50 custody. According to the "Substantial or Shared Physical Custody Adjustment" section of Rule 1910.16-4, the percentage of time spent with the child is first reduced by 30%. In the instant case, the parties share 50/50 custody of the minor child. As reflected in the Domestic Relations Office's Share Custody Summary (See Exhibit G), Appellant is attributed 182 overnights per year with the child, which equals 49.86% of share custody[9]; so, Appellant's 49.86% of time with the child is reduced by 30%, equaling 19.86%. This 19.86% is then subtracted from Appellant's percentage of the guideline monthly child support obligation, which, as stated above, is 65.88%. Therefore, Appellant's adjusted percentage of the guideline monthly child support amount is 46.02%. By subtracting Appellant's adjusted guideline child support obligation, which equals $432.13 (the above-referenced $939.00 guideline amount multiplied by Appellant's adjusted percentage of 46.02%) from Appellant's original guideline child support obligation, which equals $618.61 (the above-referenced $939.00 guideline amount multiplied by Appellant's original percentage of 65.88%), Appellant receives a reduction for share custody in the amount of $186.48, which is accurately reflected in the child support guideline calculations. (See Exhibit B).

Therefore, in entering the Final Order dated July 15, 2014, the Interim Order of Court dated April 10, 2014 with the final monthly child support obligation of $546.35, plus $24.06 per month for arrears for a total monthly child support obligation of $570.41, was appropriately calculated and became final. Contrary to Appellant's assertions, this Trial Court in the instant case, by merely correcting procedurally two computer errors which did not affect the monthly child support obligation of $546.35, did not "override or misapply the law," did not "exercise manifest un-reasonability in its judgment," did not "demonstrate partiality, prejudice, bias or ill-will," and otherwise did not abuse its discretion in any manner. Rather, this Trial Court properly concluded by Appellant's own stipulation that his 2014 monthly net income is $3,093.38; this Trial Court properly found that, after hearing testimony and reviewing admitted exhibits, Appellee's 2014 monthly net income is $1,601.79; a proper reduction for shared 50/50 custody is attributed to Appellant's monthly child support obligation pursuant to Rule 1910.16-4; and this Trial Court properly found, using these amounts of monthly net income and reductions attributable, the current child support obligation for 2014 is properly calculated at $546.35 per month using the parties' current monthly incomes. This Trial Court finds Appellant's first argument is without merit.

[9] 182 overnights/year divided by 365 days/year equals 49.86%.

2. This Trial Court was within its authority to enter the Clarification Order dated August 21st, 2014, whereby the Interim Order dated April 10th, 2014 was corrected to reflect the 2014 monthly net income of $3,093.38 stipulated by Appellant and a 2014 monthly net income of $1,601.79 for Appellee, instead of the 2013 monthly net incomes that the Domestic Relations Office computer system pulled by mistake.

Chapter 17 of the Pennsylvania Rules of Appellate Procedure governs the effects of appeals, supersedeas, and stays. *See Pa. R. A. P. 1701 et seq.* Rule 1701 of the Pennsylvania Rules of Appellate Procedure states that after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter. *Pa. R. A. P. 1701(a).* However, a trial court or other government unit has the limited authority after an appeal or review of a quasi-judicial order to take action necessary to preserve the status quo; correct formal errors in papers relating to the matter; cause the record to be transcribed, approved, filed and transmitted; grant leave to appeal *in forma pauperis;* grant supersedeas; and take other actions permitted by the Rules of Appellate Procedure. *See Pa. R. A. P. 1701(b)(1).* Subdivision (b)(1) of Pa. R. A. P. 1701 sets forth the obvious authority of the lower court or agency under these rules to take appropriate action to preserve the status quo and **to clarify or correct an order or verdict.** *See Pennsylvania Industrial Energy Coalition v. Pennsylvania Public Utility Commission,* 653 A.2d 1336, 1344 (Pa. Commw. Ct. 1995) [emphasis added]. Examples of permissible corrections are "non-substantial technical amendments to an Order, changes in the form of a decree, and modification of a verdict to add pre-judgment interest." *See id.* More specifically, where the adjudicator's action does not require the exercise of discretion, the computation is a clerical matter based on the face of the record and no fact finding is required, the amendment to an order under appeal is allowed. *Pellizzeri v. Bureau of Professional and Occupational Affairs,* 856 A.2d 297, 302 (Pa. Commw. Ct. 2004). Such actions have no effect on the appeal or petition for review and cannot prompt a new appealable issue. *See Pennsylvania Industrial Energy Coalition,* 653 A.2d at 1345.

