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Reports of Cases Decided in the Several Courts of
Erie County for the Year
2016

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ERIE, PA

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

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HONORABLE JOHN J. TRUCILLA -------------------- President Judge
HONORABLE STEPHANIE DOMITROVICH ------------------- Judge
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HONORABLE ROBERT A. SAMBROAK, JR. ------------------- Judge
HONORABLE JOHN J. MEAD ------------------------------------- Judge
HONORABLE JOSEPH M. WALSH, III, -------------------------- Judge

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IN RE: THE NAME CHANGE OF JOSEPH LEE OLLIE

JUDICIAL RESPONSIBILITY / LEGAL PRECEDENT

All courts within the Commonwealth of Pennsylvania are bound by both statutory law and legal precedent.

FAMILY LAW / NAME CHANGES

In the Commonwealth of Pennsylvania, an individual cannot change his name without permission of the appropriate court acting upon a Petition complying with the statutory requirements.

FAMILY LAW / NAME CHANGES

A trial court has wide discretion in ruling upon a Petition to Change Name and should exercise its discretion in a way as to comport with good sense, common decency and fairness to all concerned and to the public. A Petition for Change of Name may be denied upon lawful objection or if the petitioner seeks a name change in order to defraud the public.

FAMILY LAW / NAME CHANGES

The established standard of review for cases involving Petitions for Change of Name is whether or not there was an abuse of discretion. An abuse of discretion exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will. A finding by an appellate court that it would have reached a different result than the trial court does not constitute a finding of an abuse of discretion. Where the record adequately supports a trial court's reasons and factual basis, said trial court did not abuse its discretion and the Pennsylvania Superior Court must affirm, even if based on the same evidence the Superior Court would have reached a different conclusion.

FAMILY LAW / NAME CHANGES

A trial court may order a change of name for a person convicted of a felony if (1) at least two calendar years have elapsed from the date of completion of a person's sentence and that person is not subject to the probation or parole jurisdiction of any court, county probation agency or the Pennsylvania Board of Probation and Parole; or (2) the person has been pardoned.

FAMILY LAW / NAME CHANGES

The court may not order a change of name for a person convicted of murder, voluntary manslaughter, rape, involuntary deviate sexual intercourse, statutory sexual assault, sexual assault, aggravated indecent assault, robbery, aggravated assault, arson, kidnapping or robbery of a motor vehicle or criminal attempt, criminal conspiracy or criminal solicitation to commit any of the offenses listed above or an equivalent crime under the laws of this Commonwealth in effect at the time of the commission of that offense or an equivalent crime in another jurisdiction.

FAMILY LAW / NAME CHANGES

The primary purpose of the Judicial Change of Name Statute, other than with regard to minor children, is to prohibit fraud by those attempting to avoid financial obligations, and necessity for judicial involvement in name change petition centers on governmental concerns that individuals not alter their identity to avoid financial obligations.

FAMILY LAW / NAME CHANGES

At the time of the scheduled hearing, a petitioner must be able to present an official search

of the proper offices of the county where petitioner resides and of any other county where petitioner has resided within five (5) years prior to filing the petition showing that there are no judgments, decrees of record or other similar matters against the Petitioner.

FAMILY LAW / NAME CHANGES

In dismissing a Petition for Change of Name, a trial court is required to have some factual basis to support its decision; and where the record was devoid of any such evidence, the trial court abuses its discretion in dismissing the Petition for Change of Name.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 13538-2014

Appearances: Joseph Lee Ollie, *Pro Se,* Appellant

OPINION

Domitrovich, J., May 14th, 2015

This matter is currently before the Pennsylvania Superior Court on the appeal of Joseph Lee Ollie (hereafter referred to as "Appellant") from this Trial Court's Orders of February 25th, 2015 and March 11th, 2015. This Trial Court denied Appellant's Petition for Change of Name and Appellant's Motion for Reconsideration respectively for Appellant's inability to meet the statutory requirements. Due to Appellant's voluminous Concise Statement of Reasons Complained of on Appeal, this Trial Court will summarize Appellant's issues as follows: (1) whether this Trial Court erred in denying Appellant's Petition for Change of Name where Appellant's criminal record history, provided by the Pennsylvania State Police, Criminal Records and Identification Division Central Repository, indicates Appellant has been convicted of relevant felony violations; (2) whether this Trial Court erred in denying Appellant's Petition for Change of Name where Appellant's official judgment lien search, conducted and provided by the Erie County Prothonotary's Office, indicates two [2] outstanding judgment liens remaining of record against Appellant in the total amount of twenty thousand, eight hundred sixty-three dollars and 43/100 ($20,863.43); and (3) whether this Trial Court erred in denying Appellant's Petition for Change of Name for his inability to meet the statutory requirements, thereby allegedly violating Appellant's freedom of religion.

A. Procedural History

Appellant filed a Petition for Change of Name on December 31st, 2014, indicating a desire to formally change his name from "Joseph Lee Ollie" to Yusuf Abdullah Salleem" for religious reasons. By Order dated January 12th, 2015, a hearing on Appellant's Petition for Change of Name was scheduled for March 2nd, 2015 before the undersigned judge. The Order dated January 12th, 2015 also directed Appellant to give notice of the filing of the Petition for Change of Name, including the date and time set for the hearing, by publication once in the Erie Times News and once in the Erie County Legal Journal and submit proofs of publication to this Trial Court. *See Notice of Hearing Order dated January 12th, 2015.*

Appellant filed a Petition to Cause a Search of Records to be conducted on January 15th, 2015. Appellant filed a "Petition to Order the State Correctional Institution at Albion to take Joseph L. Ollie's Fingerprints and to file them [the fingerprints] with the Erie Clerk of Records" on January 22nd, 2015. By Order dated January 26th, 2015, this Trial Court, after information received from the Records Department at SCI Albion via telephone, dismissed Appellant's "Petition to Order the State Correctional Institution at Albion to take Joseph L.

Ollie's Fingerprints and to file them [the fingerprints] with the Erie Clerk of Records" as Appellant had already been fingerprinted and said fingerprints were sent to the Pennsylvania State Police for the purpose of conducting a criminal record history search pursuant to 54 Pa. C. S. §702(b).

Appellant's fingerprint card was filed on February 3rd, 2015. Appellant's criminal record history, provided by the Pennsylvania State Police Criminal Records and Identification Division Central Repository, was filed on February 23rd, 2015. An official judgment lien search and the Proof of Publication of Notice for only the Erie County Legal Journal[1] were filed on February 25th, 2015.

By Order dated February 25th, 2015, this Trial Court denied Appellant's Petition for Change of Name, citing several reasons to support the denial. Appellant filed a Motion for Reconsideration on March 5th, 2015, to which Appellant attached for the first time a Proof of Publication of Notice in the Erie Times News.[2] By Order dated March 11th, 2015, this Trial Court denied Appellant's Motion for Reconsideration since Appellant could not meet the statutory requirements.

Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on March 17th, 2015, appealing this Trial Court's Order dated March 11th, 2015, whereby this Trial Court denied Appellant's Motion for Reconsideration. This Trial Court filed its 1925(b) Order on March 30th, 2015. Appellant filed his Concise Statement of Reasons Complained of on Appeal on April 10th, 2015.

B. Legal Argument

All courts within the Commonwealth of Pennsylvania, including this Trial Court, are bound by both statutory law and legal precedent. *See Commonwealth v. Cahill,* 95 A.3d 298, 303 (Pa. Super. Ct. 2014); *see also In re Visoski,* 852 A.2d 345, 346 (Pa. Super. 2004); *see also Chadwick v. Dauphin County Office of the Coroner,* 905 A.2d 600, 606 (Pa. Commw. Ct. 2006).In this Commonwealth, an individual cannot change his name without permission of the appropriate court acting upon a Petition complying with the statutory requirements. *Petition of Alexander,* 394 A.2d 597, 599 (Pa. Super. 1978) (*citing In re Falucci Name Case,* 50 A.2d 200, 202 (Pa. Super. 1947)). Once a Petitioner has met the statutory requirements of the Judicial Change of Name Statute,[3] a trial court has wide discretion in ruling upon a Petition to Change Name and should exercise its discretion in a way as to comport with good sense, common decency and fairness to all concerned and to the public. *See In re McIntyre,*

[1] Heidi M. Weismiller, Managing Editor of the Erie County Legal Journal, promptly provided the Proof of Publication of Notice regarding Appellant's Petition for Change of Name directly to this Trial Court.

[2] Although not specifically raised in Appellant's Concise Statement of Reasons Complained of on Appeal, this Trial Court notes Appellant failed initially to adhere to the statutory requirement for change of name regarding presenting and filing Proof of Publication of Notice in the Erie Times News **on or before the scheduled hearing date**, March 2nd, 2015, pursuant to 54 Pa. C. S. §701(a.1)(3)(ii)(A) and (4)(ii)(A). Despite Appellant, **after the scheduled hearing date**, presenting and filing Proof of Publication of Notice in the Erie Times News, said Proof of Publication of Notice, which was attached to Appellant's Motion for Reconsideration dated March 5th, 2015, is not sufficient for this Trial Court to reconsider the denial of the Petition for Change of Name due to Appellant's inability to meet the other significant statutory requirements, such as his criminal record history being free of relevant felony violations and his judgment lien search being free of outstanding judgments in his name, Joseph Lee Ollie.

[3] 54 Pa. C. S. §701 *et seq.*

715 A.2d 400, 402 (Pa. 1998). Petitions for Change of Name may be denied upon lawful objection or if the petitioner seeks a name change in order to defraud the public. *Id.*

The established standard of review for cases involving Petitions for Change of Name is whether or not there was an abuse of discretion. *In re Miller,* 824 A.2d 1207, 1210 (Pa. Super. 2003). An abuse of discretion exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will. *Id.* A finding by an appellate court that it would have reached a different result than the trial court does not constitute a finding of an abuse of discretion. *Id.* Where the record adequately supports a trial court's reasons and factual basis, said trial court did not abuse its discretion and the Pennsylvania Superior Court must affirm, even if based on the same evidence the Superior Court would have reached a different conclusion. *Id.*

Appellant argues this Trial Court abused its discretion by denying his Petition for Change of Name. Specifically, Appellant alleges this Trial Court erred in "considering his criminal record, which is over forty (40) years old, when there was no evidence as to how the change of name would be prejudicial to law enforcement authorities; erred in considering the unproved assertions of detriment to law enforcement records and resultant harm to the public as a basis for the denial; and otherwise violated his right of freedom of religion." After review of relevant statutory and case law, this Trial Court finds Appellant's arguments are without merit.

1. **This Trial Court properly denied Appellant's Petition for Change of Name due Appellant's criminal record history indicating Appellant has been convicted of felony violations for which this Trial Court is not authorized by statute to order a change of name.**

First, this Trial Court denied the Petition for Change of Name after a review of Appellant's criminal record history, which indicated felony violations for which this Trial Court is not authorized to grant a change of name. Pursuant to 54 Pa. C. S. §702(c)(1):

(1) The court may order a change of name for a person convicted of a felony… if:

(i) at least two (2) calendar years have elapsed from the date of completion of a person's sentence and that person is not subject to the probation or parole jurisdiction of any court, county probation agency or the Pennsylvania Board of Probation and Parole; or

(ii) the person has been pardoned.

54 Pa. C. S. §702(c)(1)(i)-(ii). However, §702(c)(1) is subject to the provisions of paragraph (c)(2), which states:

> The court **may not order a change of name** for a person convicted of murder, voluntary manslaughter, rape, involuntary deviate sexual intercourse, statutory sexual assault, sexual assault, aggravated indecent assault, robbery …, aggravated assault …, arson…, kidnapping or robbery of a motor vehicle or criminal attempt, criminal conspiracy or criminal solicitation to commit any of the offenses listed above or an equivalent crime under the laws of this Commonwealth in effect at the time of the commission of that offense or an equivalent crime in another jurisdiction.

54 Pa. C. S. §702(c)(2) [emphasis added]. Upon processing Appellant's fingerprints, the Pennsylvania State Police, Criminal Records and Identification Division Central Repository provided Appellant's criminal record history to the Erie County Prothonotary's Office and said information was filed on February 23rd, 2015. A review of Appellant's criminal record indicates "this person [Appellant] has been convicted of felony violation(s) for which the court may not order a change of name." *See Appellant's Criminal Record History filed February 23rd, 2013.* Specifically, according to the criminal rap sheet, attached hereto as Exhibit A, Appellant was convicted of Rape (F1), Statutory Rape (F2) and Indecent Assault (M2) at docket number 570 – 1977 and was sentenced to nine and one-half (9 ½) to twenty (20) years of incarceration. *See id.* Appellant's conviction of Rape, regardless of how much time has passed since the conviction, prohibits this Trial Court from granting Appellant's Petition for Change of Name, according to the provisions of 54 Pa. C. S. §702(c)(2). Appellant argues there is no evidence as to how his proposed change of name would be prejudicial to law enforcement authorities and argues this Trial Court's denial of his Petition for Change of Name was based solely on "unproved assertions of detriment to law enforcement records and resultant harm to the public," *citing Petition of Alexander,* 394 A.2d 597, 599 (Pa. Super. 1978). Contrary to Appellant's argument, this Trial Court remains constrained by statutory law as to mandatory requirements. As Appellant's criminal record history indeed contains relevant statutory felony violations, this Trial Court is not authorized to grant a change of name and thereby properly denied Appellant's Petition for Change of Name.

2. This Trial Court properly denied Appellant's Petition for Change of Name due to the two (2) outstanding judgment liens remaining of record against Appellant.

Furthermore, this Trial Court denied the Petition for Change of Name after a review of the official judgment lien search required by statute, which indicates two (2) outstanding judgments liens remaining of record against Appellant. The primary purpose of the Judicial Change of Name Statute, other than with regard to minor children, is to prohibit fraud by those attempting to avoid financial obligations, and necessity for judicial involvement in name change petition centers on governmental concerns that individuals not alter their identity to avoid financial obligations. *In re McIntyre,* 715 A.2d 400, 402 (Pa. 1998); *see also Commonwealth v. Goodman,* 676 A.2d 234, 236 (Pa. 1996). Furthermore, at the scheduled hearing, a Petitioner must be able to present an official search of the proper offices of the county where petitioner resides and of any other county where petitioner has resided within five (5) years prior to filing the petition showing that there are **no judgments, decrees of record or other similar matters against the Petitioner.** *See 54 Pa. C. S. §701(a.1)(4)(ii)(B)* [emphasis added].

Prior to the scheduled hearing date, March 2nd, 2015, an official judgment lien search was conducted regarding Appellant and filed by the Erie County Prothonotary's Office on February 25th, 2015. According to the official judgment lien search, attached hereto as Exhibit B, there are two (2) outstanding judgment liens remaining of record against Appellant – a Commonwealth Tax Lien, docket number 30441 – 2012, in the amount of twenty thousand, five hundred fifty-one dollars and 52/100 ($20,551.52), and a City of Erie Municipal Lien, docket number 50494 – 2012, in the amount of three hundred eleven dollars and 91/100 ($311.91). Although Appellant alleges his ex-wife, Dolly Mae Rogers, is solely responsible for the outstanding judgment liens, both dockets clearly name Appellant as the sole defendant[4] or as a co-defendant.[5] Furthermore,

[4] See docket number 30441 – 2012.

[5] See docket number 50494 – 2012.

the two (2) outstanding judgments were filed against Appellant in the year 2012. From that time period forward, Appellant acknowledges the existence of these outstanding judgment liens and has taken no action to resolve the outstanding judgment liens against his name as Joseph Lee Ollie. The presence of two (2) outstanding judgment liens remaining of record against Appellant raises the appearance of avoiding one's financial obligations and requires a trial court to follow the requirements of statutory law and deny the instant Petition for Change of Name so as to not allow an individual to evade his financial responsibilities. *See McIntyre,* 715 A.2d at 402. As the official judgment lien search indicates two (2) outstanding judgment liens remaining of record against Appellant in the total amount of twenty thousand, eight hundred sixty-three dollars and 43/100 ($20,863.43), this Trial Court properly denied Appellant's Petition for Change of Name.

3. This Trial Court's denial of Appellant's Petition for Change of Name did not violate Appellant's freedom of religion.

Finally, Appellant's case law in support of this appeal issue, specifically *Petition of Alexander,* 394 A.2d 597 (Pa. Super. 1978), regarding freedom of religion, is easily distinguishable from the instant appeal.[6] In *Petition of Alexander*, the Petitioner requested a change of name from Henry Alexander to "Abu Suleiman Abdul-Haqq Asadi" for religious reasons. *Id.* at 598. At the hearing on the Petition for Change of Name, the Commonwealth objected on the basis that it would have a detrimental effect on law enforcement documents and records and would otherwise be harmful to the public. *Id*. The trial court dismissed the Petition for Change of Name, and Petitioner appealed to the Pennsylvania Superior Court. *Id*. The Pennsylvania Superior Court reversed the trial court's decision, holding the trial court was required to have some factual basis to support its decision, and where the record was devoid of any such evidence, the trial court abused its discretion in dismissing the Petition for Change of Name. *See id.* at 599.

In the instant case, this Trial Court did not deny Appellant's Petition for Change of Name due to Appellant's choice of proposed new name or any "unproven assertion" that Appellant's change of name would be detrimental to law enforcement records or otherwise harmful to the public; rather, the sole grounds for this Trial Court's denial of Appellant's Petition for Change of Name were Appellant's inability to meet the statutory requirements regarding change of name, specifically 54 Pa. C. S. §702(c)(2) (regarding Appellant's conviction of felony violations for which this Trial Court cannot order a change of name) and 54 Pa. C. S. §701(a.1)(4)(ii)(B) (regarding outstanding judgment liens remaining of record against Appellant). Therefore, as this Trial Court based its denial on Appellant's inability to meet the statutory requirements, and not on Appellant's choice of name or an unproven detriment to law enforcement records or harm to the public, Appellant's citing case law, specifically *Petition of Alexander,* 394 A.2d 597 (Pa. Super. 1978), is easily distinguishable from the instant appeal. Therefore, Appellant's argument that this Trial Court's denial of his Petition for Change of Name violated his freedom of religion is moot and, therefore, is without merit.

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**

[6] In his Petition for Change of Name, Appellant states as his reason "I am a Muslim and I follow the Islamic Religious teachings of the Ka'ran (sic) and Sunah (sic) of prophet Muhammad. I move to dissolve the slave name that my Mother and/or Father had given to me, and I can't find any line of decent (sic) or ancestors."

NMMM, INC., t/a THE DOG HOUSE, Appellant
v.
PENNSYLVANIA LIQUOR CONTROL BOARD, Appellee

LIQUOR CODE / PRELIMINARY PROVISIONS / INTERPRETATION OF ACT

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.

GOVERNMENTS / STATE/TERRITORIAL GOVERNMENTS / LICENSES

Renewal of a licensee's liquor license is not an automatic procedure. 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 licensees, 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.

GOVERNMENTS / STATE/TERRITORIAL GOVERNMENTS / LICENSES

When an appeal is taken from a Board decision, pursuant to 47 Pa. C. S. §4-464, a trial court hears the matter *de novo* and fashions its own trial court findings of fact and conclusions of law. A trial court must receive the record of the proceedings below, if offered, and may hear new evidence.

GOVERNMENTS / STATE/TERRITORIAL GOVERNMENTS / LICENSES

A trial court may make its own findings of fact and reach its own conclusions of law based on those findings of fact, even when the evidence it hears is substantially the same as the evidence presented to the Board.

ADMINISTRATIVE LAW / JUDICIAL REVIEW / STANDARDS OF REVIEW / SUBSTANTIAL EVIDENCE

A trial court may reverse the Board's decision to deny a license renewal where its Findings are supported by substantial evidence in the record as a whole.

LIQUOR CODE / LICENSES AND REGULATIONS / GENERAL PROVISIONS

Pursuant to 47 P.S. §4-470(a), failure by an applicant to adhere to a Conditional Licensing Agreement will be sufficient cause to form the basis for a citation under section 471 and for the nonrenewal of the license.

GOVERNMENTS / STATE/TERRITORIAL GOVERNMENTS / LICENSES

A trial court may consider corrective or remedial measures taken by a licensee in determining whether said corrective measures warrant renewal of a liquor license, and is free to consider the corrective measures a licensee implements in response to its citations and substitute its discretion for that of the Pennsylvania Liquor Control Board in determining that those corrective measures warranted the renewal of the licensee's license.

GOVERNMENTS / STATE/TERRITORIAL GOVERNMENTS / LICENSES

Even a single past citation is sufficient to support the Board's decision to deny renewal of a liquor license, and the Board may consider a licensee's entire citation history to determine whether a pattern emerges and may consider all past Liquor Code violations, no matter when they occurred.

GOVERNMENTS / STATE/TERRITORIAL GOVERNMENTS / LICENSES

A trial court is permitted to consider the corrective measures a licensee took in response to its citations, and to substitute its discretion for that of the Board in determining that those corrective measures warranted the renewal of Licensee's license.

GOVERNMENTS / STATE/TERRITORIAL GOVERNMENTS / LICENSES

A trial court, similar to the Board, may take into consideration whether any substantial steps were taken to address the activity occurring on or about the premises.

GOVERNMENTS / STATE/TERRITORIAL GOVERNMENTS / LICENSES

Although a licensee is required to take substantial affirmative measures to prevent misconduct, a licensee is not required to do everything possible to prevent criminal activity on the premises, act as its own police force or close its business.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
MD 384-2014

Appearances: Charbel G. Latouf, Esq., Attorney for Appellant, William Mitchel, operator and sole shareholder of NMMM, Inc., t/a The Dog House
Michael J. Plank, Esq., Attorney for Appellee, Pennsylvania Liquor Control Board, Bureau of Licensing

OPINION

Domitrovich, J., September 18, 2015

After thorough consideration of the entire record regarding Petitioner's request for this Court to 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 10th, 2013 and June 23rd, 2015, 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 reversing the Pennsylvania Liquor Control Board's decision not to renew Appellant's liquor license:

FINDINGS OF FACT

I. Factual and Procedural History

1. William Mitchel is the operator and sole shareholder of NMMM, Inc., t/a The Dog House (hereafter referred to as "Appellant"), located at 2202 East Lake Road, Erie,

Pennsylvania 16511.

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. On May 21st, 2013, Appellant filed a timely application with the Board for renewal of Liquor License No. R-17528 with all of the supporting documents and appropriate filing fees. On said application, Bernard George was erroneously named as "Secretary" and Mary Mitchell was erroneously named as "Manager and Steward." *See Respondent's Exhibit 5, sub-Exhibit B-1.*
4. By Letter dated June 4th, 2013, the Board informed Appellant it was in receipt of Appellant's Application for Renewal and indicated some inconsistencies on said Application, including missing lease information and William Mitchell not being listed on the Application for Renewal. The Board provided an Application Addendum and a Notice of Change in the Business Structure of Licensed Corporation to Appellant. *See Respondent's Exhibit 5, sub-Exhibit B-2.*
5. On June 14th, 2013, the Board received Appellant's Application Addendum, signed by William Mitchell and Mary Mitchell. Said Addendum specified William Mitchell was "Owner/Manager" and did not specify a title for Mary Mitchell.
6. Previously, Appellant entered into a Conditional Licensing Agreement (hereafter referred to as "CLA") on November 9th, 2011 for the license period effective August 1st, 2011 through July 31st, 2013, which placed the following conditions on Appellant:
    a. Appellant shall use a "transaction scan device" to scan the identification of all patrons purchasing alcoholic beverages, notwithstanding the fact that the patron may have had his or her identification scanned on a previous occasion (i.e. *7:00 a.m. until 2:00 a.m. the following day*);
    b. Appellant shall maintain adequate lighting conditions directly outside, in the parking lot, and within the licensed premises. Exterior lighting will be sufficient to permit patrons to be identifiable upon entering and leaving the licensed premises. Interior lighting and lighting in the parking lot area will be sufficient during operating hours for surveillance cameras to obtain and record clear images;
    c. Appellant shall employ at least one (1) security guard who will be present and working at the premises during all pre-planned events (i.e. *any gathering of an identifiable group of people at the licensed premises, which is organized by a third party, for which Appellant has at least twenty-four (24) hours' notice*), for which thirty (30) or more individuals are attending, and two (2) security guards who will be present and working at the premises during all pre-planned events for which fifty (50) or more individuals are attending. Appellant shall employ at least two (2) security guards who will be present and working at the premises during all events at the premises that have been advertised in print, radio, television or internet, events involving live music, and all "theme nights." All security persons shall be employed by a reputable professional security firm which has been approved by the Lawrence Park Township Police Chief. All security persons shall be clothed in such a way as to make his/her status as security personnel readily apparent. A record of the pre-planned events where security personnel is required, including

the time, date and security personnel included in each event, shall be retained as a business record pursuant to section 493(12) of the Liquor Code and shall be made available upon request to law enforcement officials, as well as Board employees and employees of the Pennsylvania State Police, Bureau of Liquor Code Enforcement;

d. During all times when paragraph (c) does not require security to be present at the premises, if the number of patrons present at the licensed premises exceed thirty (30), Appellant shall immediately notify the Lawrence Park Township Police Department;

e. Appellant shall direct at least one (1) employee or security guard to patrol the exterior of the premises at least once per hour every night of operation from 9:00 p.m. until all patrons have vacated the premises and Appellant has closed for the business day. Appellant shall immediately notify the Lawrence Park Township Police Department of any disturbance or unlawful activity observed as part of these patrols. A record of the patrols, including the time, date and personnel included in each patrol, shall be retained as a business record pursuant to section 493(12) of the Liquor Code and shall be made available upon request to law enforcement officials, as well as Board employees and employees of the Pennsylvania State Police, Bureau of Liquor Code Enforcement;

f. Appellant shall maintain and enforce a written barred patron list on the licensed premises. Such list shall be maintained by Appellant as a business record pursuant to section 493(12) of the Liquor Code and shall be made available upon request to law enforcement officials, as well as Board employees and employees of the Pennsylvania State Police, Bureau of Liquor Code Enforcement;

g. Appellant shall immediately contact and cooperate with the local police department in the event of any fight, disturbance and/or misconduct at the premises or in areas adjacent to the licensed premises;

h. Appellant shall, within ninety (90) days of the approval of the CLA, become compliant with and remain compliant with the Responsible Alcohol Management Provisions (“RAMP”) of the Liquor Code including, but not limited to:
   i. New employee orientation;
   ii. Training for alcohol service personnel;
   iii. Manager/owner training;
   iv. Displaying of responsible alcohol service signage; and
   v. A certification compliance inspection by a representative of the Board’s Bureau of Alcohol Education;

i. Appellant shall initiate and attend regular monthly meetings with a designated representative of the Lawrence Park Township Police Department for the purpose of addressing any problems at the premises, and to solicit and implement recommendations on how to orderly operate the establishment. Records of such meetings, including the date and substance of the meetings, shall be maintained as business records, subject to section 493(12) of the Liquor Code;

j. Two (2) or more adjudicated (i.e. *the issuance of a decision and order after the effective date of this Agreement, by the Office of Administrative Law Judge or any other tribunal, affirming the citation without respect to any appeals of*

such adjudication) citations in any two (2)-year licensing term, which requires a minimum fine, if a fine is imposed, of one thousand dollars ($1,000.00) shall require that the license be placed in safekeeping within fifteen (15) days of such adjudication, until such time as it is transferred to a bona fide third party. Appellant authorizes the Board to place the license in safekeeping in the event it fails to do so as required by this paragraph.;

k. Appellant shall prominently display four (4) signs, at least two (2) feet by two (2) feet in size, that advise patron that unlawful activity will not be tolerated;
l. Appellant shall not allow patrons on the premises between 2:30 a.m. and 7:00 a.m.;
m. Appellant shall refuse entry to the premises to individuals wearing clothing or other items exhibiting colors or other symbols which have been identified by the Lawrence Park Township Police Department to be symbols of gang affiliation; and
n. Appellant shall maintain camera surveillance, to include at least three (3) cameras of the interior of the licensed premises. The cameras shall be operating and input of all cameras will be recorded during all operating hours. Recordings shall be retained for not less than thirty (30) days. Appellant shall make all recordings from the system available upon request to the Board, its employees, or to any local, state or federal law enforcement agency, including, but not limited to, the Lawrence Park Township Police Department and the Pennsylvania State Police, Bureau of Liquor Code Enforcement. Recordings shall be provided within three (3) days of a request. *See Respondent's Exhibit 5, sub-Exhibit B-4.*

7. On May 1st, 2012, Appellant requested a modification of the November 9th, 2011 CLA that would require Appellant to use its transaction scanning device to check patrons' identifications who appear to be forty (40) years of age or younger, instead of all patrons.
8. On July 5th, 2012, Appellant and the Board entered into an Amended CLA, which was approved by the Board on July 11th, 2012. The following changes were made, with all other provisions remaining in full force and effect:
   a. Appellant shall use a "transaction scanning device" to scan the identification of all patrons forty (40) years of age or under, purchasing alcoholic beverages unless the patron's identification has already been previously scanned and Appellant has retained the data obtained from such scan. Information from the transaction scan device shall be provided upon request of the Board, any local, state or federal law enforcement agency, and the Pennsylvania State Police, Bureau of Liquor Control Enforcement, and;
   h. Appellant shall remain compliant with the Responsible Alcohol Management Provisions of the Liquor Code including, but not limited to:
      i. New employee orientation;
      ii. Training for alcohol service personnel;
      iii. Manager/owner training;
      iv. Displaying of responsible alcohol service signage; and
      v. A certification compliance inspection by a representative of the Board's Bureau of Alcohol Education. *See Respondent's Exhibit 5, sub-Exhibit B-5.*
9. On July 16th, 2013, the Board sent a letter to Appellant stating its objection to the

renewal of Appellant's liquor license, pursuant to 47 Pa. C. S. § 4-470, alleging Appellant had done the following:

a. Abused its licensing privilege and would no longer be allowed to hold a liquor license based upon violations of the Liquor Code relative to Citation Numbers: 12-0584, 12-0522, 12-0054, 11-1314, 11-0990, 11-0768, 06-1840, 03-1165, 02-0690, 01-1924, 01-0666, and 01-0485, and eight (8) reported incidents of disturbance;
b. Appellant breached the Conditional Licensing Agreement by not having adequate lighting inside and outside in the parking lot; not employing security personnel from a reputable professional security firm approved by the Lawrence Park Township Police Department; not retaining the records of the patrols, including date, time and personnel included in each patrol of the exterior of the premises performed at least once per hour every night of operation from 9:00 p.m. until all patrons have vacated the premises; not scheduling an appointment to conduct the on-site compliance check related to RAMP training and thus not completing RAMP training by February 8th, 2012 deadline; not initiating and attending regular monthly meetings with a designated representative of the Lawrence Park Township Police Department for addressing problems; not prominently displaying any signs that advised patrons that unlawful activity will not be tolerated; not refusing entry to individuals wearing clothing or other items exhibiting colors or other symbols which have been identified by the Lawrence Park Township Police Department to be symbols of gang affiliation; and not retaining camera surveillance for a period of thirty (30) days, or making available within three (3) days of the request of the Lawrence Township Police Department the recordings from the camera surveillance system; and
c. The Board not being convinced that William Mitchell was the only entity with a pecuniary interest in the license, pursuant to the renewal application signed by Mary Mitchell, with the title of "Manager and Steward," and Bernard George, with the title of "Secretary." (*See Respondent's Exhibit E, sub-Exhibit B-3).*

10. The following are the adjudicated citations for which Appellant filed a Statement of Waiver, Admission, and Authorization or a hearing was conducted and the charges were sustained:

a. Citation 12-0584, which was issued on April 23rd, 2012, contained one count of failure to adhere to the Conditional Licensing Agreement, sections 6(a), 6(c), 6(k) and 6(m). Appellant executed a Statement of Waiver, Admission, and Authorization admitting to this charges. The Administrative Law Judge sustained the charge, and Appellant was fined one thousand dollars and 00/100 ($1,000.00);
b. Citation 12-0522, which was issued on March 30th, 2012, contained one count of failure to adhere to the Conditional Licensing Agreement, sections 6(b), 6(c), 6(e), 6(h), 6(i) and 6(k). Appellant executed a Statement of Waiver, Admission, and Authorization admitting to this charge. The Administrative Law Judge sustained the charge, and Appellant was fined five hundred dollars and 00/100 ($500.00);
c. Citation 12-0054, which was issued on January 23rd, 2012, contained one count of failure to adhere to the Conditional Licensing Agreement, sections 6(c), 6(i), 6(m) and 6(n). Appellant executed a Statement of Waiver, Admission, and Authorization

admitting to this charge. The Administrative Law Judge sustained the charge, and Appellant's restaurant liquor license was suspended for a period of two (2) days, beginning 7:00 a.m. on Monday, June 11th, 2012, and ending 7:00 a.m. on Wednesday, June 13th, 2012;

d. Citation 11-1314, which was issued on July 27th, 2011, contained three counts – one count of sale of alcoholic beverages between 2:00 a.m. and 7:00 a.m., in violation of 47 P.S. §§4-406(a)(2) and 4-493(16); one count of failure to require patrons to vacate premises habitually used for the service of alcoholic beverages not later than one-half (1/2) hour after cessation of service of alcoholic beverages, in violation of 47 P.S. §4-499(a); and one count of permitting patrons to possess and/or remove alcoholic beverages from the premises habitually used for the service of alcoholic beverages, in violation of 47 P.S. §4-499(a). Appellant executed a Statement of Waiver, Admission, and Authorization admitting to these charges. The Administrative Law Judge sustained the charges, and Appellant's restaurant liquor license was suspended for a period of five (5) days, beginning 7:00 a.m. on Monday, June 18th, 2012, and ending 7:00 a.m. on Saturday, June 23rd, 2012;

e. Citation 11-0990, which was issued on June 8th, 2011, contained one count of sale, furnishing or providing alcoholic beverages to minors, in violation of 47 P.S. §4-493(1). Appellant executed a Statement of Waiver, Admission, and Authorization admitting to this charge. The Administrative Law Judge sustained the charge, and Appellant's restaurant liquor license was suspended for a period of four (4) days, beginning 7:00 a.m. on Monday, April 2nd, 2012, and ending 7:00 a.m. on Friday, April 6th, 2012;

f. Citation 11-0768, which was issued on June 3rd, 2011, contained two counts – one count of noisy and/or disorderly operation, in violation of 47 P.S. §4-471, and one count of recklessly endangering another person, in violation of 47 P.S. §4-471. Appellant executed a Statement of Waiver, Admission, and Authorization admitting to these charges. The Administrative Law Judge sustained the charges, and Appellant's restaurant liquor license was suspended for a period of three (3) days, beginning 7:00 a.m. on Friday, April 6th, 2012, and ending 7:00 a.m. on Monday, April 9th, 2012. Said suspension was vacated at the request of Appellant and was re-imposed beginning on 7:00 a.m., Friday, April 13th, 2012, and ending on 7:00 a.m., Monday, April 16th, 2012;

g. Citation 06-1840, which was issued on August 11th, 2006, contained three counts – one count of sale, furnishing or providing alcoholic beverages on Sunday after 2:00 a.m., in violation of 47 P.S. §§4-406(a)(2) and 4-493(16); one count of failing to require patrons to vacate the premises habitually used for the service of alcoholic beverages not later than one-half (1/2) hour after cessation of service of alcoholic beverages, in violation of 47 P.S. §4-499(a); and one count of permitting patrons to possess and/or remove alcoholic beverages from the premises habitually used for the service of alcoholic beverages, in violation of 47 P.S. §4-499(a). Appellant executed a Statement of Waiver, Admission, and Authorization admitting to these charges. The Administrative Law Judge sustained the charges, and Appellant was fined one thousand, six hundred dollars and 00/100 ($1,600.00);

h. Citation 03-1165, which was issued on July 11th, 2003, contained one count of use of loudspeakers whereby the sound of music or other entertainment could be heard outside. Appellant executed a Statement of Waiver, Admission, and Authorization admitting to this charge. The Administrative Law Judge sustained the charge, and Appellant was fined two hundred fifty dollars and 00/100 ($250.00);

i. Citation 02-0690, which was issued on April 12th, 2002, contained two counts – one count of failing to require patrons to vacate the premises habitually used for the service of alcoholic beverages not later than one-half (1/2) hour after cessation of service of alcoholic beverages, in violation of 47 P.S. §4-499(a); and one count of permitting patrons to possess and/or remove alcoholic beverages from the premises habitually used for the service of alcoholic beverages, in violation of 47 P.S. §4-499(a). An administrative hearing was conducted on September 19th, 2002. The Administrative Law Judge concluded Appellant violated the above-referenced statutes, and Appellant's restaurant liquor license was suspended for a period of two (2) days, beginning 7:00 a.m. on Monday, December 9th, 2002, and ending 7:00 a.m. on Wednesday, December 11th, 2002;

j. Citation 01-1924, which was issued on September 20th, 2002, contained one count of transporting malt or brewed beverages in a vehicle not registered with the Pennsylvania Liquor Control Board, in violation of §§9.11 and 9.23 of the Liquor Control Board Regulations. Appellant executed a Statement of Waiver, Admission, and Authorization admitting to this charge. The Administrative Law Judge sustained the charge, and Appellant was fined seventy-five dollars and 00/100 ($75.00);

k. Citation 01-0666, which was issued on April 6th, 2001, contained two counts – one count of refusing to allow Liquor Enforcement officers the right to inspect completely the entire premises at the time the premises were open for transaction of business or when patrons were in the premises wherein alcoholic beverages are sold, in violation of 47 P.S. §4-493(21), and one count of failing to require patrons to vacate the premises habitually used for the service of alcoholic beverages not later than one-half (1/2) hour after cessation of service of alcoholic beverages, in violation of 47 P.S. §4-499(a). An administrative hearing was conducted on August 22nd, 2001. The Administrative Law Judge concluded Appellant violated the above-referenced statutes, and Appellant was fined one thousand, six hundred fifty dollars and 00/100 ($1,650.00); and

l. Citation 01-0485, which was issued on March 19th, 2001, contained one count of fortified, adulterated and/or contaminated liquor, in violation of 47 P.S. §4-491(10). Appellant executed a Statement of Waiver, Admission, and Authorization admitting to this charge. The Administrative Law Judge sustained the charge, and Appellant was fined seventy-five dollars and 00/100 ($75.00). *See Respondent's Exhibit 5, sub-Exhibit B-6.*

11. Thereafter, pursuant to 47 Pa. C. S. § 4-464, the Board scheduled a hearing to address Appellant's liquor license Renewal Application and Addendum. Appellant received notice of that hearing by the Bureau's letter dated August 22nd, 2013. (See Respondent's Exhibit E, sub-Exhibit B-8).
12. The scheduled license renewal hearing occurred at the Homewood Suites by Hilton,

2084 Interchange Road, Erie, Pennsylvania 16501, on September 10th, 2013 before Hearing Examiner John A. Mulroy, Esq., who was appointed by the Board, at which William Mitchell, as operator and sole shareholder of Appellant, appeared and was represented by counsel, Charbel G. Latouf, Esq. The Board was represented by its counsel, Michael J. Plank, Esq. *(See Respondent's Exhibit 5)*.

13. By letter and Order June 4th, 2014, the Board denied Appellant's application for renewal of its liquor license. *(See Respondent's Exhibit 2)*.
14. Appellant filed an appeal of the Board's denial of its Application of Renewal on June 6th, 2014.
15. Board filed an Opinion in support of its Order on March 10th, 2015. (*See Respondent's Exhibit 4)*.
16. A Civil *De Novo* trial was held on June 23rd, 2015 in Courtroom G, Room 222, Erie County Courthouse, Erie, Pennsylvania, before the undersigned judge, at which several live witnesses were presented; transcripts were admitted regarding testimony by witnesses appearing before Hearing Examiner John A. Mulroy, Esq.; stipulations and exhibits were entered; and arguments were heard. William Mitchell, owner and sole shareholder of Appellant, appeared and was represented by counsel, Charbel G. Latouf, Esq. The Board was represented by its counsel, Michael J. Plank, Esq.

II. <u>Findings of Fact by this Trial Court from the Transcript of Testimony of Witnesses appearing before the Hearing Examiner at the Administrative Hearing, September 10th, 2013</u>

A. Officer Scott Hellman, Lawrence Park Township Police Department

i. August 26th, 2011

17. Officer Hellman, along with Officer Kufner, responded to a call for a "large fight." *See Notes of Testimony, Administrative Hearing, 9/10/13, pg. 7, lines 7-20.*
18. A telephone call was made to the Lawrence Park Township Police Department around 1:55 a.m., and when Officers Hellman and Kufner arrived, they observed a large group of people outside, scattering and attempting to leave the parking lot. *See id., pg. 8, lines 6-12.*
19. Officer Hellman investigated the incident and spoke with Bernard George, Mary Mitchell and Richard Hartleb. *See id., pg. 9, lines 4-22.*
20. Through his investigation, Officer Hellman discovered a large black female, who was inside Appellant's premises earlier and was removed. She attempted to return to the premises and, upon refusal, attempted to strike Bernard George and another individual, Richard Hartleb, and was again removed from the premises. *See id, pg. 12, line 25 – pg. 13, line 14.*
21. Officer Hellman discovered from Officer Kufner that a shooting occurred near Marne Avenue, which may have originated from the fight at Appellant's premises. *See id., pg. 14, line 25 – pg. 15, line 10.*
22. Officer Hellman does not know the identity of the person who called the incident in, but believes it was an employee of Appellant and their actions were consistent with what is recommended if there is a disturbance or other incident. *See id., pg. 17, line 23 – pg. 18, line 11.*

ii. November 12th, 2011

23. Officer Hellman, along with Officer Buzanowski, responded to a call of a "very large fight" occurring at Appellant's premises at 4:02 p.m. *See id., pg. 19, lines 3-17.*
24. Officer Hellman learned from Bernard George and Erica Porath, a bartender, that an individual, Christopher McCammon, entered Appellant's premises, approached another individual, identified as Van Williams, and struck Mr. Williams in the face. *See id., pg. 19, line 23 - pg. 20, line 22.*
25. Mr. McCammon and Mr. Williams "wrestled around and engaged in a physical altercation," and Mr. McCammon fled the scene prior to police arriving. *See id., pg. 20, lines 22-25.*
26. Prior to this altercation, on an unspecified date, Officer Hellman and Chief John Morell responded to Appellant's premises around 6:30 a.m. for an assault victim. *See id., pg. 22, lines 16-20.*
27. Christopher McCammon and Bernard George were accused of assaulting another victim, and while Bernard George was found not guilty, Christopher McCammon pled guilty and alleged witnesses were lying and he was "thrown under the bus." *See id., pg. 22, line 21 – pg. 23, line 7.*
28. On November 12th, 2011, Officer Hellman did not recall if Bernard George was working as security, but did acknowledge Bernard George often worked as security and wore a yellow shirt marked "Security." *See id., pg. 24, lines 8-21.*
29. Officer Hellman acknowledged Christopher McCammon was only charged with summary Harassment after the November 11th, 2011 incident, as there was only minor redness on the victim's face and neck and there was no "large, huge fight." *See id., pg. 25, lines 13-24.*
30. Officer Hellman spoke with William Mitchell, who had previously told Christopher McCammon he was not allowed on the premises. *See id., pg. 29, lines 2-5.*
31. Officer Hellman stated the employee who called in the incident characterized the incident as a "large fight." *See id., pg. 31, lines 8-11.*

B. Officer Jeffrey Devore, Lawrence Park Township Police Department

i. August 28th, 2011

32. Officer Devore was patrolling in front of Appellant's premises at 2:32 a.m. when he observed "several Hispanic individuals yelling and screaming at one another" in the parking lot. *See id., pg. 37, lines 3-8.*
33. Officer Devore entered the parking lot and numerous individuals started to separate, but were still yelling. *See id., pg. 38, lines 23-25.*
34. Officer Devore observed a black Chrysler attempting to leave the parking lot, with several individuals trying to stop it; he pulled his police cruiser behind the Chrysler to stop it, and made contact with the driver and passenger. *See id., pg. 39, lines 15-21.*
35. Officer Devore observed a female driver bleeding from her nose and face area, and both driver and female passenger wanted charges pressed for disorderly conduct. *See id., pg. 40, lines 4-21.*
36. James Carr, Jr., a security bouncer, stated the females began fighting, and believed one of the female's husband discarded a kitchen knife near the back door of the premises, which was located by the police. *See id., pg. 41, line 20 – pg. 42, line 14.*

37. Officer Devore stated he only observed the incident occurring outside in the parking lot of the premises and not inside the premises. *See id., pg. 43, lines 2-11.*

ii. March 19th, 2012

38. Officer Devore stated he was called to Appellant's premises 12:31 a.m., March 19th, 2012, which was St. Patrick's Day, to respond to a "large fight." *See id., pg. 43, line 16 – pg. 44, line 4.*
39. Officer Devore observed fifty (50) to seventy-five (75) people outside Appellant's premises causing a disturbance and yelling and screaming at one another, but not physically fighting one another. *See id., pg. 44, line 8-11.*
40. Officer Devore observed an individual with blood coming out of his mouth and face and a large contusion on his left cheek, who stated he was involved in an altercation inside Appellant's premises with an unknown male, which spilled outside. *See id., pg. 45, line 1-13.*
41. Office Devore acknowledged no formal charges resulted from either August 28th, 2011 or March 19th, 2012. *See id., pg. 47, lines 4-7.*

iii. June 17th, 2012

42. Officer Devore stated, around 1:30 a.m., Bernard George asked for an officer to make a presence near Appellant's premises to prevent any trouble in the parking lot. *See id., pg. 49, lines 1-9.*
43. Officer Devore arrived around 2:00 a.m. and observed several Hispanic females leaving Appellant's premises and yelling at one another; later, two Hispanic males began screaming at each other, at which Officer Devore made contact. S*ee id., pg. 49, lines 14-24.*
44. Officer Devore acknowledged the large number of patrons in the parking lot is consistent with the number of patrons exiting Appellant's premises at closing time. *See id., pg. 52, lines 7-21.*
45. Officer Devore acknowledged all of the patrons in the parking lot were not involved in the actual fighting. *See id., pg. 55, lines 5-12.*
46. Officer Devore stated the number of incidents involving Hispanic individuals stemmed from "Hispanic Night," held on Appellant's premises, and acknowledged Appellant no longer holds "Hispanic Night." *See id., pg. 66, lines 6-14.*
47. Office Devore acknowledged eliminating "Hispanic Night" was a good decision for Appellant. *See id., pg. 67, lines 2-10.*

C. Corporal Noble Brown, Lawrence Park Township Police Department

i. August 28th, 2011

48. Corporal Brown responded to the August 28th, 2011 incident to assist Officer Devore and located the kitchen knife in the back of Appellant's parking lot near the air conditioning unit. *See id., pg. 68, lines 8-19.*
49. Officer Devore told Corporal Brown the kitchen knife was possibly carried by Jorge Beneficio, who discarded it by the back door; no charges were pressed. *See id., pg. 69, lines 1-13.*
50. Corporal Brown also located a large quantity of white powder near the back door of Appellant's premises, and believed it to be cocaine with an estimated value of one

thousand, five hundred dollars and 00/100 ($1,500.00) to two thousand dollars and 00/100 ($2,000.00). *See id., pg. 69, lines 16-20; pg. 71, lines 19-22.*

51. Corporal Brown spoke with Van Williams, a bartender, who said he would advise William Mitchell so he could report to the Pennsylvania Liquor Control Board. *See id., pg. 73, lines 21-25.*
52. Corporal Brown acknowledged he did not field test this white powder to determine whether it was cocaine. *See id., pg. 74, lines 8-20.*

ii. November 27th, 2011

53. Corporal Brown responded to a shooting at Appellant's premises at 2:08 a.m. *See id., pg. 76, lines 11-20.*
54. Upon responding, Corporal Brown looked for any type of physical evidence and conducted interviews with people on the scene, including Bernard George and Appellant's employees, such as Van Williams, and Luis Marrero, who were working security. *See id., pg. 77, lines 8-23.*
55. Corporal Brown was told there were four shots fired, but no one saw the individual who fired the weapon. *See id., pg. 78, lines 4-19.*
56. Corporal Brown also spoke to Jasmine Watson, who gave a description of a Hispanic male; later, she stated she believed it was "Luis Marrero or someone who fit his description" who fired the shots. *See id., pg. 79, lines 3-15.*
57. Corporal Brown was unable to determine who fired the shots. *See id., pg. 79, lines 19-22.*
58. Two casings were found near Appellant's front door and two casings were found on the west side of Appellant's premises in the grass, and said casings belonged to a .25 caliber handgun. *See id., pg. 80, lines 5-25.*
59. Corporal Brown acknowledged he could not conclude where the shooter was when the shots were fired. *See id., pg. 81, lines 13-18.*
60. Corporal Brown stated no charges were filed as a result of the shooting. *See id., pg. 82, lines 12-13.*

D. Officer Scott Baker, Lawrence Park Township Police Department

i. June 5th, 2012

61. Officer Baker was dispatched to a fight at Appellant's premises at 9:50 p.m., and there was much screaming and shouting. *See id., pg. 85, lines 15-19.*
62. Officer Baker learned an individual drove his motorcycle through Appellant's front doors, dismounted his bike and chased after his girlfriend, a barmaid, who he grabbed by the throat and pushed against the wall. *See id., pg. 86, lines 3-25.*
63. Officer Kufner spoke to the barmaid, Lucille Anderson, who did not press charges against this individual on the motorcycle, later identified as Leon Frederick Akerly, II, a member of the Iron Wings Motorcycle Gang. *See id., pg. 87, line 23 – pg. 88, line 15.*
64. Officer Baker spoke to Bernard George, who contributed information to what was described. *See id., pg. 89, lines 7-16.*
65. Office Kufner filed a misdemeanor Disorderly Conduct and two traffic violations against Mr. Akerly, due to operating a motorcycle with a learner's permit and not wearing protective equipment. *See id., pg. 89, lines 19-24.*

66. Bernard George had previously contacted the Lawrence Park Township Police Department to inform them that Mr. Akerly may appear at Appellant's premises to "beat up" a female bartender. *See id., pg. 92, lines 3-10,*
67. Leon Akerly was not barred from the premises, but would be asked to leave if he appeared to be causing problems. *See id., pg. 92, lines 11-14.*
68. Bernard George asked the Lawrence Park Township Police Department to make extra passes by Appellant's premises due to the possibility of Mr. Akerly causing trouble. *See id., pg. 92, lines 17-21.*
69. Officer Baker acknowledged there was nothing that Appellant's employees could have done to stop this incident from occurring. *See id., pg. 94, lines 5-12.*

E. Chief John Morell, Lawrence Park Township Police Department

70. Chief Morell was familiar with the May 12th, 2012 call from Bernard George regarding Mr. Akerly. *See id., pg. 95, line 14 – pg. 96, line 3.*
71. The Iron Wings Motorcycle Gang is located in Erie, Pennsylvania and has caused numerous issues around Appellant's premises, which was a major reason for the CLA dated November 9th, 2011. *See id., pg. 97, line 24 – pg. 98, line 6.*
72. Chief Morell stated Appellant's premises was the clubhouse for the Iron Wings, a/k/a "923" for many years prior to the CLA dated November 9th, 2011. *See id., pg. 99, lines 18-22.*
73. There were many incidents involving the Iron Wings "beating people up, assaulting people, intimidating witnesses, etc., which lead to the characterization of a 'gang'." *See id., pg. 101, lines 3-6.*
74. Chief Morell indicated the need for an additional patrolman due to the increased number of calls, including from Appellant's premises. *See id., pg. 104, 15-25.*
75. Chief Morell stated, between 2011 and 2012, the Lawrence Park Township Police Department was "inundated with calls to Appellant's premises," but acknowledged Bernard George "stepped up and took a lead" at Appellant's premises and he has "no issues at this point." *See id., pg. 105, lines 17-21.*
76. Chief Morell stated the calls his officers responded to at Appellant's premises sometimes involved sixty (60) to seventy-five (75) people, which is "alarming from a management standpoint" and required extra help. *See id., pg. 106, 8-14.*
77. Chief Morell acknowledged Bernard George is "calling on a regular basis to let Lawrence Park Township Police Department if there was going to be a problem." *See id., pg. 108, line 25 – pg. 109, line 3.*
78. Regarding the incident on June 5th, 2012, Chief Morell did view a video recording of the incident, but Appellant's video surveillance system was not compatible with DVD; however, Bernard George brought in his equipment and provided a DVD, but said DVD was not compatible with the police department's system. *See id., pg. 109, lines 11-18.*
79. Chief Morell acknowledged William Mitchell was attending meetings, pursuant to the November 9th, 2011 CLA, but had developed anxiety according to Bernard George; therefore, Chief Morell authorized Bernard George to attend meetings, which was more productive. *See id., pg. 109, line 19 – pg. 110, line 13.*
80. Chief Morell stated a "barred letter" may have prevented the incident on July 5th,

2012 regarding Mr. Akerly, but he could not be absolutely positive and estimated a 50/50 probability. *See id., pg. 117, line 18 – pg. 118, line 13.*

81. Chief Morell admitted the major reason for an additional officer was for "the general safety of the public," and was unrelated to Appellant's premises, which was only one of many reasons. *See id., pg. 126, lines 5-15.*
82. Chief Morell stated he has concerns due to Bernard George parting ways with Appellant's establishment, as Bernard George was the one keeping Appellant in compliance. *See id., pg. 131, line 23 – pg. 132, line 1.*
83. Chief Morell acknowledged there have been no fights, no shots fired, no drug activity and no alarming, excessive amounts of people outside the premises within the past year. *See id., pg. 133, lines 6-22.*
84. Chief Morell acknowledged Appellant has eliminated "Hispanic Night," which was the cause of a majority of the disturbances on or near Appellant's premises. *See id., pg. 137, line 13 – pg. 138, line 10.*
85. Chief Morell also acknowledged Appellant prohibited the Iron Wings from wearing their colors or apparel inside Appellant's premises and, by doing so, eliminated any potential problems with the Iron Wings. *See id., pg. 138, lines 11-25.*
86. Chief Morell observed significant improvements to several problems with Appellant's premises, including adequate lighting, proper security personnel, routine meetings with the Lawrence Park Township Police Department, and people wearing colors; however other issues, including records of patrols, RAMP certification, placement of signs, and video surveillance systems, were either not resolved or unknown to Chief Morell. *See id., pg. 144, line 4 – pg. 147, line 17.*

F. Bernard A. George, Jr.

87. Bernard George admitted there was a mistake made on the computer-generated renewal forms, and that he is not the official secretary, nor he is an official shareholder or board member of Appellant. *See id., pg. 150, lines 1-25.*
88. Bernard George admitted he has no pecuniary interest in Appellant. *See id., pg. 151, line 24 – pg. 152, line 2.*
89. Bernard George related information about the positive evolving improvements Appellant had made. He stated at least ninety (90) percent of the employees are RAMP certified and Appellant is using approved security, has adequate lighting, patrolling the parking lot regularly, attending regular meetings with Chief John Morell, are prominently displaying signs, prohibiting individuals entering with gang colors or symbols of affiliation, and using a video surveillance system, with four (4) cameras retaining thirty (30) days of footage. *See id., pg. 152, line 25 – 154, line 21.*
90. Bernard George acknowledged he and Appellant's employees put safety measures in place to eliminate as many problems as they could, but stated it would be impossible to eliminate all problems inside or outside Appellant's premises. *See id., pg. 155, line 24 – pg. 156, line 12.*
91. Bernard George stated Appellant's employees are not permitted to go outside and get involved in altercations, but are instructed to telephone police, which is what they have been doing. *See id., pg. 156, lines 14-24.*
92. Bernard George recounted that the reason for eliminating "Hispanic Night" was due

to numerous disturbances. He acknowledged "Hispanic Night" was not worth risking Appellant's liquor license over, even if Appellant was making a great deal of money from those nights. *See id., pg. 157, lines 7-23.*

93. Bernard George stated all security personnel are required to wear black shirts with "Security" in white lettering on the front and back of the shirt. *See id., pg. 170, lines 7-11.*
94. This Trial Court believes that sending a barred letter to Mr. Akerly would not have prevented the incident on July 5th, 2012. *See id., pg. 176, line 23 – pg. 177, line 5.*
95. Prior to his involvement with Appellant, Bernard George was a police officer for fourteen (14) years and worked with the Lansdale Police Department, Wesleyville Police Department, Lawrence Park Township Police Department and Penn State Erie – Behrend College Campus Police. *See id., pg. 182, lines 11-18.*
96. Bernard George admitted he has only been "affiliated" with Appellant for the past two (2) years. *See id., pg. 187, lines 10-12.*
97. Bernard George stated he was never employed with Appellant and was never paid for helping Appellant. *See id., pg. 189, lines 5-14.*
98. Bernard George stated he is a good friend of William Mitchell and simply helped him whenever he could, even though Mr. George has his own business. *See id., pg. 190, lines 13-21.*

III. <u>Live Testimony heard before the Trial Judge at the Civil *De Novo* Trial, June 23rd, 2015</u>

A. Ian C. Murray, Esq.

97. Attorney Murray represented Appellant around the year 2012. *See Notes of Testimony, Civil De Novo Trial, 6/23/15, pg. 14, lines 21-23.*
98. Lieutenant Vicos asked Attorney Murray to assist Appellant with its problems, and Attorney Murray had extensive discussions with Chief John Morell, Lawrence Park Township Police Department, and an agent from PA State Police Bureau of Liquor Control Enforcement. *See id., pg. 15, lines 7-16.*
99. Pursuant to those discussions, all parties drafted a list of issues that needed addressed by Appellant, including fights, scanners, lighting, security, etc. *See id., pg. 15, line 17 – pg. 17, line 1.*
100. Attorney Murray acknowledged, after the CLA was signed and approved, no one called him regarding further problems and Appellant's premises were straightened out. *See id., pg. 20, lines 1-8.*
101. Attorney Murray, along with Appellant, admitted Appellant was out of compliance with the Liquor Laws and, although a CLA was approved, it would take significant time to fully comply with the provisions. *See id., pg. 20, line 18 – pg. 21, line 4.*
102. Attorney Murray recommended eliminating "Hispanic Night," a major cause of several disturbances on or near Appellant's premises. *See id., pg. 31, lines 15-22.*
103. Attorney Murray acknowledged most of the bikers who frequented Appellant's establishment were great, except for a couple "boneheads" like Leon Akerly. *See id., pg. 32, lines 5-12.*
104. Appellant prohibited bikers, biker gangs, etc. inside Appellant's premises with

jackets, colors or insignia on, and while it did not take long to turn bikers away, it did take some time before bikers started to come in without jackets, colors or insignia. *See id., pg. 32, lines 14-16.*

105. Attorney Murray acknowledged the name of the bar changed to the "Turn Around Bar," as the culture of the bar radically changed and "turned around" over the two (2) years. *See id., pg. 32, lines 19-20.*
106. Attorney Murray stated there were weekly personal meetings with Chief John Morell, which became to telephone meetings because Appellant was "doing so well and there were no problems at all." *See id., pg. 33, lines 11-19.*
107. Attorney Murray stated he worked with the Board to resolve the issues with Appellant, which culminated in the CLA dated November 9th, 2011. *See id., pg. 38, lines 22-25.*
108. Attorney Murray admitted Appellant had the November 9th, 2011 CLA for six (6) months before requesting a change of several CLA provisions. *See id., pg. 39, line 14 – pg. 40, line 3.*
109. Attorney Murray stated it was ridiculous to scan the identifications of individuals who were fifty (50) to seventy (70) years old, and the Board agreed to change this provision. *See id., pg. 43, lines 3-7.*
110. Attorney Murray stated the CLA provision regarding adequate lighting remained the same in the amended CLA so the issue of adequate lighting could be re-addressed by Appellant. *See id., pg. 45, lines 3-22*.
111. Attorney Murray stated the CLA provision regarding security remained the same in the amended CLA. *See id., pg. 46, line 18 – pg. 47, line 2.*
112. Attorney Murray stated the CLA provision as to contacting the police for the number of people remained the same in the amended CLA. *See id., pg. 47, lines 3-9.*
113. Attorney Murray stated the CLA provision regarding security remained the same in the amended CLA. *See id., pg. 47, lines 10-20.*
114. Attorney Murray stated the CLA provision regarding a barred patron list remained the same in the amended CLA and acknowledged Appellant was retaining a barred patron list. *See id., pg. 48, lines 1-12.*
115. Attorney Murray stated the CLA provision as to contacting and cooperating with the police remained the same in the amended CLA. *See id., pg. 49, lines 4-10.*
116. Attorney Murray stated the CLA provision regarding RAMP certification remained the same in the amended CLA, but he was not sure whether Appellant was pushing hard enough on RAMP certification of its employees. *See id., pg. 49, line 13 – pg. 50, line 10.*
117. Attorney Murray stated the corrective measures of the CLA "would take time to implement, and everyone knew that and accepted that." *See id., pg. 53, lines 19-23.*
118. Attorney Murray admitted, as it pertained to the CLA provision regarding monthly meetings with Chief John Morell, it could have been done sooner. *See id., pg. 55, lines 21-24*.
119. Attorney Murray stated the CLA provision regarding signs prohibiting unlawful activity remained the same in the amended CLA. *See id., pg. 56, lines 12-24.*
120. Attorney Murray stated the CLA provision regarding individuals on the premises after 2:30 a.m. remained the same in the amended CLA. *See id., pg. 57, lines 8-11.*

121. Attorney Murray stated the CLA provision regarding gang colors, symbols and affiliation remained the same in the amended CLA. *See id., pg. 57, lines 12-19.*
122. Attorney Murray admitted if he had been on Appellant's premises the day the CLA was signed, biker gang members would have been there, as well; however, these gangs have their own clubhouses now. *See id., pg. 58, lines 8-13.*
123. Attorney Murray stated the CLA provision regarding a video surveillance system remained the same in the amended CLA. *See id., pg. 58, lines 19-22.*

B. Bernard A. George, Jr.

124. Bernard George stated he was "affiliated" with Appellant and its operator and sole shareholder, William Mitchell, and assisted Appellant in complying with the terms of the November 9th, 2011 and July 11th, 2012 CLA's. *See id., pg. 88, lines 6-14.*
125. Bernard George stated, although he accomplished receiving his education and there exists concerns he would not be available on a full-time basis, Bernard George continued to promise to assist William Mitchell with any issues relative to maintaining compliance with the CLA. *See id., pg. 89, lines 2-24.*
126. Bernard George admitted he is not now and was never actually employed with Appellant. *See id., pg. 91, lines 12-20.*

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 licensees, 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).

When an appeal is taken from a Board decision, pursuant to 47 Pa. C. S. §4-464, a trial court hears the matter *de novo* and fashions its own Trial Court Findings of Fact and Conclusions of Law. *See Goodfellas, Inc. v. Pennsylvania Liquor Control Board,* 921 A.2d 559, 565 (Pa. Commw. Ct. 2007) (*citing Two Sophia's, Inc. v. Pennsylvania Liquor Control Board,* 799 A.2d 917, 919 (Pa. Commw. Ct. 2002). A trial court must receive the record of the proceedings below, if offered, and may hear new evidence. *See id.* A trial court may make its own Findings of Fact and reach its own Conclusions of Law based on those Findings of Fact, even when the evidence it hears is substantially the same as the evidence presented to the Board. *See Pennsylvania Liquor Control Board v. Bartosh*, 730 A.2d 1029, 1032 (Pa. Commw. Ct. 1999). A trial court may **reverse** the Board's decision to deny a license renewal where its Findings are supported by substantial evidence in the record as a whole. *See BCLT, Inc. v. Pennsylvania Liquor Control Board,* 2015 Pa. Commw. LEXIS 281 (Pa. Commw. Ct. 2015) [emphasis added].

By letter dated July 16, 2013, the Board objected to the renewal of Appellant's liquor license and based its objections upon (1) Appellant's breach of the CLA entered into on November 9th, 2011 and amended on July 11th, 2012; (2) Appellant's adjudicated citation history; (3) eight (8) incidents occurring on or near Appellant's premises; and (4) the Board not being convinced that William Mitchell was the only entity with a pecuniary interest in Appellant. *See Respondent's Exhibit 5, sub-Exhibit B-3*. In the instant case, this Trial Court finds and concludes the Board erred in refusing to renew Appellant's liquor license, in view of the following distinct bases:

1. Appellant's Conditional Licensing Agreement ("CLA") and Alleged Breaches Thereof

On November 9th, 2011, the Board approved a Conditional Licensing Agreement ("CLA"), which Appellant entered into on November 2nd, 2011, and Appellant's liquor license was renewed subject to the following conditions: (a) Appellant was to use a "transaction scan device" to scan all patron's identifications; (b) Appellant was to maintain adequate lighting inside and outside of the premises; (c) Appellant was to employ one (1) security guard for events of thirty (30) or more people and two (2) security guards for events for fifty (50) of more people; (d) Appellant was to notify the Lawrence Park Township Police Department if thirty (30) or more people are within the premises; (e) Appellant was to patrol the exterior once per hour between 9:00 p.m. and closing; (f) Appellant was to maintain a "barred patrons" list; (g) Appellant was to contact and cooperate with police in the event of a disturbance; (h) Appellant was to obtain Responsible Alcohol Management Provisions ("RAMP) certification; (i) Appellant was to initiate and attend regular monthly meetings with the Lawrence Park Township Police Department; (j) Appellant was to hold its license in safekeeping in the event of two (2) or more citations of one thousand dollars and 00/100 ($1,000.00) or more in any two (2) year licensing term; (k) Appellant was to display four (4) signs regarding tolerance

of unlawful activity; (l) Appellant was not to allow patrons on the premises between 2:30 a.m. and 7:00 a.m.; (m) Appellant was to prohibit entry of individuals wearing colors or symbols associated with gang activity; and (n) Appellant was to maintain a three [3] camera video surveillance system. *See Respondent's Exhibit 5, sub-Exhibit B-4*.[1]

Appellant received three (3) separate citations; each alleging Appellant breached various provisions of the CLA. First, Citation 12-0584, issued on April 23rd, 2012, alleged Appellant (1) did not scan all patrons' identifications using a "transaction scan device;" (2) did not employ security personnel from a reputable professional security firm; (3) did not prominently display signs stating unlawful activity will not be tolerated; and (4) did not refuse entry to individuals exhibiting colors or symbols relation to gang activity. *See Respondent's Exhibit 5, sub-Exhibit B-6.*

Second, Citation 12-0522, issued on March 30th, 2012, alleged Appellant (1) did not have adequate lighting outside of Appellant's premises in the parking lot; (2) did not employ security personnel from a reputable professional security firm and wearing clothing identifying them as "security;" (3) did not record the date, time and personnel conducting patrols of Appellant's premises; (4) did not complete RAMP certification by the deadline of February 8, 2012; (5) did not contact and attend monthly meetings with the Lawrence Park Township Police Department; and (6) did not prominently display signs stating unlawful activity will not be tolerated. *See id.*

Finally, Citation 12-0054, issued on January 23rd, 2012, alleged Appellant (1) did not employ security personnel from a reputable professional security firm; (2) did not contact and attend monthly meetings with the Lawrence Park Township Police Department; (3) did not refuse entry to individuals exhibiting colors or symbols relation to gang activity; and (4) did not maintain a video surveillance system with three (3) security cameras and provide the recordings when requested. *See id.*

These citations alleging Appellant's breach of the CLA, standing alone, can be reason enough for the Board to deny renewal of Appellant's liquor license, as "failure by an applicant to adhere to a Conditional Licensing Agreement will be sufficient cause to form the basis for a citation under section 471 and for the nonrenewal of the license." *See 47 P.S. §4-470(a).* However, a trial court may consider corrective or remedial measures taken by a licensee in determining whether said corrective measures warrant renewal of a liquor license, and is free to consider the corrective measures a licensee implements in response to its citations and substitute its discretion for that of the Pennsylvania Liquor Control Board in determining that those corrective measures warranted the renewal of the licensee's license. *See Becker's Café v. Pennsylvania Liquor Control Board,* 67 A.3d 885, 893 (Pa. Commw. Ct. 2013).

Ian C. Murray, Esq., former counsel for Appellant, provided credible testimony. Attorney Murray stated he was counsel for Appellant when the original CLA was implemented. *See N.T., Civil De Novo Trial, 6/23/2015, pg. 15, line 17 – pg. 17, line 1.* Attorney Murray also stated although the CLA was approved by the Board on November 9th, 2011, changes would not happen overnight and it was understood that it would take significant time to comply

[1] By request of Appellant, the November 9th, 2011 CLA was amended as follows: Paragraph A was amended to require scanning of identifications for all individuals forty (40) years of age or younger, and Paragraph H was amended to require Appellant to remain compliant with RAMP certifications.

with the provisions. *See id., pg. 20, line 18 – pg. 21, line 4.* However, Attorney Murray acknowledged Appellant did eliminate "Hispanic Night," as it was a major cause of several disturbances on or near Appellant's premises. *See id., pg. 31, lines 15-22.* Attorney Murray also acknowledged Appellant did begin prohibiting bikers, biker gangs, etc. inside the premises with jackets, colors or insignia, although it took some time before individuals started to come in without jackets, colors or insignia. *See id., pg. 32, lines 2-16.* These remedial measures were significant steps in correcting the problems Appellant was previously having and supports renewal of Appellant's liquor license.

More significant, however, was the credible testimony of Bernard A. George, Jr. Mr. George stated he was a police officer for fourteen (14) years and worked with the Lansdale Police Department, Wesleyville Police Department, Lawrence Park Township Police Department and Penn State Erie – Behrend College Campus Police. *See N.T., Administrative Hearing, 9/10/13, pg. 182, lines 11-18*. Mr. George was proud of his accomplishment of obtaining at least ninety (90) percent of Appellant's employees as RAMP certified and Appellant is using approved security; has adequate lighting; patrolling the parking lot regularly; attending regular meetings with Chief Morell; are prominently displaying signs; prohibiting individuals entering with gang colors or symbols of affiliation; and using a video surveillance system; with four (4) cameras and which retains thirty (30) days of footage. *See id., pg. 152, line 25 – 154, line 21.* Hearing Examiner John A. Mulroy, Esq., found Mr. George's testimony credible regarding compliance with the CLA. The CLA indicates not only that substantial remedial measures were taken to become compliant with the Liquor Code, but also indicates Appellant's willingness to remain compliant with the Liquor Code. These "significant improvements" supports renewal of Appellant's liquor license. *See Recommended Opinion of Hearing Examiner John A. Mulroy, Esq., pg. 16.*

Finally, Chief John Morell, Lawrence Park Township Police Department, also supports the substantial remedial measures taken by Appellant. Chief Morell admitted numerous problems surrounding Appellant, but emphatically stated Bernard George "stepped up and took a lead" at Appellant's premises and there have been no issues since 2013. *See id., pg. 105, lines 17-21.* Hearing Examiner John A. Mulroy, Esq., also found Chief Morell's testimony credible regarding Appellant's substantial remedial measures and concluded "the most important factor appears to be the level of cooperation that took place between Mr. George and Chief Morell." This Trial Court concludes the credible and candid testimony of both Bernard George and Chief John Morell supports renewal of Appellant's liquor license.

2. Appellant's Citation History

Between March of 2001 and April of 2012, Appellant has received twelve (12) adjudicated citations[2]:

a. Citation 11-1314, issued on July 27th, 2011, contained one count of sale of alcoholic beverages between 2:00 a.m. and 7:00 a.m.; one count of failure to require patrons to vacate premises not later than one-half (1/2) hour after cessation of service of alcoholic beverages; and one count of permitting patrons to possess and/or remove

[2] Citations 12-0584, 12-0522 and 12-0054 each contained one count of failure to adhere to the Conditional Licensing Agreement and were addressed above.

alcoholic beverages from the premises;

b. Citation 11-0990, issued on June 8th, 2011, contained one count of sale, furnishing or providing alcoholic beverages to minors;

c. Citation 11-0768, issued on June 3rd, 2011, contained one count of noisy and/or disorderly operation and one count of recklessly endangering another person;

d. Citation 06-1840, issued on August 11th, 2006, contained one count of sale, furnishing or providing alcoholic beverages on Sunday after 2:00 a.m.; one count of failing to require patrons to vacate the premises not later than one-half (1/2) hour after cessation of service of alcoholic beverages; and one count of permitting patrons to possess and/or remove alcoholic beverages from the premises;

e. Citation 03-1165, issued on July 11th, 2003, contained one count of use of loudspeakers whereby the sound of music or other entertainment could be heard outside;

f. Citation 02-0690, issued on April 12th, 2002, contained one count of failing to require patrons to vacate the premises not later than one-half (1/2) hour after cessation of service of alcoholic beverages and one count of permitting patrons to possess and/or remove alcoholic beverages from the premises;

g. Citation 01-1924, issued on September 20th, 2002, contained one count of transporting malt or brewed beverages in a vehicle not registered with the Pennsylvania Liquor Control Board;

h. Citation 01-0666, issued on April 6th, 2001, contained one count of refusing to allow Liquor Enforcement officers the right to inspect completely the entire premises at the time the premises were open for transaction of business and one count of failing to require patrons to vacate the premises not later than one-half (1/2) hour after cessation of service of alcoholic beverages; and

i. Citation 01-0485, issued on March 19th, 2001, contained one count of fortified, adulterated and/or contaminated liquor.

See Respondent's Exhibit 5, sub-Exhibit B-6. These adjudicated citations, standing alone, can be reason enough for the Board to deny renewal of Appellant's liquor license. *See 47 Pa. C. S. § 4-470(a.1)(2)* (the Board may deny renewal of a liquor license if the licensee, its shareholders, directors, officers, association members, servants, agents or employees have one or more adjudicated citations); *see also St. Nicholas Greek Catholic Russian Aid Society v. Pennsylvania Liquor Control Board*, 41 A.3d 953, 959 (Pa. Commw. Ct. 2012) (reinforcing the proposition that even a single past citation is sufficient to support the Board's decision to deny renewal of a liquor license, and the Board may consider a licensee's entire citation history to determine whether a pattern emerges and may consider all past Liquor Code violations, no matter when they occurred). However, a trial court is permitted to consider the corrective measures a licensee took in response to its citations, and to substitute its discretion for that of the Board in determining that those corrective measures warranted the renewal of Licensee's license. *See Goodfellas, Inc.,* 921 A.2d 559, 566 (Pa. Commw. Ct. 2007).

This Trial Court notes all of the above-referenced Liquor Code citations, with the exception of Citations 12-0584, 12-0522 and 12-0054, occurred **before** Appellant and the Board entered into the CLA on November 9th, 2011. After Appellant and the Board entered into the CLA on November 9th, 2011, no further violations were issued such as those enumerated in the

above-referenced citations. Therefore, this Trial Court concludes the implementation of the November 9th, 2011 CLA was indeed an effective corrective measure utilized to prevent further violations of the Liquor Code.

Pertaining to Citations 12-0584, 12-0522 and 12-0054 (regarding Appellant's failure to adhere to the provisions of the CLA, addressed above), the credible and candid testimony of both Bernard A. George, Jr. and Chief John Morell, Lawrence Park Township Police Department, again demonstrates the corrective measures taken by Appellant and the lack of problems thereafter. Bernard George has indicated clearly that nearly all of Appellant's employees are RAMP certified; Appellant is using approved security; Appellant has adequate lighting; Appellant's employees are patrolling the parking lot regularly; Appellant is attending regular meetings with Chief Morell; Appellant is prominently displaying signs prohibiting individuals entering with gang colors or symbols of affiliation; and Appellant is using a video surveillance system, with four (4) cameras retaining thirty (30) days of footage. *See N.T., Administrative Hearing, pg. 152, line 25 – pg. 154, line 21.* In addition, Chief Morell credibly acknowledged Mr. George's positive involvement with Appellant, stating Bernard George "stepped up and took a lead" at Appellant's premises and he has "no issues at this point." *See id., pg. 105, lines 17-21.* Consideration of the corrective measures taken by Appellant, with the able and effective help of Bernard A. George, Jr., and the credible and candid testimony of both Mr. George and Chief Morell supports renewal of Appellant's liquor license.

3. Incidents and/or Disturbances On or Near Appellant's Premises.

Between August of 2011 and June of 2012, eight (8) reported incidents occurring on or near Appellant's premises:

a. Officer Scott Hellman, Lawrence Park Township Police Department, was dispatched to Appellant's premises for a "large fight" on August 26th, 2011. Officer Hellman learned a large, black female, who had been previously removed from the premises, re-entered and tried to strike Bernard George and another individual, identified as Richard Hartleb. The female was once again removed from the premises. No formal charges were filed. *See id., pgs. 7-18;*

b. Officer Hellman was also dispatched to Appellant's premises for a "large fight" on November 12th, 2011. Officer Hellman learned that an individual, Christopher McCammon, entered Appellant's premises and struck another individual, identified as Van Williams. According to Bernard George, Christopher McCammon was not permitted on Appellant's property at the time of the incident. Christopher McCammon was charged with summary Harassment and pled guilty. *See id., pgs. 19-31;*

c. Officer Jeffrey Devore, Lawrence Park Township Police Department, was patrolling Appellant's premises on August 28th, 2011 when he observed several Hispanic individuals arguing. Officer Devore observed a female bleeding from her nose and face. A charge of Disorderly Conduct was filed against another female, but was ultimately dismissed. *See id., pgs. 37-43;*

d. Officer Devore was also dispatched to Appellant's premises for a "large fight" on March 19th, 2012. Officer Devore observed a large group of people outside arguing and discovered a male with blood coming out of his mouth and face. No formal

charges were filed. *See id., pgs. 43-47;*

e. Officer Devore, by request of Bernard George, was asked to patrol Appellant's premises on June 17th, 2012. During his patrol, Officer Devore observed several Hispanic females arguing. No formal charges were filed. *See id., pgs. 49-67;*

f. Corporal Noble Brown, Lawrence Park Township Police Department, was called to assist Officer Jeffrey Devore regarding the August 28th, 2011 incident. During his investigation, Corporal Brown discovered a large kitchen knife and a large quantity of cocaine near the rear of Appellant's premises. No formal charges were filed. *See id., pgs. 68-74;*

g. Corporal Brown was also dispatched to Appellant's premises for a shooting on November 27th, 2011. Corporal Brown investigated the incident, searched for physical evidence and spoke to several individuals. Numerous individuals heard the shots fired, but no one saw the individual who fired the shots. No formal charges were filed. *See id., pgs. 76-82;* and

h. Officer Scott Baker, Lawrence Park Township Police Department, was dispatched to Appellant's premises for a "large fight" on June 5th, 2012. Officer Baker learned an individual, Leon Frederick Akerly, II, drove his motorcycle through Appellant's front doors and attacked his girlfriend, Lucille Anderson, a barmaid. Mr. Akerly was not barred from the premises, but was advised he would not be welcomed. Mr. Akerly was charged with misdemeanor Disorderly Conduct and two traffic violations. *See id., pgs. 85-94.*

These incidents on or near Appellant's premises, standing alone, can be reason enough for the Board to deny renewal of Appellant's liquor license. *See 47 P.S. §4-470(a.1)(4)* (the Board, in deciding whether to renew a liquor license, may consider activity that occurred on or about the licensed premises or in areas under the licensee's control). However, a trial court, similar to the Board, may take into consideration whether any substantial steps were taken to address the activity occurring on or about the premises. *See id.* Furthermore, although a licensee is required to take substantial affirmative measures to prevent misconduct, a licensee is not required to do everything possible to prevent criminal activity on the premises, act as its own police force or close its business. *See I.B.P.O.E. of West Mount Vernon Lodge 151 v. Pennsylvania Liquor Control Board,* 969 A.2d 642, 651 (Pa. Commw. Ct. 2009).

A major cause of the incidents on or near Appellant's premises was "Hispanic Night." In order to alleviate any further problems on or near the premises, Appellant chose to eliminate "Hispanic Night." This pivotal act by Appellant, in and of itself, was a significant step to prevent further incidents, even at the cost of Appellant's financial business. Bernard George acknowledged the reason for eliminating "Hispanic Night" was due to numerous disturbances and its continuance would not be worth risking Appellant's liquor license, even if Appellant was making a great deal of money from those nights. *See N.T., Administrative Hearing, 9/10/13, pg. 157, lines 7-23.* Officer Jeffrey Devore stated the number of incidents involving Hispanic individuals stemmed from "Hispanic Night," held on Appellant's premises, and Officer Devore acknowledged Appellant made the prudent decision in discontinuing "Hispanic Night." *See id., pg. 66, lines 6-14; pg. 67, lines 2-10.*

Another cause of the incidents on or near Appellant's premises was the "Iron Wings Motorcycle Club," whose members had frequently used Appellant's premises as their

clubhouse. However, the implementation of the November 9th, 2011 CLA, including its provision prohibiting individuals wearing gang colors or symbols from entering the premises, has alleviated a number of incidents regarding the "Iron Wings."

This Trial Court notes that, of the eight (8) incidents occurring on or near Appellant's premises, only three (3) of the incidents resulted in formal criminal charges being filed. Furthermore, at the time of each incident, Appellant and its employees followed proper procedures and immediately telephoned the Lawrence Park Township Police Department. In fact, due to increased concerns, Bernard George even requested the Lawrence Park Township Police Department to make extra patrol passes to monitor Appellant's premises. This example of a licensee being aware of criminal activity occurring on or near its premises, instead of turning a blind eye to said activity, is admirable as Appellant took a positive stance, became involved with the local police department, and effectively exercised the highest of efforts to prevent further criminal activity. Chief Morell has acknowledged that, since these "substantial affirmative steps" have been taken by Appellant, there have been "no fights, no shots fired, no drug activity and no alarming, excessive amounts of people outside the premises" since 2013. *See id., pg. 133, lines 6-22.* These substantial affirmative steps taken by Appellant in regards to the incidents occurring on or near Appellant's premises support renewal of Appellant's liquor license.

4. Pecuniary Interest of Bernard George and Mary Mitchell

In its letter dated July 16th, 2013, the Board, as part of its objections to the renewal of Appellant's liquor license, stated:

> The Board is not convinced that the licensee and sole corporate officer William Mitchell are the only entities with a pecuniary interest in this license, in that the renewal application for the period beginning August 1st, 2013 was signed by Mary Mitchell with the titles of Manager and Steward and Bernard George with the title of Secretary, and that each may have an interest, in violation of Section 404 of the Pennsylvania Liquor Code (47 P.S. Section 4-404).

See Respondent's Exhibit 5, sub-Exhibit B-3. However, at the Administrative Hearing on September 10th, 2013, Bernard George credibly admitted he is not the official secretary, nor is he an official shareholder or board member of Appellant, and has no pecuniary interest whatsoever in Appellant. *See id., pg. 150, lines 1-25; pg. 151, line 24 – pg. 152, line 2.* Bernard George credibly testified that the discrepancy was caused by a mistake in completing the computer-generated forms. *See id., pg. 150, lines 5-14.* However, on the Application Addendum for Renewal of License/Permit, William Mitchell signed as Applicant/Licensee, with a title of "Owner/Manager," and Mary Mitchell also signed as Applicant/Licensee, with no title listed. *See Respondent's Exhibit 5, sub-Exhibit B-1.* Therefore, based upon the Application Addendum filed by William Mitchell and the credible testimony of Bernard George, this Trial Court concludes William Mitchell is the only individual with a pecuniary interest in Appellant and, as such, this clerical error should not bar renewal of Appellant's liquor license.

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

ORDER

AND NOW, to wit, this 18th day of September, 2015, after thorough consideration of the entire record regarding Petitioner's request for this Court to 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 10th, 2013 and June 23rd, 2015, 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 **GRANTED** consistent with this Trial Court's Findings of Fact and Conclusions of Law set forth above. The Order of the Pennsylvania Liquor Control Board dated June 4th, 2014 denying Appellant's request to renew its liquor license is hereby **REVERSED**.

BY THE COURT:
/s/ Stephanie Domitrovich, Judge

MICHAEL T. McGRATH, Appellee
v.
VIRGINIA M. McGRATH, Appellant

FAMILY LAW – DIVORCE – STANDARD OF REVIEW

In reviewing equitable distribution Orders, the Pennsylvania Superior Court's standard of review is limited. Absent an abuse of discretion on the part of the trial court, the Pennsylvania Superior Court will not reverse an award of equitable distribution. In addition, when reviewing the record of the proceedings, the Pennsylvania Superior Court is guided by the fact that trial courts have broad equitable powers to effectuate economic justice, and the Pennsylvania Superior Court will find an abuse of discretion only where the trial court misapplied the laws or failed to follow proper legal procedures.

FAMILY LAW – DIVORCE – EQUITABLE DISTRIBUTION

When fashioning equitable distribution awards, a trial court must weigh and apply the eleven (11) criteria found in 23 Pa. C. S. §3502(a) in order to "effectuate economic justice between parties" and "ensure a fair and just determination and settlement of their property rights."

FAMILY LAW – DIVORCE – EQUITABLE DISTRIBUTION

Pursuant to 23 Pa. C. S. §3502(a), the eleven equitable distribution factors include: (1) the length of the marriage; (2) any prior marriage of either party; (3) the age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties; (4) the contribution by one party to the education, training, or increased earning power of the other party; (5) the opportunity of each party for future acquisitions of capital assets and income; (6) the sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits; (7) the contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker; (8) the value of the property set apart to each party; (9) the standard of living of the parties established during the marriage; (10) the economic circumstances of each party at the time the division of property is to become effective; (10.1) the Federal, State and local tax ramifications associated with each asset to be divided, distributed or assigned, which ramifications need not be immediate and certain; (10.2) the expense or sale, transfer or liquidation associated with a particular asset, which expense need not be immediate and certain; and (11) whether the party will be serving as custodian of any dependent children.

FAMILY LAW – DIVORCE – STANDARD OF REVIEW

Further, the finder of fact is free to believe all, part, or none of the evidence, and the Pennsylvania Superior Court will not disturb the Divorce Master's credibility determinations.

FAMILY LAW – DIVORCE – STANDARD OF REVIEW

In addition, the Pennsylvania Superior Court does not evaluate the propriety of the distribution Order upon its agreement with a trial court's actions nor will the Pennsylvania Superior Court find a basis for reversal on a trial court's application of a single factor. Rather, the Pennsylvania Superior Court reviews the distribution as a whole, in light of the trial court's overall application of 23 Pa. C. S. §3502(a) factors for consideration in awarding equitable distribution. If the Pennsylvania Superior Court finds no abuse of discretion, the Order must stand.

FAMILY LAW – DIVORCE – CREDIBILITY OF WITNESSES

A Master's Recommendations and Report, although only advisory, are given the fullest consideration, particularly on the question of the credibility of witnesses, because the Master has had the opportunity to observe and assess the behavior and demeanor of the parties.

FAMILY LAW – DIVORCE – MARITAL PROPERTY

Pursuant to §3501(a) of the Pennsylvania Divorce Code, "marital property" means all property acquired by either party during the marriage and the increase in value of any property acquired prior to marriage or property acquired in exchange for property acquired prior to the marriage or property acquired by gift, except between spouses, bequest, devise or descent or property acquired in exchange for such property.

FAMILY LAW – DIVORCE – MARITAL DEBT

Between divorcing parties, debts which accrue to them jointly prior to separation are marital debts.

FAMILY LAW – DIVORCE – MARITAL DEBT

A debt accrued during this time may be a non-marital debt where the other spouse did not take part in incurring the debt and received no benefit therefrom. Without documentation to support a spouse's allegations regarding marital debts, the trial court is not required to accept those allegations.

FAMILY LAW – DIVORCE – STANDARD OF REVIEW

Trial courts have broad equitable powers to effectuate economic justice in these matters and a trial court's award of equitable distribution will not be reversed absent an abuse of discretion. The Pennsylvania Superior Court will find an abuse of discretion only if the trial court misapplied the law or failed to follow proper legal procedures.

FAMILY LAW – DIVORCE – MARITAL PROPERTY – RENTAL VALUE

The general rule is a dispossessed party is entitled to a credit for the fair rental value of jointly held marital property against a party in possession of that property, provided there are no equitable defenses to the credit. Second, the rental credit is based upon, and, therefore, limited by, the extent of the dispossessed party's interest in the property. Generally, in regard to the marital home, the parties have an equal one-half interest in the marital property. It follows, therefore, in cases involving the marital home, the dispossessed party is entitled to a credit for one-half of the fair rental value of the marital home. Third, the rental value is limited to the period of time during which a party is dispossessed and the other party is in actual or constructive possession of the property. Fourth, the party in possession is entitled to a credit against the rental value for payments made to maintain the property on behalf of the dispossessed spouse.

FAMILY LAW – DIVORCE – VALUATION OF MARITAL PROPERTY

When determining the value of marital property, a trial court is free to accept all, part or none of the evidence as to the true and correct value of the property. Where the evidence offered by one party is not contradicted, a trial court may adopt that value even though the resulting valuation would be different if more accurate and complete evidence were presented. A trial court does not abuse its discretion in adopting the only valuation submitted by the parties.

CIVIL PROCEDURE – PRE-TRIAL NARRATIVE STATEMENTS

Rule 1920.33 of the Pennsylvania Rules of Civil Procedure governs the filing of pre-trial

narrative statements and appropriate sanctions for failure to timely file pre-trial narrative statements, and states.

CIVIL PROCEDURE – PRE-TRIAL NARRATIVE STATEMENTS – SANCTIONS

Within the time required by Order of Court or written directive of the master or, if none, at least sixty days before the scheduled hearing on the claim for the determination and distribution of property, each party shall file and serve upon the other party a pre-trial statement... If a party fails to file either an inventory as required by subdivision (a) or a pre-trial statement as required by subdivision (b), the court may make an appropriate Order under Rule 4019(c) governing sanctions.

CIVIL PROCEDURE – PRE-TRIAL NARRATIVE STATEMENTS - SANCTIONS

A party who fails to comply with a requirement of subdivision (b) of this rule shall, except upon good cause shown, be barred from offering any testimony or introducing any evidence in support of or in opposition to claims for the matters not covered therein. A party shall, except upon good cause shown, be barred from offering any testimony or introducing any evidence that is inconsistent with or which goes beyond the fair scope of the information set forth in the pre-trial statement…

CIVIL PROCEDURE – PRE-TRIAL NARRATIVE STATEMENTS – SANCTIONS

The Rules governing pre-trial statements and sanctions for failure to file pre-trial narrative statements are intended to provide an even playing field for both parties in the marital and economic dissolution of marriages and these Rules should not, and must not, be utilized to play games of "gotcha."