After immediately discovering the two computer clerical errors on August 18, 2014 in the Interim Order, this Trial Court entered a Clarification Order dated August 21, 2014 to clarify these two computer clerical errors on that Interim Order. Pursuant to the Clarification Order dated August 21, 2014, the first portion of the first paragraph of the Interim Order was clarified and corrected to read:

> "AND NOW, 10TH DAY OF APRIL, 2014, based upon the Court's determination that the Payee's monthly net income is $1,601.79 and the Payor's monthly net income $3,093.38…."[10]

Pursuant to Pa. R. A. P. 1701(b)(1) and the relevant case law, this Trial Court was within its authority to enter the above-referenced Clarification Order as these two procedural changes do not directly affect the substance of the appeal and these two procedural changes were not substantive in nature; rather these two changes were merely clerical. This Trial Court did not exercise any discretion or any powers to change the Interim Order nor did this Trial

[10] See Clarification Order dated August 21, 2014.

Court conduct fact-finding in the Interim Order; rather, these two clerical errors within the Interim Order were generated solely from PACSES and appear clearly as computer errors on the face of the Order to which Appellant and his counsel or Appellee could have seen these two computer clerical errors before the *de novo* hearing since these errors existed two months before this Trial Court held the *de novo* hearing and entered its Final Order. (See Appellant's first argument above). Additionally, after clarifying the first portion of the first paragraph of the Interim Order, this Clarification Order maintained Appellant's current monthly child support obligation of $546.35 per month as calculated correctly and all other aspects of the Interim Order remained in full force and effect.

Furthermore, Appellant argues this Trial Court was without continuing jurisdiction to make these two procedural changes to the Interim Order entered on July 15, 2014, and corrected after thirty (30) days with a Clarification Order dated August 21, 2014. Pursuant to 42 Pa. C. S. § 5505, this Trial Court is aware that a court may modify or rescind any order within thirty days after its entry, if no appeal has been taken; however, once a notice of appeal is filed, this Trial Court cannot take further action in the matter, pursuant to Pa.R.A.P. 1701(a). *See Manack v. Sandlin*, 812 A.2d 676, 680 (Pa. Super. 2002). However, this rule must be read in conjunction with the inherent power of a trial court to amend its records, to correct mistakes of the clerk or other officer of the court, inadvertencies of counsel, or supply defects or omissions in the record, even after the lapse of the thirty (30) day time limit. *See id.; see also Commonwealth v. Cole*, 263 A.2d 339 (Pa. 1970) (the Pennsylvania Supreme Court held a trial court had inherent authority to correct an erroneous order two and one-half months after the 30-day statutory period allowing amendment of orders had lapsed, reasoning that "the 1959 statute was never intended to eliminate the inherent power of a court to correct obvious and patent mistakes in its orders, judgments and decrees."). In the instant case, the Interim Order was made final on July 15, 2014, but dated April 10, 2014 to reflect the effective date of the Appellee's filing the Petition for Modification. Neither Appellant's counsel nor Appellee brought to this Trial Court's attention the two patent mistakes of the use of 2013 prior monthly net incomes in the Interim Order of April 10, 2014. Appellant's counsel even stipulated to Appellant's 2014 monthly net income as $3,093.38. Patently, the computer's use of the monthly net income of $2,455.38 for Appellant and the use of Appellee's 2013 monthly net income instead of this Trial Court's finding of her 2014 updated monthly net income were in error. Therefore, pursuant to the holdings in *Manack* and *Cole*, this Trial Court was within its authority to enter the Clarification Order dated August 21, 2014, whereby the Interim Order dated April 10, 2014 was clarified and corrected to reflect the proper 2014 monthly income as stipulated by Appellant's counsel and the proper 2014 monthly net income for the Appellee as found by this Trial Court, even after thirty (30) days had elapsed. This Trial Court finds Appellant's second argument is without merit.

C. Conclusion

For the foregoing reasons, this Trial Court finds the instant Appeal is without merit.

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