FAMILY LAW – DIVORCE – MASTER'S REPORT – EXCEPTIONS

Within twenty days of the receipt of the date of mailing of the master's report and Recommendations, whichever occurs first, any party may file exceptions to the report or any part thereof, to rulings on objections to evidence, to statements or findings of fact, to conclusions of law, or to any other matters occurring during the hearing. Each exception shall set forth a separate objection precisely and without discussion. Matters not covered by exceptions are deemed waived unless, prior to entry of the final decree, leave is granted to file exceptions raising those matters…

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 13760-2009

Appearances: Gerald J. Villella, Esq., Attorney for Virginia M. McGrath, Appellant
James L. Moran, Esq., Attorney for Michael T. McGrath, Appellee

OPINION

Domitrovich, J., January 20th, 2015

This matter is currently before the Pennsylvania Superior Court on the appeal of Virginia M. McGrath (hereafter referred to as "Appellant") from this Trial Court's Memorandum Opinion and Order dated October 23rd, 2014. In its Memorandum Opinion and Order dated October 23rd, 2014, after consideration of oral argument held September 23rd, 2014 and briefs provided by the parties after oral argument and review of statutory and case law, this Trial Court granted in part and dismissed in part Appellant's Exceptions to Master Ralph R. Riehl III, Esq.'s (hereafter referred to as "Master") Recommendations and Report dated

May 9th, 2014. This Trial Court awarded Appellant the marital residence, thereby achieving a 75% distribution of the marital estate to Appellant; awarded Appellee the proceeds from the failed sale and current rent of the pizza shop and the rental proceeds from the rental unit to achieve a 25% distribution of the marital estate to Appellee; concluded the Morgan Stanley loans were marital debt and allocating full repayment of the Morgan Stanley loans to Appellee; concluded a proper valuation of the pizza shop equipment at the time of separation was the agreed-upon amount of $10,000.00; concluded a proper valuation of the parties' joint credit card debt at the time of separation was the amount of $10,000.00, which was the only value given to the Master and to the Court; allocated full repayment of the credit card debt to Appellee; and concluded Appellant's counsel's untimely filing of Appellant's Pre-trial Narrative Statement violated Rule 1920.33 of the Pennsylvania Rules of Civil Procedure.

A. Procedural History

Appellee Michael T. McGrath filed a Complaint in Divorce, alleging irretrievable breakdown of his and Appellant Virginia M. McGrath's marriage, by and through his counsel, James L. Moran, Esq., on August 20th, 2009. On August 26th, 2011, Appellee filed an Affidavit under §3301(d) of the Divorce Code, alleging he and Appellant have not lived together as husband and wife since August 1st, 2009, and have continued to live separate and apart for a period of at least two (2) years. Appellant filed a Counter-Affidavit under §3301(d) of the Divorce Code on September 14th, 2011, opposing the entry of a divorce decree as Appellant desired economic issues be resolved prior to the entry of a divorce decree and also desired to claim economic relief, including alimony, division of property, attorney's fees, etc. A Praecipe for Appearance on behalf of Appellant was filed by Joseph Martone, Esq., on November 14th, 2011.

Appellee filed a Motion for Appointment of a Master on July 25th, 2013. By Order of Court dated July 29th, 2013 and signed by Judge Elizabeth K. Kelly, Ralph R. Riehl, III, Esq. was appointed as Master. Said Order also directed the parties to file their Income and Expense statements and Inventory and Appraisement forms within forty-five (45) days from the date of said Order. Appellant filed her Income and Expense statements and Inventory and Appraisement forms on August 27th, 2013. Appellee filed his Income and Expense statements and Inventory and Appraisement forms on August 30th, 2013. On December 12th, 2013, Paige Peasley, Esq., filed a Motion for Special Relief requesting the Law Firm of Martone & Peasley be permitted to withdraw as Appellant's counsel. As Motion Court Judge, the undersigned judge granted said Motion on the same day. Appellant was granted an additional thirty (30) day time period to secure new counsel.

By letter dated January 17th, 2014, Master Ralph R. Riehl, III, Esq. stated the Master's hearing had been scheduled for March 31st, 2014 and directed the parties to file their Pre-trial Narrative Statements on or before March 17th, 2014.[1] Appellee filed his Pre-trial Narrative Statement on March 17th, 2014. Appellant, by and through her new counsel, Gerald J. Villella, Esq., filed her Pre-trial Narrative Statement on March 20th, 2014.[2] The Master's Hearing

[1] The Master also directed the parties' attention to Rule 1920.33(b) and (d) of the Pennsylvania Rules of Civil Procedure regarding the time period for filing Pre-trial Narrative Statements and failure to adhere to said time period.

[2] It should be noted that the deadline for filing Pre-trial Narrative Statements was March 17, 2014; therefore, Appellant's Pre-trial Narrative Statement was filed three (3) days after the deadline and was deemed "untimely."

commenced on March 31st, 2014, at which both parties and their counsel were present. Despite Appellant's counsel's untimely filing of Appellant's Pre-trial Narrative Statement, to which the Master held his ruling for sanctions in abeyance and allowed Appellant to testify, comprehensive testimony and evidence were presented by both parties and their counsel. Although he allowed Appellant to testify over Appellee's counsel's objections, the Master ultimately concluded Appellant should have been precluded from offering testimony and evidence; however, the Master also concluded preclusion of Appellant's testimony and evidence would not be prejudicial, stating "no harm will befall [Appellant] as a result of that ruling given the nature of the assets and liabilities of the parties and given the necessary conclusions to be drawn therefrom." *See Master's Recommendations and Report, pg. 11.* Master Ralph R. Riehl, III, Esq. filed his Master's Recommendations and Report on May 9th, 2014, concluding, after considering the testimony and evidence presented by both parties, Appellant would receive 65% of the net marital assets and Appellee would receive 35% of the net marital assets. Following his Report, the Master made the following Recommendations: (1) the parties would be officially divorced from their marriage; (2) the marital residence would be awarded to Appellee and credit for $10,400.00 in real estate taxes paid after the date of separation would also be awarded to Appellee; (3) the rental income from the 1st floor rental unit, as well as fair rental value for continued utilization of the rental unit after the date of separation, in the amount of $30,600.00 would be awarded to Appellant; (4) the proceeds from the sale of the Pizza Shop and all rental income from the Pizza Shop in the amount of $21,912.00 would be awarded to Appellant; (5) each party would retain all personal property in their possession; (6) Appellee would retain his IRA, valued at $36,756.00, and his annuity, valued at $30,541.00; (7) each party would retain their respective life insurance policies; (8) Appellee would retain his 2003 Lexus 300, valued at $15,000.00; (9) Appellant would retain her 1993 BMW 318i, valued at $4,000.00; (10) Appellant would retain her IRA, valued at $7,774.00, and her annuity, valued at $22,767.00; (11) Appellee would become solely responsible for repaying the outstanding Morgan Stanley loan amount of $217,085.71 and the credit card debt of $10,000.00; (12) Appellant would retain the income tax refund she received in the year 2011, valued at $6,593.00; and (13) Appellee would retain his Morgan Stanley AAA investment account, valued at $119,440.00, as well as the $5,000.00 he retained from said account, which he had utilized for purchasing his Bonnie Brae Drive property.[3]

On May 28th, 2014, Appellant filed her Exceptions to the Master's Recommendations and Report. Additionally, Appellant filed a Demand for a *De Novo* Hearing on the same day. Appellee filed a Motion to Quash Appellant's Exceptions to the Master's Recommendations and Report on July 3rd, 2014, arguing Appellant's counsel did not adhere to the proper procedure in filing a Request for Argument. By Order of Court dated July 15th, 2014 and signed by Judge John J. Trucilla, Appellee's Motion to Quash was denied and Appellant was granted an additional ten (10) days to file a Request for Argument. Appellant filed said Request for Argument on July 22nd, 2014.

Appellant filed her Brief in Support of Exceptions to Master's Recommendations and

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[3] Appellant received $113,210.00, equaling 66.49% of net marital assets, and Appellee received $67,051.29, equaling 22.51% of the net marital assets, according to the Master's findings in his Recommendation and Report.

Report on August 22nd, 2014. Appellee filed his Brief in Opposition to Exceptions to Master's Recommendations and Report on August 25th, 2014. A hearing on Defendant's Exceptions to the Master's Report convened on September 2nd, 2014 before Judge John J. Trucilla; however, due to a conflict of interest and upon immediate notification to both parties and their counsel, Judge Trucilla as Administrative Judge recused himself and reassigned the instant matter to this Trial Court Judge. Oral Arguments were heard by this Trial Court Judge on September 23rd, 2014. Appellant filed Supplemental Authority in Support of Exceptions to Master's Recommendations and Report on the same day. This Trial Court entered its Memorandum Opinion and Order on October 23rd, 2014, granting in part and dismissing in part Appellant's Exceptions to the Master's Recommendations and Report.

Appellant filed her Notice of Appeal to the Pennsylvania Superior Court on November 19th, 2014, appealing this Trial Court's Memorandum Opinion and Order dated October 23rd, 2014. This Trial Court filed its 1925(b) Order on November 20th, 2014. Appellant filed her Statement of Matters Complained of on Appeal on December 11th, 2014.

A. Legal Argument

In reviewing equitable distribution Orders, the Pennsylvania Superior Court's standard of review is limited. *Lee v. Lee,* 978 A.2d 380, 382 (Pa. Super. 2009) (quoting *Anzalone v. Anzalone,* 835 A.2d 773, 780 (Pa. Super. 2003)). Absent an abuse of discretion on the part of the trial court, the Pennsylvania Superior Court will not reverse an award of equitable distribution. *Id*. In addition, when reviewing the record of the proceedings, the Pennsylvania Superior Court is guided by the fact that trial courts have broad equitable powers to effectuate economic justice, and the Pennsylvania Superior Court will find an abuse of discretion only where the trial court misapplied the laws or failed to follow proper legal procedures. *Id*. When fashioning equitable distribution awards, a trial court must weigh and apply the eleven (11) criteria found in 23 Pa. C. S. §3502(a) in order to "effectuate economic justice between parties" and "ensure a fair and just determination and settlement of their property rights." *Smith v. Smith*, 653 A.2d 1259, 1264 (Pa. Super. 1995). Pursuant to 23 Pa. C. S. §3502(a), the eleven equitable distribution factors include:

1. The length of the marriage;
2. Any prior marriage of either party;
3. The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties;
4. The contribution by one party to the education, training, or increased earning power of the other party;
5. The opportunity of each party for future acquisitions of capital assets and income;
6. The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits;
7. The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker;
8. The value of the property set apart to each party;
9. The standard of living of the parties established during the marriage;
10. The economic circumstances of each party at the time the division of property is to become effective;

10.1 The Federal, State and local tax ramifications associated with each asset to be divided, distributed or assigned, which ramifications need not be immediate and certain;
10.2 The expense or sale, transfer or liquidation associated with a particular asset, which expense need not be immediate and certain; and
11. Whether the party will be serving as custodian of any dependent children.

23 Pa. C. S. §3502(a). Further, the finder of fact is free to believe all, part, or none of the evidence, and the Pennsylvania Superior Court will not disturb the Divorce Master's credibility determinations. *See Lee,* 978 A.2d at 382 (Pa. Super. 2009) (quoting *Anzalone*, 835 A.2d at 780 (Pa. Super. 2003)).

In addition, the Pennsylvania Superior Court does not evaluate the propriety of the distribution Order upon its agreement with a trial court's actions nor will the Pennsylvania Superior Court find a basis for reversal on a trial court's application of a single factor. *Lee v. Lee,* 978 A.2d 380, 382 (quoting *Trembach v. Trembach,* 615 A.2d 33, 36 (Pa. Super. 1992)). Rather, the Pennsylvania Superior Court reviews the distribution as a whole, in light of the trial court's overall application of 23 Pa. C. S. §3502(a) factors for consideration in awarding equitable distribution. *Id*. If the Pennsylvania Superior Court finds no abuse of discretion, the Order must stand. *Id*.

Finally, a Master's Recommendations and Report, although only advisory, are given the fullest consideration, particularly on the question of the credibility of witnesses, because the Master has had the opportunity to observe and assess the behavior and demeanor of the *parties. See Moran v. Moran,* 839 A.2d 1091, 1095 (Pa. Super. 2003).

In her Statement of Matters Complained of on Appeal, Appellant raises seven (7) separate issues on appeal for consideration, which this Trial Court will summarize as follows:

1. "Neither the Trial Court nor the Master properly allocated all of the proceeds of the two Morgan Stanley loans, totaling $243,600, to [Appellee]…;"
2. "The distribution of income to [Appellee] from the proceeds of the failed sale and current rental of the pizza shop business and the residential rental unit in the marital real estate from date of separation through calendar year 2012 is improper and/or inequitable…;"
3. "Crediting [Appellee] with $10,400.00 for part of the rental of the apartment used as their marital residence is inequitable…;"
4. "The value of the pizza shop equipment was agreed as $10,000 at time of separation but has substantially declined in value since then…;"
5. "[Appellee]'s solely verbal claim of having paid a credit card debt of approximately $10,000.00 post-separation should not be credited to him…;"
6. "The affirmation of the Master's sanction of prohibiting [Appellant]'s testimony and proffered exhibits at the March 31st, 2014 hearing at [Appellee]'s instance because [Appellant]'s Pre-trial Narrative Statement was filed March 20th, 2014, merely three (3) days after the Master's designated date, March 17th, 2014, is contrary to the appellate decisions of the Commonwealth…;" and
7. "Any marital asset value in excess of 75% resulting to [Appellant] after any or all

of the foregoing matters are determined should have been deemed as either in lieu of alimony, and/or in recognition of [Appellant]'s substantial pre-marital contribution of funds…."

See Appellant's Statement of Matters Complained of on Appeal. This Trial Court will address Appellant's issues as follows.

1. **This Trial Court, having given the fullest consideration to the Master's Recommendations and Report regarding the credibility of the parties, concluded the two Morgan Stanley loans, incurred during the marriage and utilized by both parties for marital expenditures, were marital debt and properly allocated full repayment to Appellee in the amount of $217,085.71.**

Pursuant to §3501(a) of the Pennsylvania Divorce Code, "marital property" means all property acquired by either party during the marriage and the increase in value of any property acquired prior to marriage or property acquired in exchange for property acquired prior to the marriage or property acquired by gift, except between spouses, bequest, devise or descent or property acquired in exchange for such property. *See 23 Pa. C. S. §3501(a).* Between divorcing parties, debts which accrue to them jointly prior to separation are marital debts. *Litmans v. Litmans,* 673 A.2d 382, 391 (Pa. Super. 1996). However, a debt accrued during this time may be a non-marital debt where the other spouse did not take part in incurring the debt and received no benefit therefrom. *Lizik v. Lizik*, 3 Pa. D. & C. 5th 484, 489 (Pa. County Ct. 2007). Without documentation to support a spouse's allegations regarding marital debts, the trial court is not required to accept those allegations. *Id*. (quoting *Litmans*, 673 A.2d 382, 395 (Pa. Super. 1996)).

At the Master's hearing on March 31st, 2014, Appellee stated that when he commenced employment with Morgan Stanley in August of 2007 and as part of the financial arrangement with Morgan Stanley, Morgan Stanley gave Appellee two loans totaling $243,600.00 – one loan in the amount of $185,600, payable in 7 years at $26,514.29 per year, with 5.25% interest accruing on unpaid amounts, and one loan in the amount of $58,000.00, payable in 5 years at $11,600.00 per year, with 3.5% interest accruing on unpaid amounts. *Transcript of Master's hearing, pg. 21, line 20 – pg. 22, line 5; see also Appellee's Master's hearing Exhibit 1.* When he was terminated from Morgan Stanley, Appellee entered into a repayment agreement to pay the remainder of the balance of the two loans, which Appellant did not contribute to, and commenced repayment of the balance of the two loans prior to the date of separation and was current on all loan payments.[4] *Id. pg. 25, lines 4-20*. Appellee indicated he invested a substantial amount of funds from the two Morgan Stanley Loans into an AAA Investment account, which he used to make the annual payments on the two Morgan Stanley loans, and used an unspecified amount of funds from the two Morgan Stanley loans to pay marital expenditures. *Id., pg. 25, line 21 – pg. 26, line 11; pg. 27, lines 4-10; pg. 47, lines 14-15; pg. 48, lines 3-6, 10-15; pg. 49, lines 10-14.* In her testimony, Appellant stated Appellee told her, and she believed, the two loans were a "bonus" Appellee received following an offer of employment from Morgan Stanley. *Id., pg. 99, line 19 – pg. 100, line*

[4] At the date of separation, August 1st, 2009, the total outstanding balance on the two Morgan Stanley loans was $217, 085.71.

9. Appellant insisted she never had possession of any funds from the two Morgan Stanley loans and was not aware of any purchases made using those funds. *Id., pg. 100, lines 12-20.* However, Appellee maintained Appellant was fully aware of the nature of these loans he received from Morgan Stanley. *Id., pg. 52, lines 8-12.*

After consideration of the testimony and evidence presented by both parties, the Master found Appellee's testimony and evidence were more credible and determined the two Morgan Stanley loans were marital debt, stating:

> As to the Morgan Stanley debt, the [$243,600.00] undoubtedly was available to the parties during the marriage. Whether Mrs. McGrath knew that it was a loan as opposed to a bonus is of little consequence. The money was there. There is no evidence to the effect that Mr. McGrath has hidden it anywhere, and therefore, the Master concludes that aside from the $5,000.00 retained by Mr. McGrath from the Bonnie Brae purchase, and aside from the $119,400.00 which he had in the AAA account at the date of separation… there are no assets remaining which can be traced to that loan. However, at the date of separation, the loan did remain outstanding, and therefore, must be considered to be a marital debt.

See Master's Recommendations and Report, pg. 17. In its Opinion and Order, this Trial Court concluded the Master did not err in determining the two Morgan Stanley loans incurred solely by Appellee were marital debt, and this Trial Court dismissed Appellant's Exception thereto, accepting the Master's Recommendations that Appellee's testimony and evidence were more credible than Appellant's. A master's recommendations and report, although only advisory, are given the fullest consideration, particularly on the question of the credibility of witnesses, because the master has had the opportunity to observe and assess the behavior and demeanor of the parties. *See Moran*, 839 A.2d 1091, 1095 (Pa. Super. 2003). Appellee's testimony indicated that, while Appellant did not have a hand in securing either of the two Morgan Stanley loans, she did receive a substantial benefit from the loans, as the funds were used towards household, joint business and other marital expenditures. Although Appellant's testimony indicated her confusion as to the nature of the loans, Appellant's testimony did not show a complete lack of knowledge as to the loans' existence and availability. Therefore, this Trial Court, having given the fullest consideration to the Master's Recommendations and Report regarding the credibility of the parties, concluded the two Morgan Stanley loans, incurred by both parties during the marriage and utilized for marital expenditures, were marital debt and properly allocated full repayment to Appellee in the amount of $217,085.71. This Trial Court finds Appellant's first issue on appeal is without merit.

2. This Trial Court properly distributed to Appellee the income from the proceeds of the failed sale and current rental of the pizza shop business, in the amount of $21,912.00, and the residential rental unit in the marital real estate, in the amount of $30,600.00, from the date of separation.

Trial courts have broad equitable powers to effectuate economic justice in these matters and a trial court's award of equitable distribution will not be reversed absent an abuse of discretion. *Lyons v. Lyons,* 585 A.2d 42, 45 (Pa. Super. 1991). The Pennsylvania Superior Court will find an abuse of discretion only if the trial court misapplied the law or failed to follow proper legal procedures. *Id*.

In the proposed Order following his Recommendations and Report, the Master recommended awarding each party their respective IRA's and annuities, their respective vehicles, their respective life insurance policies, their respective items of personal property. Furthermore, the Master recommended awarding Appellant the proceeds she received in rent from the apartment, the proceeds from the failed sale and current rent of their marital pizza shop, and the joint IRS tax refund. The Master recommended awarding and allocating to Appellee his AAA investment account, the remainder of the proceeds utilized for purchasing Appellee's real property on Bonnie Brae Drive, and allocated repayment of the two Morgan Stanley loans and the credit card debt to Appellee. After this allocation of assets and debts, Appellant received $124,246.00 from the marital estate and Appellee received -$30,748.71, a negative amount, from the marital estate; therefore, the Master recommended awarding Appellee the marital residence to achieve a 65% distribution of the marital estate to Appellant and a 35% distribution of the marital estate to Appellee as the Master envisioned.[5]

After review of the eleven equitable distribution factors, *see 23 Pa. C. S. §3502(a)*, and the relevant statutory and case law, this Trial Court dismissed the majority of Appellant's Exceptions and reinstated the majority of the Master's recommended distribution Order. However, this Trial Court granted Appellant's Exceptions regarding the recommended award of the marital residence to Appellee after review of the statutory equitable distribution factors and, therefore, awarded the marital residence to Appellant, stating:

> As the Master found in his findings of fact, [Appellee] not only has significant sources of income, but has greater income-producing capabilities. [Appellee] stated he graduated from high school and completed one and a half years of college, while [Appellant] did not graduate from high school. [Appellee] also indicated he has a detailed work experience history, while [Appellant] stated she only worked in the Pizza Shop business. Finally, [Appellee] has shown capability of procuring his own residence, as he was able to purchase a home on Bonnie Brae Drive after the parties separated in November of 2009. Finally, [Appellant] stated her health was an issue as [Appellant] stated she is "full of radiation," is frequently sick, and now sees a gynecologist.
>
> Such disparity in income, education and work experience, as well as [Appellant]'s testimony regarding her physical health, leads this Trial Court to conclude [Appellant] should have been awarded the marital residence, in contrast to the Master's Decree awarding [Appellee] the marital residence. [Appellant] will not be able to sustain the standard of living the parties were accustomed to prior to separation; thereby depriving the marital residence from her distribution would cause her further economic hardship.

See Trial Court's Opinion, pg. 23-24. However, the award of the marital residence to Appellant again left Appellee with -$30,748.71 (negative) from the marital estate, due to the full amount of debt from the two Morgan Stanley loans and the credit card debt being allocated to Appellee. Thus, in order to effectuate economic justice between the parties and

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[5] The Master's award of the marital residence to Appellee, and not to Appellant, was a major point of contention and was discussed considerably in Appellant's Exceptions nos. 8 and 10.

achieve as close to a 65% distribution of the marital estate to Appellant and a 35% distribution of the marital estate to Appellee, as envisioned and recommended by the Master, this Trial Court awarded Appellee the proceeds from the failed sale and current rent of the pizza shop, in the amount of $21,912.00, and the rental proceeds from the apartment, in the amount of $30,600.00, both retained by Appellant. This Trial Court's distribution scheme, rather than the Master's, not only allocated a positive distribution to Appellee, thereby effectuating economic justice between the parties, but created a greater distribution for Appellant, as Appellant now would receive nearly 75% of the marital estate, as opposed to 65% of the marital estate from the Master's distribution Order. This Trial Court finds Appellant's second issue on appeal is without merit.

3. This Trial Court properly allocated to Appellee a credit in the amount of $10,400.00 for part of the fair rental value of the apartment used as the parties' marital residence.

The general rule is a dispossessed party is entitled to a credit for the fair rental value of jointly held marital property against a party in possession of that property, provided there are no equitable defenses to the credit. *Trembach v. Trembach,* 615 A.2d 33, 37 (Pa. Super. 1992) (quoting *Hutnik*, 535 A.2d 151, 154 (Pa. Super. 1987)). Second, the rental credit is based upon, and, therefore, limited by, the extent of the dispossessed party's interest in the property. *Id*. (quoting *Gee v. Gee,* 460 A.2d 358, 360 (Pa. Super. 1983)). Generally, in regard to the marital home, the parties have an equal one-half interest in the marital property. *Id*. (quoting *Hutnik*, 535 A.2d at 154 (Pa. Super. 1987)). It follows, therefore, in cases involving the marital home, the dispossessed party is entitled to a credit for one-half of the fair rental value of the marital home. *Id*. Third, the rental value is limited to the period of time during which a party is dispossessed and the other party is in actual or constructive possession of the property. *Id*. Fourth, the party in possession is entitled to a credit against the rental value for payments made to maintain the property on behalf of the dispossessed spouse. *Id*.

In his testimony at the Master's hearing, Appellee stated he paid approximately $2,600.00 per year in real estate taxes for the marital residence after the parties had separated in the year 2009, except for the year 2011, when the parties' joint income tax return was used to pay the real estate taxes. *Transcript of Master's hearing, pg. 8, line 8 – pg. 9, line 2*. Appellee further stated he paid the utilities and other expenses for the marital residence after the parties separated in the year 2009. *Id., pg. 7, lines 10-15.* Although Appellee voluntarily chose to leave the marital residence in the year 2009, such action did not invalidate Appellee's interest in the marital residence. The basis of the award of rental value is that the party out of possession of jointly owned property (generally the party who has moved out of the formal marital residence) is entitled to compensation for her/his interest in the property. *Lee v. Lee,* 978 A.2d 380, 385 (Pa. Super. 2009). Furthermore, Appellee voluntarily chose to pay the real estate taxes, utilities and other expenses for the marital residence, despite no longer residing in the marital residence. Finally, while Appellee was paying the real estate taxes, utilities and other expenses for the marital residence, Appellant was living in the marital residence without making any contributions towards said expenses. These voluntary expenses for the marital residence paid by Appellee after separation in the year 2009, coupled with Appellant's lack of contribution, entitled Appellee a credit for the fair rental value of the marital residence in the amount of $10,400.00. This Trial Court finds Appellant's third issue on appeal is without merit.

4-5. This Trial Court properly valued the pizza shop equipment, allocated to Appellee, in the amount of $10,000.00 as the agreed-upon amount by both parties; and properly credited Appellee in the amount of $10,000 for payment made by Appellee on the credit card debt as the only value amount provided by the parties to the Master and to this Trial Court.

When determining the value of marital property, a trial court is free to accept all, part or none of the evidence as to the true and correct value of the property. *Biese v. Biese,* 979 A.2d 892, 895 (Pa. Super. 2009). Where the evidence offered by one party is not contradicted, a trial court may adopt that value even though the resulting valuation would be different if more accurate and complete evidence were presented. *Id*. A trial court does not abuse its discretion in adopting the only valuation submitted by the parties. *Id*.

As Appellant's fourth and fifth issues concern the valuation of assets and debts, and therefore, utilize similar case law, these issues will be addressed simultaneously. First, Appellant's fourth issue concerns the valuation of the equipment from the pizza shop. The parties' marital residence consisted of three separate units – the 2nd floor residential unit where the parties resided, the 1st floor residential unit the parties placed for rent, and a commercial unit. *Transcript of Master's hearing, pg. 6, line 24 – pg. 7, line 1*. During their marriage, the parties operated the commercial unit as the "Mr. Pizza" pizza shop. *Id*. During his testimony at the Master's hearing, Appellee stated the remaining equipment from the pizza shop was worth an estimated $10,000.00. *Id., pg. 30, lines 3-6*. Furthermore, in his Recommendations and Report, the Master stated: "The parties agreed on the record that in all likelihood, the equipment remaining in the business is worth no more than $10,000.00." *See Master's Recommendations and Report, pg. 8.* Although Appellant now insists the value of the pizza shop equipment has substantially declined in value, there was little or no contradiction from Appellant in the form of direct or cross-examination regarding the current value of the pizza shop equipment. Without a more detailed valuation of the pizza shop equipment after the Master's hearing to substantiate a significant decrease in value, this Trial Court was within its authority to adopt the agreed-upon valuation of the pizza shop equipment in the amount of $10,000.00. *Biese*, 979 A.2d at 895. This Trial Court finds Appellant's fourth issue on appeal is without merit.

Furthermore, Appellant's fifth issue concerns the valuation of credit card debt at the date of separation. During his testimony at the Master's hearing, Appellee stated, as of the date of separation, the parties had a joint credit card account used to purchase inventory and equipment for the pizza shop and said account had a current balance of at least $10,000.00. *Transcript of Master's hearing, pg. 37, lines 7-16.* In the Master's Report, the Master recommended that the full repayment of the credit card debt be allocated to Appellee, along with the two Morgan Stanley loans. *See Master's Recommendations and Report, pg. 21.* Again, there was little to no contradiction from Appellant in the form of direct or cross-examination regarding the credit card debt, and without a more detailed valuation of the credit card debt at the date of separation, this Trial Court was within its authority to adopt the only valuation provided to the Master and to this Trial Court regarding the credit card debt in the amount of $10,000.00. *Biese*, 979 A.2d at 895. This Trial Court finds Appellant's fifth issue on appeal is without merit.

6. This Trial Court properly affirmed the Master holding his ruling on sanctions in abeyance; allowing Appellant to offer testimony; and concluding that Appellant's testimony and evidence should have been precluded at the March 31st, 2014 Master's hearing, due to Appellant's filing of her Pre-trial Narrative Statement three (3) days after the Master's designated date for filing pre-trial narrative statements.

Rule 1920.33 of the Pennsylvania Rules of Civil Procedure governs the filing of pre-trial narrative statements and appropriate sanctions for failure to timely file pre-trial narrative statements. Rule 1920.33 states, in pertinent part:

> (b) **Within the time required by Order of Court or written directive of the master** or, if none, at least sixty days before the scheduled hearing on the claim for the determination and distribution of property, each party shall file and serve upon the other party a **pre-trial statement...**
>
> (c) If a party **fails to file** either an inventory as required by subdivision (a) or a **pre-trial statement** as required by subdivision (b), the court may make an appropriate Order under Rule 4019(c) governing sanctions.
>
> (d)(1) A party who fails to comply with a requirement of subdivision (b) of this rule shall, **except upon good cause shown**, be **barred from offering any testimony or introducing any evidence in support of or in opposition to claims for the matters not covered therein.**
>
> (2) A party shall, **except upon good cause shown,** be **barred from offering any testimony or introducing any evidence that is inconsistent with or which goes beyond the fair scope of the information set forth in the pre-trial statement…**

Pa. R. Civ. P. 1920.33(b), (c), (d)(1)-(2) [emphasis added]. Furthermore, Rule 4019(c) of the Pennsylvania Rules of Civil Procedure states, in pertinent part:

> (c) The court, when acting under subdivision (a) of this rule, may make:
>
> …
>
> (2) an Order **refusing to allow the disobedient party to support or oppose designated claims** or defenses, or **prohibiting such party from introducing in evidence designated documents, things or testimony**, or from introducing evidence of physical or mental condition…

Pa. R. Civ. P. 4019(c)(2) [emphasis added].

Prior to the Master's hearing, Master Ralph R. Riehl III, Esq., by letter dated January 17th, 2014, informed both parties and their counsel as to the date the Master's hearing would be held, March 31st, 2014, and directed the parties to file their Pre-trial Narrative Statements on or before March 17th, 2014. Appellee, by and through his counsel, filed his Pre-trial Narrative Statement on March 17th, 2014. Appellant's counsel, however, filed Appellant's Pre-trial Narrative Statement on March 20th, 2014, three (3) days after the due date set forth by the Master for filing Pre-trial Narrative Statements. At the Master's hearing on March 31st, 2014, Appellee's counsel objected to any and all testimony and evidence offered by Appellant, arguing violation of Rule 1920.33 of the Pennsylvania Rules of Civil Procedure. Appellant's counsel admitted filing Appellant's Pre-trial Narrative Statement outside of the Master's designated time period, but argued against any prohibitive sanctions, stating three

(3) days were a "minimal delay" in filing her Pre-trial Narrative Statement; most of the evidence Appellant would introduce would come from public records or was included in her previously-filed Inventory Statement; Appellant's counsel, who was out-of-town, had difficulty in reaching his own client, the Appellant, prior to the Pre-trial Narrative Statement being filed; and Appellant's counsel was hoping for a settlement and, therefore, did not start working on Appellant's Pre-trial Narrative Statement as early as he could have done. The Master held his ruling in abeyance and permitted Appellant to testify at the Master's hearing, but ultimately concluded Appellant should have been precluded from offering any testimony or evidence. However, the Master also concluded preclusion of Appellant's testimony and evidence would not be prejudicial, stating "no harm will befall [Appellant] as a result of that ruling given the nature of the assets and liabilities of the parties and given the necessary conclusions to be drawn therefrom." *See Master's Recommendations and Report, pg. 11.*

Although Appellant's counsel argues his filing of Appellant's Pre-trial Narrative Statement three (3) days after the due date was a "minimal delay" and such delay would not prejudice Appellee, Appellant's failure to adhere to the time limit set forth by the Master for filing Pre-trial Narrative Statements is a *per se* violation of Rule 1920.33(b); therefore, where a party fails to comply with the requirements of Rule 1920.33(b), prohibiting the untimely party from introducing testimony or evidence supporting or opposing claims addressed therein, absent a showing of good cause, is an appropriate sanction.

As to whether Appellant had "good cause" for this delay in filing her Pre-trial Narrative Statement, Appellant's counsel stated he had been out of town the Friday before the Pre-trial Narrative Statements were due and had difficulty obtaining information from his own client, the Appellant. *Transcript of Master's hearing, pg. 84, lines 13-15.* Appellant's counsel also stated it was not Appellant's intention to proceed with the Master's hearing, but instead he wanted to "try and work it out" with Appellee and his counsel. *Id., pg. 86, lines 12-14.* However, it was admitted by Appellant's counsel that a Status Conference had taken place on January 16th, 2014, at which no agreement could be reached, and no further settlement discussions had taken place thereafter. *Id., pg. 86, lines 15-25*. Appellant's "hope" that a settlement could be reached prior to the Master's hearing, where the evidence demonstrated the lack of any substantial settlement discussions taking place for months prior to the Master's hearing, did not constitute "good cause" for failure to adhere to the time limit set forth by the Master for filing Pre-trial Narrative Statements. The Rules governing pre-trial statements and sanctions for failure to file pre-trial narrative statements are intended to provide an even playing field for both parties in the marital and economic dissolution of marriages and these Rules should not, and must not, be utilized to play games of "gotcha." *See Anderson v. Anderson,* 822 A.2d 824, 829 (Pa. Super. 2003). However, Appellant's counsel's unavailability prior to filing Pre-trial Narrative Statements and difficulty in obtaining information from Appellant did not constitute "good cause," as Appellant and her counsel had received the Master's letter dated January 17th, 2014, which stated pre-trial narrative statements were due fifty-nine (59) days, a more than reasonable time to prepare for trial and submit Appellant's Pre-trial Narrative Statement. Therefore, Appellant and Appellant's counsel did not show "good cause" for their failure to file her Pre-trial Narrative Statement within the time period as set forth by the Master and was a clear violation of Rule 1920.33 of the Pennsylvania Rules of Civil Procedure. This Trial Court finds Appellant's sixth issue on appeal is without merit.

7. At the time of the Master's hearing, Appellant admitted that only equitable distribution was outstanding and waived the issue of alimony by failing to preserve this issue in her initial Exceptions and failed to request leave to file additional Exceptions. Furthermore, any marital asset should not be deemed in recognition of Appellant's substantial pre-marital contribution of funds as acknowledged in part by Appellee.

The Sixth Judicial District known as the Court of Common Pleas of Erie County, Pennsylvania follows Rule 1920.55-2 of the Pennsylvania Rules of Civil Procedure regarding Master's Reports, Exceptions to Master's Reports, and Final Decrees entered by a trial court, as do a majority of counties in the Commonwealth of Pennsylvania. *See Pa. R. Civ. P. 1920.55-1.* Pursuant to Rule 1920.55-2:

> (b) Within twenty days of the receipt of the date of mailing of the master's report and Recommendations, whichever occurs first, any party may file exceptions to the report or any part thereof, to rulings on objections to evidence, to statements or findings of fact, to conclusions of law, or to any other matters occurring during the hearing. Each exception shall set forth a separate objection precisely and without discussion. **Matters not covered by exceptions are deemed waived unless, prior to entry of the final decree, leave is granted to file exceptions raising those matters…**

Rule 1920.55-2(b). [emphasis added].

Appellant argues any distribution of marital assets, after all foregoing matters have been determined, should be deemed in lieu of alimony. However, of the eleven (11) Exceptions filed by Appellant on May 29th, 2014, Appellant did not list an Exception in any pleading concerning equitable distribution in lieu of alimony, and, therefore, failed to raise and preserve an issue regarding alimony. Additionally, as included in her Pre-trial Narrative Statement, Appellant merely mentions alimony as part of a "Proposed Resolution of Economic Claims," which did not clearly indicate a direct claim for alimony. Finally, the parties stipulated at the Master's hearing that the Master was "authorized to hear the case and make Recommendations concerning equitable distribution" only. *See Master's Recommendations and Report, pg. 3*. Furthermore, the Master indicated there were "no pleadings of record raising any economic claims." *See id.* If Appellant truly desired a claim for alimony, as mentioned in her Pre-trial Narrative Statement, she could have raised and preserved alimony prior to or during the Master's hearing; could have filed an additional Exception to the Master's Recommendations and Report for alimony in her initial Exceptions; and could have requested leave to file additional Exceptions before the final divorce decree was entered. Appellant chose none of these methods to preserve the issue of alimony. As Appellant decidedly chose none of these actions, any claim for alimony now on appeal is deemed waived, pursuant to Rule 1920.55-2(b) of the Pennsylvania Rules of Civil Procedure.

Appellant also argues any distribution of marital assets, after all foregoing matters have been determined, should be deemed in consideration of her pre-marital contribution of funds. As part of his Report, the Master acknowledged Appellant's pre-marital contributions towards the current parties' marital estate, including funds utilized towards the purchase of the parties' marital residence and furnishings within the marital residence; the pizza shop

business; Appellant's 1993 BMW 318i; an investment account; a term life insurance policy for Appellee; and an IRA account for Appellee. However, the Master also acknowledged Appellant's testimony and evidence were received over Appellee's objections regarding Appellant's untimely filing of her Pre-trial Narrative Statement and that the Master ultimately concluded Appellant should have been precluded from testimony and evidence pursuant to Rule 1920.33 of the Pennsylvania Rules of Civil Procedure.[6] Furthermore, the Master determined preclusion of Appellant's testimony and evidence would not be prejudicial to Appellant, stating "…no harm will befall [Appellant] as a result of that ruling, given the nature of the assets and liabilities of the parties and given the necessary conclusions to be drawn therefrom." *See Master's Recommendations and Report, pg. 11.* In its Opinion, this Trial Court, while acknowledging Appellant's pre-marital contributions to the current parties' marital estate, properly concluded preclusion of Appellant's testimony and evidence would not prejudice Appellant and dismissed Appellant's Exceptions regarding pre-marital contributions.[7] The Trial Court finds Appellant's final issue on appeal is without merit.

B. Conclusion

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

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

[6] See Legal Argument no. 6 above.

[7] See Appellant's Exceptions to Master's Report nos. 7 and 9.

ALBERT CELEC, INDIVIDUALLY AND AS EXECUTOR AND ON BEHALF OF THE ESTATE OF HIS PARTNER, DR. PHILIP GINNETTI, PLAINTIFF V. CIGNA CORPORATION AND LIFE INSURANCE COMPANY OF NORTH AMERICA, DEFENDANTS

JOINDER OF AN INDISPENSABLE PARTY AND COORDINATE JURISDICTION

The coordinate jurisdiction doctrine, part of the law of the case doctrine, does not bind a Common Pleas Judge to a prior finding from a federal district court that a party is indispensable when the analysis under Pennsylvania law is different than the federal analysis.

JOINDER OF AN INDISPENSABLE PARTY AND COORDINATE JURISDICTION

The voluntary payment of a life insurance policy to a beneficiary within a named class of beneficiaries under the policy does not make that beneficiary an indispensable party under Pennsylvania law to subsequent litigation filed by a different party claiming to be the beneficiary.

BAD FAITH (INSURANCE)

Pennsylvania has a prevailing interest in resolving a bad faith claim when a life insurance policy was contracted in Pennsylvania, the decedent had significant ties to Pennsylvania and the Defendants do business in Pennsylvania.

BAD FAITH (INSURANCE)

A plaintiff has failed to factually establish a statutory bad faith claim against an insurance company when the insurance company paid the policy to an identified beneficiary asserting a claim consistent with the terms of the policy and existing law (even though the law was subsequently changed).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 12343 OF 2014

Appearances: John Stember, Esq., Attorney for Plaintiff
James A. Keller, Esq., Attorney for Defendants

OPINION

The Plaintiffs, Albert Celec, individually and as Executor of the Estate of Dr. Philip Ginnetti, filed a Complaint against the Defendant, Cigna Corporation and Life Insurance Company of North America, for failing to pay proceeds under a life insurance policy after the death of his partner, Dr. Philip Ginnetti. This Opinion is in response to the Defendants' Preliminary Objections, filed November 13, 2015. For the reasons stated herein, the Preliminary Objections are **OVERRULED** in part and **SUSTAINED** in part.

BACKGROUND

Dr. Philip Ginnetti and Albert Celec were domestic partners from 1994 until Dr. Ginnetti's death in 2012. Dr. Ginnetti and Mr. Celec executed a Shared Living Agreement ("SLA") in Ohio in 1999. As part of the SLA, each agreed to name the other as beneficiary on any life insurance policy.

In 2010, Dr. Ginnetti accepted a position as Provost and Vice President at Edinboro University ("Edinboro"), largely because of its policy against discrimination based on sexual orientation. Shortly after, Dr. Ginnetti applied for Mr. Celec to be his qualified domestic partner under the Management Benefits Program ("MBP") through Edinboro. The couple received benefits under the MBP until Dr. Ginnetti's death on June 29, 2012.

As part of the MBP benefits, Edinboro provided Dr. Ginnetti with $50,000 in life insurance through Prudential Financial ("Prudential"). Dr. Ginnetti also exercised the option to purchase $100,000 in additional life insurance coverage from Life Insurance Company of North America ("LICNA"), a subsidiary of Cigna Corporation ("Cigna") through the MBP. There was no named beneficiary under either policy.

After Dr. Ginnetti's death, Prudential paid Mr. Celec the $50,000 under its insurance policy. Mr. Celec also filed a claim for the benefits from the LICNA policy. Under this policy when no beneficiary was named, the proceeds would go to, in order if living at the time of the decedent's death, a surviving spouse, child(ren), parent(s), sibling(s) and so on. Cigna determined under Ohio law that Mr. Celec did not qualify as a surviving spouse. Further, Dr. Ginnetti had no living children. The $100,000 was paid to the decedent's mother, Irene Ginnetti, as the next in line pursuant to the policy's terms.

On December 5, 2014, the Plaintiffs filed a law suit against Life Insurance Company of North America ("LICNA"), Cigna, its parent company, and Edinboro in the Erie County Court of Common Pleas. The case was removed to the United States District Court for the Western District of Pennsylvania on January 5, 2015.

The parties engaged in motion practice. The claims for breach of contract against Edinboro were dismissed without prejudice by stipulation on May 11, 2015. The Defendants filed a motion to join Irene Ginnetti as an indispensable party and necessary to litigation under F.R.C.P. 19. On September 18, 2015, the Honorable Judge Robert M. Hornak ruled Mrs. Ginnetti was a necessary and indispensable party, without whom the Plaintiffs could not proceed and dismissed the remaining claims against Edinboro. *See Opinion of Judge Hornak, pp. 8-19.* The dismissal of the claims against Edinboro destroyed federal question jurisdiction; joinder of Mrs. Ginnetti would destroy diversity jurisdiction. As a result of Judge Hornak's rulings, there was no basis for jurisdiction in federal court. Instead of dismissing the Plaintiffs' action entirely, Judge Hornak remanded the case and all state law claims to this Court. To date, Mrs. Ginnetti has not been joined.

On November 11, 2015, the Defendants filed Preliminary Objections to the Plaintiffs' Complaint citing a failure to join a necessary and indispensable party; failure to state a claim on which relief can be granted as to bad faith; and the case against Cigna should be dismissed because LICNA bears sole responsibility for the administration of any life insurance benefits.

DISCUSSION

A preliminary objection on the ground of legal insufficiency of the pleading, in the nature of a demurrer, can only be sustained where the complaint is clearly insufficient to establish the Plaintiffs' right to relief. *Reed v. Dupuis,* 920 A.2d 861, 864 (Pa.Super. 2007). To test the legal sufficiency of a pleading on this basis, a trial court must assume as true all well-pleaded, material, relevant facts, and every inference fairly deducible therefrom, but not conclusions of law, averments, argumentative allegations, or unjustified inferences. *Id*. All

doubts should be resolved against the moving party. *Id*.

Where the preliminary objection will result in the dismissal of the action, the objections may be sustained only in cases that are clear and free from doubt, meaning it must appear with certainty that the law would not permit recovery upon the facts averred. *Swisher v. Pitz,* 868 A.2d 1228 (Pa.Super. 2005). Thus, a preliminary objection on the ground of legal insufficiency in the nature of a demurrer is not to be sustained, and the pleading dismissed, unless the law is clear that no recovery is possible. *Shick v. Shirey*, 716 A.2d 1231 (Pa. 1998).

JOINDER OF IRENE GINNETTI

The Defendants claim the entire case should be dismissed for failure to join Irene Ginnetti, whom the Defendants argue is a necessary and indispensable party.

The Defendants argue Judge Hornak's finding Mrs. Ginnetti is a necessary and indispensable party is the law of the case and should not be disturbed. Separately, the Defendants argue Mrs. Ginnetti is a necessary and indispensable party under Pennsylvania law.

The law of the case doctrine refers to a family of rules, each of which embodies the concept "that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter." *Commonwealth v. Starr,* 664 A.2d 1326, 1331 (Pa. 1995). The various purposes of the law of the case doctrine rules are to promote judicial economy, protect the settled expectations of the parties, ensure uniformity of decisions, and effectuate the proper and streamlined administration of justice. *Id*.

Among the rules that are included in the law of the case doctrine is the coordinate jurisdiction rule, which states a trial court may not alter the resolution of a legal question previously made by a court of coordinate jurisdiction. *Id*. For the law of the case doctrine and the coordinate jurisdiction rule to apply, the issues that were disposed of in the earlier court's ruling must be the same as those raised in the instant proceedings. *Nicholson Co. v. Pennsy Supply, Inc.,* 524 A.2d 520, 522 (Pa. Super. 1987).

The issue before this Court and the issue determined by Judge Hornak are not the same. Judge Hornak's finding Mrs. Ginnetti is a necessary and indispensable party was based on an analysis of F.R.C.P 19. The issue before the Court is whether Irene Ginnetti is a necessary and indispensable party, as raised under Pa. R.C.P. No. 1028 and determined by Pa. R.C.P. No. 2227.

While similar, these two issues are distinct. Under F.R.C.P 19, a court is to consider the rights and interests of the absent parties as well as those of the named parties. See F.R.C.P 19(a)(1). When determining whether a party is necessary and indispensable under Pennsylvania law, the focus is on the party to be joined. See Pa. R.C.P. No. 2227; *See Delaware Cty. v. J.P. Morgan Chase & Co.,* 827 A.2d 594, 598 (Pa.Commw.Ct. 2003); *see also Polydyne, Inc. v. City of Philadelphia*, 795 A.2d 495, 496 (Pa.Commw.Ct. 2002), *as amended* (Apr. 30, 2002). Although there is clearly overlap between the two rules, the federal

[1] Whether this Court is a court of coordinate jurisdiction with the United States District Court for the Western District of Pennsylvania is still unclear under Pennsylvania law. However, Pa. R.A.P. 311 is illuminating. The comments note that Rule 311(c), which discusses changes of venue to courts of coordinate jurisdiction, does not apply to 42 Pa. C.S.A. § 5103 because "such a transfer is not to a 'court of coordinate jurisdiction within the meaning of [the] rule. 42 Pa. C.S.A. § 5103 relates to the transfer of erroneously filed matters, including those erroneous filed in federal court, because of improper subject matter jurisdiction.

rule requires more expansive consideration of the parties than the Pennsylvania counterpart. Therefore the issue in the present case is not the same as it was before Judge Hornak and the law of the case doctrine and the rule of coordinate jurisdiction do not apply.

Whether Irene Ginnetti is a necessary and indispensable party under Pennsylvania law is governed by Pa. R.C.P. No. 2227, which states in relevant part: "Persons having only a joint interest in the subject matter of an action must be joined on the same side as plaintiffs or defendants." A party is indispensable when "his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights." *Polydyne, Inc. v. City of Philadelphia,* 795 A.2d 495, 496 (Pa. Commw. Ct. 2002), as amended (Apr. 30, 2002). Whether an absent party is indispensable is determined by the following criteria:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of the right or interest?
3. Is that right or interest essential to the merits of the issue?
4. Can justice be afforded without violating due process rights of absent parties?

Delaware Cty., 827 A.2d at 598.

Upon consideration of these four factors, Irene Ginnetti is not an indispensable and necessary party. The Defendants argue Mrs. Ginnetti has a right related to the instant litigation because Cigna paid the proceeds of the life insurance policy to Mrs. Ginnetti. This argument is unavailing.

Cigna chose to pay the proceeds of the life insurance policy to Mrs. Ginnetti. The $100,000 previously paid by Cigna to Mrs. Ginnetti is not the subject of the present litigation. Mr. Celec is not asserting a claim to the money paid to Mrs. Ginnetti nor is she asserting a claim to the money sought by Mr. Celec. If Mr. Celec were to prevail in this lawsuit, Cigna would be responsible for paying Mr. Celec the policy proceeds, not Mrs. Ginnetti. As a party against whom no redress is sought, Mrs. Ginnetti need not be joined. *See Sprague v. Casey,* 550 A.2d 184, 189 (Pa. 1988).

Cigna argues it would be at risk of paying the life insurance benefits twice if Mrs. Ginnetti is not joined. However, this risk was created by and is solely born by Cigna. Any outcome in the present case would not bind Mrs. Ginnetti in future litigation and therefore the merits of this case can be determined without prejudice to the rights of Mrs. Ginnetti. *Id*. Hence, Mrs. Ginnetti need not be joined for this case to proceed.

THE PLAINTIFFS HAVE FAILED TO ESTABLISH A CLAIM OF BAD FAITH

In Count IV of the Complaint, the Plaintiffs allege the Defendants acted in bad faith dispersing the life insurance benefits to Mrs. Ginnetti "in violation of Pennsylvania statutory and common law" and/or "in violation of Delaware common law."[2] The Defendants argue the Plaintiffs cannot recover under the Pennsylvania statute because neither Mr. Celec nor Dr. Ginnetti were Pennsylvania residents. The Defendants also contend the Plaintiffs

[2] The Plaintiffs have pled in the Complaint "[t]he choice of law provision in the Cigna policy selecting Delaware is limited to construing the policy. It does not encompass tort claims arising from Cigna's administration of the policy." Complaint, para. 93. In Plaintiffs' Brief in Opposition to Defendants' Preliminary Objections the Plaintiffs reassert the "bad faith claims are governed by Pennsylvania law." p. 15. The Plaintiffs go on to explain only Pennsylvania has the sole interest in applying its law in the current suit. By Plaintiffs own contention, Pennsylvania law governs the dispute between the parties. As such, there is no need to address whether Delaware or Ohio law applies.

cannot recover for bad faith under common law because Pennsylvania does not recognize the common law action of bad faith.[3] Additionally, the Defendants argue the Plaintiffs have failed to state a factual basis for bad faith on which relief can be granted.

The Plaintiffs seek relief through the Pennsylvania bad faith statute. 42 Pa. C.S.A. §8371(preempted as applied to Employee Retirement Income Security Act of 1974, stated by *Barber v. Unum Life Ins. Co. of Am.,* 383 F.3d 134 (3d Cir. 2004).) The Defendants argue the Plaintiffs cannot recover under the statute as a non-resident. The Defendants cite to numerous federal district court cases, all of which engage in a choice of law analysis prior to concluding the out of state residents could not get relief under the Pennsylvania bad faith statute. *See e.g., Hatchigian v. State Farm Ins. Co.,* 2008 WL 5002957, at *5 (E.D. Pa. Nov. 25, 2008); *Mega Const. Corp. v. Quincy Mut. Fire Ins. Co.,* 42 F. Supp. 3d 645, 654 (E.D. Pa. 2012) *Jaber v. Nationwide Mut. Fire Ins. Co.,* 2005 WL 2031270, at *1 (M.D. Pa. July 20, 2005)(noting the legislature's purpose was to protect Pennsylvania . . . insureds.) In each of those cases another state had a prevailing interest in the case, such that the case should have been properly brought in another state or the law of another state should apply.

In this case, Pennsylvania has the prevailing interest in adjudicating the case and applying its law. Pennsylvania State System of Higher Education ("PASSHE") contracted with LICNA to provide life insurance to its employees. Dr. Ginnetti bought the additional insurance through his employer, Edinboro University, a Pennsylvania institution. The insurance policy was issued by the Defendants to Dr. Ginnetti in Pennsylvania. Dr. Ginnetti worked full-time in Pennsylvania. Dr. Ginnetti owned property in Pennsylvania and lived part-time in Pennsylvania. Hence, there is a basis for a bad faith claim pursuant to 42 Pa. C.S.A. § 8371.

However, under the Pennsylvania bad faith statute (or, indeed, Pennsylvania or Delaware common law), the Plaintiffs have failed to factually establish a claim for bad faith. The Plaintiffs contend the Defendants acted in bad faith by refusing to pay despite "clear evidence of Celec's entitlement," and "discriminated against Plaintiffs on the basis of sexual orientation and marital status by requiring more and different evidence…to establish Celec's entitlement." *Plaintiffs' Complaint December 5, 2014 ("Complaint"), paras 88, 95-96, 101-102.*

Bad faith claims against an insurer are fact specific and depend on the conduct of the insurer in relation to the insured. *Rancosky v. Washington Nat. Ins. Co.*, 130 A.3d 79 (Pa. Super. 2015). To prevail on a bad faith claim, a plaintiff must plead sufficient facts to show "the insurer did not have a reasonable basis for denying benefits under the policy and that the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim." B*erg v. Nationwide Mut. Ins. Co.,* 44 A.3d 1164, 1171 (Pa. Super. 2012). The standard is high and "mere negligence or bad judgment" is not sufficient. *Condio v. Erie Ins. Exchange,* 899 A.2d 1136, 1143 (Pa.Super. Ct. 2006). Prior to the enactment of the bad faith statute in 1990, bad faith was defined as "any frivolous or unfounded refusal to pay proceeds of a policy." *Berg, 44 A.3d at 1171.* "Bad faith conduct of an insurer includes evasion of the spirit of

[3] It is undisputed that Pennsylvania's bad faith statute subsumes the common law tort of bad faith. *Mishoe v. Erie Ins. Co.,* 824 A.2d 1153, 1160 (Pa. 2003). It remains unsettled whether a common law action for bad faith sounding in contract exists. *See Mishoe v. Erie Ins*. Co., 573 Pa. 267, 281, 824 A.2d 1153, fn. 11 (Pa. 2003); *Compare Johnson v. Beane,* 664 A.2d 96, 99 fn. 3 (Pa. 1995) *with Johnson v. Beane,* 664 A.2d 96, 101 (Pa.1995) (Cappy, J. concurring). Because the issues before the Court can be resolved without this determination, it is left for another day.

the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." *Rancosky*, 130 A.3d at 1171. Importantly, bad faith cannot be found where the insurer's conduct is in accordance with a reasonable but incorrect interpretation of the insurance policy and the law. *See J.H. France Refractories Co. v. Allstate Ins. Co.,* 626 A.2d 502, 510 (Pa. 1993).

The Plaintiffs has failed to plead a claim for bad faith under any standard. The Plaintiffs do not dispute there was no named beneficiary to the Cigna life insurance policy. According to the policy, "[i]f there is no named beneficiary or surviving beneficiary, Death Benefits will be paid to the first surviving class of the following living relatives: spouse, child or children, mother, or father; brothers or sisters; or to the executors or administrators of the Insured's estate." *Complaint, para 71; Complaint Exhibit A at p. 14.* The policy also defines "spouse" as a "current lawful spouse." *Complaint Exhibit A at p. 22.*

In determining whether Mr. Celec was a "current lawful spouse" at the time of Dr. Ginnetti's death, Cigna applied Delaware law, as required by the policy, which recognizes legal unions that are validly formed in other jurisdictions. Mr. Celec and Dr. Ginnetti were residents of Ohio. At the time, Ohio had adopted a constitutional amendment precluding recognition of any legal status of same sex domestic partnerships. While this amendment was recently held unconstitutional by *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015), Cigna applied the law as it existed at the time. Cigna explained its reasoning and analysis of the relevant law and policy provisions that it reviewed in determining Mr. Celec was not entitled to benefits.

Mrs. Ginnetti filed with Cigna a Preference Beneficiary's Affidavit stating no beneficiary was designated under the policy and she was a member of the first class of beneficiaries under the policy. Hence, Cigna had an identifiable beneficiary under the policy terms.[4]

Cigna made a reasonable determination based on its analysis of the policy and the law. Upon finding Mrs. Ginnetti was entitled to the $100,000 under the policy, Cigna paid her. Regardless of whether this interpretation was correct at the time, or in hindsight in light of the landmark *Obergefell* decision, the interpretation was reasonable and therefore not a basis for bad faith.

DISMISSAL OF CLAIMS AGAINST CIGNA

The Defendants argue all claims against Cigna Corporation should be dismissed because Cigna is not a proper party to the present litigation. Cigna claims the insurance policy was issued by LICNA and LICNA bore the sole responsibility for administration of the claims. P.O., paras 144-146.

Cigna is the parent company of LICNA. Defendants' Preliminary Objections November 13, 2015 ("P.O.") para. 145. Generally, a parent company is not liable for the acts of its subseries. *United States v. Bestfoods,* 524 U.S. 51, 61 (1998). However, in this case Plaintiffs' allegations against Cigna and LICNA are intertwined. Mr. Celec was informed when he filed a claim as beneficiary, if the "insurance benefit is $5,000 or more, CIGNA will automatically open a free interest bearing account in [the beneficiary's] name," called the "CIGNAssurance

[4] To the extent the Plaintiffs are arguing bad faith by comparing Prudential's decision to pay Mr. Celec, that argument is unhelpful. There is no averment the terms of the Prudential policy were the same as the LICNA policy or that Mrs. Ginnetti filed a Beneficiary Claim. That Prudential came to a different decision from Cigna does not make Cigna's decision unreasonable.

Program." *Complaint, Exhibit H.* The "Company Name" on the insurance claim referred to CIGNA and the form had a Cigna Group Insurance letter head. *Complaint, Exhibit H.* Celec sent his claim to the benefits under the LICNA policy to Cigna Corporation where it was denied by an employee of Cigna. *Complaint, Exhibit I.* Celec was also instructed that he could appeal the decision to Cigna Group Insurance. *Complaint, Exhibit I.* As the insurance documents reference both Cigna and LICNA, it is not clear that they are distinct and separate entities.

Based on the Complaint, there is sufficient evidence to show Cigna may have been involved in the denial of Mr. Celec's claim.

CONCLUSIONS

Irene Ginnetti is not a necessary and indispensable party. The Preliminary Objection for failure to join a necessary party is **OVERRULED**. The Plaintiffs have not pled facts sufficient to establish a prima facie case of bad faith. The Preliminary Objection related to bad faith is **SUSTAINED**. The Preliminary Objection to all claims related to Cigna is **OVERRULED** as premature.

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

COMMONWEALTH OF PENNSYLVANIA
v.
TERRENCE S. SIMPSON

SUPPRESSION OF EVIDENCE / BURDEN OF PROOF

Once a motion to suppress has been filed, it is the Commonwealth's burden to prove by a preponderance of the evidence the challenged evidence was not obtained in violation of defendant's rights.

SEARCH AND SEIZURE / WHAT CONSTITUTES A SEARCH

A search occurs when the Government obtains information by physically intruding on a constitutionally protected area.

SEARCH AND SEIZURE / CURTILAGE

The curtilage of a home is the area immediately surrounding and associated with the home and is part of the home for Fourth Amendment purposes. While boundaries of the curtilage are generally clearly marked, the concept of curtilage can be easily understood from daily experience. In determining what constitutes curtilage, the court is to consider factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. The front porch is a classic example of curtilage for Fourth Amendment purposes.

SEARCH AND SEIZURE / CURTILAGE / INVESTIGATION

Police officers may enter the curtilage to conduct an investigation. A police officer not armed with a warrant may approach a home and knock, because that is no more than any private citizen may do. The implicit license to knock typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, then leave absent invitation to linger longer. The scope of a license - express or implied – is limited not only to a particular area but also to a specific purpose.

SEARCH AND SEIZURE / CURTILAGE

Entry onto the curtilage is generally not a Fourth Amendment violation when the curtilage is used by the public.

SEARCH AND SEIZURE / WARRANTLESS SEARCH

Probable cause and exigent circumstances are required for a warrantless search. Without a showing of probable cause, the Commonwealth cannot claim an exigency exception to the warrant requirement.

SEARCH AND SEIZURE / ILLEGAL SEARCH / REMEDY

The remedy for an illegal search is the exclusion of all the evidence derived from the illegal search.

SEARCH AND SEIZURE / SEARCH WARRANT / LEGALITY OF INFORMATION:

The inclusion of illegally obtained evidence will not invalidate a search warrant if the warrant is also based upon other sources valid and sufficient to constitute probable cause.

PRETRIAL PROCEEDINGS / BURDEN OF PROOF

Hearsay evidence alone may establish a prima facie case at a preliminary hearing.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION NO. 3147 of 2015

Appearances: Nathaniel E. Strasser, Esq., Attorney for Commonwealth
Philip B. Friedman, Esq., Attorney for Defendant

MEMORANDUM OPINION

Brabender, J. April 7, 2016

The matter is before the Court on Defendant's Omnibus Pre-Trial Motion and Application for Writ of Habeas Corpus. After an evidentiary hearing and the submission of briefs, the Omnibus Pre-Trial Motion shall be **GRANTED**. The Application for Writ of Habeas Corpus shall be **DENIED**.

BACKGROUND

On July 31, 2015, Officer Andrew Miller, an officer with the Albion Police Department, entered the Defendant's property. The officer conducted an investigation, and during the course thereof, made observations which prompted him to obtain a search warrant.

The Defendant was subsequently charged as follows:

Count One - Operating a Methamphetamine Laboratory;[1]
Count Two - Possession With Intent to Deliver;[2]
Count Three - Illegal Dumping of Methamphetamine Waste;[3]
Count Four - Liquefied Ammonia Gas; Precursors and Chemicals;[4]
Count Five - Possession of Pseudoephedrine for Methamphetamine Manufacture;[5]
Count Six - Possession;[6] and
Count Seven - Possession of Drug Paraphernalia.[7]

Defendant filed an Omnibus Pre-Trial Motion on January 26, 2016, requesting suppression of seized items. Concurrently, Defendant filed an Application for Writ of Habeas Corpus. A hearing was held on the Defendant's motions on February 22, 2016. The parties subsequently filed briefs.

FACTUAL FINDINGS

On July 31, 2015, while on patrol duty at approximately 9:45 a.m., Officer Andrew Miller of the Albion Police Department was traveling westbound on North Street, approaching the intersection of North Street and North Main Street, in the Borough of Albion, Pennsylvania.[8]

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[1] 35 P.S. §780-113.4(a)(1).
[2] 35 P.S. §780-113(a)(30).
[3] 35 P.S. §780-113.4(b)(1).
[4] 35 P.S. §780-113.1(a)(3).
[5] 35 P.S. §780-113(a)(39).
[6] 35 P.S. §780-113(a)(16).
[7] 35 P.S. §780-113(a)(32).

[8] North Street runs generally perpendicular to North Main Street. At the corner of the two streets, there is a parking lot owned by the Borough of Albion. Defendant's residence is located at 95 North Main Street, next to the parking lot. The front of Defendant's residence faces North Main Street. There is a driveway next to Defendant's residence, which runs along the side of the house which is opposite to the parking lot. The driveway side of the house is bounded by a row of tall bushes, and tall, cone-shaped evergreen trees or shrubs which separates Defendant's property from the neighbor's property. *Defendant's Exhibits 6-9, 11; Commonwealth's Exhibit "B"*. The other side of Defendant's property is bounded by tall pine trees and shorter bushes next to Defendant's house. On this side of the property, in the backyard; the ground at the edge of the yard slopes down to the parking lot which abuts the property. *Defendant's Exhibits 2, 11; Commonwealth's Exhibit "B"*. The back of Defendant's residence is accessible via Defendant's driveway, or by cutting through the backyard from either the parking lot on the one side of Defendant's property or from the neighbor's property on the other side.

As Officer Miller approached the intersection of North Street and North Main Street, the officer looked over to his left toward the parking lot which abuts one side of Defendant's residence at 95 North Main Street, and observed a maroon Dodge pickup truck in the back of Defendant's residence, in the driveway, with the passenger side door open. The officer continued on his way, onto North Main Street. The truck could only be seen from the side of the house which abuts the parking lot. The truck was not visible from the front of the residence which faces North Main Street.

The officer testified that, approximately 45 minutes later, he was again traveling westbound on North Main Street[9] and observed the same vehicle, the maroon Dodge pick up truck, in the same location in Defendant's backyard. The officer again observed the passenger-side door to the truck was open.

Apparently assuming the door to the truck had remained open the entire 45 minutes that had passed since the officer first observed the truck in Defendant's backyard, and not seeing anyone around the vehicle or on the property, the officer became concerned someone might be hurt or injured, or that "something was going on." Officer Miller pulled his vehicle into the parking lot adjacent to the Defendant's residence, exited the vehicle, cut through the Defendant's backyard, walked up to the open door of the vehicle, and looked inside the truck, to see if someone was there. Not finding anyone in or around the vehicle, the officer knocked on the back door of the residence.[10] The officer testified he did so to find out why the vehicle door was open; if anyone inside the residence was O.K.; or if there was a problem.

The back door to the residence opens from a raised deck which is attached to the rear of the house, and wraps around the back of the residence. There are three steps to the deck. There is a tall wooden railing, with spindles, surrounding the deck. A portion of the railing on each side of the steps is somewhat shorter. *Defendant's Exhibits 3, 5, 11.* The back door opens into a back porch which is enclosed.

Upon approaching the back door to Defendant's residence, Officer Miller observed, on a railing to his left, a jar with a red plastic cap containing a darkish-yellow liquid on the top, with a white substance on the bottom. The officer suspected the substance in the jar was used in the manufacture of methamphetamine. The officer knocked on the back door three times. There being no response, the officer looked inside the back door to see if he could see anyone. The officer did not enter the enclosed back porch. Although he saw no persons inside the residence, he observed a burnt sweatshirt on the floor, and a square brown bottle with a white cap in the back porch. The bottle appeared to be of the type that would contain hydrogen peroxide or iodine.

Next, Officer Miller went around the house to the front door and knocked twice. There are steps with a railing at the front door to the residence. *Defendant's Exhibits 1-2.* No one answered the front door.

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[9] The Court believes the officer intended to testify he was again driving westbound on *North Street* (rather than on North Main Street). The Officer used the word, "again," suggesting a repetition of his previous route, and he testified the truck at the rear of Defendant's residence was *not* visible from *North Main Street.*

[10] The officer had been to the residence some months earlier concerning the suspected theft of Defendant's property. At that time, the officer accompanied the Defendant into the residence through the back door. Inside the residence, the officer observed the front foyer area was blocked by items. Based on his observations during the earlier investigation, the officer believed the front entryway was not being used at that time as a means of entering or leaving the residence.

The officer then returned to the rear of the house via the driveway, from where he could see a shed in the Defendant's backyard, a burn barrel and a blue barrel next to the shed.

The front of the shed, the side of the shed facing the barrels[11], and the barrels themselves, are visible from steps at the rear door of the residence. *Defendant's Exhibits 10-11.* The back of Defendant's residence, the deck, the side of the shed facing the barrels and the general area around the barrels are all visible from the adjacent lot where Officer Miller parked his patrol vehicle. *Commonwealth's Exhibit "B".*

The officer proceeded to walk to the rear of the house and back toward the area of the truck. The officer suspected meth production, based upon his observation of the jar with the red lid. From the vantage point of the truck, prior to walking behind the shed, the officer observed Coleman fuel cans, a butane torch and a small, green Coleman propane bottle. The officer next proceeded to walk around debris and weeds to the left of the shed in the backyard and around the back of the shed, for the stated reason of making sure there were no persons back there. The officer testified that, as there was no one inside the vehicle and he believed there was no one inside the house, he continued to search for whoever the owner of the truck might be. The officer did not find anyone behind the shed or backyard area. The officer next looked into the bottom of the burn barrel where he saw additional items.[12] Around the burn barrel, the officer observed more Coleman cans, some empty blister packs, a stripped lithium battery and lithium battery packaging. The officer knew from experience that the items he observed were items used in the manufacture of methamphetamine.

Officer Miller called his Chief to apprise him of the situation. Officer Miller then contacted another officer, Officer Duell, and arranged for him to secure the property while Officer Miller went to the Albion Police Station to obtain a search warrant. The application for the search warrant contained information provided by both Officers Miller and Duell. Neither officer entered the residence prior to obtaining the search warrant.

The search warrant was admitted in evidence at the suppression hearing as *Commonwealth's Exhibit "A".* The Affidavit of Probable Cause dated July 31, 2015, lists, *inter alia,* the items which Officer Miller observed from the time he entered the Defendant's property up to his return to the backyard area near the truck, after knocking on the front door, as follows: 1.) an open box of Sudafed decongestant non-drowsy pills, found above the glove box of the truck[13]; 2.) a green sweatshirt that appeared to be burnt; 3.) a square brown bottle with a white cap which appeared to be a bottle of iodine or peroxide (both the sweatshirt and brown bottle were observed on the ground or floor, inside the rear door of the residence); and 4.) the jar with a red plastic lid containing yellow liquid and a white substance, observed on the railing of the rear deck.[14] *Affidavit of Probable Cause, "Section C. Facts and Circumstances", appended to Application for Search Warrant, Commonwealth Ex. "A".*

Officer Miller maintained the sole reason he entered onto the Defendant's property and

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[11] Photographs introduced by the Defendant depict a similar looking blue container, possibly a rain barrel, on the side of the house, toward the front. *Defendant's Exhibits 8 and 9.*

[12] The officer did not specify what he observed inside the burn barrel.

[13] At the suppression hearing, the Officer did not testify he found anything in the truck.

[14] Officer Miller testified subsequent testing revealed the substance in the jar was unrelated to the production of methamphetamine.

remained there throughout his investigation was his belief someone may have needed aid, based upon the 45-minute length of time the officer assumed the truck door had remained open and the officer's observations there was no one around. The officer had no information from any source that someone was in distress at the house; that someone was inside the residence; or that there was anything illegal going on in the house.

The officer maintained he knocked on the back door to check on the welfare of whoever owned the truck, or was on the property. The officer admitted he could have first gone to the front door and knocked instead of initially going to the back door. He admitted he was unaware whether the objects he had seen blocking the inside of the front door three months earlier remained there when the officer returned. The officer admitted he could have simply left the residence when no one answered the front door.

DISCUSSION AND CONCLUSIONS OF LAW

Omnibus PreTrial Motion

Defendant asserts an illegal search and seizure occurred on July 31, 2015, and all evidence obtained on that date, and the fruits thereof, should be suppressed. The Defendant asserts that Officer Miller entered Defendant's property without probable cause, consent of the owner, or a valid search warrant, on the pretext of conducting a "welfare check." During the "welfare check", the Defendant contends the officer trespassed upon the curtilage of the property and conducted an illegal search of a vehicle and the curtilage. Defendant asserts the curtilage of Defendant's property included the back porch, the rear of Defendant's residence, and the area around the burn barrel, and is constitutionally protected pursuant to *Florida v. Jardines,* 133 S.Ct. 1409 (2013). Defendant asserts Officer Miller had no right to enter the curtilage. The Defendant asserts the search was conducted in violation of the Fourth Amendment to the United States Constitution, and Article 1, Section 8 of the Pennsylvania Constitution. Therefore, Defendant argues, any evidence seized as a result of the post-warrant search must be suppressed as fruits of the poisonous tree.

Alternatively, Defendant asserts the officer improperly remained on the property without a warrant longer than was necessary to conduct a welfare or safety check, and the items seized as a result of the officer's observations from that point on are fruits of the poisonous tree and should be suppressed.

In response to the suppression motion, the Commonwealth asserts Defendant had no reasonable expectation of privacy protected by the Fourth Amendment at the driveway or back porch of the residence, thus, any evidence observed from the back porch was not protected. The Commonwealth asserts the officer reasonably believed the rear door was the primary entrance to the house, based upon the officer's experience months earlier, when he observed objects in the front foyer area which appeared to impede use of the front door. The Commonwealth asserts that any citizen with the officer's knowledge would have used the back door.

The Commonwealth asserts that analysis under Fourth Amendment scrutiny does not begin until Officer Miller left the Defendant's driveway and walked toward the shed and the burn barrel. Even then, the Commonwealth asserts the officer did not illegally intrude, because the officer possessed the reasonable belief, based upon the totality of circumstances, including the fact the officer observed that the vehicle door had been open for 45 minutes, that someone might need medical or emergency assistance, and thus, an exception to the

warrant requirement was present.

In the alternative, if the Court concludes a search warrant was required, the Commonwealth requests that the Court suppress only those items observed by Officer Miller when he was in an area deemed by the Court to be a protected area. In that event, the Commonwealth requests the Court to examine the Application for Search Warrant and determine whether probable cause still existed to search the residence without the excluded items.

"Once a motion to suppress has been filed, it is the Commonwealth's burden to prove, by a preponderance of the evidence, that the challenged evidence was not obtained in violation of the defendant's rights." *Commonwealth v. Wallace,* 42 A.3d 1040, 1047-1048 (Pa. 2012). *See also, Pa.R.Crim.P. 581(H).*

A search undoubtedly occurs when "the Government obtains information by physically intruding on a constitutionally protected area". *United States v. Jones,* 132 S.Ct. 945, 950, n. 3 (2012). *See also, Florida v. Jardines,* 133 S.Ct. 1409, 1414 (2013).

"Absent probable cause and exigent circumstances, warrantless searches and seizures in a private home violate both the Fourth Amendment and Article I §8 of the Pennsylvania Constitution." *Commonwealth v. Bowmaster,* 101 A.3d 789, 792 (Pa.Super. 2014); *Commonwealth v. Gibbs,* 981 A.2d 274, 279 (Pa.Super. 2009). "These constitutional protections have been extended to the curtilage of a person's home." *Commonwealth v. Bowmaster, supra; Commonwealth v. Gibbs, supra.*

The curtilage of a home is the area "immediately surrounding and associated with the home", and is "part of the home itself for Fourth Amendment purposes." *Florida v. Jardines, supra*, quoting *Oliver v. U.S.*, 466 U.S. 170, 180 (1984). "While the boundaries of the curtilage are generally 'clearly marked,' the 'conception defining curtilage' is at any rate familiar enough that it is 'easily understood from our daily experience." *Florida v. Jardines, supra*, quoting *Oliver v. U.S., supra* at 182, n. 12. In determining what constitutes "curtilage", the court is to consider "factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." *Commonwealth v. Bowmaster, supra; Commonwealth v. Gibbs, supra; Commonwealth v. Eichler,* 2016 WL 410018, *6 (Pa.Super. 2016). "Curtilage is … a place where the occupants have a reasonable expectation of privacy that society is prepared to accept." *Commonwealth v. Bowmaster, supra; Commonwealth v. Eichler, supra*. The front porch is a classic example of curtilage for Fourth Amendment purposes. *Florida v. Jardines, supra* at 1415.

However, our state courts have recognized police officers may enter the curtilage to conduct an *investigation. See Commonwealth v. Eichler, supra* at *7 ("police officers have the authority to enter the curtilage for the purpose of conducting an *investigation*") (emphasis added). *See also, Commonwealth v. Gibson,* 638 A.2d 203, 207 (Pa. 1994)(police officers have the authority "to knock on the doors of the citizens of this Commonwealth *for investigatory purposes* without probable cause")(emphasis added). And in *Florida v. Jardines*, the United States Supreme Court recognized, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" *Florida v. Jardines, supra at 1416, quoting Kentucky v. King,* 131 S.Ct. 1849, 1862 (2011). The "implicit license" to knock "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Florida v. Jardines, supra at 1415.* "The

scope of a license - express or implied - is limited not only to a particular area but also to a specific purpose." *Id.*

Further, "entry onto the curtilage generally is not a Fourth Amendment violation when the curtilage is used by the public." *Commonwealth v. Eichler, supra at *7.*

With regard to the requirements of probable cause and exigent circumstances when a warrantless *search* is conducted, the legal standard for probable cause is well-recognized.

> Probable cause is made out when 'the facts and circumstances which are within the knowledge of the officer at the time …, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime.' The question we ask is not whether the officer's belief was 'correct or more likely true than false.' Rather, we require *only* a *'probability* and not a prima facie showing, of criminal activity.' In determining whether probable cause exists, we apply a totality of the circumstances test.

Commonwealth v. Thompson, 985 A.2d 928, 931 (Pa. 2009)(internal citations omitted). *See also, Commonwealth v. Gibson*, 638 A.2d 203, 206 (Pa. 1994). Mere suspicion is not a substitute for probable cause to conduct a valid search and seizure. *Commonwealth v. Gibson, supra; Commonwealth v. Kelly,* 409 A.2d 21, 23 (Pa. 1979); *Commonwealth v. Parker,* 619 A.2d 735, 739 (Pa.Super. 1993). "[T]he evidence required to establish probable cause for a warrantless search must be more than a mere suspicion or a good faith belief on the part of the police officer." *Commonwealth v. Copeland,* 955 A.2d 396, 400 (Pa.Super. 2008), *citing Commonwealth v. Lechner,* 685 A.2d 1014, 1016 (Pa.Super. 1996). "Without a showing of probable cause, the Commonwealth cannot claim an exigency exception to the warrant requirement." *Commonwealth v. Gibson, supra.*

In determining whether exigent circumstances exist to support a warrantless search, the Pennsylvania Supreme Court has stated as follows:

> Among the factors to be considered are: (1) the gravity of the offense, (2) whether the suspect is reasonably believed to be armed, (3) whether there is above and beyond a clear showing of probable cause, (4) whether there is strong reason to believe that the suspect is within the premises being entered, (5) whether there is a likelihood that the suspect will escape if not swiftly apprehended, (6) whether the entry was peaceable, and (7) the time of the entry, i.e., whether it was made at night. These factors are to be balanced against one another in determining whether the warrantless intrusion was justified.
>
> Other factors may also be taken into account, such as whether there is hot pursuit of a fleeing felon, a likelihood that evidence will be destroyed if police take the time to obtain a warrant, or a danger to police or other persons inside or outside the dwelling. Nevertheless, police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.

Commonwealth v. Roland, 637 A.2d. 269, 270-271 (Pa. 1994)(quotations and citations omitted). *See also, Commonwealth v. Bowmaster, supra at 794; Commonwealth v. Lee,* 972 A.2d 1, 3-4 (Pa.Super. 2009).

"The remedy for an illegal search is an exclusion of all the evidence derived from the

illegal search." *Commonwealth v. Gibson, supra at 206-207, citing Mapp v. Ohio,* 367 U.S. 643, 655, 657 (1961). "[T]he inclusion of illegally obtained evidence will not invalidate a search warrant if the warrant is also based upon other sources which are valid and sufficient to constitute probable cause." *Commonwealth v. Cosby,* 335 A.2d 531, 533 (Pa.Super. 1975).

1. Entry into the Backyard

The backyard and rear deck were clearly part of the curtilage of the residence. The backyard exhibited uses that were extensions of home life. The backyard contained a deck attached to the home. The deck itself was also curtilage, raised from the ground, attached to the house, bounded by a railing of various heights with spindles, and containing a table and chairs. There was indication fires had been made in the backyard, and a burn barrel there was used for burning activity. A shed in the backyard suggested further use of the backyard as an area associated with the home.

The backyard of the residence was relatively private. In many areas, the backyard was bounded by trees and shrubs. On one side, a sloped area formed an obvious boundary between the backyard and the adjacent parking lot. The majority of the backyard, including that portion of the driveway in the backyard where the truck was parked, was not visible from the street in front of the house. Based upon these factors, an individual would reasonably expect the rear deck and backyard to remain private, and Defendant had a reasonable expectation of privacy in these areas.

Even though Defendant's backyard and deck were curtilage, Officer Miller stopped to investigate whether someone was in peril, and upon entering the property for that purpose, he was "licensed" to investigate by briefly looking into the passenger compartment of the truck in the backyard, and knocking at the back door on the deck. *See Florida v. Jardines, supra at 1415; Commonwealth v. Eichler, supra at *7; , Commonwealth v. Gibson, supra at 207.* The officer's prior use of the back door several months earlier to enter the residence with the Defendant, and the officer's observations at that time inside the residence of the obstructed front entryway, reasonably led the officer to believe the back door was commonly used as a means of entry to the residence, even for guests or private citizens.

2. Approach at the Front Door

When no one answered the back door, Officer Miller was justified in knocking on the front door of the house. The front steps and the front door to the residence were clearly curtilage. *See Florida v. Jardines, supra at 1415.* The front door was separated from the street by a front yard. There were steps and a railing leading from the front yard to the front door. A private citizen not having any familiarity with Defendant's residence could reasonably be expected to knock on the front door for whatever purpose brought the citizen to the residence. However, Officer Miller was "licensed" to continue his investigation by briefly knocking at the front door. *See Florida v. Jardines, supra at 1415; Commonwealth v. Eichler, supra at *7; Commonwealth v. Gibson, supra at 207.*

3. Departure from Front Steps and Return to Backyard Area Near the Truck

It was improper for Officer Miller to return to the area of the truck in the backyard, after there was no answer to the officer's knocks at the front door. The backyard of Defendant's residence was curtilage, as previously discussed. The scope of the officer's license to investigate whether a person was in peril at Defendant's residence ended when there was

no answer to the officer's knocks at the front door. "[T]he scope of a license -- express or implied – [to investigate] is limited not only to a particular area but also to a specific purpose." *Florida v. Jardines, supra at 1416.* "…[T]he background social norms that invite a visitor to the front door do not invite him there to conduct a search." *Id*.

Nothing but a warrantless search occurred after the officer finished knocking at the front door. There was no reason to further "investigate." The backyard area was visible to the officer from the parking lot where he parked the police cruiser, and from the back steps of Defendant's residence. *Commonwealth's Exhibit "B"; Defendant's Exhibits 10-11.* The officer observed no one as he exited the police cruiser, transversed the backyard to the truck, inspected the inside of the truck, and walked to the Defendant's back door. The officer observed no one as he turned from the door, descended the deck steps, and walked down the driveway to the front of the residence to knock on the front door. The officer satisfied himself there was no one in the residence, after knocking at both the back and front doors and receiving no answer. There were no visible or audible signs of foul play at the residence. The officer admitted there were no signs anyone was in distress or that there was anything illegal going on. The only thing out of the ordinary to the officer was, a door to a truck in the backyard was open and had remained open, the officer assumed, for approximately 45 minutes.

When Officer Miller returned to Defendant's backyard and to the area of the truck, areas which were constitutionally protected, a search undoubtedly occurred. *See, e.g., United States v. Jones, supra at 950, n. 3.* The officer's testimony that, upon returning to the backyard, his motive was to continue to search for a person in peril or the owner of the truck is accorded little weight. The behavior of Officer Miller, once he left the front steps and re-entered the backyard area near the truck, objectively reveals a purpose to conduct a warrantless search.

The crux of this case becomes whether, when Officer Miller departed the front steps for the driveway in order to return to Defendant's backyard, there existed both probable cause and exigent circumstances that would have justified Officer Miller's warrantless return to the backyard, and the area of the truck. *See Commonwealth v. Fickes,* 969 A.2d 1251, 1255 (Pa.Super. 2009).

Officer Miller lacked probable cause to return to the Defendant's backyard, after knocking at the front door. The facts and circumstances within the officer's knowledge at the time, and of which he had reasonably trustworthy information, were not sufficient to warrant a man of reasonable caution in the belief "that the suspect has committed or is committing a crime."

When the officer was heading back down the driveway to return to the backyard, the officer merely believed some unknown person *might* be in peril, based upon his earlier view of the open vehicle door and the assumption he had formed that the door had been open for 45 minutes. The officer did not believe a crime had been committed or was being committed. The officer had no "victim" in mind, and there was no "suspect." The officer admitted he had no information from any source that someone was in distress; that someone was inside the residence; or that there was anything illegal going on at the house. The officer's mere suspicion the glass jar with red lid he had observed on the deck railing had something to do with the production of meth did not constitute probable cause to return to the backyard. Mere suspicion is not a substitute for probable cause to conduct a valid search and seizure. *Commonwealth v. Gibson, supra; Commonwealth v. Kelly, supra at 23; Commonwealth v. Parker, supra at 739*. Moreover, this was not even the officer's stated reason for returning

to the backyard.

Without a showing of probable cause, the Commonwealth cannot claim an exigency exception to the requirement for a search warrant. S*ee Commonwealth v. Gibson, supra at 206.* Assuming, *arguendo*, the Commonwealth had established probable cause, it nonetheless failed to establish exigent circumstances to support the warrantless search, under the *Roland* factors. *See Commonwealth v. Roland, supra at 270-271.*

When Officer Miller left the front steps, re-entered the backyard, and re-approached the area of the truck, Officer Miller did not believe an offense had occurred or was occurring, thus the factor concerning the gravity of the offense cannot be established. There was no suspect, thus no belief a suspect was within the premises, and no belief a suspect would escape if not swiftly apprehended. There was no interference with the officer's entry upon the premises. The officer's entry was during the day. Analysis of these factors dictates the warrantless search by Officer Miller in returning to the Defendant's backyard was illegal.

Analysis of the other factors identified by the Court in *Roland* also dictates the search was illegal. There was no hot pursuit of a fleeing felon. There was no evidence of a likelihood that evidence would be destroyed if the police had taken the time to obtain a warrant. Likewise, there was no evidence of danger to police or other persons inside or outside the dwelling. There was no evidence a person was in danger or in peril. There were no physical or audible signs or evidence that anyone was in danger or had been hurt. No one was even found on the premises at that point. No urgent need was identified that might have justified a warrantless search at the time the officer decided to return to the backyard area and re-approach the area of the truck. Accordingly, lacking any exigent circumstances, the officer should have obtained a search warrant before continuing his investigation by returning to the Defendant's backyard, after leaving the front steps. *See, Commonwealth v. Lee,* 972 A.2d 1, 4 (Pa.Super. 2009). By failing to do so, Officer Miller violated Defendant's constitutional rights to be free from unreasonable searches. The officer's observations from that point on, and the fruits thereof, must be suppressed. The remedy for an illegal search is an exclusion of all the evidence derived from the illegal search. *Commonwealth v. Gibson, supra at 206-207.*

<u>4. Review of Affidavit of Probable Cause</u>

The last inquiry is whether, excising the items from the Affidavit of Probable Cause which were illegally viewed, the remaining items provided probable cause to obtain a search warrant. *See Commonwealth v. Cosby, supra at 533.*

The items lawfully viewed by Officer Miller were those items the Officer viewed prior to returning to the area of the truck in the backyard, after knocking at the front door. These items are listed in the Affidavit of Probable Cause, and analyzed herein, as follows:

1. One open box of Sudafed decongestant, non-drowsy formula (found on glove box of truck);
2. A green sweatshirt that appeared to be burnt (found inside the enclosed porch at the back of the residence);
3. A square brown bottle with a white cap which appeared to be a bottle of iodine or hydrogen peroxide (found inside the enclosed porch at the back of the residence); and
4. A jar with a red plastic lid, containing a yellow liquid, a white substance, and a thin brown layer at the bottom (found on the railing of the rear deck).

Affidavit of Probable Cause, "Section C. Facts and Circumstances", appended to Application for Search Warrant, Commonwealth Ex. "A".

The open box of Sudafed decongestant, non-drowsy formula, found on the glove box of the truck, did not alone, or together with the other three items, provide probable cause to obtain a search warrant. This is an over-the-counter, non-prescription medication. Although Sudafed can be used in the production of meth, the quantity - one box - of this common decongestant, on a vehicle glove box, is not sufficient to warrant a person of reasonable caution in the belief a crime has occurred or is in the process of occurring. Moreover, the officer did not provide any testimony about the significance or lack thereof of finding this item. He did not even testify about this item at the suppression hearing.

Neither the green sweat shirt, nor the brown bottle of iodine or hydrogen peroxide with a white cap, alone or together with the other items, provided probable cause to obtain a search warrant. Neither item would warrant a person of reasonable caution in the belief a crime has occurred or is in the process of occurring. There was no testimony regarding the significance of the article of clothing, a nondescript sweatshirt. There was no testimony regarding the significance of the bottle of iodine or hydrogen peroxide, a typical household item.

The single jar with the red lid found alone on the back deck railing in the middle of the summer did not provide probable cause to obtain a search warrant. It did not, together with the other three items, provide probable cause to obtain a search warrant. Officer Miller testified he suspected the substance in the jar was related to the production of meth. The officer's suspicion does not satisfy the requirement of probable cause. The Court is unable to conclude that Officer Miller had probable cause to associate the jar, or the substance in it, with any criminal activity.

The items lawfully viewed by Officer Miller on the day in question did not constitute probable cause to obtain a search warrant for Defendant's property. Testimony and evidence about the items observed by Officer Miller, and all evidence seized pursuant to the warrant, must be suppressed as fruit of the poisonous tree. *Wong Sun v. United States,* 83 S.Ct. 407, 417 (1963).

Application for Writ of Habeas Corpus

In the Application for Writ of Habeas Corpus, the Defendant asserts the Commonwealth failed to present a *prima facie* case at the preliminary hearing to support any of the allegations in the criminal information. The Defendant asserts there was no evidence at the preliminary hearing the Defendant was present at the residence at the same time as the officer; there was no evidence placing Defendant at the residence during any time the items were on the premises; the sole person present was Robert Klingensmith. Defendant asserts there was no testimony connecting Defendant with the substances or paraphernalia on the premises. Defendant asserts the only related testimony was a hearsay statement allegedly made by Klingensmith, after *Miranda* warnings, to Agent Brett Bailor.[15]

The Commonwealth relies upon the record as established at the preliminary hearing, in support of its request to deny the Application.

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[15] Brett Bailor is a forensic scientist at the Pennsylvania State Police Crime Lab. *Transcript, Preliminary Hearing of October 26, 2015 (P.H. Tr.), pp. 16, 21.* Although Bailor testified at the preliminary hearing, it was not he, but rather, Officer Duell, who testified at the preliminary hearing about contact with Klingensmith at the residence, and subsequent statements by Klingensmith. *P.H. Tr. pp. 22-30.*

The Rules of Criminal Procedure allow hearsay evidence alone to establish a prima facie case at a preliminary hearing. *Pa.R.Crim.P. 542(E); Comment to Pa.R.Crim.P. 542; Commonwealth v. Ricker,* 120 A.3d 349, 357 (Pa. Super. 2015). Defendant had no state or federal constitutional right to confront Klingensmith in person at Defendant's preliminary hearing. *See Commonwealth v. Ricker, supra* at 362. Moreover, Defendant had the opportunity at the Preliminary Hearing to fully cross-examine the witnesses, including Officer Duell, who encountered Klingensmith at Defendant's residence, and subsequently interviewed him at the police station, *Transcript of Proceedings, Preliminary Hearing held October 26, 2015 (Tr. P.H.), pp. 22-30),* and Trooper Shawn Massey, one of the members of the CLRT Team who responded to the search warrant and found Defendant's driver's license inside the residence, *Tr. P.H., pp. 6, 12-15*.

The hearsay statements of Klingensmith were admissible hearsay at the preliminary hearing. A *prima facie* case against Defendant was established. The Application for Writ of Habeas Corpus shall be denied.

ORDER

AND NOW, to-wit, this 7th day of April, 2016, upon consideration of Defendant's Omnibus Pre-Trial Motion and Application for Writ of Habeas Corpus, and after an evidentiary hearing and the submission of briefs, it is **ORDERED** as follows:

1. The Defendant's Omnibus Pre-Trial Motion is **GRANTED**. Testimony and evidence about the items observed by Officer Miller, and all evidence seized pursuant to the search warrant issued on July 31, 2016, must be suppressed as fruit of the poisonous tree.
2. The Defendant's Application for Writ of Habeas Corpus is **DENIED**.

BY THE COURT:
/s/ **Daniel J. Brabender, Jr., Judge**

COMMONWEALTH OF PENNSYLVANIA, Appellee
v.
JOHN WESLEY LEGGETT, Appellant

PCRA / JURISDICTION AND PROCEEDINGS

A PCRA petition must be filed within one year of the date judgment becomes final unless the petition alleges and the petitioner proves one of the following exceptions apply: (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States; (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively. Any petition invoking any of the above exceptions to the filing time requirement must be filed within sixty days of the date the claim could have been presented.

PCRA / JURISDICTION AND PROCEEDINGS

The Post-Conviction Collateral Relief Act makes clear that where the petition is untimely, it is the petitioner's burden to plead in the petition and prove that one of the exceptions applies. That burden necessarily entails an acknowledgment by the petitioner that the PCRA petition under review is untimely but that one or more of the exceptions apply. It is for the petitioner to allege in his petition and to prove the petitioner falls within one of the exceptions found in 42 Pa. C. S. §9545(b)(1)(i)-(iii).

PCRA / JURISDICTION AND PROCEEDINGS

The Post-Conviction Collateral Relief Act’s timeliness requirements are mandatory and jurisdictional in nature, and no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA petition that is filed in an untimely manner.

PCRA / TIMELINESS EXCEPTION / NEWLY DISCOVERED FACTS

The newly-discovered fact exception has two components, which must be alleged and proved; namely, the petitioner must establish that (1) the facts upon which the claim was predicated were unknown, and (2) the facts could not have been ascertained by the exercise of due diligence.

PCRA / TIMELINESS EXCEPTION / NEWLY DISCOVERED FACTS

Pennsylvania courts have expressly rejected the notion that judicial decisions can be considered newly-discovered facts which would trigger the protections afforded by 42 Pa. C. S. §9545(b)(1)(ii), as a judicial opinion does not qualify as a previously unknown "fact" capable of triggering the newly-discovered fact exception.

PCRA / TIMELINESS EXCEPTION / AFTER RECOGNIZED CONSTITUTIONAL RIGHT

A new constitutional rule applies retroactively in a collateral proceeding only if (1) the rule is substantive, i.e. rules that decriminalize conduct or prohibit punishment against a class of persons, or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

PCRA / TIMELINESS EXCEPTION / AFTER RECOGNIZED CONSTITUTIONAL RIGHT

Pennsylvania courts have held *Alleyne v. United States* is not substantive as it does not prohibit punishment for a class of offenders, nor does it decriminalize conduct; rather,

the holding in *Alleyne* procedurally mandates the inclusion of facts in an indictment or information, which will increase a mandatory minimum sentence, and a determination by a fact finder of those facts beyond a reasonable doubt. Nor does the holding in *Alleyne* constitute a watershed procedural rule.

PCRA / TIMELINESS EXCEPTION / AFTER RECOGNIZED CONSTITUTIONAL RIGHT

Assuming the holding in *Alleyne v. United States* did announce a new constitutional right, neither the Pennsylvania Supreme Court nor the United States Supreme Court has held *Alleyne* to be applied retroactively to cases in which the judgment of sentence had become final.

PCRA / SECOND OR SUBSEQUENT REVIEW

Requests for review of a second or subsequent post-conviction petition will not be entertained unless a strong *prima facie* showing is offered to demonstrate that a miscarriage of justice may have occurred. This standard is met only if petitioner can demonstrate either: (a) the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or (b) he is innocent of the crimes charged.

PCRA / SECOND OR SUBSEQUENT REVIEW

A *Lawson* determination is not a merits determination. Like the threshold question of timeliness, whether a second petition satisfies the *Lawson* standard must be decided before a PCRA court may entertain the petition. Like an untimely petition, a *Lawson*-barred petition yields a dismissal. The merits are not addressed.

CRIMINAL LAW / SENTENCING / MANDATORY MINIMUM

In *Alleyne v. United States,* the United States Supreme Court held that, because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an "element" of the crime that must be submitted to the jury and proven beyond a reasonable doubt.

CRIMINAL LAW / SENTENCING / ENHANCEMENTS

Alleyne dealt with factors that either increased the mandatory minimum sentence or increased the prescribed sentencing range beyond the statutory maximum, respectively. In contrast, when dealing with a sentencing enhancement, the sentencing court is required to raise the standard guideline range; however, the court retains the discretion to sentence outside the guideline range

CRIMINAL LAW / SENTENCING / ENHANCEMENTS

By their very character, sentencing enhancements do not share the attributes of a mandatory minimum sentence that the United States Supreme Court held to be elements of the offense that must be submitted to a jury. Sentencing enhancements do not bind a trial court to any particular sentencing floor, nor do they compel a trial court in any given case to impose a sentence higher than the court believes is warranted, but only require a trial court consider a higher range of possible minimum sentences, which are not binding on a trial court.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
NO. 685 of 1999

Appearances: John Wesley Leggett, *Pro Se*
Nathaniel E. Strasser, Esq., Attorney for the Commonwealth, Appellee

OPINION

Domitrovich, J., November 25th, 2015

The instant matter is currently before the Pennsylvania Superior Court on the Appeal of John Wesley Leggett (hereafter referred to as "Appellant") from this Trial Court's Opinion and Order dated September 2nd, 2015, whereby this Trial Court dismissed Appellant's seventh (7th) Petition for Post-Conviction Collateral Relief (hereafter referred to as "PCRA Petition"). Appellant's 7th PCRA Petition, which argued Appellant's current sentence of incarceration was illegal and unconstitutional pursuant to the United States Supreme Court's holding in *Alleyne v. United States,* 133 S. Ct. 2151 (2013), was patently untimely as it was filed nine (9) years after Appellant's judgment of sentence became final, and Appellant failed to prove any of the three (3) timeliness exceptions pursuant to 42 Pa. C. S. §9545(b)(1). Furthermore, assuming *arguendo* Appellant's 7th PCRA Petition was filed timely, this Trial Court concluded Appellant would not be entitled to any relief as the holding in *Alleyne v. United States* does not apply to "Deadly Weapon Enhancements," which was applied to Appellant's sentence; rather, *Alleyne* only held any fact which increases the **mandatory minimum** sentence is an "element" which must be submitted to a jury.

Factual and Procedural History

Appellant was found guilty by a jury of Count 1 – Robbery: Inflicting Serious Bodily Injury, in violation of 18 Pa. C. S. §3701(a)(1)(i); Count 2 – Conspiracy to Commit Robbery, in violation of 18 Pa. C. S. §903(a)(1); Count 3 – Simple Assault, in violation of 18 Pa. C. S. §2701(a)(3); Count 4 – Criminal Attempt: Criminal Homicide/Murder, in violation of 18 Pa. C. S. §901(a); and Count 5 – Aggravated Assault, in violation of 18 Pa. C. S. §2702(a)(4).[1] Thereafter, on August 30th, 1999, this Trial Court sentenced Appellant as follows: at Count 1, Appellant was sentenced to serve seven (7) to twenty (20) years state incarceration; at Count 2 Appellant was sentenced to serve six (6) to fifteen (15) years state incarceration consecutive to the sentence imposed at Count 1; and at Count 4 Appellant was sentenced to serve ten (10) to twenty (20) years state incarceration consecutive to the sentence imposed at Count 2.[2]

On October 1st, 1999, Appellant filed a Notice of Appeal, in which Appellant challenged the sufficiency of evidence presented at the trial conducted before this Trial Court and the denial of his Pre-Trial Motion to suppress photographic identification evidence. On September 15th, 2000, in a Memorandum Opinion, the Pennsylvania Superior Court affirmed this Trial Court's judgment of sentence.

On February 12th, 2001, Appellant filed his first PCRA Petition. On February 14th, 2001, William J. Hathaway, Esq., was appointed by this Trial Court as Appellant's PCRA counsel. However, on March 30th, 2001 due to a conflict of interest in that Attorney Hathaway represented Appellant's Co-Appellant, this Trial Court granted Attorney Hathaway's Petition for Leave of Court to Withdraw as Counsel, and this Trial Court appointed Charbel G. Latouf, Esq., as Appellant's subsequent PCRA counsel. Thereafter, on September 27th, 2001, this Trial Court dismissed Appellant's first PCRA Petition. On October 10th, 2001, Appellant

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[1] This Trial Court notes the jury also found Appellant guilty of Carrying a Firearm without a License codified at 18 Pa. C. S. §6106(a); however, this charge was later demurred.

[2] For sentencing purposes, Count 3 merged into Count 1, and Count 5 merged into Count 4.

filed a Notice of Appeal. On March 1st, 2004, the Pennsylvania Superior Court addressed the merits of Appellant's appeal and affirmed this Trial Court's September 27th, 2001 Order, which dismissed Appellant's first PCRA Petition.

On May 14th, 2004, Appellant filed his second PCRA Petition, in which Appellant claimed he was afforded ineffective assistance of counsel because John Kent Lewis, Esq., Appellant's previous appellate counsel, failed to inform Appellant of his right to file an appeal to the Pennsylvania Supreme Court from the Pennsylvania Superior Court's March 1st, 2004 Opinion. Subsequently, this Trial Court appointed James A. Pitonyak, Esq. as Appellant's PCRA counsel, and on June 24th, 2004, Attorney Pitonyak filed Appellant's Supplemented Motion For Post-Conviction Collateral Relief, in which Attorney Pitonyak argued for Appellant's right to direct appeal to the Pennsylvania Supreme Court be reinstated *nunc pro tunc.* Thereafter, on August 25th, 2004, upon no objection by the Commonwealth, this Trial Court granted Appellant's second PCRA Petition to the extent that Appellant's right to file a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was reinstated. On September 27th, 2004, Appellant filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, and on February 10th, 2005, the Pennsylvania Supreme Court denied Appellant's Petition.

On June 9th, 2008, Appellant filed his third PCRA Petition. On June 25th, 2008, this Trial Court appointed Alison M. Scarpitti, Esq. as Appellant's PCRA counsel, and on December 1st, 2008, Attorney Scarpitti filed a Petition to Withdraw as Counsel and No Merit Letter, in which Attorney Scarpitti stated Appellant had failed to state a colorable claim for Post-Conviction Collateral Relief. On April 17th, 2009, this Trial Court entered an Order dismissing Appellant's third PCRA.

On September 16th, 2009, Appellant filed his fourth PCRA Petition. On January 15th, 2010, this Trial Court entered an Order dismissing Appellant's fourth PCRA. On February 3rd, 2012, Appellant filed a Notice of Appeal. On April 13th, 2012, the Pennsylvania Superior Court affirmed this Trial Court's Order dismissing Appellant's fourth PCRA.

On June 21st, 2012, Appellant filed his fifth PCRA Petition. On August 7th, 2012, Appellant filed an Amended Petition for Post-Conviction Collateral Relief. This Trial Court dismissed Appellant's fifth PCRA on September 28th, 2012. Appellant filed a Notice of Appeal on October 29th, 2012 and the Pennsylvania Superior Court dismissed Appellant's appeal for failure to file a brief on May 21st, 2013.

Appellant filed a Praecipe for Writ of Habeas Corpus *Ad Subjiciendum*, which this Trial Court treated as Appellant's sixth PCRA petition, on November 22nd, 2013. On December 17th, 2013, this Trial Court entered an Order dismissing Appellant's sixth PCRA petition. Appellant filed a Notice of Appeal on January 16th, 2014 and the Pennsylvania Superior Court dismissed Appellant's appeal for failure to file a brief on September 4th, 2014.

Appellant filed the instant PCRA petition, his seventh (7th), on March 12th, 2015, whereby Appellant claims he is serving an illegal sentence pursuant to the holding of *Alleyne v. United States*, 133 S. Ct. 2151 (2013). Keith H. Clelland, Esq., was appointed as PCRA counsel on April 8th, 2015. The Commonwealth filed its Response to Appellant's Petition for Post-Conviction Collateral Relief on June 18th, 2015. On July 27th, 2015, this Trial Court notified Appellant of its intention to dismiss his 7th PCRA Petition and Appellant had twenty (20) days to file any Objections. On September 2nd, 2015, and with no Objections

filed by Appellant or his counsel, this Trial Court dismissed Appellant's 7th PCRA Petition and also granted Appellant's counsel's Motion to Withdraw Representation.

On September 30th, 2015, Appellant, pro se, filed a Notice of Appeal. This Trial Court filed its 1925(b) Order on October 2nd, 2015. Appellant filed his "Concise Statement of Matters Complained Of on Appeal, Pursuant to Pa. R. A. P. 1925(b)" on October 15th, 2015.

Legal Argument

In his "Concise Statement of Matters Complained Of on Appeal, Pursuant to Pa. R. A. P. 1925(b)," Appellant argues (1) the Court of Common Pleas of Erie County erred by dismissing his 7th PCRA Petition; (2) the "Deadly Weapon Enhancement" is an element that should have been submitted to the jury and found beyond a reasonable doubt since it increased the penalty of a crime; and (3) Appellant is serving an illegal sentence under 42 Pa. C. S. §9713, according to the ruling made in *Commonwealth v. Newman,* 99 A.3d 86 (Pa. Super. 2014), and *Alleyne v. United States,* 133 S. Ct. 2151 (2013). This Trial Court will combine and summarize Appellant's three (3) issues into two (2) issues as follows:

1. **This Trial Court properly dismissed Appellant's 7th PCRA Petition as it is patently untimely and fails to prove any of the timeliness exceptions pursuant to 42 Pa. C. S. §9545(b)(1).**

A PCRA Petition must be filed within one year of the date judgment becomes final unless the petition alleges and the Petitioner proves one of the following exceptions applies:

> (i) The failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
> (ii) The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
> (iii) The right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa. C. S. §9545(b)(1)(i)-(iii). Any PCRA Petition invoking any of the above exceptions to the timeliness requirement must be filed within sixty (60) days of the date the claim could have been presented. *42 Pa. C. S. §9545(b)(2).* The Pennsylvania Supreme Court has stated the statute makes clear that where, as here, a PCRA Petition is untimely, it is the petitioner's burden to plead in the Petition and prove that one of the exceptions of 42 Pa. C. S. §9545(b)(1) applies. *See Commonwealth v. Beasley,* 741 A.2d 1258, 1261 (Pa. 1999). "That burden necessarily entails an acknowledgment by the petitioner that the PCRA Petition under review is untimely but that one or more of the exceptions apply." *Id*. It is for the petitioner to allege in his Petition and to prove that he falls within one of the exceptions found in 42 Pa. C. S. §9545(b)(1)(i) – (iii). *See Commonwealth v. Holmes,* 905 A.2d 507, 511 (Pa. Super. 2006). As the PCRA's timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA Petition that is filed in an untimely manner. *See Commonwealth v. Taylor*, 933 A.2d

1035, 1042-43 (Pa. Super. Ct. 2007).

In the instant PCRA Petition, pursuant to 42 Pa. C. S. §9545(b)(3), Appellant's judgment of sentence became final on February 10th, 2005, when the Pennsylvania Supreme Court denied Appellant's Petition for Allowance of Appeal. Therefore, Appellant could have filed a timely PCRA Petition on or before February 10th, 2006. As Appellant filed his 7th PCRA Petition on March 12th, 2015, nine (9) years after his judgment of sentence became final, Appellant failed to timely file his 7th PCRA Petition. However, Appellant alleged his 7th PCRA Petition fell within either the newly-discovered facts exception, pursuant to 42 Pa. C. S. §9545(b)(1)(ii), or the after-recognized constitutional right exception, pursuant to 42 Pa. C. S. §9545(b)(1)(iii).[3] Specifically, Appellant argued, in consideration of the United States Supreme Court's holding in *Alleyne v. United States,* 133 S. Ct. 2151 (2013)[4], his current sentence is illegal and his constitutional rights have been violated due to this Trial Court's imposition of the "Deadly Weapon Enhancement," codified at 204 Pa. Code 303.10(a).

Appellant's argument that his 7th PCRA Petition falls within the newly-discovered fact exception, pursuant to 42 Pa. C. S. 9545(b)(1)(ii), is without merit. The newly-discovered fact exception has two components, which must be alleged and proved; namely, the petitioner must establish that (1) the facts upon which the claim was predicated were unknown, and (2) the facts could not have been ascertained by the exercise of due diligence. *See Commonwealth v. Cintora,* 69 A.3d 759, 763 (Pa. Super. 2013). However, Pennsylvania courts have expressly rejected the notion that judicial decisions can be considered newly-discovered facts which would trigger the protections afforded by 42 Pa. C. S. §9545(b)(1)(ii), as a judicial opinion does not qualify as a previously unknown "fact" capable of triggering the newly-discovered fact exception. *See id (citing Commonwealth v. Watts,* 23 A.3d 980, 986 (Pa. 2011)); *see also Commonwealth v. Brandon,* 51 A.3d 231, 235 (Pa. Super. 2012). Thus, Appellant's reliance on the holding in *Alleyne* as a newly-discovered fact is misplaced and cannot be used to invoke the newly-discovered fact exception, pursuant to 42 Pa. C. S. §9545(b)(1)(ii).

Furthermore, Appellant's argument that his 7th PCRA Petition falls within after-recognized constitutional right exception, pursuant to 42 Pa. C. S. §9545(b)(1)(iii), is without merit. A new constitutional rule applies retroactively in a collateral proceeding only if (1) the rule is substantive, i.e. rules that decriminalize conduct or prohibit punishment against a class of persons, or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *See Commonwealth v. Riggle,* 2015 Pa. Super. 147 (*citing Whorton v. Bockting,* 549 U.S. 406 (2007)). Ultimately, the Pennsylvania Superior Court has held the holding in *Alleyne* is not substantive as it does not prohibit punishment for a class of offenders, nor does it decriminalize conduct; rather, the holding in *Alleyne* procedurally mandates the inclusion of facts in an indictment or information, which will increase a mandatory minimum sentence, and a determination by a fact finder of

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[3] As Appellant does not argue his failure to timely file his 7th PCRA Petition was "the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States," pursuant to 42 Pa. C. S. §9545(b)(1)(i), said timeliness exception will not be addressed in this Opinion.

[4] In *Alleyne*, the United State Supreme Court overruled *Harris v. United States,* 536 U.S. 545 (2002), and held because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an "element" of the crime that must be submitted to the jury and cannot merely be determined to be true by a judge's discretion.

those facts beyond a reasonable doubt. See *id*. Nor does the holding in *Alleyne* constitute a watershed procedural rule. *Id*. Finally, assuming the holding in *Alleyne* did announce a new constitutional right, neither the Pennsylvania Supreme Court nor the United States Supreme Court has held *Alleyne* to be applied retroactively to cases in which the judgment of sentence had become final. *See Commonwealth v. Miller,* 102 A.3d 988, 995 (Pa. Super 2014). Thus, Appellant's reliance on the holding in *Alleyne* as an after-recognized constitutional right is misplaced and cannot be used to invoke the after-recognized constitutional right exception, pursuant to 42 Pa. C. S. §9545(b)(1)(iii).

Additionally, as the instant PCRA Petition is Appellant's 7th PCRA Petition, Appellant was also required to comply with the mandates of *Commonwealth v. Lawson,* 549 A.2d 107, 112 (Pa. 1988) and its progeny. *See Commonwealth v. Palmer*, 814 A.2d 700, 709 (Pa. Super. 2002). As part of its holding in *Palmer*, the Pennsylvania Superior Court has stated:

> Requests for review of a second or subsequent post-conviction petition will not be entertained unless a strong *prima facie* showing is offered to demonstrate that a miscarriage of justice may have occurred… This standard is met only if the petitioner can demonstrate either: (a) the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or (b) he is innocent of the crimes charged.

Id at 709. Furthermore, in *Palmer*, the Pennsylvania Superior Court stated:

> A *Lawson* determination is not a merits determination. Like the threshold question of timeliness, whether a second petition satisfies the *Lawson* standard must be decided before a PCRA court may entertain the petition. Like an untimely petition, a *Lawson*-barred petition yields a dismissal. The merits are not addressed.

Id at 709, footnote 18. As thoroughly stated above, Appellant's reliance on *Alleyne v. United States* to invoke either the newly-discovered facts timeliness exception or the after-recognized constitutional right timeliness exception is without merit and failed to demonstrate Appellant's 7th PCRA Petition was timely filed. Appellant offered no further argument to demonstrate a strong *prima facie* showing that either the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate or that Appellant is innocent of the crimes charged. *See id.* As Appellant failed to meet the *Lawson* standard, his 7th PCRA Petition is time-barred and this Trial Court properly dismissed Appellant's 7th PCRA Petition.

Therefore, as Appellant's 7th PCRA Petition was filed nine (9) years after his judgment of sentence became final, failed to prove any of the (3) timeliness exceptions, pursuant to 42 Pa. C. S. §9545(b)(1) and failed to meet timeliness standards pursuant to *Commonwealth v. Lawson*, Appellant's 7th PCRA Petition is patently untimely and this Trial Court properly dismissed Appellant's 7th PCRA Petition.

2. **Appellant is serving a legal sentence as the holdings in *Alleyne v. United States* and *Commonwealth v. Newman* require any fact that increases the mandatory minimum sentence must be submitted to a jury and found beyond a reasonable doubt, and these decisions have been held not to apply to "Deadly Weapon Enhancements," which were applied to Appellant's sentence.**

Appellant argues he is serving an illegal sentence due to the imposition of the "Deadly Weapon Enhancement," in light of the holdings in *Alleyne v. United States* and *Commonwealth v. Newman.* In *Alleyne*, the United States Supreme Court held that, because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an "element" of the crime that must be submitted to the jury and proven beyond a reasonable doubt. *See Alleyne,* 133 S. Ct. 2151, 2158 (2013); *see also Commonwealth v. Newman,* 99 A.3d 86, 98 (Pa. Super. 2015) (holding 42 Pa. C. S. §9714 unconstitutional as it permits the trial court, as opposed to the jury, to increase a defendant's minimum sentence based upon a preponderance of the evidence that the defendant was dealing drugs and possessed a firearm, a fact which, under *Alleyne*, must be presented to the jury and found beyond a reasonable doubt).

However, the holding in *Alleyne* dealt strictly with **mandatory minimum sentences**, not **sentencing enhancements**. The Pennsylvania Superior Court distinguished mandatory minimum sentences and sentencing enhancements in *Commonwealth v. Buterbaugh*, 91 A.3d 1247 (Pa. Super. 2014), stating:

> *Alleyne* dealt with factors that either increased the **mandatory minimum sentence** or increased the prescribed sentencing range beyond the statutory maximum, respectively. Our case does not involve either situation; instead, we are dealing with a **sentencing enhancement.** If a sentencing enhancement applies, the sentencing court is required to raise the standard guideline range; however, the court retains the discretion to sentence outside the guideline range. Therefore, the situations addressed in *Alleyne* are not implicated.

See Buterbaugh, 91 A.3d at 1269 [emphasis added]; *see also Commonwealth v. Ali,* 112 A.3d 1210, 1226 (Pa. Super. 2015) ("By their very character, sentencing enhancements do not share the attributes of a mandatory minimum sentence that the United States Supreme Court held to be elements of the offense that must be submitted to a jury. Sentencing enhancements do not bind a trial court to any particular sentencing floor, nor do they compel a trial court in any given case to impose a sentence higher than the court believes is warranted, but only require a trial court consider a higher range of possible minimum sentences, which are not binding on a trial court."). In sentencing Appellant, this Trial Court applied the "Deadly Weapon Enhancement," codified at 204 Pa. Code 303.10(a). The "Deadly Weapon Enhancement" only required this Trial Court to consider an enhanced range of minimum sentences and did not bind this Trial Court's sentence to a mandatory minimum. As recent case law has continuously held the "Deadly Weapon Enhancement," along with other sentencing enhancements, do not run afoul of *Alleyne*, this Trial Court properly and legally sentenced Appellant using an enhanced range of minimum sentences.

Conclusion

For all of the foregoing reasons, this Trial Court concludes the instant appeal is without merit and respectfully requests the Pennsylvania Superior Court affirm its Order dated September 2nd, 2015.

BY THE COURT:
/s/ Stephanie Domitrovich, Judge

MARK RICHARD NEEDHAM
v.
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION

TRANSPORTATION LAW / PRIVATE VEHICLES / VEHICLE REGISTRATION / GENERAL OVERVIEW

The Pennsylvania Commonwealth Court's scope of review regarding license suspension cases "is limited to determining whether the trial court's findings of fact are supported by competent evidence and whether the trial court committed an error of law or an abuse of discretion in reaching its decision. The standard for sustaining an appeal based on delay requires an appellant to show (1) an unreasonable delay chargeable to PennDOT led the appellant to believe that their operating privileges would not be impaired; and (2) prejudice would result by having the operating privileges suspended after such delay.

TRANSPORTATION LAW / PRIVATE VEHICLES / OPERATOR LICENSES / GENERAL OVERVIEW

Although the Department of Transportation is required to send out suspension notices within a "reasonable time," whether its delay in doing so is "unreasonable" depends upon the circumstances of the particular case.

TRANSPORTATION LAW / PRIVATE VEHICLES / OPERATOR LICENSES / GENERAL OVERVIEW

When the Department of Transportation fails to take responsibility for moving a case forward under circumstances where it is reasonable for it to be expected to do so, the delay is attributable to the Department. Where the other party is reasonably expected to move things forward, attribution must follow as well. The moving party has the burden to move the case forward.

TRANSPORTATION LAW / PRIVATE VEHICLES / OPERATOR LICENSES / REVOCATION & SUSPENSION

Once a licensee raises the delay defense, PennDOT must then prove that the delay was caused by some factor other than mere administrative inaction. If PennDOT meets this burden, the licensee's appeal should be dismissed. If the Department fails to meet this burden, then the burden shifts to the licensee to prove prejudice.

TRANSPORTATION LAW / PRIVATE VEHICLES / OPERATOR LICENSES / GENERAL OVERVIEW

In determining whether there was an unreasonable delay attributable to PennDOT, the relevant time period is that between the point at which DOT receives notice of the licensee's conviction from the judicial system and the point at which PennDOT notifies the licensee that their license has been suspended or revoked.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
NO. 10205-2015

Appearances: W. Charles Sacco, Esq., on behalf of Mark Richard Needham (Appellant)
Terrance M. Edwards, Esq., on behalf of the Commonwealth of Pennsylvania Department of Transportation (Appellee)

OPINION

Domitrovich, J., August 5th, 2015

The instant matter is before the Pennsylvania Commonwealth Court on Mark Richard Needham's (hereafter referred to as "Appellant") appeal from this Trial Court's Order dated June 1st, 2015, whereby this Trial Court dismissed Appellant's civil License Suspension Appeal. By its Order dated June 1st, 2015, this Trial Court concluded the Pennsylvania Department of Transportation (hereafter referred to as "PennDOT") properly and timely reinstated Appellant's two (2) separate civil license suspensions by Notice dated December 29th, 2014, and Appellant did not offer any evidence to demonstrate the nearly five (5) year delay was chargeable to PennDOT, nor did Appellant offer any evidence offered to indicate circumstances existed making it reasonable to shift the burden of moving Appellant's civil License Suspension Appeal forward to PennDOT.

I. Procedural History

In May of 2009, Appellant was charged with Driving under the Influence: General Impairment – 2nd Offense, in violation of 75 Pa. C. S. §3802(a)(1); Driving Under the Influence: High Rate of Alcohol (BAC .10 - .16) – 2nd Offense, in violation of 75 Pa. C. S. §3802(b); and Maximum Speed Limits,[1] in violation of 75 Pa. C. S. §3362(a)(1). On October 26th, 2009, following a Non-Jury Criminal Trial before the Honorable Shad Connelly, Appellant was found guilty on all charges. Sentencing occurred on November 30th, 2009, at which Appellant was sentenced on Count 2 (Driving under the Influence: High Rate of Alcohol (BAC .10 - .16) – 2nd Offense, in violation of 75 Pa. C. S. §3802(b)) to sixty (60) days of Electronic Monitoring and four (4) months of probation.[2]

Appellant filed a Notice of Appeal regarding his criminal convictions to the Pennsylvania Superior Court on December 2nd, 2009. PennDOT imposed two (2) separate civil license suspensions by Notice dated February 10th, 2010, wherein PennDOT notified Appellant of his right to appeal the two (2) separate civil license suspensions in the Court of Common Pleas (Civil Division) within thirty (30) days of the date of Notice, February 10th, 2010. *See PennDOT's Exhibit 1, Sub-Exhibit 8, pg. 3.* Instead, Appellant chose to file a Motion for Supersedeas in his criminal action, and Judge Shad Connelly, by Order dated February 19th, 2010, granted a supersedeas at the criminal docket. Appellant's criminal sentences were affirmed by the Pennsylvania Superior Court on May 25th, 2010, and Appellant filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court on July 9th, 2010. By Order dated December 7th, 2010, the Pennsylvania Supreme Court denied Appellant's Petition for Allowance of Appeal.

PennDOT reinstated Appellant's two (2) separate civil license suspensions by Notice dated December 29th, 2014. Appellant filed a Petition for Appeal from a Suspension of Operating Privileges/Denial of Driver's License/Suspension of Motor Vehicle Registration on January 28th, 2015. A License Suspension Appeal hearing was scheduled for April 29th, 2015 before this Trial Court, at which Appellant appeared and was represented by W.

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[1] Under this section, Appellant was charged with exceeding the posted speed limit, i.e. 35 mph, by 11 mph.

[2] Count 1 (Driving under the Influence: General Impairment – 2nd Offense, in violation of 75 Pa. C. S. §3802(a)(1)) merged with Count 2 (Driving under the Influence: High Rate of Alcohol (BAC .10 - .16) – 2nd Offense, in violation of 75 Pa. C. S. §3802(b)). No further penalties were assessed at Count 3 (Maximum Speed Limits, in violation of 75 Pa. C. S. §3362(a)(1)).

Charles Sacco, Esq., and Chester J. Karas Jr., Esq., appeared on behalf of the Department of Transportation. Following said hearing, at which the issue of undue prejudice regarding delay was argued by both counsel, this Trial Court requested both counsel submit Memoranda of Law. Appellant filed his Memorandum of Law on May 8th, 2015. Chester J. Karas Jr., Esq., filed his Memorandum of Law on May 11th, 2015. On June 1st, 2015, this Trial Court filed its Opinion and Order, whereby this Trial Court dismissed Appellant's civil License Suspension Appeal.

Appellant filed his Notice of Appeal to the Pennsylvania Commonwealth Court on June 26th, 2015. This Trial Court filed its 1925(b) Order on June 26th, 2015. Appellant filed his Statement of Matters Complained of on Appeal July 15th, 2015.

II. Legal Argument

The Pennsylvania Commonwealth Court's scope of review regarding license suspension cases "is limited to determining whether the trial court's findings of fact are supported by competent evidence and whether the trial court committed an error of law or an abuse of discretion in reaching its decision. *Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing v. Gombocz,* 909 A.2d 798, 800-801 (Pa. 2006) (*citing Terraciano v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing*, 753 A.2d 233, 236 (Pa. 2000)). The standard for sustaining an appeal based on delay requires an appellant to show (1) an unreasonable delay chargeable to PennDOT led the appellant to believe that their operating privileges would not be impaired; and (2) prejudice would result by having the operating privileges suspended after such delay. *Id*. Although PennDOT is required to send out suspension Notices within a "reasonable time," whether its delay in doing so is "unreasonable" depends upon the circumstances of the particular case. *Lancos v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing,* 689 A.2d 342, 344 (Pa. Commw. Ct. 1997). When PennDOT fails to take responsibility for moving a case forward under circumstances where it is reasonable for it to be expected to do so, the delay is attributable to PennDOT. *Gombocz*, 909 A.2d at 801 (*citing Terraciano,* 753 A.2d at 236). Where the other party is reasonably expected to move things forward, attribution must follow as well. *Id*. **The moving party has the burden to move the case forward**. *Id*. [emphasis added].

Furthermore, once a licensee raises the delay defense, PennDOT must then prove that the delay was caused by some factor other than mere administrative inaction. *Cesare v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing,* 16 A.3d 545, 548-549 (Pa. Commw. Ct. 2011) (*citing Grover v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing*, 734 A.2d 941, 943 (Pa. Commw. Ct. 1999). In determining whether there was an unreasonable delay attributable to PennDOT, the relevant time period is that between the point at which DOT receives notice of the licensee's conviction from the judicial system and the point at which PennDOT notifies the licensee that their license has been suspended or revoked. *Pokoy v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing,* 714 A.2d 1162, 1164 (Pa. Commw. Ct. 1998). If PennDOT meets this burden, the licensee's appeal should be dismissed. *Cesare*, 16 A.3d at 549.

As part of his Statement of Matters Complained of on Appeal, Appellant argues this Trial Court failed to consider his "numerous factors" which he lists that make it reasonable to shift

the burden of moving the instant civil License Suspension Appeal forward to PennDOT: "(1) PennDOT was fully aware of the supersedeas on the criminal docket, which Appellant alleges was improperly obtained to act as a civil supersedeas; (2) PennDOT took no reasonable steps to correct this error, although numerous easily-implemented corrective actions were available; (3) PennDOT ignored its own appellate procedure and created an 'appellate entity' doomed to failure; (4) PennDOT failed to monitor this 'appellate entity' and allowed it to languish for nearly five (5) years; (5) these actions shifted the burden of moving the instant civil License Suspension Appeal forward to PennDOT; and (6) PennDOT assumed the duty and responsibility for the timely and efficient processing of the instant civil License Suspension Appeal by deviating from normally-accepted appellate procedures." After a thorough review of the record, as well as a review of relevant statutory and case law, this Trial Court concludes Appellant's argument is without merit.

Appellant was charged with Count 1 - DUI: General Impairment – 2nd Offense, Count 2 - DUI: High Rate of Alcohol (BAC .10 - .16) – 2nd Offense, and Count 3 - Maximum Speed Limits, was ultimately convicted on Counts 2 and 3 (Count 1 merging with Count 2) and sentenced to sixty (60) days Electronic Monitoring and four (4) months of probation regarding said conviction on November 30th, 2009. Thereafter, Appellant was made aware of the two (2) separate civil license suspensions of his operating privileges by separate Notices sent promptly by PennDOT and dated February 10th, 2010. But rather than appeal the two (2) separate civil license suspensions through civil License Suspension Appeal process in the Civil Division of the Court of Common Pleas, Appellant chose to appeal only the underlying criminal convictions to the Pennsylvania Superior Court and obtained a supersedeas at the criminal docket regarding the two (2) separate civil license suspensions via Motion for Supersedeas in criminal court. PennDOT, honoring the grant of supersedeas regarding the two (2) separate civil license suspensions, restored Appellant's operating privileges. The Pennsylvania Superior Court affirmed Appellant's underlying criminal convictions and the Pennsylvania Supreme Court denied Appellant's Petition for Allowance of Appeal. Thereafter, Appellant failed to challenge the two (2) separate civil license suspensions in the Civil Division of the Court of Common Pleas until nearly five (5) years later, when PennDOT reinstated the two (2) separate civil license suspensions by Notices dated December 29th, 2014. Clearly, Appellant was the moving party, and had the responsibility of moving forward with a civil license suspension appeal. *See Gombocz,* 909 A.2d at 801 (*citing Terraciano,* 753 A.2d at 236).

There is no evidence to indicate the burden of moving Appellant's civil license suspension action forward had fallen onto PennDOT. *See Gombocz,* 909 A.2d at 801 (*citing Terraciano,* 753 A.2d at 236). Appellant, not PennDOT, requested and obtained the supersedeas on the two (2) separate civil license suspensions in criminal court in order to appeal the underlying criminal convictions. PennDOT, by virtue of the Honorable Shad Connelly's Order dated February 19th, 2010, simply acknowledged and honored the supersedeas regarding Appellant's two (2) separate civil license suspensions. As these license suspensions were **civil actions** in nature through the Pennsylvania judicial system, rather than criminal actions, and PennDOT was not a party to Appellant's criminal action, PennDOT would not have been privy to information regarding Appellant's appeal of the underlying criminal convictions, including the affirmance of Appellant's criminal convictions. Appellant has offered no evidence to

indicate an unreasonable delay in the reinstatement of Appellant's two (2) separate civil license suspensions was attributable to PennDOT, nor does the record indicate PennDOT created or accepted a circumstance under which it assumed the responsibility of moving Appellant's case forward. *See id.* As Appellant has not offered any evidence to demonstrate the nearly five (5) year delay was chargeable to PennDOT, nor was any evidence offered to indicate circumstances existed making it reasonable to shift that burden of moving Appellant's civil license suspension action forward to PennDOT, the standard set forth in *Gombocz* has not been met, and PennDOT properly and promptly reinstated Appellant's two (2) separate civil license suspensions by Notice dated December 29th, 2014.

III. Conclusion

For all of the foregoing reasons, this Trial Court finds the instant appeal is without merit.

BY THE COURT:
/s/ Stephanie Domitrovich, Judge

AUDREY J. SLATER, INDIVIDUALLY AND AS THE EXECUTRIX OF THE ESTATE OF DONALD R. SLATER, PLAINTIFFS
v.
SAINT VINCENT HEALTH CENTER, DEFENDANT

EFFECT OF A RELEASE

An expansive release signed by a party can discharge the liability of an unknown party that did not contribute any consideration for the release.

A general release signed by a plaintiff as part of a settlement of a medical malpractice case can release a second hospital for alleged malpractice if the second hospital stay was causally connected to the injuries suffered in the first hospital stay.

DUPLICATIVE DAMAGES FOR WRONGFUL DEATH

An action can only be brought for wrongful death if no recovery for the same damages claims in the wrongful death action were obtained by the injured individual during his lifetime or in any prior actions. See 42 Pa. C.S.A. §8301.

CORPORATE NEGLIGENCE

To establish a prima facie case for corporate negligence, a plaintiff must supply expert testimony to establish the hospital acted in deviation from the standard of care and the hospital's negligence was a substantial factor in bringing about harm to the injured party.

A narrow exception to the requirement of an expert witness exists if each element is so obvious to be within the comprehension of the average layperson.

PUNITIVE DAMAGES

A claim for punitive damages must be based on the actions of the defendant related to the plaintiff in the action. Awarding punitive damages based on actions related to nonparties violates the Constitution's Due Process Clause.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISIONS NO. 13332 OF 2012

Appearances: L.C. TeWinkle, Esquire, Attorney for Plaintiff
Thomas M. Lent, Esquire, Attorney for Defendant
Michael V. Primis, Esquire, Attorney for Defendant

OPINION

Cunningham, J. May 18, 2016

AND NOW, to-wit, this 18th day of May, 2016, after oral argument, the Motion for Summary Judgment as filed by the Defendant is hereby GRANTED in part.

BACKGROUND

In March, 2006, Donald R. Slater was hospitalized at Hamot Medical Center ("Hamot") as a result of a motorcycle accident. During his stay at Hamot, Mr. Slater was involved in a fall that resulted in his paralysis from the waist down. He was released from Hamot in April, 2006. Mr. Slater filed a lawsuit on August 4, 2006 against Hamot for injuries related to his care/fall.

Due to his paralysis, Mr. Slater was bound to a wheelchair and was required to self-catheterize daily. This self-catheterization caused repeated urinary tract infections.

On August 14, 2006, Mr. Slater presented to Saint Vincent Health Center with sepsis

caused by multiple urinary tract infections. On August 16, 2006, Dr. Fred W. Holland, a cardiothoracic surgeon, performed an aortic valve replacement on Mr. Slater. Dr. Holland left the hospital at 5:30 p.m. that day.

Around 7:00 p.m., Mr. Slater's condition began to deteriorate—his central venous pressure rose, his blood pressure fell and drainage from his chest tube increased. Nurses updated Dr. Holland regarding Mr. Slater's worsening condition via phone calls. Dr. Holland issued verbal orders in response. Dr. Holland did not return to the hospital to respond to Mr. Slater's condition.

At some point in the evening of August 16, 2006, Dr. Holland told the nurses to call Dr. James P. Takara, who was on call, to respond to Mr. Slater's symptoms. According to Dr. Takara, he was informed of Mr. Slater's condition around 8:30 p.m. and left his house at 8:46 p.m. The medical records show Dr. Takara arrived at the hospital at 8:50 p.m.

Mr. Slater coded at 8:50 p.m. and was taken to the operating room at 9:35 p.m. Mr. Slater suffered an anoxic brain injury due to a lack of oxygen flowing to his brain. Doctors informed Mr. Slater's family he would not recover. Care was withdrawn and Mr. Slater died on August 19, 2006. The death certificate authored by Dr. Holland identified the cause of death as multiple organ failure and endocarditis.

After Mr. Slater's death, Audrey Slater was substituted as the Plaintiff against Hamot individually and as Executrix of the Estate of Donald R. Slater. The lawsuit against Hamot settled on April 8, 2010.

Over 2½ years later, on October 1, 2012, Audrey J. Slater, individually and as Executrix of the Estate of Donald R. Slater (the "Plaintiffs") filed the instant lawsuit against Saint Vincent Health Center (the "Defendant") seeking damages for Mr. Slater's death based on a claim of corporate negligence.

The Defendant filed Preliminary Objections on December 3, 2012. The Plaintiffs filed an Amended Complaint on December 18, 2012. On February 1, 2013, the Defendant filed Preliminary Objections to Plaintiff's Amended Complaint. The Preliminary Objections were denied by Order dated July 11, 2013, with the exception of striking Paragraph 10 of the Amended Complaint. The Defendant filed an Answer and New Matter on July 31, 2013.

Subsequently, the Defendant filed the present Motion for Summary Judgment, raising five grounds:

1. This lawsuit was not brought within the applicable statute of limitations;
2. The damages are barred as duplicative;
3. The claims are precluded by the April 8, 2010 Release in the Hamot case;
4. The Plaintiffs have failed to establish a prima facie case for corporate negligence; and
5. There is not a factual basis for punitive damages.

The Plaintiffs filed an Answer and Brief in Opposition to the Defendant's Motion for Summary Judgment. Oral argument was held on March 29, 2016.

DISCUSSION

Summary judgment may be granted only where the record clearly shows that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Varner-Mort v. Kapfhammer,* 109 A.3d 244, 246 (Pa.Super. 2015). The moving party has the burden of proving that no genuine issue of material fact exists. *Rush v. Philadelphia*

Newspaper, 732 A.2d 648, 650 (Pa.Super. 1999). Only when the facts are so clear that reasonable minds cannot differ may a trial court properly enter summary judgment. *Basile v. H & R Block, Inc.,* 761 A.2d 1115, 1118 (Pa. 2000). In determining whether to grant summary judgment, the trial court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. *Davis v. Res. for Human Dev., Inc.,* 770 A.2d 353, 357 (Pa. 2001).

There are genuine issues of material facts which preclude summary judgment based on the alleged statute of limitations violation. The remaining four grounds are appropriate for summary judgment in favor of the Defendant.

The April 8, 2010 Release

The Defendant contends the Release signed by the Plaintiffs to settle the Hamot litigation discharged the Defendant from any liability related to Mr. Slater's death.

In response, the Plaintiffs argue the Release is limited to Hamot and other parties for healthcare provided during the March to April, 2006 period. Since no claims in this case relate to the health care provided to Mr. Slater during the March 2006 to April 2006 period, the Defendant was not released from liability for corporate negligence allegedly committed in August, 2006.

This Court finds the relief requested in this lawsuit is precluded by the Release the Plaintiffs signed in the Hamot litigation.

There is no genuine issue of a material fact the Plaintiffs executed a Full and Final Release on April 8, 2010 settling Plaintiffs' lawsuit against Hamot. For purposes of summary judgment, it is a legal question whether the Release applies to the Defendant herein.

In relevant part the release provides:

> …the undersigned hereby fully and forever releases, acquits, and discharges: Hamot Medical Center, its trustees, members, successors, affiliates, directors, officers, employees, nurses, therapists, technicians, agents, and servants, **and any and all persons, corporations and/or other entities that are or might be claimed to be liable to the undersigned whether or not named herein,** including the heirs, executors, administrators, successors, assigns, attorneys, insurers, servants, and employees of each of them (hereafter referred to collectively as "Releasees"), third party administrators, **from any and all actions,** causes of action, claims or demands, or whatever nature, for any known or unknown injuries, losses or damages allegedly sustained by the undersigned and **related in any way to any incident** and/or medical or professional health care services rendered by and/or on the premises of any Releasee and on account of which a Legal Action was instituted by the undersigned in the Court of Common Pleas of Erie County, Pennsylvania at No. 12290-2006, or **at any other number or in any other Court.** (Emphasis added).

The Release went on to declare:

> This release and settlement is intended to cover and does cover not only all now known injuries, losses or damages, but any future injuries, losses or damages not now known or anticipated, but which may later develop or be discovered, including all the effects and consequences thereof.

After signing the Release, the Plaintiffs presented it for judicial approval to settle the Hamot litigation. In so doing, the Plaintiffs were attesting to the viability of all of the Release provisions, regardless of how broad, in settling the Hamot case.

Any release must be construed according to traditional principles of contract law. *Davis Ex Rel. Davis v. Government Employees Insurance Company,* 775 A.2d 871 (Pa.Super.2001). The effect of a release must be determined by the ordinary meaning of its language. *Taylor v. Solberg,* 566 Pa. 150, 778 A.2d 664 (2001). While the intent of the parties must be considered, the primary focus must be on the document itself. *Ford Motor Co. v. Buseman,* 954 A.2d 580, 583 (Pa.Super. 2008). Ultimately, a court must adopt the interpretation of the release that is most reasonable and probable given the plain meaning of the language. *Id*.

When parties sign a release agreeing not to sue each other or anyone else in relation to an event, the release can discharge others who have not contributed any consideration for the release. *Black v. Jamison,* 913 A.2d 313, 318 (Pa. Commw. Ct. 2006). "This is true even if the language of the release is general and releases 'any and all persons' rather than naming the actual persons released." *Id*. However, a general release will not discharge liability in relation to acts that had not yet occurred at the time the release was signed. *Vaughn v. Didizian,* 648 A.2d 38, 40 (Pa.Super. 1994).

There is no express limitation within the Release circumscribing the scope of it to healthcare providers for Mr. Slater during March and April, 2006. In fact, there is no time limit stated within the Release. Hence the plain meaning of the language used by the parties does not support the Plaintiffs' interpretation of the Release.

The Release between the Plaintiffs and Hamot is expansive. The Plaintiffs released "any and all . . . entities that are or might be claimed to be liable to the undersigned whether or not named herein . . . from any and all actions . . .of whatever nature… for any known or unknown injuries . . . related in any way" to the incident at Hamot. The Release broadly covers "any future injuries, losses, or damages not now known or anticipated, but which may later develop or be discovered." The only discernable limitation provided by the Release is the connection—however tangential—to the fall at Hamot.

There is a causal connection between the fall at Hamot and the injuries Mr. Slater allegedly sustained at Saint Vincent Health Center. Mr. Slater's fall at Hamot led to the need for self-catheterization resulting in sepsis and his stay at Saint Vincent. Absent the injury sustained at Hamot, Mr. Slater would not have been subject to the medical care at Saint Vincent.

Indeed this causal connection was strenuously advocated by the Plaintiffs in the Hamot litigation. In the Plaintiffs' Pre-Trial Narrative in the Hamot case, the Plaintiffs assert:

> Without adequate safety precautions, Mr. Slater fell causing the rebleeding of his surgical site, causing impairment of his spinal cord, which manifested itself in the neurogenic bowel and bladder, and lack of ability to bear weight. Without the fall, Mr. Slater's epidural hematoma would have reabsorbed as Dr. Dalton and the other neurosurgeons expected it would. The additional blood prevented that from happening and let, inevitably, to neurogenic bowel and bladder, fecal contamination, septic shock and death.
>
> *Plaintiffs' Pre-Trial Narrative, DN 12290 of 2006, July 24, 2009, pp. 2-3.*

In support of their argument Hamot was liable for the death of Mr. Slater, the Plaintiffs presented an expert report from Bernard S. Strauss, M.D., who proffered this expert opinion:

> It is my opinion within a reasonable degree of medical certainty that these bacteria, specifically E. Coli and enterococcus facialis, were introduced into Mr. Slater's bladder in the course of his straight catechizations, resulting in an acute urinary tract infection which progressed to urosepsis and his ultimate demise.
>
> I am of the opinion that the fall of 4/09/06 was causally related to the development of the epidural hemorrhage and hematoma, the neurogenic bladder, and eventual urosepsis leading to his death.
>
> *Plaintiffs' Pre-Trial Narrative, DN 12290 of 2006, July 24, 2009, Exhibit B p. 4.*

There is not a material issue of fact the Plaintiffs were advocating for damages from Hamot for the death of Mr. Slater prior to signing the Release.

This is not a case of the Plaintiffs' release from liability of unknown actors for acts that had not occurred. As known to the Plaintiffs years before signing the Release, the Defendant provided medical care for Mr. Slater at the time of his demise and therefore could be possibly liable. The Defendant easily falls within the realm of those entities covered by the Release.

The Pennsylvania Supreme Court has consistently held that a party can release a claim against unknown parties who have paid no consideration:

> In *Hasselrode v. Gnagey,* 404 Pa. 549, 172 A.2d 764 (1961) this Court held that a release given to a particular individual and "any and all other persons….whether herein named or not" was applicable to all tort-feasors despite the fact they were not specifically named. *See Wolbach v. Fay,* 488 Pa. 239, 412 A.29 476 (1980).
>
> *Buttermore v. Aliquippa Hosp.,* 561 A.2d 733 (Pa. 1989).

In *Buttermore*, the victim of a car accident was hospitalized. Without the benefit of counsel, the victim signed a general release in the claim against the negligent driver that released "any and all parties" from liability for his injuries. The Pennsylvania Supreme Court held this general language discharged the hospital that treated the victim for the accident injuries from liability for negligence while in the hospital's care. The same rationale applies in this case substituting Hamot for the negligent driver and the Defendant for the treating hospital.

The rationale for these decisions, in part, is explained by the Pennsylvania Supreme Court:

> Parties with possible claims may settle their differences upon such terms as are suitable to them. They may include or exclude terms, conditions and parties as they can agree. In doing so, they may yield, insist or reserve such right as they choose. If one insists that to settle, the matter must end then and forever, as between them, they are at liberty to do so. They may agree for reasons of their own that they will not sue each other or any one for the event in question. However improvident their agreement may be or subsequently prove for either party, their agreement, absent fraud, accident or mutual mistake, the law of their case.
>
> *Buttermore*, 561 A.2d at 735.

Unlike the victim in *Buttermore*, the Plaintiffs herein were represented by counsel throughout the Hamot litigation. The Plaintiffs had the ability through counsel to enter into a more limited release, or at least preserve the Plaintiffs' ability to sue an unknown party

upon a future finding of liability for Mr. Slater's death. In their Release the Plaintiffs did not reserve the right to sue other entities for damages related to Mr. Slater's death.

Further, there is nothing in this record to suggest, indeed the Plaintiffs do not even contend, the Release was the result of fraud, mistake or accident.

In sum, when the Plaintiffs signed the Release, it was their stated position of record that Hamot was liable for the injuries that caused Mr. Slater's death. In accepting the settlement proceeds from Hamot, the Plaintiffs intended to release all claims against Hamot and all other parties, known or unknown, from liability for the injuries and death of Mr. Slater. In so doing the Plaintiffs discharged the Defendant from liability in this case.

Duplicative Damages

As a related matter, the Defendant argues the damages claimed by the Plaintiffs are barred as duplicative. In this case Plaintiffs are seeking damages pursuant to the Wrongful Death and Survival Act. However, an action can only be brought for wrongful death "if no recovery for the same damages claimed in the wrongful death action [were] obtained by the injured individual during his lifetime or any prior actions for the same injuries." 42 Pa. C.S.A. § 8301.

The Plaintiffs have not illuminated what damages sought in this case that are different from the damages recovered in the lawsuit against Hamot.

In rebuttal to the Defendant's statute of limitation allegation, the Plaintiffs assert that when they settled with Hamot, they were not aware of the legal or factual basis for this lawsuit against the Defendant. Accepting this assertion as true creates a problem for the Plaintiffs regarding damages. Because the Plaintiffs were unaware of the possible liability of Saint Vincent hospital, they argued Mr. Slater's death resulted from the injuries sustained at Hamot and produced an expert report outlining economic damages that resulted from Mr. Slater's death.

The damages Plaintiffs sought in the Hamot litigation involved lost pension benefits, lost Social Security benefits, lost health insurance, lost value of household services, pain and suffering for Mr. Slater through the time of his death and medical expenses related to his hospitalization with the Defendant in August, 2006. All of these damages are now claimed in Plaintiffs' Pre-Trial Narrative in this case.

The existing record in this case fails to distinguish any difference in damages sought herein from the damages received in the Hamot lawsuit.

Hence, summary judgment is appropriate based on the failure to establish any recoverable, non-duplicative damages.

Corporate Negligence

To establish a prima facie case of corporate negligence, a plaintiff must demonstrate (1) the hospital acted in deviation from the standard of care; (2) the hospital had actual or constructive knowledge of the defect or procedures which created the harm; and (3) the hospital's negligence was a substantial factor in bringing about the harm to the injured party. *Thompson v. Nason Hosp.,* 591 A.2d 703, 708 (Pa. 1991). The Plaintiffs have not presented evidence to establish a prima facie case on any of the three prongs.

The most glaring deficiency is the failure of the Plaintiffs to establish the second and third prongs by expert testimony. "Unless a hospital's negligence is obvious, an expert witness is required to establish two of the three prongs: that the hospital deviated from the standard of care and that the deviation was a substantial factor in bringing about the harm." *Rauch*

v. Mike-Mayer, 783 A.2d 815, 827 (Pa.Super. 2001). The exception to the requirement that corporate medical malpractice claims be supported by an expert is narrow and only occurs in circumstances in which the medical and factual issues presented are such that a lay juror could recognize negligence just as well as any expert. *Jones v. Harrisburg Polyclinic Hosp.,* 437 A.2d 1134, 1137 (Pa. 1981). Rather than the overall claim, each element must be "so obvious to be within the comprehension of the average layperson." *Brodowski v. Ryave,* 885 A.2d 1045, 1057 (Pa. Super. 2005).

In support of their corporate negligence theory, the Plaintiffs submitted reports of Michael Culig, M.D. and Irvin Krukenkamp, M.D. The admissibility of these reports is highly doubtful.[1] Assuming *arguendo* their admissibility, these reports were prepared in a different legal context in which the Plaintiffs were not a party. These reports were not prepared for this litigation and do not address the elements of a corporate negligence claim. As a result there are no experts to establish at least two prongs of a corporate negligence claim, to-wit, whether the Defendant deviated from the standard of care and whether the deviation was a substantial factor in bringing about the harm.

As a fallback position, the Plaintiffs argue the basis for corporate negligence is obvious therefore no expert is needed or alternatively, they could produce such an expert. However, the deadline to file any expert report has long past.

Mr. Slater died August 16, 2006. The Writ of Summons was filed in this case on October 1, 2013. After several amendments, the final Case Management Order dated November 18, 2014 required all discovery be completed by February 28, 2015. Plaintiffs Pre-Trial Narrative was timely filed on March 26, 2015. The Defendant's Pre-Trial Narrative was timely filed on April 30, 2015. The Case Management Order recommended a June, 2015 jury trial.

It is now nearly 10 years since Mr. Slater's death and over 3 ½ years since this case started. Discovery closed well over 1 year ago and the Pre-Trial Narratives have been filed for over 1 year. The initial pleadings filed by the parties framed the issues for discovery and summary judgment purposes.

Since receiving the Defendant's Pre-Trial Narrative and the Motion for Summary Judgment, the Plaintiffs have not supplemented the record with an expert on the elements of corporate negligence. Instead, the Plaintiffs nonchalantly posit that an expert is not needed or can be produced if necessary prior to or at trial.

The Plaintiffs' position renders meaningless the purpose of a Case Management Order or the filing of a Pre-Trial Narrative. It is also prejudicial to the Defendant to bear the continuing costs of defending this case in the absence of evidence of corporate negligence.

The gravamen of the Plaintiffs' complaint is that Dr. Holland deviated from the standard of care in rendering treatment to Mr. Slater by responding to the nurse's calls with verbal orders by telephone instead of coming to the hospital. The Plaintiffs case of corporate negligence hinges on the assertion the Defendant knew doctor(s) were not timely responding to patients and did not take appropriate steps to remedy this problem. The Plaintiffs argue that as a result of this failure, on the day of Mr. Slater's death, Dr. Holland did not timely

[1] Dr. Culig's report was prepared for presentation to Defendant's counsel as part of a Fair Hearing administrative proceeding under the Peer Review Protection Act. It was disclosed during the Holland v. Saint Vincent Health Center case pursuant to a Confidentiality Agreement entered into by the parties (the Plaintiffs herein were not a party to that litigation). It is likely protected material under the Peer Review Protection Act as well as the Attorney Client privilege. 63 P.S. 425.4. It is also unclear whether these two doctors have agreed to be witnesses in this case.

respond to Mr. Slater, which resulted in his death.

The most fundamental issue in this case is a layered determination of whether the Defendant was negligent in not preventing Dr. Holland from being negligent. The Plaintiffs' failure to produce an expert to establish either of these layers is dispositive.

In this case, it is not obvious what constitutes the standard of care, whether the standard was breached, and if so, whether there is a causal connection to the Plaintiffs' harm. The Plaintiffs have yet to identify who is going to testify that the failure of Dr. Holland to come to the hospital sooner and perform surgery was the cause of Mr. Slater's death. Likewise, the Plaintiffs have not identified who is going to testify about the standard of care the Defendant owed to ensure a doctor timely appeared and treated Mr. Slater, how that standard of care was breached and its causation to Mr. Slater's injuries.

The Plaintiffs present a plausible theory of the case, but the Plaintiffs have yet to present evidence in support of this theory. Accepting as true the Plaintiffs' assertions the Defendant was on notice of prior occasions when Dr. Holland did not come to the hospital to treat a patient, this assertion alone does not form the basis of a corporate negligence claim against the Defendant.

It is uncontroverted the Defendant had a call system in place on August 16, 2006. The nurses who observed Mr. Slater's declining condition utilized the call system several times to advise Dr. Holland of Mr. Slater's condition. Dr. Holland was accessible by phone as he answered each call. Dr. Holland provided verbal orders which were acted upon by the nursing staff. Ultimately, Dr. Holland advised the nursing staff to contact Dr. Takara, who was the on-call physician at the time. The medical records establish Dr. Takara arrived at the hospital approximately twenty minutes after he was contacted.

Hence, this is not a case where the treating doctor was inaccessible or non-responsive to phone calls from the nursing staff. This is not a case where nursing staff failed to contact superiors after a doctor refused to come to the hospital. This is not a case where the verbal orders of Dr. Holland have been found to be in error.

The Plaintiffs opted not to sue Dr. Holland to establish his negligence in treating Mr. Slater. Thus, the underlying predicate of the Plaintiffs' corporate negligence claim, i.e., the Defendant's failure to ensure the appearance of Dr. Holland to properly treat Mr. Slater, is not established. The Defendant cannot be negligent for failing to ensure a doctor timely appeared when the Plaintiffs have not presented evidence Doctor Holland was negligent in not appearing sooner at the hospital. Further, the Plaintiffs have not presented any evidence the verbal orders given by Dr. Holland to the nursing staff deviated from the standard of care.

The discretion a doctor uses in making medical decisions, such as when to see a patient in person instead of issuing medical orders to nurses telephonically, is possibly a basis for a claim of corporate negligence in the absence of any protocol in place for the communications between nurses and attending doctors.

However, it is undisputed the Defendant had a call system in place to facilitate communications between the nurses and Dr. Holland. The Plaintiffs proffer no evidence this call system was not utilized or underutilized in this case. Nor is there evidence the call system was the cause of Dr. Holland's decision not to come to the hospital sooner or to send Dr. Takara there sooner. The Plaintiffs have no evidence the verbal orders issued by Dr. Holland to the nursing staff were the cause of any harm to Mr. Slater. In addition, the

Plaintiffs have offered no evidence that had Dr. Holland come to the hospital earlier, Mr. Slater would not have suffered further injury or died.

The best the Plaintiffs can argue is that the Defendant should have had a second call system in place that would have permitted a second doctor to be on call. This is a barren argument without any factual or legal basis that the outcome for Mr. Slater would have been different. The Plaintiffs do not tender any expert testimony in support of this theory. The reality is that there was a second doctor available on call, Dr. Takara, who came in when summoned.

Giving the Plaintiffs the benefit of all favorable inferences from the evidence, the standard of care a hospital needs to have in place to ensure a treating doctor exercises proper discretion in deciding when to treat a patient in person or to respond telephonically, would not be obvious to a lay person absent expert testimony. Likewise, how the Defendant deviated from a standard of care when there was a call system in place that was utilized by the nurses and Dr. Holland on August 16, 2006 would not be obvious to a lay person absent expert testimony. Whether Dr. Holland's verbal orders deviated from the standard of care is unclear. Finally, there is nothing in this record to make it obvious that had Dr. Holland come to the hospital sooner, Mr. Slater would not have suffered any further injury or died.

The failure to adduce expert testimony is fatal to the Plaintiffs' claim for corporate negligence because at least two prongs are not satisfied. The narrow exception to the requirement of expert testimony is unavailable to the Plaintiffs since the basis for each element of corporate negligence is not obvious.

Punitive Damages

As the Plaintiffs have failed to establish a prima facie case of corporate negligence, the claim for punitive damages cannot stand. Separately, the Plaintiffs' claims for punitive damages must be dismissed as no factual basis for punitive damages has been established.

> Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. As the name suggests, punitive damages are penal in nature and are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct. The purpose of punitive damages is to punish a tortfeasor for outrageous conduct and to deter him or others like him from similar conduct. Additionally, this Court has stressed that, when assessing the propriety of the imposition of punitive damages, the state of mind of the actor is vital. The act, or the failure to act, must be intentional, reckless or malicious.

Sokolsky v. Eidelman, 93 A.3d 858, 871 (2014), *quoting Hutchison v. Luddy,* 870 A.2d 766, 770–771 (Pa. 2005).

Accepting as true the Plaintiffs' theory of this case, there is no actual evidence the Defendant's conduct was outrageous, driven by an evil motive or the result of willful, wanton and reckless conduct. This is not a case where the Defendant turned a blind eye to the need to provide timely, in- person medical attention to patients.

There was a call system in place by the Defendant which was utilized such that Dr. Holland was aware of Mr. Slater's status and interacting with the nursing staff whenever called. He was providing verbal medical directives to the nurses. The discretionary decision Dr. Holland made not to come to the hospital or to send Dr. Takara there sooner is a medical

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Accepting as true the Plaintiffs' theory of this case, there is no actual evidence the Defendant's conduct was outrageous, driven by an evil motive or the result of willful, wanton and reckless conduct. This is not a case where the Defendant turned a blind eye to the need to provide timely, in- person medical attention to patients.

There was a call system in place by the Defendant which was utilized such that Dr. Holland was aware of Mr. Slater's status and interacting with the nursing staff whenever called. He was providing verbal medical directives to the nurses. The discretionary decision Dr. Holland made not to come to the hospital or to send Dr. Takara there sooner is a medical

decision subject to a determination of whether medical malpractice occurred. There is no actual evidence of medical malpractice by Dr. Holland proffered in this case.

To the extent the Plaintiffs are demanding punitive damages based on care (or lack thereof) provided to patients who are not a party to this litigation, e.g., the patients in the Howard and Holland cases, "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e. injury that it inflicts upon those who are, essentially, strangers to the litigation." *Phillip Morris USA v. Williams*, 127 S.Ct. 1057, 1063 (2007).

CONCLUSIONS

There is a genuine issue of material fact whether the statute of limitations was violated in this case.

As a matter of law, the Defendant is within the realm of those entities whom the Plaintiffs released from liability when settling their litigation against Hamot by the April 8, 2010 release.

The Plaintiffs have not identified any damages sought in this case that were not demanded or recovered in settling the Hamot litigation.

There is not a prima facie case of corporate negligence. The Plaintiffs have failed to establish at least two prongs of a corporate negligence claim for lack of any expert testimony. Plaintiffs cannot avail themselves of the narrow exception to the expert requirement since their claim is not obvious to the lay person.

The Plaintiffs have failed to establish a basis for punitive damages.

While the Plaintiffs' claim in theory is serious and not taken lightly by this Court, the Plaintiffs have failed to adduce evidence in support of it nearly a decade after the event. Accordingly, Summary Judgment is granted in favor of the Defendant.

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

THOMAS WILER, Plaintiff
v.
THOMAS M. MAGGIO, Defendant

DOCTRINE OF LACHES AND INJUNCTIVE RELIEF

A suit in equity is not viable when the moving party is engaging in the same conduct that the party seeks to enjoin.

To successfully assert the Doctrine of Laches, a party must show a lack of due diligence in pursuing a claim by the other party that causes prejudice because of the delay.

A delay of nearly a century in enforcing a deed restriction is sufficient to invoke the Doctrine of Laches. By failing to bring a claim for 6 ½ years, the Plaintiff is "guilty of a want of due diligence."

The Plaintiff's awareness of the investment of time, labor, and materials to improve the Defendant's rear building for rental purposes constitutes evidence of the actual prejudice suffered by the Defendant due to the Plaintiff's delay in seeking to enforce the deed restriction. The Defendant's need to rent the rear building to pay the mortgage and the fact he would not have purchased the property if he could not rent the rear building constitute irreparable harm.

When a greater harm would result from granting an injunction rather than denying it, the extraordinary remedy of a permanent injunction is not warranted.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 12230-2012

Appearances: Gery Nietupski, Esq., Attorney for Plaintiff
Richard Filippi, Esq., Attorney for Defendant

OPINION

Cunningham, William R., J. May 24, 2016

This lawsuit represents the Plaintiff's attempt to enjoin a neighbor from renting a single family dwelling in alleged violation of their respective deed restrictions.

A bench trial resulted in a verdict in favor of the Defendant on January 11, 2016 denying the Plaintiff's request for an injunction. After the Plaintiff's Motion for Post Trial Relief was denied, this timely appeal followed. A Statement of Matters Complained of on Appeal was filed April 12, 2016; this Opinion is in response thereto.

In summary, the Garden Court deed restrictions do not prevent a member from renting a single family dwelling. If renting is a violation of the deed restrictions, the Plaintiff is committing the same violation as the Defendant. Further, the doctrine of laches prevents the Plaintiff from objecting to the Defendant's use of his building. As a matter of equity, the Plaintiff has not set forth a basis to receive the extraordinary remedy of a permanent injunction.

BACKGROUND

The Plaintiff Thomas Wiler is the sole owner of 614 Cherry Street, Erie, Pennsylvania by deed dated December 10, 2005.[1] *Plaintiffs' Exhibit* 26. This property is adjacent to the real

[1] At the time of trial, Michael Kohler was withdrawn as a Plaintiff for lack of standing since he has never had an ownership interest in co-Plaintiff Thomas Wiler's property that is the subject of this lawsuit.

property known as 620 Cherry Street, Erie Pennsylvania, owned by the Defendant by deed dated January 30, 2008 and recorded on February 5, 2008. *Plaintiffs' Exhibit 1.*

These two properties are located in the historic Garden Court area of the City of Erie and governed, in part, by a Declaration of Trust of J.W. Little to Edward J. Crowell, et al. recorded on June 22, 1907 (the "Declaration"). *Plaintiffs' Exhibit 4.*

The Declaration has a total of eight restrictions serving as covenants running with the land of each lot within the Garden Court. The first three restrictions limit each lot to only one single family building with minimum cost and setback requirements. *Id., Restrictions 1-3.* The fourth restriction states that "(n)o barns, automobile houses or sheds, or other out buildings shall be placed or erected …" *Id., Restriction 4.* Further, "[n]o building placed or erected on the said described premises shall at any time be used for commercial purposes." *Id., Restriction 5.* The question in this case is whether these restrictions, which have never been abrogated and remain generally valid, are nonetheless unenforceable against the Defendant.

The Defendant's property is the only one in the Garden Court with two buildings suitable for residential living. These two buildings have been in existence likely since 1913. The main house on the Defendant's property has always been identified as 620 Cherry Street and is over 2000 square feet. The second building, which is approximately 675 square feet, sits on the rear of the Defendant's property. It has been identified as 620 ½ Cherry Street from at least 1930 until the Defendant had the address changed to 622 Cherry Street in 2012. It is the smaller building, identified as 620 ½ Cherry, which is the subject of this lawsuit.

The Plaintiff claims the Defendant converted 620 ½ Cherry from a garage to a rental apartment sometime between 2008 and 2011. The Plaintiff contends the Defendant cannot use 620 ½ Cherry for commercial purposes by renting it as an apartment to non-members of the Garden Court.

At trial the Defendant did not contest the validity of the deed restrictions. The Defendant denied converting 620 ½ Cherry from a garage and presented a long history of the open, residential use of it by many different tenants. The governing body of the Garden Court, known as the Civic Art Realty Company, knew of the deed violations at 620 ½ Cherry likely since 1913 yet never instituted any legal action to enforce the deed restrictions.

The Plaintiff was aware of these deed violations prior to buying 614 Cherry in 2005 and never took action until filing this lawsuit in 2012. The Defendant would not have bought this property if he could not use the smaller building as a rental and he spent considerable sums on this building since the time of his purchase.

I. THE PLAINTIFF CANNOT PREVENT THE DEFENDANT'S RENTAL

The Plaintiff selectively contorts the restrictions within the Declaration to read that he can rent his home but his neighbor cannot rent a longstanding residential building behind his home. There is no support for the Plaintiff's position from a plain reading of the restrictions and as a matter of equity.

There is no language in any of the Declaration's eight restrictions using the words rent or rental or prohibiting the rental of a building. Likewise, there is no definition of "commercial purposes" in Restriction 5 or anywhere in the Declaration.

As a result, the Plaintiff maintains the rental of his home, which he has done for years, is

not in violation of any restriction. *Trial Transcript October 7, 2015 (hereafter "T.T.") pp. 60-61.*[2] To accept the Plaintiff's testimony and interpretation inherently means renting a home is not a commercial activity proscribed by Restriction 5 or anywhere in the Declaration. If renting is not a commercial endeavor, then the Plaintiff cannot seek equitable relief to preclude the Defendant from renting since the Defendant is not violating any restriction.

If renting is a commercial activity prohibited by Restriction 5, it is applicable to the only type of building permitted under the Declaration, to-wit, a single-family home. As such, Restriction 5 applies to all homes, including the Plaintiff's.

Since the recording of the Declaration in 1907, no enforcement action has ever been taken by the governing body or any association member of the Garden Court to prevent another association member from renting a home in the Garden Court because such a rental constituted commercial activity. For years members have rented homes within the Garden Court—including the Plaintiff.

As a matter of equity, the Plaintiff cannot prevent the Defendant from renting a building just as the Plaintiff has been doing for years. The Plaintiff does not have a viable claim in equity.[3]

The analysis of this case need go no further since the equitable relief the Plaintiff seeks is to enjoin the Defendant from renting his rear building. However, to the extent the use of the Defendant's building as a rental unit remains in dispute, laches bars any further argument.

II. THE DOCTRINE OF LACHES APPLIES

"The doctrine of laches is an equitable bar to the prosecution of stale claims and is the practical application of the maxim that those who sleep on their rights must awaken to the consequence that they have disappeared." *Fulton v. Fulton,* 106 A.3d 127, 131 (Pa. Super. 2014), quoting *Jackson v. Thomson,* 53 A. 506, 506 (Pa. 1902).

The doctrine of laches bears these requirements:

> Laches bars relief when the complaining party is guilty of want of due diligence in failing to promptly institute the action to the prejudice of another. Thus, in order to prevail on an assertion of laches, respondents must establish: a) a delay arising from petitioner's failure to exercise due diligence; and, b) prejudice to the respondents resulting from the delay. Moreover, the question of laches is factual and is determined by examining the circumstances of each case.

Fulton, 106 A.3d at 132, *quoting Estate of Scharlach*, 809 A.2d 382, 383 (Pa. Super. 2002).

The doctrine of laches is not subject to a statute of limitations; indeed, laches may bar a suit in equity when a legal claim involving the same matter is still within a statute of limitations. *Fulton, supra*.

In this case, the smaller building on the Defendant's property was likely built in 1913 and used as a medical office. Since the early 1920s it has been used as a residential apartment for non-members of the Garden Court.

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[2] *See also* Plaintiff's Proposed Findings of Fact, Paragraph 18 ("There are no restrictions in the Declaration of Trust concerning the renting out of the property.").

[3] Separately, the Plaintiff is in violation of Restriction 6 of the Declaration since 2011 when he put up a fence. This violation is yet another reason he does not have clean hands in making this claim in equity.

Since its construction 620 ½ Cherry has been in violation of Restrictions 2, 3 and 4 of the Declaration which together permit only one single-family building per lot. Despite knowledge of these violations since the construction of the second building, no legal action was ever filed by the governing body or any member of the Garden Court until the Plaintiff filed this lawsuit in 2012.

The Plaintiff was aware of these violations prior to his purchase of 614 Cherry in 2005 and waited over 6 ½ years to seek to enforce the restrictions despite his knowledge of the time and expense incurred by the Defendant to give his rear building a facelift.

Hence, there is nearly a century's worth of delay in enforcing the deed restrictions. To enforce the deed restrictions now would cause substantial prejudice to the Defendant. Each prong of laches is satisfied in this case.

A. The Historical Use of 622 Cherry Street

As noted, the Declaration of Trust creating the deed restrictions for the Garden Court was formally recorded in 1907. From 1910 until the time of the Defendant's purchase in 2008, there were only two predecessors in title for 620 Cherry. For those 98 years, each of these two prior owners openly used 620 ½ Cherry as an apartment, albeit sporadically at times.

Carl and Emma Kirschner, husband and wife, bought 620 Cherry by deed dated August 23, 1910 and recorded August 25, 1910. *Plaintiff's Exhibit 3.* Carl Kirschner used the building now known as 620 ½ Cherry as a medical office. *Defendant's Exhibit 8.* It is unclear when this use began, but it ended when Dr. Kirschner died on April 20, 1920. His widow then held title to this property until 1961.

After her husband's death, Emma Kirschner converted 620 ½ Cherry to an apartment suitable for residential living. This conversion had to be before 1930.

At some point Mrs. Kirschner's daughter and son-in-law lived in the converted apartment. Thereafter the public records show various other people living there when it was known as 620 ½ Cherry, an address recognized by the US Census Bureau in 1930.

The U.S. Census for 1930 showed a Charles and Myrtle Stanbaugh paid rent to live at 620 ½ Cherry. It is unknown whether this couple is the daughter and son-in-law of Mrs. Kirschner.

Thereafter, the City of Erie Directory shows a Mrs. Mod Thompson lived at 620 ½ Cherry in 1934. *Defendant's Exhibit 26.* Likewise, the City of Erie Directory shows a Mrs. Mod Thompson lived at 620 ½ Cherry in 1943. Defendant's Exhibit 27.

The same Directory shows a Raymond G. Kern living at 620 ½ Cherry in 1953. *Defendant's Exhibit 28.* The City of Erie telephone book for 1955 lists a phone number for Raymond J. Kern at 620 ½ Cherry. *Defendant's Exhibit 29.*

The 1957 City Directory shows a Mrs. Jean Kern lived at 620 ½ Cherry. *Defendant's Exhibit 30.* She was possibly a spouse or family member of Raymond Kern. The City Directory shows a Gladys Wilkinson living at 620 ½ Cherry in 1959 and 1960. *Defendant's Exhibits 31, 32.*

In 1961 Mrs. Emma Kirschner conveyed a deed for 620 Cherry and 620 ½ Cherry to John and Micaela Bowler. *Plaintiff's Exhibit 2.*

In the latter years of Mrs. Kirschner's ownership, the Civic Art Realty Company did raise a concern to her about the residential use of 620 ½ Cherry. The following entry appears in

the minutes of a March 19, 1957 Civic Art Realty Company meeting under "New Business":

> "Garage Apartment at 620 Cherry St. – It was learned that Mrs. Kirschner is planning to rent the garage apartment which had originally been established for her husband's office and later for her daughter and son-in-law. It is felt that renting this apartment to outsiders would become a precedent for the establishment of two-family homes or apartments on the Court. Mr. Lovercheck will see the owner personally within a few days to express the Court's feeling on this matter and to attempt to have her plans changed. It this is not successful, Messrs. McClure and Quinn will draft a letter to the owner to go on record as a preliminary step to further action."
>
> *Plaintiffs' Exhibit 10.*

The diplomatic approach of Mr. Lovercheck was unsuccessful. One week later, the minutes of the March 26, 1957 meeting of the Civic Art Realty Company reflect an entry under "Old Business" as follows:

> "Garage apartment at 620 Cherry St. – Mr. Lovercheck reported the results of his visit with Mrs. Kirschner on March 24. The latter said she would be cooperative by being careful who rents the apartment, and that she would allow no one with children because of the insufficient room; at the same time, she was positive in her determination to keep the apartment. She expressed the opinion that the Court should have complained several years earlier; she said also that she wasn't the first person to rent such an apartment, but did not say who was the first. Insofar as we know, of, course, no rent had previously been collected for the apartment, which was originally established as an office for Dr. Kirschner and subsequently used by Mrs. Kirschner's daughter and her husband as an apartment. We believe that, for the reason that the garage dwelling had up to this time been used by members of the owner's family, no action had been taken in the past."
>
> *Defendant's Exhibit 19.*

These minutes clearly reflect the knowledge of the Civic Art Realty Company in 1957 there were two single- family dwellings on one lot in violation of Restrictions 2 and 4. The minutes also reflect the Board's failed attempt through its envoy Mr. Lovercheck to get Mrs. Kirschner to cease using the rear building as an additional dwelling/apartment.

The Civic Art Realty Company then chose to report Mrs. Kirschner to the City of Erie building inspector for an alleged zoning violation. By letter dated April 1, 1957 on company letterhead, Mr. J. G. Ward, in his capacity as Secretary-Treasurer of the Civic Art Realty Co., requested an investigation into the rental by Mrs. Kirschner of both buildings at 620 Cherry, identifying one rental as "a second dwelling (garage apartment) at the rear of the lot is or will be rented by Mrs. Kirschner to a new tenant." *Defendant's Exhibit 15.* This is no evidence the City of Erie conducted the requested investigation. What is known is the City of Erie never instituted an enforcement action against Mrs. Kirschner for an alleged zoning violation.

Despite the knowledge and belief of members of the Civic Art Realty Company that Mrs. Kirschner's use of 620 ½ Cherry was in violation of the deed restrictions, the Board never took any legal action of any type to enforce the deed restrictions during the 41 years that

she owned the property.[4] The failure of the Board to file any enforcement action against Mrs. Kirschner means the Board acquiesced to her use of 620 ½ Cherry Street and "slept on its rights" making laches applicable.

The same failure of the Civic Art Realty Company to file any enforcement action occurred during the nearly 47 years the Bowlers owned 620 and 620 ½ Cherry. According to Mrs. Bowler, various people lived in the rear building throughout the years. *Plaintiffs' Exhibit 34, p. 26.* Clara Storch was a tenant living in the building for 5 to 6 years and Mrs. Bowler's sister-in-law also lived there for a time. *Plaintiffs' Exhibit 34, p. 11-12.* She also let family members stay at 620 ½ Cherry. Her neighbor of twenty-four years, Gerald Urbaniak, recalled the Bowlers' daughters staying in what his daughter affectionately called the Little House. *T.T. p. 182.*

Mr. Bowler was an attorney. According to Mr. Urbaniak, at times he thought Mr. Bowler was using the rear building as an office. *T.T. p. 183.* Mr. Urbaniak observed mail being delivered there by the mailman. *Id*. If so, such use was arguably commercial in violation of Restriction 5. Yet at no time did the Civic Art Realty Company ever file any enforcement action against the Bowlers.

The use of 620 ½ Cherry again surfaced in 1974 when the City of Erie was contemplating a zoning change affecting the Garden Court. Most of the Garden Court residents were in favor of the proposed rezoning. John Bowler was not in favor of it.

The minutes of a Civic Art Realty Company meeting on October 20, 1974 state:

> "A petition in support of the rezoning had been circulated in the Court and all but three members of the Court signed the petition. John Bowler did not sign because he has two dwellings on his property, and he felt that the Rezoning would limit the possible use of the second dwelling. He would like a clarification of this before he would sign the petition."
>
> *Defendant's Exhibit 16, page 2.*

Thereafter, Attorney Bowler authored a letter dated February 11, 1975 to John Horan, Director of Community Development and City Planning for the City of Erie, in which he outlined his concerns for the rezoning of 620 and 620 ½ Cherry. *Defendant's Exhibit 17.* Attorney Bowler was very open that "our premises had erected thereon two single-family dwellings" and he wanted assurances that the rezoning "was not intended to adversely affect our rights in any way." *Id*. He wanted to ensure that the new zoning "will not be construed to restrict the unqualified right of my wife and me and our successors in title to use the premises for two single family dwellings and that such rights shall not be lost by periodic vacancy (no matter how long continued) in view of the permanent nature of the design for use as separate dwellings." *Id*.

There is no documented evidence of a response from any City of Erie official to Attorney Bowler's letter. However, there was a response from the Civic Art Realty Company.

[4] It is interesting to note the reference by Mrs. Kirschner to Mr. Lovercheck in their March 24, 1957 meeting that she was not the first owner to rent an apartment in the Garden Court which perhaps explains the unwillingness of the Board to take action. Another possible explanation is the recognition, as the Plaintiff endorses in this case, that renting a home is not prohibited by the terms of the Declaration.

In an effort to assuage Attorney Bowler's concerns, the Civic Art Realty Company sent a letter dated September 15, 1975 to him stating *en toto*:

> "This is to assure you that the present Board of Directors of the Civic Art Realty Company realize you have two existing dwellings on your property. Because the smaller building now exists as a complete dwelling, the Directors would not object to the future occupancy of this building under the R-1 zoning restrictions."
> *Defendant's Exhibit 19.*

For purposes of laches, this letter speaks volumes. The Board recognized the existence of two dwellings and described the smaller one as "a complete dwelling." *Id*. Further, the Board acquiesced to the continued use of the smaller building as a dwelling under the proposed zoning change despite the fact the Board knew this constitutes a violation of the deed restrictions. This second acquiescence of the Board to the use of 620 ½ Cherry was in 1975, some 45 years after a tenant first appeared in the US Census at 620 ½ Cherry and 37 years before the Plaintiff filed this lawsuit.

The most recent occasion when the Civic Art Realty Company reviewed the use of 620 ½ Cherry was when William Lechner was Board President. In 2012, the Board received an "informal" opinion letter from Attorney William Schaaf that the deed restrictions were not enforceable regarding 620 ½ Cherry because no legal action had been taken in the nearly 100 years of the violations. *T.T. p. 158.* As a result, the Board decided not to take any enforcement action against the Defendant. When prodded, Mr. Lechner opined the decision not to take legal action was based 60-75 percent on the lack of merit and the remaining percentage due to a lack of funds. *T.T. p. 162.* The decision not to take legal action constitutes the third time the Civic Art Realty Company acquiesced to the use of 620 ½ Cherry as an apartment.

Over the decades there were a host of prominent lawyers who were associated with and/or resided in Garden Court.[5] Several lawyers were involved in attempting to dissuade Mrs. Kirschner from renting 620 ½ Cherry. Other lawyers were involved in reporting her to the zoning office. None of these lawyers or any other association member ever took legal action to enforce the deed restrictions against 620 ½ Cherry between 1913 and 2012.

Mathew Puz, the current zoning officer for the City of Erie, testified the City's records show a "permitted occupancy" at 620 Cherry allowing "a one-family dwelling in front and additional one-family dwelling (676 square feet) in rear – legal nonconforming use existing prior to 1968." *T.T. p. 113.* Mr. Puz believes the legal nonconforming use of the rear dwelling unit goes back to at least 1937 when the 1937 Polk Directory showed there was a tenant at 620 Cherry and a tenant at 620 ½ Cherry. *T.T. p. 116*. Whether 1937 is an accurate starting date is not dispositive. The main point is the legal, nonconforming use of 620 ½ Cherry predates the City of Erie's zoning ordinance enacted in 1968 and therefore is grandfathered in.

The Defendant also presented Scott Maas, the current Director of Assessment for the County of Erie. After the first full tax reassessment of properties in 33 years for Erie County, the assessment records since 2003 for 620 Cherry show two dwelling units, one

[5] Attorneys Ritchie T. Marsh, Charles Lovercheck, John Quinn, Harvey McClure, William Schaaf and Thomas Lent to name a few.

in the front and one in the rear. *T.T. p. 131.* There are two separate assessment cards, one for each dwelling. The rear dwelling is listed as a 676 square foot bungalow type building built around 1913 containing a bedroom, two full bathrooms, one bedroom and a kitchen. There is central heat from a forced air and gas system. The building is listed as in good condition. *T.T. p. 132-135.* All of these assessment records are public documents available for inspection by any citizen.

When the Plaintiff bought 614 Cherry in 2005, Mrs. Bowler still owned 620 and 620 ½ Cherry.[6] The "complete dwelling" as described by the Board in 1975 still existed. By his own admission, the Plaintiff was in 620 ½ Cherry prior to buying the adjoining property. *T.T. pp. 31, 57.* He was also in this building during the three years Mrs. Bowler owned it before she sold the property to the Defendant in 2008. The Plaintiff knew the rear building was more suitable for residential living than for a garage. The Plaintiff was familiar with the restrictions within the Declaration prior to the purchase of his property. *T.T. pp. 25, 30, 31.*[7] At no time during these three years did the Plaintiff file any legal action to enforce the deed restrictions against Mrs. Bowler.

The Plaintiff was informed early on by the Defendant of the cosmetic updates he was making to both dwellings and his intent to rent the rear dwelling. *T.T. pp. 213-216.* The Defendant was very open with the Civic Art Realty Company Board about his renovations and at least three board members came to the Defendant's property to witness the work. *Id.* Yet it was not until 2012, and after differences arose between Mr. Kohler and the Defendant, that the Plaintiff filed this lawsuit.

Hence, the Plaintiff failed to take action from the date of his purchase on December 10, 2005 until the filing of this lawsuit on June 20, 2012, a period of over 6 ½ years. During this time period, the Plaintiff acquiesced to the use of 620 ½ Cherry as had his predecessors in title and all of the other association members since at least 1913.

B. The Plaintiff is "Guilty Of A Want Of Due Diligence"

To successfully assert the defense of laches, the Defendant must show the Plaintiff did not exercise due diligence in pursuing his claim against the Defendant. "In determining whether a party exercised due diligence, the focus is on what the party reasonably should have known by the use of the means of information within his reach, with the vigilance the law requires, not on what he actually knew." *Fulton, supra., p. 135.*

The Plaintiff maintains he did research about 620 Cherry before he bought the adjoining property. He claimed to have read the restrictions in the Declaration prior to his purchase. *T.T., pp. 25, 30, 31.* If so, the position he has taken in this lawsuit would have been obvious to him because there is no language in the Declaration prohibiting the rental of a building in Garden Court. He would have been aware of the restriction of one building per lot, which would make the very existence of 620½ Cherry an obvious violation of the Declaration prior to the Plaintiff's purchase of 614 Cherry.

As the Plaintiff's purported research of the property would have made him aware of the basis of his claim as early as 2005, the only way he can justify the belated filing of this lawsuit is if there was some change serving as the impetus for the lawsuit. The Plaintiff

[6] John Bowler died on July 1, 2000.
[7] See also Plaintiff's Proposed Findings of Fact 15 ("Plaintiff was aware of the restrictions set forth in the Declaration of Trust and the restrictions played a role in his decision to purchase 614 Cherry Street.").

asserted just such a change in the Complaint.

In its entirety, Paragraph 11 of the Plaintiff's Complaint reads: "Sometime between 2008 and 2011, Defendant converted a garage on the premises into an apartment which is currently renting or is intending to rent." The Plaintiff, Thomas Wiler, signed the Verification to the Complaint in this case. *Plaintiff's Exhibit 1.* This statement is patently false and the Plaintiff knew so when he signed the Verification.

The reason the Plaintiff knew it was false was because he was inside 620 ½ Cherry at least once before he bought 614 Cherry in 2005 and several times during Mrs. Bowler's ownership. During this time he knew there were four rooms, including a bathroom. The Plaintiff had no basis to believe the building was a garage nor did he identify any structural changes the Defendant made to convert it from a garage to an apartment.

By contrast, the Defendant presented a number of photographs of the interior of 620 ½ Cherry in 2007. *Defendant's Exhibits 9 – 11.* These pictures show that in 2007 the building was not a garage. Instead it was laid out for residential purposes. There was a kitchen stove in a kitchen room, with markings on the floor where a refrigerator once stood. There was a living room with a bookcase over a fireplace. *T.T. p.195.* There was a bathroom with a working toilet and sink. There was water and sewer service. There was forced air heating with a functioning furnace. The hot water heater was working. There was electricity and a separate meter for electrical service to this building.

The Defendant's pictures were taken before he bought the property and after the Plaintiff had been in 620 ½ Cherry several times with Mrs. Bowler. These pictures were also around 5 years before the Plaintiff signed the Verification to his Complaint.

According to Mrs. Bowler, the rear building was not a garage when they bought the property in 1961. Instead, it was always a house with a kitchen, bathroom, living room, furnace room and gas and water service separate from the main house. *Plaintiffs' Exhibit 34, pp.7-12.* Mrs. Bowler's neighbor of 24 years, Mr. Urbaniak, had been in the rear building numerous times before 2008 and described a kitchen, bathroom and living room. *T.T. pp. 181-182.* Former Board President William Lechner observed the Defendant fixing up the rear structure and stated the Defendant did not convert the building from a garage. *T.T. pp. 158, 159.* Mr. Lechner has lived in Garden Court since 2000 and never saw a garage door for a vehicle on this building. *Id*.

The Plaintiff adduced the testimony of Attorney Thomas Lent, a resident of Garden Court from 1990 to 2000. Attorney Lent authored a history of Garden Court. *Plaintiff's Exhibit 8.* According to him, the only property in Garden Court with a second building that was not a garage was 620 Cherry. *T.T. p. 99.* Attorney Lent observed the rear building used as an apartment because there was no garage door, it had a chimney and Mr. Bowler always parked his car behind it. *T.T. pp. 103, 104.*

The Defendant presented Richard Bertges, a licensed realtor/ broker whom he asked to evaluate the property before buying it. Mr. Bertges visited the premises at least twice before the Defendant's purchase. *T.T. p. 261.* The building known as 620 ½ Cherry had a kitchen with a sink and stove and a mark where a refrigerator stood. *T.T. p. 258.* There was a bathroom with a cast iron tub. *Id.* The bathroom and kitchen fixtures appeared to be of 1930s and 1940s vintage. *Id.* There was a living room and a bedroom. *T.T. p. 259.* There was forced air heating and a gas hot water tank. The electrical service was on. *Id*. It was not

a garage, and there was no garage door. *T.T. p. 260.* Mr. Bertges' observations corroborated the Defendant's testimony.

Pictures of the physical structure of 620 ½ Cherry show that it was not a garage. There is not a door big enough to admit a vehicle. There were no structural changes to the building by the Defendant. The fact the Defendant did not need any building permits corroborates the lack of any structural changes.

The Defendant's pictures; his testimony; the testimony of Mrs. Bowler, Mr. Urbaniak, Mr. Lechner, Attorney Lent, and Mr. Bertges; and all of the historical documents eviscerate the Plaintiff's credibility when he signed the Verification in 2012 representing that the Defendant had converted a garage into an apartment between 2008 and 2011.

Moreover, all of the Plaintiff's posturing about the Defendant's purported conversion of a garage to an apartment is meaningless because 620 ½ Cherry by its mere existence constitutes a violation regardless of its use. Therein lies the fallacy of the Plaintiff's position.

If the Plaintiff was as concerned about the use of 620 ½ Cherry prior to his purchase as he proffers, such a concern was not reflected in any effort to research the public records readily available to him.

The Plaintiff did not review the records of the Civic Art Realty Company about the use of 620 ½ Cherry. If he had done so, the Plaintiff would have learned about the failed effort of the Civic Art Realty Company in 1957 to prevent Mrs. Kirschner from renting this building. He would have also learned the Board reported Mrs. Kirschner to the zoning officer in 1957 but that no enforcement action was ever filed by any zoning entity.

The Plaintiff would have also discovered the unequivocal acquiescence of the Civic Art Realty Company in 1975 to the existence and use of 620 ½ Cherry under a proposed rezoning of Garden Court properties. *Defendant's Exhibit 19.* The "complete dwelling" as recognized and accepted in 1975 by the Board remained unchanged (except for the Defendant's cosmetic improvements) through the time of the Plaintiff's lawsuit in 2012.

The Plaintiff's research could not have included an examination of the publicly available zoning and assessment records of this property. If he had done so, the Plaintiff would have learned that for zoning purposes, 620 ½ Cherry is a permitted occupancy for a single- family dwelling grandfathered in since 1968, a period of some 37 years before the Plaintiff became a member of Garden Court and some 44 years before he filed this lawsuit.

The Erie County tax assessment records, which are accessible online, show 620 ½ Cherry is taxed as a separate residential building containing 676 square feet of living space since 2003. This public information was available two years prior to the Plaintiff's purchase and 9 years before instituting this case.

The public records available at the county library in the form of census reports, address directories and phone books all would have shown the Plaintiff that 620 ½ Cherry has been an apartment since at least 1930. The county library is less than one mile from the Plaintiff's property on a bus line in downtown Erie.

The Plaintiff's investigation of 620 ½ Cherry was limited to his visual observations of it during the time Mrs. Bowler owned it. However, as reflected in the Defendant's pictures in 2007, during Mrs. Bowler's ownership, 620 ½ Cherry had every appearance of a history of (and capability for) residential living.

At trial, the Plaintiff created a moving target regarding his accusation the Defendant

converted a garage to an apartment. When faced with the overwhelming evidence that 620 ½ Cherry was not a garage prior to the Defendant's purchase, the Plaintiff shifted gears to contend what he meant was the Defendant "changed its legal standing, according to the tax records from a garage/barn to a bungalow and the current listing for that building now, with tax record, is a bungalow." *T.T. pp. 78-79.*

This testimony is utterly false. Had the Plaintiff done any research before buying 614 Cherry, prior to verifying his Complaint, or prior to trial, he would have known that the tax status of 620 and 620 ½ Cherry has been unchanged since 2003. Also, there has been no change in zoning status of the property since 1968.

Under these circumstances, the Plaintiff is "guilty of a want of due diligence" in bringing this claim against the Defendant. Fulton, supra.

C. For Laches Purposes, the Defendant has Suffered Actual and Irreparable Prejudice

The second prong of a laches claim involves proof of prejudice. In this case, the Defendant would suffer actual and irreparable prejudice/harm due to the Plaintiff's lack of due diligence and nearly a century's worth of Garden Court members sleeping on their right to object to 620 ½ Cherry.

Upon observing the parties testify, this Court finds the Defendant was more credible and straightforward than the Plaintiff. Unlike the Plaintiff, the Defendant was very thorough in researching the use of 620 ½ Cherry before buying in the Garden Court. *T.T. p. 197.*

The Defendant knew three owners within the Garden Court and discussed this property with them prior to his purchase. *T.T. p. 204.* In fact it was one of these owners, Gerry Urbaniak, who suggested the Defendant consider buying 620 Cherry. *T.T. p. 198.* The Defendant discussed with them the rules of Garden Court and learned of the Declaration. He received an emailed copy of the Declaration and read the restrictions, which prompted his investigation to ensure that he could use 620 ½ Cherry as a rental. *Id*.

The Defendant reviewed the letter from Attorney John Bowler claiming the right for himself, spouse and subsequent owners to use the rear building for residential use. *T.T. p. 211. Defendant's Exhibit 17.*

The Defendant's professional work in municipal matters, including zoning, helped. *T.T. p. 205.* He researched the current R-1 zoning and quickly learned 620 ½ Cherry was a recognized nonconforming use predating the zoning ordinance. *T.T. p. 205.*

The Defendant researched the county tax assessment records on the county's website and learned the rear building was listed as a bungalow dating back to 1913. *T.T. p. 203.* The City of Erie directories, phone books and census reports found at the public library revealed to the Defendant there were tenants at 620 ½ Cherry since the 1930s. *T.T. p. 203.*

The title search of the property for closing purposes did not uncover any lawsuits ever filed against or liens placed against 620 or 620 ½ Cherry in the preceding 100 years. *T.T. p. 241.*

The Defendant toured 620 ½ multiple times before buying it. *T.T. p. 199.* He took pictures of it in 2007. *Defendant's Exhibits 7-11.* These pictures clearly show from the vintage of the electrical and plumbing fixtures a long history of residential use. The floor plan of the building was intended for residential use more than any other type of use. There were no structural changes necessary to create living space.

There was viable plumbing, heating and electrical service to 620 ½ Cherry. The Defendant

toyed with the idea of living in the rear building while fixing up the main building. *T.T. p. 200.*

The Defendant had someone with expertise, Richard Bertges, look at the rear building prior to the purchase. Mr. Bertges' observations corroborated the Defendant's in terms of the historical and present use of the rear building.

The Defendant bought the house with the understanding the rear building was a separate residence with a separate address dating back to the 1930s. *T.T. p. 197.* Although the Defendant knew of the restrictions on the property, he believed the history of it meant the rear building was a recognized non-conforming use and could be rented. *T.T. pp. 203-205.*

The Defendant's calculus of the costs of ownership required that 620 ½ Cherry was rentable. In his view it was in livable condition, just needed some cosmetic work. *T.T. p. 200.* The Defendant would not have purchased the property if he could not have rented out the rear dwelling. *T.T. pp. 219-220.* The ability to rent the rear building was the deciding factor in the Defendant's decision to purchase the home. *T.T. pp. 219-220.* This building is not otherwise useful to the Defendant since he and his wife do not need 4 bedrooms (between the two dwellings). *T.T. p. 219.*

The Defendant did not hide his intent to give the rear building a face lift so that he could rent it out. The first time the Defendant had the chance to talk to the Plaintiff in early 2008 he told him of his plans to update and rent the rear building. *T.T. p. 213.* The Defendant also told three members of the Civic Art Realty Company of his plans and each at times visited his property to observe the work. *T.T. p. 213, 214.*

The Defendant began his work on the rear building right after the closing in early 2008. The Plaintiff observed the Defendant working on the rear building for years before filing this lawsuit.

The Defendant created his own sweat equity in 620 ½ Cherry by virtue of the time, labor and expenses invested in making cosmetic upgrades to it. The Defendant and his wife did most of the work, including replacing the electrical wiring. *T.T. p. 201, 202.* They removed about 100 years of wallpaper, painted walls, removed carpet, removed paint from wood trim, finished the floors and installed several storm windows. *Id*. The Defendant updated the appliances. The Defendant has rented the apartment since 2012 on a seasonal basis to various coaches of the Erie Seawolves, a Double A minor league baseball team in Erie. *T.T. p. 222.*

Hence, the Defendant has suffered actual prejudice by the Plaintiff's lack of due diligence.

For the Defendant to be enjoined from renting 620 ½ Cherry deprives him of the benefit of purchasing this property and adversely affects his ability to pay for his property. He would not have bought this property if he knew he could not rent the rear building. These forms of prejudice are irreparable.

By virtue of the actual and irreparable prejudice/harm to the Defendant, the second prong of laches is satisfied.

III. A PERMANENT INJUNCTION IS NOT WARRANTED

To be entitled to the extraordinary remedy of permanent injunctive relief the Plaintiff seeks, there must be a clear right to relief; an urgent necessity to avoid an injury that cannot be compensated in damages; and a finding that greater injury will result from refusing, rather than granting, the relief requested. *Woodward Twp. v. Zerbe,* 6 A.3d 651, 658 (Pa. Commw. Ct. 2010) *quoting Big Bass Lake Community Association v. Warren*, 950 A.2d 1137, 1144

(Pa.Cmwlth.2008). Even if the essential prerequisites are satisfied, a permanent injunction should be issued with caution and "only where the rights and equity of the plaintiff are clear and free from doubt, and where the harm to be remedied is great and irreparable." *Id*.

Based on the foregoing, the Plaintiff has failed to establish the first requirement. As to the second and third prongs, the Defendant would suffer far greater harm than the Plaintiff should an injunction be granted.

The Plaintiff fails to identify any harm that he is suffering that his predecessors in title dating back at least to 1930 did not suffer. Other than cosmetic updates, 620 ½ Cherry has remained structurally the same size and dimensions since its original construction.

When asked what irreparable harm he suffers, the Plaintiff replied he "purchased the home in the Court versus anywhere else in the City to get away from having multiple dwellings next to me." *T.T. p. 57.* This testimony cannot be true. The Plaintiff knew of the existence of 620 ½ Cherry before he bought his property. In fact, he was inside this building prior to his purchase so he observed the living quarters there. *Defendant's Exhibits 9-12.* The Plaintiff made a conscious choice to buy his property knowing there were two dwellings next door.

To create a basis to argue he suffered harm (and possibly avoid laches), the Plaintiff concocted the garage conversion story to try to make it appear that it was a garage in 2005 when he bought next door but somehow the Defendant surreptitiously converted it to an apartment between 2008 and 2011. The Plaintiff's testimony on this subject is fictional.

The Plaintiff also represented he was harmed because he lost privacy and the use of his yard. To lose something requires that the something previously existed. The Plaintiff fails to establish how he lost privacy or use of his yard when 620 ½ Cherry has been there long before his ownership. This is not a case of a new building being erected next door after the Plaintiff's purchase, taking away the Plaintiff's existing privacy and/or use of his yard.

It is uncontroverted the Plaintiff rents 614 Cherry. According to the Defendant, the Plaintiff did not live at 614 Cherry and was there occasionally on week-ends. *T.T. p. 213.* At trial the Plaintiff acknowledged he has lived in Westfield, New York for the last 2 or 3 years. *T.T. p. 59.*

Although originally the Plaintiff was coy on this point, ultimately he admitted on cross-examination that he has 614 Cherry listed for sale and intends to rent it out until he sells it. *T.T. p. 60.* Plaintiff cannot claim a lack of privacy or lost use of yard when he does not live there. Further, the Plaintiff did not present any evidence from any tenant, including Michael Kohler, that there was a loss of privacy and/or a loss of the use of the back yard caused by his neighbors. As a result, the Plaintiff never adduced any form of evidence to support his claimed lack of privacy, lost use of his yard or any alleged traffic problems.

This Court does not find any credible evidence of harm established by the Plaintiff. Instead, this Court finds the real motivation for this lawsuit was vindictive based on events involving Mr. Kohler, with whom he has some form of a relationship beyond landlord/tenant.[8]

In April, 2011, Mr. Kohler lived at 614 Cherry. On April 25, 2011, as the Defendant was directing storm water down his driveway with a shovel, Mr. Kohler came out and erupted into a vulgar rant toward the Defendant and the Defendant's wife. At first the couple thought Mr. Kohler was joking but then realized he was serious. Mr. Kohler's behavior was so worrisome the Defendant called Crisis Services seeking help for him. The Defendant also

[8] His lawyer described Mr. Kohler as the Plaintiff's "partner" without any further elaboration. *T.T. pp. 14-15.*

sent an email to the Plaintiff asking if Mr. Kohler was on some type of medication. The Plaintiff never responded. *T.T. pp. 214- 215.*

The situation quickly escalated that evening when Mr. Kohler posted 18 No Trespassing signs along their common border. The Defendant requested the signs be removed. Kohler refused and failed to offer any apology for his behavior. *T.T. p. 215.*

Next, Mr. Kohler and/or the Plaintiff installed a spotlight that shone directly on the Defendant's house. This intentional nuisance continued until eventually the Plaintiff received a notice to cease from the City of Erie zoning office. It was an unsettling situation that caused the Defendant to file harassment charges against Mr. Kohler which were resolved by a Magisterial District Justice. The Defendant installed a security camera out of fear for his wife's safety from Mr. Kohler. *T.T. pp. 215-216.*

It was in the wake of these events that this lawsuit was subsequently filed by the Plaintiff. It is not lost on this Court that Mr. Kohler, who had no ownership interest in 614 Cherry, was originally a named plaintiff in this lawsuit and remained so through the time of trial despite his obvious lack of standing. The Plaintiff's motivation in filing this lawsuit was not about any purported harm, it was rather out of spite for the Defendant.

Consequently, the Plaintiff fell woefully short of adducing sufficient evidence at trial that would warrant a finding that greater injury will result from refusing, rather than granting, the relief requested.

VII. CONCLUSIONS

The Plaintiff has no equitable basis to prevent the Defendant from renting a building under the plain meaning of the restrictions within the Declaration. If the Defendant is in violation of the restrictions, so is the Plaintiff.

The objective evidence is overwhelming that 620 ½ Cherry has been used as a residential apartment likely since the early 1920s. Despite this open use of 620 ½ Cherry, there was never any legal action instituted to enforce the violation of the deed restrictions by the Civic Art Realty Company or any other association member, including the Plaintiff's predecessors in title.

The Plaintiff was not duly diligent in bringing this claim against the Defendant. The Plaintiff's contention the Defendant converted the rear structure from a garage to an apartment sometime between 2008 and 2011 is intentionally misleading and a transparent attempt to manufacture a reason for the belatedly filed lawsuit. Overall, the Plaintiff was coy and evasive; much of his testimony was not credible. The doctrine of laches bars any enforcement claim in equity by the Plaintiff.

To grant an injunction would cause actual and irreparable prejudice to the Defendant. Conversely, the Plaintiff has failed to establish what harm he would suffer as a result of the Defendant's use of the building. Thus, greater injury would result from granting, rather than refusing, the injunction.

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

DEBORA A. STUBITS, Administratrix of The Estate of RICHARD F. DOMBROWSKI, Appellee
v.
GOLDEN GATE NATIONAL SENIOR CARE, LLC; GGNSC ERIE WESTERN RESERVE, LP, d/b/a GOLDEN LIVING CENTER-WESTERN RESERVE; GGNSC HOLDINGS, LLC; GGNSC EQUITY HOLDINGS, LLC; GGNSC ADMINISTRATIVE SERVICES, LLC; GGNSC CLINICAL SERVICES, LLC; GOLDEN GATE ANCILLARY, LLC; GPH ERIE WESTERN RESERVE LLC; GGNSC ERIE WESTERN RESERVE GP LLC; ELIZABETH KACHEL, NHA; DENISE CURRY, RVP; MILLCREEK COMMUNITY HOSPITAL; MILLCREEK HEALTH SYSTEM, Appellants[1]

CIVIL PROCEDURE / APPEAL / STANDARDS OF REVIEW / SUFFICIENCY OF EVIDENCE

The Pennsylvania Superior Court's review of a claim that a trial court improperly denied Preliminary Objections in the nature of a Petition to Compel Arbitration is limited to determining whether the trial court's findings are supported by substantial evidence and whether the trial court abused its discretion in denying the Petition.

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS

Preliminary Objections, the end result of which would be dismissal of a cause of action, should be sustained only in cases that are clear and free from doubt. The test on Preliminary Objections is whether it is clear and free from doubt from all the facts pled that the pleader will be unable to prove facts legally sufficient to establish his right to relief. When ruling on Preliminary Objections, a trial court must overrule the Objections if the complaint pleads sufficient facts which, if believed, would entitle a petitioner to relief under any theory of law.

TORTS / WRONGFUL DEATH & SURVIVAL ACTIONS

Rule 213(e) of the Pennsylvania Rules of Civil Procedure states "a cause of action for the wrongful death of a decedent and a cause of action for the injuries of the decedent which survives his or her death may be enforced in one action, but if independent actions are commenced they shall be consolidated for trial."

TORTS / WRONGFUL DEATH & SURVIVAL ACTIONS

Wrongful death actions are derivative of decedents' injuries but are not derivative of decedents' rights.

TORTS / WRONGFUL DEATH & SURVIVAL ACTIONS

Pennsylvania has a well-established public policy that favors arbitration, and this policy aligns with the federal approach expressed in the Federal Arbitration Act ("FAA"). However, compelling arbitration upon individuals who did not waive their right to a jury trial would infringe upon wrongful death claimants' constitutional rights.

TORTS / WRONGFUL DEATH & SURVIVAL ACTIONS

Neither Pa. R. Civ. P. 213 nor the Wrongful Death Statute (42 Pa. Civ. S. § 8301) prohibits

[1] Although the caption identifies all the above-named defendants as "Appellants," this Trial Court notes Defendants Millcreek Community Hospital and Millcreek Health System, currently represented by Francis J. Klemensic, Esq., are not appealing from this Trial Court's Order dated July 8th, 2015.

the arbitration of wrongful death and survival claims, and thus, Pennsylvania state law did not mirror the categorical prohibition of arbitration of wrongful death and survival actions that the United States Supreme Court viewed as a clear conflict between federal and state law.

TORTS / WRONGFUL DEATH & SURVIVAL ACTIONS

The purpose of the Wrongful Death Statute (42 Pa. Civ. S. § 8301) and Pa. R. Civ. P. 213(e) was to avoid inconsistent verdicts and duplicative damages in overlapping claims and that neither the statute or rule precluded wrongful death and survival actions from proceeding together in arbitration when all of the parties, including the wrongful death beneficiaries, agreed to arbitrate.

CONSTITUTIONAL LAW / SUPREMACY CLAUSE / PREEMPTION

Preemption stems from the Supremacy Clause of the United States Constitution, Article VI, cl. 2, which provides that federal law is paramount, and that laws in conflict with federal law are without effect.

CONSTITUTIONAL LAW / SUPREMACY CLAUSE / PREEMPTION

When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: the conflicting rule is displaced by the Federal Arbitration Act ("FAA").

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 12386-2014

Appearances: Michael T. Collis, Esq., and Stephen Trzcinski, Esq., on behalf of Debora A. Stubits (Appellee)
Patrick L. Mechas, Esq.; Ira L. Podheiser, Esq.; and Benjamin Sorisio, Esq., on behalf of Golden Gate National Senior Care, LLC; GGNSC Erie Western Reserve, LP, d/b/a Golden Living Center -Western Reserve; GGNSC Holdings, LLC, GGNSC Equity Holdings; GGNSC Administrative Services, LLC; GGNSC Clinical Services, LLC; Golden Gate Ancillary, LLC; GPH Erie Western Reserve, LLC; GGNSC Erie Western Reserve GP, LLC; Elizabeth Kachel, NHA; and Denise Curry, RVP (Appellants)

OPINION

Domitrovich, J., September 24th, 2015

The instant matter is before the Pennsylvania Superior Court on the appeal of Golden Gate National Senior Care *et al* (hereafter referred to as "Appellants") from this Trial Court's Order dated July 8th, 2015, whereby this Trial Court overruled Appellants' Preliminary Objections and declined to sever Debora A. Stubits' (hereafter referred to as "Appellee") wrongful death and survival actions and submit Appellee's survival action to arbitration, pursuant to the Alternative Dispute Resolution ("hereafter referred to as ADR") signed by the Decedent, Richard F. Dombrowski, as (1) the Pennsylvania Wrongful Death Statute, 42 Pa. C. S. §8301(a), and Rule 213(e) of the Pennsylvania Rules of Civil Procedure precludes severance of wrongful death and survival claims where individual claims are brought in the same action; (2) the Decedent's wrongful death and survival action beneficiaries, including Appellee, were not parties to the ADR signed by the Decedent and cannot be compelled to arbitrate, pursuant to the Pennsylvania Superior Court's holdings in *Pisano v. Extendicare*

Homes, Inc., Taylor v. Extendicare Homes, Inc., and Tuomi v. Extendicare, Inc.; and (3) Pennsylvania law does not violate the Federal Arbitration Act (hereafter referred to as "FAA") as Pennsylvania law does not categorically prohibit arbitration of wrongful death and survival actions, but instead seeks to prevent inconsistent verdicts and duplicative damages.

I. Procedural History

On August 27th, 2014, Appellee Debora A. Stubits, Administratrix of the Estate of Richard F. Dombrowski, by and through her counsel, Michael T. Collis, Esq., filed a Praecipe for Writ of Summons against Appellants Golden Gate National Senior Care, LLC; GGNSC Erie Western Reserve, LP, d/b/a Golden Living Center – Western Reserve; GGNSC Holdings, LLC; GGNSC Equity Holdings, LLC; GGNSC Administrative Services, LLC; GGNSC Clinical Services, LLC; Golden Gate Ancillary, LLC; GPH Erie Western Reserve, LLC; GGNSC Erie Western Reserve GP, LLC; Elizabeth Kachel; Denise Curry, RVP. Appellee filed her Complaint in Civil Action on January 7th, 2015. Appellee also filed Certificates of Merit for all thirteen (13) Defendants on January 7th, 2015.

Appellants filed their Preliminary Objections to Appellee's Complaint in Civil Action on February 17th, 2015. Appellee filed her Response in Opposition to Appellants' Preliminary Objections on March 6th, 2015. Appellants filed their Brief in Support of Preliminary Objections on March 9th, 2015. Appellee filed her Brief in Opposition to Appellants' Preliminary Objections on April 6th, 2015. Appellee filed a Motion for Argument Date on Appellants' Preliminary Objections on May 22nd, 2015. A hearing on Appellants' Preliminary Objections was held on July 1st, 2015, at which this Trial Court heard argument from both counsel.[2] Following said hearing and by Order dated July 8th, 2015, this Trial Court accepted the withdrawal of Appellants' Preliminary Objections B, C, D, E, F, and G, based upon a Stipulation between the parties, and overruled Appellants' Preliminary Objection A regarding dismissing Appellee's Complaint and directing Appellee's claims to arbitration.

Appellants filed a Notice of Appeal to the Pennsylvania Superior Court on July 28th, 2015.[3] This Trial Court filed its 1925(b) Order on August 3rd, 2015. Appellants filed their Concise Statement of Errors Complained of on Appeal on August 21st, 2015.

II. Legal Discussion

The Pennsylvania Superior Court's review of a claim that a trial court improperly denied Preliminary Objections in the nature of a Petition to Compel Arbitration is limited to determining whether the trial court's findings are supported by substantial evidence and whether the trial court abused its discretion in denying the Petition. *See Pisano v. Extendicare Homes, Inc.,* 77 A.3d 651, 654 (Pa. Super. 2013).

Preliminary Objections, the end result of which would be dismissal of a cause of action, should be sustained only in cases that are clear and free from doubt. *Bourke v. Kazaras,* 746 A.2d 642, 643 (Pa. Super. 2000). The test on Preliminary Objections is whether it is clear

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[2] At the time of the hearing on July 1st, 2015, counsel agreed to the Stipulation to withdraw Preliminary Objections B, C, D, E, F and G. *See Appellants' Preliminary Objections.* Therefore, this Court only heard argument on Appellants' Preliminary Objection A, regarding dismissal of Plaintiff's Complaint in Civil Action due to an arbitration agreement.

[3] Appellants also filed a "Stipulation Regarding Withdrawal of the Appellants' Preliminary Objections B through G to Plaintiff's Complaint" on July 28th, 2015, in support of the agreement between the parties at oral argument on July 1st, 2015.

and free from doubt from all the facts pled that the pleader will be unable to prove facts legally sufficient to establish his right to relief. *Id*. When ruling on Preliminary Objections, a trial court must overrule the objections if the complaint pleads sufficient facts which, if believed, would entitle a petitioner to relief under any theory of law. *Gabel v. Cambruzzi,* 616 A.2d 1364, 1367 (Pa. 1992).

a. This Trial Court properly overruled Appellants' Preliminary Objection A, regarding severance of Appellee's wrongful death and survival claim and submitting Appellee's survival claim to arbitration, in light of the Pennsylvania Superior Court's holdings in *Pisano*, *Taylor*, and *Tuomi*.

Appellants first argue this Trial Court erred by refusing to sever Appellee's survival action from her wrongful death action and compel Appellee's survival action to arbitration. After a thorough review of relevant statutory and case law, this Trial Court finds Appellants' first argument is without merit.

First and foremost, Pennsylvania law supports consolidation of a wrongful death claim and a survival claim when both claims are brought in a single action. Rule 213(e) of the Pennsylvania Rules of Civil Procedure states "a cause of action for the wrongful death of a decedent and a cause of action for the injuries of the decedent which survives his or her death may be enforced in one action, but if independent actions are commenced they shall be consolidated for trial." *Pa. R. Civ. P. 213(e).*

Furthermore, a recent series of Pennsylvania Superior Court cases has enforced and expanded upon the language of Rule 213(e) and supports consolidation, rather than severance, of independent wrongful death and survival claims. The first case is that of *Pisano v. Extendicare Homes, Inc.,* 77 A.3d 651 (Pa. Super. 2013). In *Pisano*, the Decedent, Vincent F. Pisano, was admitted into the Belair Health and Rehabilitative Center, a long-care nursing home operated by Extendicare Homes, Inc. *Id*. at 653. Decedent's daughter, who had Power-of-Attorney, executed an ADR prior to Decedent's admission. *Id*. Decedent died survived by two daughters and two sons, who filed a wrongful death action against Extendicare Homes, Inc. *Id*. Extendicare filed Preliminary Objections seeking dismissal of the wrongful death action for lack of jurisdiction and to compel the wrongful death action to arbitration, pursuant to the ADR. *Id*. The trial court overruled the Preliminary Objections and Extendicare timely appealed. *Id*. The Pennsylvania Superior Court affirmed the trial court's decision, first concluding a wrongful death action is not a decedent's cause of action; rather, a wrongful death action may be brought only by specified relatives of the decedent to recover damages in their own behalf, and not as beneficiaries of the estate, and is designed only to deal with the economic effect of the decedent's death upon the specified family members. *See id* at 659. Therefore, the Pennsylvania Superior Court held wrongful death actions are independent of survival actions, as wrongful death actions are derivative of decedents' injuries but are not derivative of decedents' rights. *See id* at 660. Finally, the Pennsylvania Superior Court held that compelling arbitration upon individuals who did not waive their right to a jury trial would infringe upon wrongful death claimants' constitutional rights and would amount to the Pennsylvania Superior Court placing contract law above that of both the United States and Pennsylvania Constitutions. *See id* at 662-663.

The holding in *Pisano* was bolstered by the Pennsylvania Superior Court's holding in *Taylor v. Extendicare Health Facilities, Inc.,* 113 A.3d 317 (Pa. Super. 2015). In *Taylor*, the

Decedent, Anna Marie Taylor, was residing at Havencrest Nursing Center, a skilled nursing facility operated by Extendicare Homes, Inc. *Id*. at 319. Decedent passed away and her co-Executors, Daniel E. Taylor and William Taylor, filed a Complaint asserting wrongful death and survival claims due to Extendicare's negligence which caused or contributed to Decedent's injuries and death. *Id*. Extendicare filed Preliminary Objections asserting the co-Executors' claims should be submitted to arbitration, pursuant to the arbitration agreement executed by William Taylor, Decedent's co-Executor and Power-of-Attorney. *Id* at 319-320. The trial court overruled Extendicare's Preliminary Objections pursuant to the Pennsylvania Superior Court's holding in *Pisano v. Extendicare, Inc.,* and Extendicare timely appealed. *Id* at 320. The Pennsylvania Superior Court affirmed the trial court's decision, first citing its holding in *Pisano* (i.e. a wrongful death action is a separate action belonging to the beneficiaries and, while it is derivative of the same tortious act, it is not derivative of the decedent's rights; thus, an arbitration agreement signed by the decedent or his or her authorized representative is not binding upon non-signatory wrongful death beneficiaries, and they cannot be compelled to litigate their claims in arbitration). *See id* at 320-321 (*citing Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651 (Pa. Super. 2013)). The Pennsylvania Superior Court also stated Pa. R. Civ. P. 213(e) is not the only Pennsylvania statute which supports consolidation of separate wrongful death and survival claims brought in the same action, as 42 Pa. C. S. §8301(a), also known as the "Pennsylvania Wrongful Death Statute," supports consolidation of wrongful death claims with prior actions for the same injuries in order to avoid duplicative recovery.[4] *See id* at 322. Finally, although the Pennsylvania Superior Court noted Pennsylvania has a well-established public policy favoring arbitration, a policy which aligns with the federal approach expressed in the FAA, the Pennsylvania Superior Court concluded compelling arbitration upon individuals who did not waive their right to a jury trial infringes upon a constitutional right conferred in Pa. Const. art. 1, § 6. *See id* at 324.

Most recently, the holdings of *Pisano* and *Taylor* were applied by the Pennsylvania Superior Court in *Tuomi v. Extendicare, Inc.,* 2015 Pa. Super. 142 (Pa. Super. 2015). In *Tuomi*, the Decedent, Margaret C. Tuomi, was admitted to Havencrest Nursing Center, operated by Extendicare Health Facilities, Inc. *Id* at 2. Decedent passed away and Donald Tuomi, Decedent's husband and Administrator of her Estate, commenced a wrongful death claim and a survival claim based upon Extendicare's negligence which caused or contributed to Decedent's injuries and death. *Id* at 2-3. Extendicare filed Preliminary Objections asserting the Administrator's claims should be submitted to arbitration, pursuant to the Voluntary Arbitration Agreement signed by the Administrator upon Decedent's admission to Havencrest. *Id* at 3. The trial court overruled Extendicare's Preliminary Objections pursuant to the Pennsylvania Superior Court's holding in *Pisano v. Extendicare, Inc.,* and Extendicare timely appealed. *Id* at 3-4. The Pennsylvania Superior Court affirmed the trial court's decision, first acknowledging the holdings in *Pisano* and *Taylor* are controlling and

[4] Specifically, 42 Pa. C. S. §8301(a) states: "An action may be brought, under procedures prescribed by general rules, to recover damages for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another if no recovery for the same damages claimed in the wrongful death action was obtained by the injured individual during his lifetime and **any prior actions for the same injuries are consolidated with the wrongful death claim so as to avoid a duplicate recovery."**

ultimately sustained the proposition that Pa. R. Civ. P. 213(e) and 42 Pa. C. S. §8301(a), also known as the "Pennsylvania Wrongful Death Statute," precluded severance of independent wrongful death and survival claims arising out of the same injuries and brought within the same action. *See id* at 5. Furthermore, the Pennsylvania Superior Court, again relying on the holding in *Taylor*, maintained neither Pa. R. Civ. P. 213(e) nor 42 Pa. C. S. §8301(a) prohibits the arbitration of wrongful death and survival claims, and thus, Pennsylvania law does not mirror the categorical prohibition of arbitration of wrongful death and survival actions the United States Supreme Court has viewed as a clear conflict between federal and state law. *See id* at 6. Rather, the Pennsylvania Superior Court recognized the purpose of Pa. R. Civ. P. 213(e) and 42 Pa. C. S. §8301(a) is to avoid inconsistent verdicts and duplicative damages in overlapping claims, and neither statute precludes wrongful death and survival actions from proceeding together in arbitration when all of the parties, including the wrongful death beneficiaries, agreed to arbitrate. *See id* at 6-7.

After a thorough review of relevant statutory and case law, this Trial Court properly refused to sever Appellee's wrongful death claim from her survival claim and compel the survival claim to arbitration. Appellee, as Executrix of the Estate of Richard F. Dombrowski, has commenced a wrongful death claim, pursuant to the Wrongful Death Statute, 42 Pa. C. S. §8301, and survival action, pursuant to the Survival Statute, 42 Pa. C. S. §8302, against a number of entities, including Appellants, its subsidiaries and its agents. Although Appellants argue Appellee's survival claim is subject to arbitration, pursuant to the ADR Agreement executed by Decedent Richard F. Dombrowski, the provisions of Rule 213(e) of the Pennsylvania Rules of Civil Procedure, 42 Pa. C. S. §8301(a) and the holding in *Pisano* are very clear – a wrongful death claim is independent of a survival claim, and where independent claims of wrongful death and survival are raised in the same civil action, as they are here, the independent claims of wrongful death and survival must be consolidated for trial before this Trial Court. *See Pa. R. Civ. P. 213(e); see also 42 Pa. C. S. §8103(a); see also Pisano, 77 A.3d 651.* Furthermore, although Appellants argue, by Decedent's execution of the ADR Agreement, the parties unmistakably evidenced their intent to be bound by the ADR Agreement and to resolve any claims in an arbitration forum, the holdings of *Taylor* and *Tuomi* are also very clear – in an effort to avoid inconsistent verdicts and duplicative damages, this Trial Court may properly refuse to sever independent claims of wrongful death and survival where the Decedent's beneficiaries did not independently sign, or otherwise become a party to, the ADR Agreement signed by the Decedent. *See Taylor,* 113 A.3d 317; *see also Tuomi,* 2015 Pa. Super. 142. In the instant action, although the ADR Agreement was signed by the Decedent, Richard F. Dombrowski, neither Appellee, as Executrix of the Estate of Decedent Richard F. Dombrowksi, nor any other beneficiary of Decedent's Estate signed the ADR Agreement. As the beneficiaries of Decedent's Estate did not sign the ADR Agreement or otherwise agree to refer the instant action to arbitration, the beneficiaries have retained their constitutional right to a trial by jury regarding the independent wrongful death and survival claims arising from the same injuries and brought within the same civil action. Therefore, pursuant to the Pennsylvania Superior Court's holdings in *Pisano*, *Taylor* and *Tuomi*, this Trial Court properly refused to sever Appellee's survival claim from her wrongful death claim and compel arbitration of Appellee's survival action, and Appellants' first argument is without merit.

b. This Trial Court's holding in refusing to compel arbitration of Appellee's survival claim and concluding it has jurisdiction to hear said survival claim does not violate the FAA.

Furthermore, Appellants argue this Trial Court erred by refusing to compel arbitration of Appellee's survival claim and finding this Trial Court has jurisdiction to hear the survival claim as this Trial Court's holding violates the FAA. After thorough review of relevant statutory and case law, this Trial Court finds Appellants' second argument is also without merit.

Preemption stems from the Supremacy Clause of the United States Constitution, Article VI, cl. 2, which provides that federal law is paramount, and that laws in conflict with federal law are without effect. *See U.S. Const., article IV, clause 2* ("this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby…")

Recently, the United States Supreme Court, in *Marmet Health Care Center, Inc. v. Brown,* 132 S. Ct. 1201 (2012), held when state law outright prohibits the arbitration of a particular type of claim, the analysis is straightforward: the conflicting rule is displaced by the FAA. *See id* at 1203. Furthermore, the United States Supreme Court held a prohibition against pre-dispute agreements to arbitration personal injury or wrongful death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and said rule is contrary to the FAA. *See id* at 1204.

Although Appellants, relying on the United States Supreme Court's holding in *Marmet*, argue this Trial Court's refusal to sever Appellee's wrongful death and survival claims and finding of jurisdiction to hear Appellee's claims violates the FAA, this Trial Court, relying on the Pennsylvania Superior Court's holdings in *Taylor* and *Tuomi*, concludes Pennsylvania law clearly does not run afoul of the FAA. Pennsylvania has a well-established public policy favoring arbitration, and Pennsylvania policy aligns with the federal approach expressed in the FAA; however, compelling arbitration upon individuals who did not waive their right to a jury trial infringes upon their constitutional rights conferred in Article 1, section 6 of the Pennsylvania Constitution. *See Taylor,* 113 A.3d at 325. In these situations, denying wrongful death beneficiaries their right to a jury trial would have the effect of the Pennsylvania Superior Court placing contract law above that of both the United States and Pennsylvania Constitutions. *See id*. Furthermore, neither Pa. R. Civ. P. 213(e) nor 42 Pa. C. S. §8301, also known as the "Pennsylvania Wrongful Death Statute," prohibits the arbitration of wrongful death and survival claims, and as such, Pennsylvania law does not mirror the categorical prohibition of arbitration of wrongful death and survival actions the United States Supreme Court has viewed as a conflict between federal and state law. *See id; see also Tuomi*, 2015 Pa. Super. 142. The primary concern in severing independent wrongful death and survival claims and submitting either claim to arbitration is the possibility of inconsistent verdicts and duplicative damages. As the beneficiaries of Decedent's Estate did not submit themselves to the ADR Agreement, and in order to avoid the possibility of inconsistent verdicts and duplicative damages, this Trial Court properly refused to sever the independent claims of wrongful death and survival, and properly exercised subject matter jurisdiction over the

instant civil action, consistent with the Pennsylvania Rules of Civil Procedure and relevant case law. Therefore, this Trial Court finds Appellants' second argument is without merit.

III. Conclusion

Therefore, for all of the reasons set forth above, this Trial Court concludes the instant appeal is without merit and respectfully requests the Pennsylvania Superior Court affirm its Order dated July 8th, 2015.

BY THE COURT:
/s/ Stephanie Domitrovich, Judge

COMMONWEALTH OF PENNSYLVANIA
v.
BERNARD ANTONIO SIMS, Defendant

CRIMINAL LAW & PROCEDURE – SUPPRESSION OF EVIDENCE

Pursuant to Rule 581 of the Pennsylvania Rules of Criminal Procedure, the Commonwealth, not the defendant, shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights. The Commonwealth's burden is by a preponderance of the evidence -- the burden of producing satisfactory evidence of a particular fact in issue; and . . . the burden of persuading the trier of fact that the fact alleged is indeed true.

CRIMINAL LAW & PROCEDURE – SEARCH & SEIZURE – WARRANTLESS SEARCHES – STOP & FRISK

In order to justify a pat-down search, also known as a "Terry stop," a police officer must have reasonable suspicion, under the totality of the circumstances, that criminal activity is afoot and that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others.

CRIMINAL LAW & PROCEDURE – SEARCH & SEIZURE – WARRANTLESS SEARCHES

Reasonable suspicion is a less stringent standard than probable cause necessary to effectuate a warrantless arrest, and depends on the information possessed by police and its degree of reliability in the totality of the circumstances. In order to justify the seizure, a police officer must be able to point to "specific and articulable facts" leading him to suspect criminal activity is afoot. In assessing the totality of the circumstances, courts must also afford due weight to the specific, reasonable inferences drawn from the facts in light of the officer's experience and acknowledge that innocent facts, when considered collectively, may permit the investigative detention. Even a combination of innocent facts, when taken together, may warrant further investigation by the police officer.

CRIMINAL LAW & PROCEDURE – SEARCH & SEIZURE – WARRANTLESS SEARCHES – STOP & FRISK – REASONABLE SUSPICION

Police cannot initiate a detention based solely upon an anonymous tip that a person matching the defendant's description in a specified location is carrying a gun.

CRIMINAL LAW & PROCEDURE – SEARCH & SEIZURE – WARRANTLESS SEARCHES – INVESTIGATIVE STOPS

Where the source of the information given to the officers is unknown, the range of details provided and the prediction of future behavior is particularly significant, as is corroboration by independent police work. The necessary corroboration may also be supplied by circumstances that are independent of the tip, for example, observation of suspicious conduct on the part of the suspect. The time, street location, and movements and manners of the parties bear upon the totality assessment, as does an officer's experience.

CRIMINAL LAW & PROCEDURE – SEARCH & SEIZURE – WARRANTLESS SEARCHES – STOP & FRISK – REASONABLE SUSPICION

If a suspect engages in hand movements that police know, based on their experience, are associated with the secreting of a weapon, those movements will buttress the legitimacy of a protective weapons search of the location where the hand movements occurred.

CRIMINAL LAW & PROCEDURE – SEARCH & SEIZURE – WARRANTLESS SEARCHES – STOP & FRISK – REASONABLE SUSPICION

A law enforcement officer, for his own protection and safety, may conduct a pat-down to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted.

CRIMINAL LAW & PROCEDURE – SEARCH & SEIZURE – WARRANTLESS SEARCHES – STOP & FRISK – DETENTION

For their safety, police officers may handcuff individuals during an investigative detention.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION No. CR 326 of 2016

Appearances: Mark W. Richmond, Esquire, Attorney for the Commonwealth
Stephen J. Lagner III, Esq., Attorney for Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Domitrovich, J., June 1st, 2016

After thorough consideration of the entire record regarding Defendant's Motion to Suppress Evidence, including, but not limited to, the testimony and evidence presented during the May 18th, 2016 Suppression Hearing, as well as an independent review of the relevant statutory and case law, this Trial Court hereby makes the following Findings of Fact and Conclusions of Law in support of denying Defendant's Motion to Suppress Evidence:

FINDINGS OF FACT

I. Factual and Procedural History

1. On December 13th, 2015, while on routine patrol, City of Erie Police Patrolman Richard Romanski, in full dress uniform and in a marked patrol vehicle, was dispatched to the 500 block of East 22nd Street of Erie, Pennsylvania, which is an area known to have drug and firearm issues, where an anonymous caller stated two (2) males were arguing, one of which was brandishing a firearm.
2. The dispatch was in response to the anonymous call about two (2) males arguing, and the caller was later determined to be Max Dawson, an individual residing at the 500 block of East 22nd Street, whose identity was discovered after Defendant's arrest.
3. According to the anonymous caller, the individual with the firearm was wearing dark-colored clothing and a winter hat.
4. Soon thereafter, Patrolman Romanski arrived at the 500 block of East 22nd Street, where he observed a male individual wearing dark-colored clothing and a winter hat, later identified as Defendant Bernard Antonio Sims (hereafter referred to as "Defendant"), walking with two (2) females.
5. When Patrolman Romanski exited his vehicle and approached Defendant, he observed Defendant "drop his hands towards his midsection near his belt buckled area," which is a "threatening motion" to officer's safety.
6. In response, Patrolman Romanski drew his service revolver and ordered Defendant onto the ground.
7. Defendant became irate and started yelling "Why you stopping me?" and "I ain't

got nothing!" at Patrolman Romanski, but ultimately complied with this directive by lying on the ground prone on his stomach.

8. Several City of Erie Police officers arrived as backup, including Patrolmen Bielak, Bush, Edmonds and Wilson.
9. As Defendant was lying prone on the ground, Patrolman Romanski and the other officers attempted to place Defendant's hands behind his back, but had to use force because Defendant had locked his hands in a way to prevent the handcuffing.
10. After Defendant's hands were placed behind his back and handcuff him, Defendant was patted down while on the ground.
11. When Patrolman Romanski and other officers lifted Defendant off of the ground to his feet, Patrolman Bielak shouted "Gun!" and pulled the 9mm Berretta handgun from Defendant's person, after which Defendant was placed under arrest.
12. The Erie County District Attorney's Office filed an Information on March 5th, 2016, charging Defendant with Firearms not to be Carried without a License, in violation of 18 Pa. C. S. §6106(a)(1), and Disorderly Conduct, in violation of 18 Pa. C. S. §5503(a)(2).
13. Defendant, by and through his counsel, Stephen J. Lagner III, Esq., filed the instant Motion to Suppress Evidence on April 26th, 2016.
14. A hearing on Defendant's Motion to Suppress Evidence was held on May 18th, 2016, during which this Trial Court heard testimony from Patrolman Romanski and Shelina Thomas, Defendant's fiancée; received evidence and heard argument from counsel. Defendant appeared and was represented by his counsel, Stephen J. Lagner III, Esq., and Assistant District Attorney Mark W. Richmond appeared on behalf of the Commonwealth.

CONCLUSIONS OF LAW

II. Legal Argument

Pennsylvania Rule of Criminal Procedure 581 governs suppression of evidence. Pursuant to Rule 581, the Commonwealth, not the defendant, shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights. *See Pa. R. Crim. P. 581(h)*. The Commonwealth's burden is by a preponderance of the evidence. C*ommonwealth v. Bonasorte,* 486 A.2d 1361, 1368 (Pa. Super. 1984); see also *Commonwealth v. Jury,* 636 A.2d 164, 169 (Pa. Super. 1993) (the Commonwealth's burden of proof at suppression hearing has been defined as "the burden of producing satisfactory evidence of a particular fact in issue; and . . . the burden of persuading the trier of fact that the fact alleged is indeed true.").

A. After consideration of the totality of the circumstances, the arrest and search of Defendant was proper as Patrolman Romanski had reasonable suspicion to initiate an investigatory detention and perform a pat-down search of Defendant in consideration of the anonymous call, which was corroborated by independent police investigation, and the personal observations of Patrolman Romanski at the scene, which threatened officer's safety.

The general rule for investigatory detention and pat-down searches of individuals stems from the United States Supreme Court case of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868

(U.S. 1968). In order to justify a pat-down search, also known as a "Terry stop," a police officer must have reasonable suspicion, under the totality of the circumstances, that criminal activity is afoot and that "the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others." *See Terry,* 392 U.S. at 24, 88 S. Ct. at 1881.

Reasonable suspicion is a less stringent standard than probable cause necessary to effectuate a warrantless arrest, and depends on the information possessed by police and its degree of reliability in the totality of the circumstances. *Commonwealth v. Holmes,* 14 A.3d 89, 95 (Pa. 2011). In order to justify the seizure, a police officer must be able to point to "specific and articulable facts" leading him to suspect criminal activity is afoot. *Id*. In assessing the totality of the circumstances, courts must also afford due weight to the specific, reasonable inferences drawn from the facts in light of the officer's experience and acknowledge that innocent facts, when considered collectively, may permit the investigative detention. *Id*. "Even a combination of innocent facts, when taken together, may warrant further investigation by the police officer." *Commonwealth v. Foglia,* 979 A.2d 357, 361 (Pa. Super. 2009) (*quoting Commonwealth v. Cook,* 735 A.2d 673, 676 (Pa. 1999).

Police cannot initiate a detention based solely upon an anonymous tip that a person matching the defendant's description in a specified location is carrying a gun. *Foglia*, 979 A.2d at 361. Where the source of the information given to the officers is unknown, the range of details provided and the prediction of future behavior is particularly significant, as is corroboration by independent police work. *Commonwealth v. Shine*, 784 A.2d 167, 171 (Pa. Super. 2001); *see also Commonwealth v. Jackson,* 698 A.2d 571, 574 (Pa. 1997) (a "Terry stop" may be made on the basis of an anonymous tip, provided the tip is sufficiently corroborated by independent police work to give rise to a reasonable belief that the tip was correct). The necessary corroboration may also be supplied by circumstances that are independent of the tip, for example, observation of suspicious conduct on the part of the suspect. *Shine*, 784 A.2d at 171. The time, street location, and movements and manners of the parties bear upon the totality assessment, as does an officer's experience. *Id*.

After consideration of the testimony and evidence presented at the May 18th, 2016 suppression hearing, as well as a thorough review of relevant statutory and case law, this Trial Court concludes Patrolman Romanski had reasonable suspicion to initiate an investigatory detention and perform a pat-down search of Defendant. The City of Erie Police Department received an anonymous call reporting two (2) males arguing, one of which was brandishing a firearm, at the 500 block of East 22nd Street. The anonymous caller indicated the male individual brandishing the firearm was wearing dark-colored clothing and a winter hat. Furthermore, the 500 block of East 22nd Street is known to have drug and firearm issues. Upon arriving at the 500 block of East 22nd Street, Patrolman Romanski observed an individual wearing dark-colored clothing and a winter hat, later identified as Defendant, walking with two (2) females. These observations – including, but not limited to, observing a male individual wearing dark-colored clothing and a winter hat in the vicinity of the 500 block of East 22nd Street, an area known to have drug and firearm issues, in close proximity to the time of the anonymous call -- corroborated the information provided by the anonymous caller. *See Shine,* 784 A.2d at 171; *see also Jackson,* 698 A.2d at 574. The totality of these observations provided sufficient reason for Patrolman Romanski to initiate

a "mere encounter" with Defendant and is the starting point for reasonable suspicion to initiate an investigatory detention. *See Commonwealth v. Stevenson,* 894 A.2d 759, 770 (Pa. Super. 2006) (a "mere encounter" (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or respond); *see also Foglia,* 979 A.2d at 361 (whether the defendant was located in a high crime area similarly supports the existence of reasonable suspicion).

Furthermore, the actions of Defendant at the time of the "mere encounter" also provided Patrolman Romanski adequate reasonable suspicion to initiate an investigatory detention and pat-down search of Defendant. As Patrolman Romanski approached Defendant, Defendant "dropped his hands towards his midsection near his belt buckle." Patrolman Romanski, who has served as a police officer with the City of Erie Police Department for fourteen (14) years, identified Defendant's movement as a "threatening motion" to officer's safety, immediately drew his service revolver and directed Defendant to comply by lying prone the ground. Patrolman Romanski was able to reasonably rely on his fourteen (14) years of experience as a police officer in concluding such a "threatening motion" was made in conjunction with brandishing a firearm. *See Foglia* at 361 (if a suspect engages in hand movements that police know, based on their experience, are associated with the secreting of a weapon, those movements will buttress the legitimacy of a protective weapons search of the location where the hand movements occurred).

Finally, the investigatory detention and pat-down search of Defendant was reasonable considering the urgent necessity for safety of the police officers. Pursuant to *Terry v. Ohio,* a law enforcement officer, for his own protection and safety, may conduct a pat-down to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted. *See Commonwealth v. Grahame,* 7 A.3d 810, 815 (Pa. 2010); *see also Stevenson,* 894 A.2d at 772 (police officer may frisk an individual during an investigatory detention when the officer believes, based on specific and articulable facts, that the individual is armed and dangerous). Patrolman Romanski, after observing Defendant "drop his hands towards his midsection near his belt buckle," which is a "threatening motion" to officer's safety, drew his service revolver and directed Defendant to comply by lying prone on the ground. After several City of Erie Police officers arrived as backup, Patrolman Romanski, with the other officers, attempted to place Defendant's hands behind his back. Defendant continued to struggle with the officers and locked his hands in a way requiring the use of force in order to handcuff Defendant. The act of handcuffing Defendant did not initiate an arrest, but merely aided the police officers in the investigatory detention. *See Commonwealth v. Rosas,* 875 A.2d 341, 348 (Pa. Super. 2005) (for their safety, police officers may handcuff individuals during an investigative detention). Thereafter, a pat-down search was conducted and a 9mm Berretta handgun was found on Defendant's person.

As the investigative detention and pat-down search of Defendant were supported by reasonable suspicion in the form of the information from an anonymous call, which was corroborated by independent police investigation, and Patrolman Romanski's own personal observations on the scene and the urgent necessity for officer safety, the evidence obtained during the investigatory detention and pat-down search of Defendant, including the 9mm Berretta handgun, was properly discovered and legally seized. For all of the foregoing reasons, this Court enters the following Order:

ORDER

AND NOW, to wit, this 1st day of June, 2016, after thorough consideration of the entire record regarding Defendant's Motion to Suppress Evidence, including, but not limited to, the testimony and evidence presented during the May 18th, 2016 Suppression Hearing, as well as an independent review of the relevant statutory and case law and the proceeding Findings of Fact and Conclusions of Law set forth above pursuant to Pennsylvania Rule of Criminal Procedure 581, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendant's Motion to Suppress Evidence is hereby **DENIED**.

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

COMMONWEALTH OF PENNSYLVANIA
v.
CHRISTOPHER GEORGE BOWERSOX, Defendant

CRIMINAL LAW & PROCEDURE / SUPPRESSION OF EVIDENCE

Pursuant to Rule 581 of the Pennsylvania Rules of Criminal Procedure, the Commonwealth, not the defendant, shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights. The Commonwealth's burden is by a preponderance of the evidence -- the burden of producing satisfactory evidence of a particular fact in issue; and . . . the burden of persuading the trier of fact that the fact alleged is indeed true.

CRIMINAL LAW & PROCEDURE / SEARCH & SEIZURE / WARRANTLESS SEARCHES / INVESTIGATIVE STOPS

Pursuant to 75 Pa. C. S. §6308(b), whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of the Motor Vehicle Code.

CRIMINAL LAW & PROCEDURE / SEARCH & SEIZURE / WARRANTLESS SEARCHES / STOP & FRISK / REASONABLE SUSPICION

When considering whether reasonable suspicion or probable cause is required constitutionally to make a vehicle stop, the nature of the violation has to be considered. If it is not necessary to stop the vehicle to establish that a violation of the Vehicle Code has occurred, an officer must possess probable cause to stop the vehicle. Where a violation is suspected, but a stop is necessary to further investigate whether a violation has occurred, an officer need only possess reasonable suspicion to make the stop. Illustrative of these two standards are stops for speeding and DUI. If a vehicle is stopped for speeding, the officer must possess probable cause to stop the vehicle. This is so because when a vehicle is stopped, nothing more can be determined as to the speed of the vehicle when it was observed while travelling upon a highway. On the other hand, if an officer possesses sufficient knowledge based upon behavior suggestive of DUI, the officer may stop the vehicle upon reasonable suspicion of a Vehicle Code violation, since a stop would provide the officer the needed opportunity to investigate further if the driver was operating under the influence of alcohol or a controlled substance.

CRIMINAL LAW & PROCEDURE / STANDARD OF REVIEW

It is within the suppression court's sole province as factfinder to pass on the credibility of witnesses and the weight to be given their testimony.

CONSTITUTIONAL LAW / SEARCH & SEIZURE / PROBABLE CAUSE

To determine whether probable causes exists, the court must consider "whether the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime."

VEHICLE CODE / VIOLATIONS

Pursuant to 75 Pa. C. S. §3309(1), a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety.

VEHICLE CODE / VIOLATIONS

Pursuant to 75 Pa. C. S. §3714, any person who drives a vehicle in careless disregard for the safety of persons or property is guilty of careless driving, a summary offense.

CONSTITUTIONAL LAW / SEARCH & SEIZURE / REASONABLE SUSPICION

To establish grounds for reasonable suspicion, the officer must articulate specific observations which, in conjunction with reasonable inferences derived from these observations, led him reasonably to conclude, in light of his experience, that criminal activity was afoot and the person he stopped was involved in that activity. In order to determine whether the police officer has reasonable suspicion, the totality of the circumstances must be considered. In making this determination, a trial court must give due weight to the specific reasonable inferences the police officer is entitled to draw from the facts in light of his experience. The totality of the circumstances test does not limit the inquiry to an examination of only those facts that clearly indicate criminal conduct; rather, even a combination of innocent facts, when taken together, may warrant further investigation by the police officer.

CRIMINAL LAW & PROCEDURE / SEARCH & SEIZURE / WARRANTLESS SEARCHES / INVESTIGATIVE STOPS

The Pennsylvania Supreme Court has defined three forms of police-citizen interaction: a mere encounter, an investigative detention, and a custodial detention. A mere encounter between police and a citizen need not be supported by any level of suspicion, and carries no official compulsion on the part of the citizen to stop or to respond. An investigatory stop, which subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute an arrest, requires a reasonable suspicion that criminal activity is afoot. A custodial detention is an arrest and must be supported by probable cause.

CONSTITUTIONAL LAW / SEARCH & SEIZURE / REASONABLE SUSPICION

A police officer has authority to stop a vehicle when he or she has reasonable suspicion that a violation of the Motor Vehicle Code is occurring or has occurred. Whether an officer had reasonable suspicion that criminality was afoot so as to justify an investigatory detention is an objective one, which must be considered in light of the totality of the circumstances.

EVIDENCE / SCIENTIFIC EVIDENCE / FIELD SOBRIETY TESTS

Field sobriety tests containing the results of a defendant's performance, such as the "one-leg stand" and "walking in a straight line" tests, are grounded in theories which link an individual's lack of coordination and loss of concentration with intoxication.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION NO. CR 9 of 2016

Appearances: Paul S. Sellers, Assistant District Attorney, on behalf of the Commonwealth
Charbel G. Latouf, Esq., on behalf of Christopher George Bowersox (Defendant)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Domitrovich, J., June 1st, 2016

After thorough consideration of the entire record regarding Defendant's Omnibus Pre-trial Motion – Motion to Suppress Evidence, including, but not limited to, the testimony and evidence presented during the May 18th, 2016 Suppression Hearing and Attorney Latouf's Memorandum of Law, as well as an independent review of the relevant statutory and case law, this Trial Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I. Factual and Procedural History

1. On October 18th, 2015, around 2:45 a.m., Pennsylvania State Police Trooper Kyle Callahan and his partner, Trooper Gadsby, were travelling southbound on Route 97/Perry Highway in full dress uniform and in a marked Pennsylvania State Police vehicle.
2. At that time, Trooper Callahan was travelling behind a 2004 Jeep Cherokee, which was weaving in its lane.
3. While travelling southbound on Route 97/Perry Highway, the 2004 Jeep Cherokee moved towards the westbound entrance ramp to Interstate 90 and nearly struck the guardrail near the bridge embankment, but swerved abruptly back onto Route 97/Perry Highway.
4. Thereafter, Troopers Callahan and Gadsby activated their police lights and initiated a traffic stop of the 2004 Jeep Cherokee in the Taco Bell parking lot located south of the Interstate 90/Route 97 interchange.
5. Trooper Callahan approached the 2004 Jeep Cherokee and made contact with the driver, identified as Defendant Christopher George Bowersox (hereafter referred to as "Defendant").
6. Trooper Callahan requested Defendant's license, registration and proof of insurance, after which Defendant mistakenly provided his motorcycle license.
7. While speaking with the Defendant, Trooper Callahan detected a strong odor of alcoholic beverages and noticed Defendant's eyes were bloodshot and his speech was slurred.
8. When asked where he was coming from, Defendant acknowledged he was coming from Scooters Bar and Grill and had a couple of drinks while at the establishment.
9. After speaking with Defendant and making several observations about Defendant's demeanor, Trooper Callahan requested Defendant exit his vehicle and submit to several field sobriety tests, to which Defendant complied.
10. Trooper Callahan administered three (3) field sobriety tests to Defendant – the "horizontal gaze nystagmus" ("HGN") test; the "walk-and-turn" test; and the "one leg stand" test.
11. Following the administration of these three (3) field sobriety tests and based upon the observations and conclusions Trooper Callahan took from these tests, Trooper Callahan requested Defendant submit to a portable breath test ("PBT"), to which Defendant complied.

12. Based upon the results of the PBT, which indicated positively for the presence of alcohol, Trooper Callahan placed Defendant under arrest for Driving under the Influence and transported Defendant for a blood draw.
13. Trooper Callahan's mobile video recorder ("MVR") captured the entire encounter, from the time Trooper Callahan was traveling southbound on Route 97/Perry Highway behind Defendant's 2004 Jeep Cherokee until Defendant's arrest.
14. The Erie County District Attorney's Office filed an Information on March 8th, 2016, charging Defendant with Driving under the Influence of Alcohol, General Impairment – Incapable of Safe Driving, First (1st) Offense, in violation of 75 Pa. C. S. §3802(a)(1), and Driving under the Influence, Highest Rate of Alcohol, BAC 0.16%, First (1st) Offense, in violation of 75 Pa. C. S. §3802(c).
15. Defendant, by and through his counsel, Charbel G. Latouf, Esq., filed the instant Omnibus Pre-trial Motion – Motion to Suppress Evidence on April 27th, 2016.
16. A hearing on Defendant's Omnibus Pre-trial Motion – Motion to Suppress Evidence was held on May 18th, 2016, during which this Trial Court heard testimony from Trooper Callahan, observed the MVR, received evidence and heard argument from both counsel. Defendant appeared and was represented by his counsel, Charbel G. Latouf, Esq., and Assistant District Attorney Paul S. Sellers appeared on behalf of the Commonwealth.

CONCLUSIONS OF LAW

II. Legal Argument

Pennsylvania Rule of Criminal Procedure 581 governs the suppression of evidence. Pursuant to Rule 581, the Commonwealth, not the defendant, shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights. *See Pa. R. Crim. P. 581(h)*. The Commonwealth's burden is by a preponderance of the evidence. *Commonwealth v. Bonasorte,* 486 A.2d 1361, 1368 (Pa. Super. 1984); *see also Commonwealth v. Jury,* 636 A.2d 164, 169 (Pa. Super. 1993) (the Commonwealth's burden of proof at suppression hearing has been defined as "the burden of producing satisfactory evidence of a particular fact in issue; and . . . the burden of persuading the trier of fact that the fact alleged is indeed true.").

A. The traffic stop initiated by Trooper Callahan of Defendant's vehicle on October 18th, 2015 was lawful as Trooper Callahan possessed the requisite level of proof required to stop Defendant's vehicle for a traffic violation of the Motor Vehicle Code as well as Driving under the Influence.

The general rule regarding the level of suspicion that a police officer must possess before stopping a vehicle is codified at 75 Pa. C. S. §6308(b), which states:

> Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has **reasonable suspicion** that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or

> the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

75 Pa. C. S. §6308; *see also Commonwealth v. Ibrahim,* 127 A.3d 819, 822-23 (Pa. Super. 2015). However, not all offenses of the Motor Vehicle Code require mere reasonable suspicion. In *Commonwealth v. Feczko,* the Pennsylvania Superior Court explained the requisite levels of suspicion and concluded the police must possess **probable cause** where a traffic stop will not serve an investigatory purpose. *See Feczko,* 10 A.3d 1285, 1290-91 (Pa. Super. 2010). The Pennsylvania Superior Court further elaborated upon the distinction between Motor Vehicle Code offenses that require **probable cause** and those that require only **reasonable suspicion** in *Commonwealth v. Salter,* 121 A.3d 987 (Pa. Super. 2015). In *Salter*, the Court stated:

> When considering whether reasonable suspicion or probable cause is required constitutionally to make a vehicle stop, the nature of the violation has to be considered. If it is not necessary to stop the vehicle to establish that a violation of the Vehicle Code has occurred, an officer must possess probable cause to stop the vehicle. Where a violation is suspected, but a stop is necessary to further investigate whether a violation has occurred, an officer need only possess reasonable suspicion to make the stop. Illustrative of these two standards are stops for speeding and DUI. If a vehicle is stopped for speeding, the officer must possess probable cause to stop the vehicle. **This is so because when a vehicle is stopped, nothing more can be determined as to the speed of the vehicle when it was observed while traveling upon a highway.** On the other hand, if an officer possesses sufficient knowledge based upon behavior suggestive of DUI, the officer may stop the vehicle upon reasonable suspicion of a Vehicle Code violation, **since a stop would provide the officer the needed opportunity to investigate further if the driver was operating under the influence of alcohol or a controlled substance.**

Id at 993; *see also Ibrahim,* 127 A.3d at 823-24 [emphasis added].

After consideration of the testimony and evidence presented at the May 18th, 2016 suppression hearing, as well as a thorough review of relevant statutory and case law, this Trial Court concludes Trooper Callahan possessed the requisite level of proof required to initiate a traffic stop of Defendant's vehicle, based upon his credible testimony. *See Commonwealth v. Walton*, 63 A.3d 253, 256 (Pa. Super. 2013) (it is within the suppression court's sole province as fact-finder to pass on the credibility of witnesses and the weight to be given their testimony). First, Trooper Callahan had probable cause to initiate a traffic stop of Defendant's vehicle for violations of the Motor Vehicle Code. To determine whether probable causes exists, the court must consider "whether the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime." *Ibrahim*, 127 A.3d at 824.

Following the traffic stop and prior to the Preliminary Hearing, Trooper Callahan cited Defendant for violations of Driving on Roadways Laned for Traffic (75 Pa. C. S. §3309(1))

and Careless Driving (75 Pa. C. S. §3714).[1] 75 Pa. C. S. §3309(1) states "a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety." *75 Pa. C. S. §3309(1).* Furthermore, 75 Pa. C. S. §3714 states: "any person who drives a vehicle in careless disregard for the safety of persons or property is guilty of careless driving, a summary offense." *75 Pa. C. S. §3714(a).* On October 18th, 2015, Trooper Callahan was behind Defendant's 2004 Jeep Cherokee traveling southbound on Route 97/Perry Highway, where he observed Defendant's vehicle weaving. Defendant's vehicle also moved towards to the westbound entrance ramp of Interstate 90, nearly striking a guardrail on the bridge embankment, but swerved abruptly back into his lane. Trooper Callahan's MVR in his police cruiser captured the events clearly and as they unfolded. *See Commonwealth's Exhibit 1.* Considering Defendant's vehicle weaving in its lane and swerving abruptly out of an entrance ramp and back into its lane to avoid striking a guardrail, Trooper Callahan had probable cause to initiate a traffic stop of Defendant's vehicle for the Motor Vehicle Code violations addressed above and no further investigation was necessary as Trooper Callahan clearly observed these violations. *See Ibrahim,* 127 A.3d at 824 (the moment a police officer clearly observed a defendant riding his bicycle westbound on a road that requires all traffic to proceed eastbound, a Motor Vehicle Code violation occurred, no further investigation was necessary and the police officer had probable cause to stop the defendant).

Furthermore, Trooper Callahan possessed reasonable suspicion to initiate a traffic stop for suspicion of Driving under the Influence. To establish grounds for reasonable suspicion, "the officer must articulate specific observations which, in conjunction with reasonable inferences derived from these observations, led him reasonably to conclude, in light of his experience, that criminal activity was afoot and the person he stopped was involved in that activity." *Commonwealth v. Fulton,* 921 A.2d 1239, 1243 (Pa. Super. 2007). In order to determine whether the police officer has reasonable suspicion, the totality of the circumstances must be considered. *Id.* In making this determination, a trial court must give "due weight…to the specific reasonable inferences the police officer is entitled to draw from the facts in light of his experience." *Id (quoting Commonwealth v. Cook,* 735 A.2d 673, 676 (1999)). Also, the totality of the circumstances test does not limit the inquiry to an examination of only those facts that clearly indicate criminal conduct; rather, "even a combination of innocent facts, when taken together, may warrant further investigation by the police officer." *Id (quoting Cook,* 735 A.2d at 676).

Trooper Callahan has three (3) years' experience with the Pennsylvania State Police and has conducted over one hundred (100) traffic stops for suspected DUI in those three (3) years; therefore, he has considerable experience with DUI traffic stops. Furthermore, Trooper Callahan's observations while following Defendant's vehicle, including Defendant's vehicle weaving in its lane, moving into the westbound entrance ramp for Interstate 90, nearly striking a guardrail on a bridge embankment and swerving abruptly to avoid said guardrail, constitute specific observations which, taken in conjunction with his reasonable inferences derived

[1] These traffic offenses were withdrawn by the Commonwealth at the Preliminary Hearing, and the Commonwealth is no longer pursuing these offenses. However, as these offenses are relevant to the issue of whether Trooper Callahan possessed probable cause to conduct the traffic stop, these offenses will be discussed for that purpose only.

from these observations, led Trooper Callahan to conclude reasonably that Defendant was driving under the influence of alcohol and a traffic stop was necessary to investigate further in order to confirm or dispel these conclusions. *See id* (a police officer, with more than five years' experience, had reasonable suspicion of driving under the influence when he observed a defendant's vehicle swerve out of his lane three times in thirty seconds in dense fog on a road shared with oncoming traffic); *see also Commonwealth v. Sands,* 887 A.2d 261, 272 (Pa. Super. 2005) (an officer with experience in observing and arresting drunk drivers had reasonable suspicion of driving under the influence when he observed a defendant's vehicle cross the fog line three times).

Therefore, this Trial Court concludes Trooper Callahan had the requisite level of proof for initiating a traffic stop on Defendant's vehicle for a traffic violation of the Motor Vehicle Code as well as Driving under the Influence.

B. Trooper Callahan's continued detention of Defendant was proper as the traffic stop was initiated with the requisite level of proof required and Trooper Callahan's additional observations of Defendant at the scene provided reasonable suspicion for the continued detention of Defendant.

The Pennsylvania Supreme Court has defined three forms of police-citizen interaction: a mere encounter, an investigative detention, and a custodial detention. *Commonwealth v. Fuller,* 940 A.2d 476, 478 (Pa. Super. 2007). A **mere encounter** between police and a citizen need not be supported by any level of suspicion, and carries no official compulsion on the part of the citizen to stop or to respond. *Id* at 479 [emphasis added]. An **investigatory stop,** which subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute an arrest, requires a reasonable suspicion that criminal activity is afoot. *Id* [emphasis added]. A **custodial detention** is an arrest and must be supported by probable cause. *Id* [emphasis added].

A police officer has authority to stop a vehicle when he or she has reasonable suspicion that a violation of the Motor Vehicle Code is occurring or has occurred. *See 75 Pa. C. S. §6308(b); see also Commonwealth v. Farnan,* 55 A.3d 113, 116 (Pa. Super. 2012) "Whether an officer had reasonable suspicion that criminality was afoot so as to justify an investigatory detention is an objective one, which must be considered in light of the totality of the circumstances." *Id*. (Pa. Super. 2012) (*quoting Commonwealth v. Holmes,* 14 A.3d 89, 95-96 (Pa. Super. 2011)).

This Trial Court concludes Trooper Callahan had reasonable suspicion to initiate and continue the investigatory detention of Defendant. While traveling southbound on Route 97/Perry Highway, Trooper Callahan observed Defendant's 2004 Jeep Cherokee weaving in its lane. The 2004 Jeep Cherokee moved towards the westbound exit ramp of Interstate 90 and nearly struck a guardrail near the bridge embankment, but swerved abruptly back into its lane. The totality of these observations, coupled with the reasonable inferences derived therefrom, prompted Trooper Callahan, who had over one hundred (100) DUI stops in three (3) years with the Pennsylvania State Police, to initiate a traffic stop of Defendant's vehicle on reasonable suspicion of Defendant driving under the influence of alcohol and other Motor Vehicle Code violations. *See Salter*, 121 A.3d 987, 993 (Pa. Super. 2015); *see also Ibrahim,* 127 A.3d 819, 823-24 (Pa. Super. 2015).

Furthermore, subsequent to the traffic stop, Trooper Callahan's reasonable suspicion of DUI continued. After approaching Defendant's vehicle and requesting his driver's license,

registration and proof of insurance, Trooper Callahan detected a strong odor of alcoholic beverages, and observed Defendant's eyes were bloodshot and his speech was slurred. Thereafter, Trooper Callahan requested Defendant exit his vehicle and submit to three (3) field sobriety tests – the "horizontal gaze nystagmus ("HGN")" test, the "walk-and-turn" test, and the "one-leg stand" test. During Defendant's performance of these three (3) field sobriety tests, Trooper Callahan noted several deficiencies by Defendant, characterized by Trooper Callahan as "clues," indicating Defendant's intoxication. *See Commonwealth v. Ragan,* 652 A.2d 925, 928 (Pa. Super 1995) (Field sobriety tests containing the results of a defendant's performance, such as the "one-leg stand," … and "walking in a straight line" tests, are grounded in theories which link an individual's lack of coordination and loss of concentration with intoxication). Trooper Callahan was also allowed to rely on his observations from the HGN test in determining whether Defendant was driving under the influence of alcohol. *See Commonwealth v. Weaver,* 76 A.3d 562, 567 (Pa. Super. 2013). Following his observations from Defendant's field sobriety tests, Trooper Callahan requested Defendant submit to a portable breath test ("PBT"), which indicated positively for the presence of alcohol.

Therefore, considering the totality of the circumstances, including, but not limited to, the observations of Trooper Callahan and all reasonable inferences drawn therefrom, this Trial Court concludes, based on Trooper Callahan's credible testimony, that there was reasonable suspicion to initiate and continue an investigatory detention of Defendant in order to determine if Defendant had been driving a vehicle under the influence of alcohol, in violation of 75 Pa. C. S. §3802. For all of the foregoing reasons, this Court enters the following Order:

ORDER

AND NOW, to wit, this 1st day of June, 2016, after thorough consideration of the entire record regarding Defendant's Omnibus Pre-trial Motion – Motion to Suppress Evidence, including, but not limited to, the testimony and evidence presented during the May 18th, 2016 Suppression Hearing and counsels' Memoranda of Law, as well as an independent review of the relevant statutory and case law and the proceeding Findings of Fact and Conclusions of Law set forth above pursuant to Pennsylvania Rule of Criminal Procedure 581, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendant's Omnibus Pre-trial Motion – Motion to Suppress Evidence is hereby **DENIED**.

BY THE COURT:
/s/ Stephanie Domitrovich, Judge

COMMONWEALTH OF PENNSYLVANIA
v.
ANDREW JEROME WURST

POST-CONVICTION RELIEF ACT

A petitioner is entitled to relief pursuant to *Miller v. Alabama,* 132 S. Ct. 2455 (2012), *Montgomery v. Louisiana,* 136 S. Ct. 718 (2016) (holding *Miller* applies retroactively on state collateral review), and *Graham v. Florida,* 560 U.S. 48 (2010) if sentenced to life without the possibility of parole for a homicide committed as a juvenile.

In this case, Andrew Wurst entered into a favorable plea agreement to reduced charges, including third degree murder, which included a stipulated sentence of 30 to 60 years. The plea and sentencing agreement took into account Mr. Wurst's age and mitigating circumstances. Accordingly, *Montgomery v. Louisiana* affords him no relief.

A sentence of 30 to 60 years of incarceration provides Mr. Wurst a meaningful opportunity for release possibly prior to age 44. His victim John Gillette was 48 years old when Mr. Wurst killed him.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION NO. 1337 of 1998

Appearances: William J. Hathaway, Esq., Attorney for Defendant

ORDER

And now to wit, this 6th day of June, 2016, it is hereby **ORDERED** that the Defendant's Petition for Post Conviction Collateral Relief is **DISMISSED** for the reasons set forth in this Court's Notice of Intent to Dismiss of May 10, 2016.

Upon consideration of the Defendant's Response and Objections filed May 25, 2016, same are **OVERRULED**. Petitioner does not contend, nor does the record support, that his age and mitigating circumstances were not considered at the time of his plea or sentence.

Petitioner's plea and sentence occurred on the eve of trial. The record reflects the sentence of 30 to 60 years Petitioner now contests as unreasonable was negotiated as part of the plea. Petitioner, Petitioner's mother, and Petitioner's counsel were all present at his plea and sentencing. Prior to entering the plea—part of which included recommendation for the 30 to 60 years—the Commonwealth, the Court and Petitioner's Counsel engaged in an extensive colloquy to ensure Petitioner was entering into the plea knowingly and voluntarily.

As a result of the plea, Petitioner's exposure decreased from the possibility of life without the possibility of parole (LWOP) plus an additional 28 ½ to 57 years to a maximum of 97 years, with an agreement by all parties to 30 to 60 years. *Plea and Sentencing Transcript September 9, 1999 ("N.T."), pp. 20-23.* Petitioner's sentence of 30 to 60 years of incarceration reflects consideration of Petitioner's age and need for a meaningful chance of release from incarceration.

The Petitioner's age was frequently discussed by the presiding Judge during the plea/sentencing proceeding. *N.T. pp. 37, 41, 65-66, 78-79, 81*. Petitioner's age was also discussed by the prosecutor and defense counsel. *N.T. pp. 76, 78.*

Ultimately, the presiding Judge reflected on the reasons he accepted the plea and recommended sentence:

> THE COURT: And having full knowledge of the factual situation, and full knowledge of this defendant's psychological and psychiatric makeup and having had the opportunity to hear much testimony from people who were such experts in their field, both on behalf of the Commonwealth and behalf of the defendant, and on that basis, and taking into account the feelings of the victim and the age of the defendant and the feelings of his family who were victimized in this situation in a different way, they were victimized, the decedent's family, and on all those factors and many more, but at least for those factors, I am approving the plea agreement.
> *N.T., pp. 78-79.*
>
> THE COURT: One other thing I have to say before I do announce a sentence, this Court's heart goes out to the victim's family. Mr. Gillette was certainly a wonderful person, whom I never knew or had the pleasure of knowing, but as described by many people in this courtroom, and the acts of a young defendant not only devastated the family of the decedent, but unfortunately, he took down his own family as well. And my heart goes out to you, ma'am, as the mother of this young defendant.
> *N.T. p. 81.*

Petitioner was aware of his sentence at the time he entered his plea and entered into the plea knowingly and voluntarily after considering that sentence. As a result of the plea entered nearly 20 years ago, Petitioner already has the meaningful opportunity for release he now seeks. The Petitioner shall have thirty (30) days from the date of this Order to file an appeal to the Superior Court of Pennsylvania.

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

U.S. BANK, NATIONAL ASSOCIATION, TRUSTEE FOR PENNSYLVANIA HOUSING FINANCE AGENCY, Plaintiff
v.
BRYAN J. WATTERS, Defendant

PETITION TO OPEN MORTGAGE FORECLOSURE / NAMED DEFENDANTS

A 'real owner' or 'terre-tenant' required to be named as a defendant under Pa.R.C.P. No. 1144 is limited to one who claims an interest in the land subject to the lien of the mortgage (the original mortgagor) or one who takes title from the original mortgagor.

Individuals who have an equitable right to the subject property, such as the right to equitable division during a pending divorce, are not real owners required to be named as defendants under Rule 1144.

A spouse's right to equitable division during a pending divorce does not require joinder pursuant to Pa. R.C.P. No. 2227 because the merits of the action can be decided without joining the spouse.

An individual has no right to intervene in a mortgage foreclosure action in which default judgment has been entered and (s)he had notice of the action prior to the foreclosure.

A Petition to Strike or Open Default Judgment filed 584 days after notice of the default judgment was sent to the Defendant is untimely.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 10516-2014

Appearances: Jill M. Wineka, Esq., Attorney for Plaintiff
Stephen H. Hutzelman, Esq., Attorney for Defendant

OPINION

Cunningham, J., June 9, 2016

The Defendant, Bryan J. Watters, and the Proposed Intervener, Diane Watters (together "Appellants"), filed a Notice of Appeal on April 5, 2016 from an Order dated March 9, 2016, denying the Petition to Strike or Open Judgment and the Application for Leave to Intervene. This Opinion is in response to the Statement of Issues to be Raised on Appeal filed April 18, 2016 by Appellants.

BACKGROUND

On June 7, 2006, Bryan J. Watters (the "Defendant") signed a Note and Mortgage for $73,071.00 to purchase real property at 831 Rice Avenue, Girard, Pennsylvania 16417 (the "Property"). The Mortgage was assigned from the original mortgagee, American Home Mortgage, to Pennsylvania Housing Finance Agency (PaHFA) and subsequently assigned to U.S. Bank National Association, as Trustee for the PaHFA (the "Plaintiff").

At the time the Defendant purchased the Property, he was married to Diane Watters (the "Petitioner"). *Hearing Transcript March 8, 2016("H.T."), p. 13.* Because of Petitioner's credit rating, she was intentionally not a party to this purchase or the mortgage. *H.T. p. 14*. The Petitioner did not sign the Note or Mortgage and her name did not appear on the

deed when title was transferred to the Defendant's name. *H.T. p. 13.* On April 16, 2013, the Defendant filed for divorce from the Petitioner. *H.T. p. 14.* After separating, the Defendant moved from the Property and the Petitioner continued to reside there. *See H.T. p. 14.*

The Defendant failed to pay the mortgage payment due June 1, 2013 and defaulted on all subsequent installments. The Plaintiff filed an action in mortgage foreclosure on February 28, 2014. *H.T. p. 14*. On March 10, 2014, the Petitioner was served with a copy of the Complaint as an occupant of the Property secured by the Mortgage. *H.T. p. 14.* The Defendant was personally served with the Complaint on March 13, 2014. *H.T. p. 14.*

On April 11, 2014, notices that the Defendant must vacate or pay within 10 days were mailed to the Property and to the Defendant at his new address. *Plaintiff's Brief in Opposition to Petition, p. 2.* When no action was taken, the Plaintiff filed a Praecipe for a Default Judgment against the Defendant.

A Sheriff's sale was scheduled for July 25, 2014. A copy of the Notice of Sale was mailed to the Petitioner at the property address. *H.T. p. 15.* The Petitioner received the Notice of Sale and attempted to work with the bank to stave off the foreclosure. *H.T. p. 15.* As a result of the Petitioner's actions, the Sheriff's sale was continued to August 22, 2014. *H.T. pp. 15.* The Sheriff's sale was postponed a second time to October 17, 2014 after the Plaintiff became aware the Petitioner was attempting to obtain financing to purchase the home from the Defendant. *H.T. p. 15-16.*

The Sheriff's sale occurred on October 17, 2014 and the Plaintiff was the successful bidder. *H.T. p. 15-16.* A deed was recorded November 10, 2014 transferring title to the Plaintiff and extinguishing the Defendant's ownership rights. *H.T. p. 16.*

Over one year later, on December 3, 2015, the Appellants filed a Petition to Open or Strike Default Judgment, Set Aside Sheriff's sale and Application for Leave to Intervene ("Petition"). The Plaintiff filed an Answer on January 8, 2016. After the submission of briefs and oral argument, the Petition was denied *en toto* by Order dated March 9, 2016.

The Appellants filed a Notice of Appeal on April 5, 2016. On April 18, 2016, the Appellants filed a Statement of Issues to be Raised on Appeal raising the following issues, consolidated for clarity:

1. Whether Application to Intervene should have been granted because Diane Watters is a "real owner" of the Property in Pa. R.C.P. 1144(a)(3) and was therefore required to be named as a defendant in the mortgage foreclosure action.
2. Whether actual notice of the foreclosure proceedings by Ms. Watters in this case was sufficient.
3. Whether the Petition to Open or Strike Default Judgment was timely filed.

APPLICATION TO INTERVENE

A. Diane Watters is not a "real owner" required to be joined under Pa. R.C.P. 1144

Appellants argue the Petitioner is a "real owner" and thus was required to be joined pursuant to Pa.R.C.P. 1144(a)(3) in the mortgage foreclosure proceeding against the property at 831 Rice Avenue, Girard, Pennsylvania. "A 'real owner' or 'terre-tenant' is one who claims an interest in the land subject to the lien of the mortgage." *Levitt v. Patrick*, 976 A.2d 581 (Pa. Super. 2009) *citing Bank of Pennsylvania v. G/N Enterprises, Inc.,* 463 A.2d 4, 6 (Pa. Super. 1983). Thus, a real owner is the original mortgagor or one who takes title from the

original mortgagor. *Id.* Individuals who have an equitable right to the subject property or those who claim title antagonistic to the mortgagor are not real owners required to be named as defendants. *See Bradley v. Price,* 152 A.2d 904 (Pa. 1959) *citing Orient Building & Loan Ass'n v. Gould,* 86 A. 863 (Pa. 1913)(analyzing the term "real owner" in the context of notice required by a local rule of a Sheriff's sale subsequent to a mortgage foreclosure).

It is uncontroverted the Petitioner was not named on the Mortgage, Note, or Deed. She was not an original mortgagor and never took title from the original mortgagor. At the time of the foreclosure proceedings, the Petitioner had at most an equitable interest in the property because it was marital property and the divorce was not yet finalized. *See* 23 Pa. C.S. § 3501. An equitable interest in property is not an interest in the land subject to the lien of a mortgage. Thus, the Petitioner is not a real owner required to be joined pursuant to Pa. R.C.P. 1144.

In arguing the Petitioner was required to be joined, Appellants relied on the policies of two title insurance companies which state: "Non-titled spouses are required to join in the *execution* of a Deed or Mortgage if there is a pending Divorce." This provision simply relates to the ability of divorcing parties to tender title clear of all legal and equitable interests to the satisfaction of typically cautious title insurance companies. These policies do not make the Petitioner a real owner required to be a party to this foreclosure action. In fact these policies are irrelevant to this case.

B. Diane Watters is not required to be joined under any other Rules[1]

Entwined with Appellants' argument the Petitioner was required to be joined under Rule 1144, Appellants argued the Petitioner is a necessary and indispensable party under Pa. R.C.P. No. 2227. A party is indispensable and must be joined when "his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights." *Polydyne, Inc. v. City of Philadelphia,* 795 A.2d 495, 496 (Pa. Commw. Ct. 2002), as amended (Apr. 30, 2002). Whether an absent party is indispensable is determined by consideration of (1) whether absent parties have a right or interest related to the claim, (2) the nature of the right or interest, (3) whether that right or interest is essential to the merits of the issue, and (4) whether justice can be afforded without violating due process rights of absent parties. *Delaware Cty. v. J.P. Morgan Chase & Co.*, 827 A.2d 594, 598 (Pa. Commw.Ct. 2003).

Upon consideration of these four factors, Diane Watters is not an indispensable and necessary party. Appellants argued the Petitioner had a right related to the mortgage foreclosure because her marriage and pending divorce to the Defendant at the time of the default and Sheriff's sale. This argument is unavailing.

At the time of the mortgage foreclosure, while the divorce was pending, the Petitioner had a right to equitable division of all marital property and thus had an equitable interest in that property. However, the merits of this case can be determined without joining her as a party. The mortgage foreclosure action herein sought liability under the terms of the mortgage. The Petitioner was not a party to the mortgage transaction. The Petitioner was not responsible for

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[1] Although the Defendant did not raise any issues related to Rule 2227 or Rule 410 in the Statement of Issues to be Raised on Appeal, and thus each is waived, each will be addressed for completeness as each was part of the argument set forth in the Petition.

mortgage payments and was not liable if the payments were in default. Thus, the Petitioner's interest in the property was not linked to the disposition of the mortgage foreclosure action and the merits can be decided absent the Petitioner as a defendant.

Stated differently, if Petitioner was joined as a defendant, she had a successful defense by simply averring that she was not a party to the mortgage transaction and therefore not liable under the terms of the mortgage.

Notably, the Defendant never sought to join the Petitioner as an additional Defendant despite his ability to do so. The Defendant cannot now seek to capitalize on his failure to join the Petitioner, whom he knew to be living on the mortgaged premises and was his spouse at the time the property was purchased.

In the Petition to Intervene, the Petitioner also argued she was required to be named as a defendant under Rule 410(b)(2), which states "[i]f the relief sought is possession the person so served shall thereupon become a defendant in the action." However, the relief sought in this case was not possession of the property. Instead, this case is a mortgage foreclosure action and therefore Rule 410(b)(3) is applicable, which states "If the relief sought is mortgage foreclosure, the person so served shall not thereby become a party to the action." Hence, the argument the Petitioner was required to be named as a defendant under Rule 410 is without merit.

C. Diane Watters had Actual Notice of the Sheriff's sale

The final issue raised by Petitioner related to the Application to Intervene is whether actual notice of the foreclosure proceedings was sufficient. Undoubtedly, if Petitioner was required to be named as a defendant formal service of process was required. However, this issue is moot because Petitioner was not required to be named as a defendant under Rule 1144, Rule 2227, or Rule 410.

Nonetheless, it is undisputed the Petitioner had actual notice the mortgage was in default, when the Sheriff's sale would occur and all related proceedings. The Petitioner was served with the Complaint as a resident of the property and received notice of the Sheriff's sale. *H.T. p. 15; Petition, para. 13, 18.* The Petitioner also took a number of actions to forestall the Sheriff's sale. The date of the first Sheriff's sale was continued because the Defendant and the Petitioner were working to save the Property. *H.T. p. 15*. The Petitioner was also "contacting the bank back and forth trying to get them to hold off on the Sheriff's sale." *H.T. p. 15*. The Sheriff's sale was once again continued when the Petitioner was seeking to obtain funds to purchase the Property. *H.T. p. 15*. According to the Petitioner, she "was aware of the foreclosure action from the start" and did "everything [she] could possibly think of including sending letters to the courthouse." *H.T. p. 16.* The Sheriff's sale ultimately occurred on October 17, 2014.

Importantly, the Petitioner has failed to set forth any explanation for the delay in filing the Application to Intervene considering she was fully aware of the proceedings. The Petitioner did not seek to intervene before the default judgment was entered. Instead, the Petitioner waited over a full year after the Sheriff's sale, 584 days after the default judgment was entered and 633 days after she originally was given notice of the foreclosure to file the Application to Intervene. Given this unexplained lengthy period of time, the Application to Intervene was not timely filed. *See Financial Freedom, SFC v. Cooper* 21 A.2d 1329 (Pa. Super. 2011).

PETITION TO STRIKE OR OPEN JUDGMENT

A default judgment may be opened only if the petition to open the default judgment (1) was promptly filed; (2) shows a meritorious defense to the allegations set forth in the underlying complaint and (3) provides a reasonable excuse or explanation for failure to file a responsive pleading. *Smith v. Morrell Beer Distributors, Inc.*, 29 A.3d 23, 25 (Pa. Super. 2011). In the Statement of Issues to be Raised on Appeal, Appellants only raise the issue of timeliness. However, the Defendant failed to establish any of the three elements.

"The timeliness of a petition to open a judgment is measured from the date that notice of the entry of the default judgment is received." *Myers v. Wells Fargo Bank, N.A.*, 986 A.2d 171, 176 (Pa. Super. 2009) While there is no specific time period within which a petition to open a judgment must be filed, in cases where courts have found the petition to be timely filed, the period of delay has normally been less than one month. *Id*. Additionally, the reason for the delay is considered in evaluating the timeliness of the petition. *Id*.

Here, default judgment was entered on April 25, 2014 and notice was sent to the Defendant on April 28, 2014. The Defendant filed the Petition to Open on December 3, 2015—584 days after notice was sent to the Defendant. Thus, the Petition to Strike or Open Judgment is patently untimely. Notably, the Defendant did not provide any reason for failing to file a responsive pleading or any reason for the belated filing of the Petition to Strike or Open Judgment.

Additionally, the Defendant was fully aware that the Petitioner was not joined as a Defendant as he was served with notice of the judgment. The Defendant also knew the Petitioner was attempting to purchase the property from the Defendant. This is not a case where a lack of knowledge of the factual basis for the Petition was recently discovered. Rather, the Defendant knew of the facts on which he is now basing the petition before the Sheriff's sale even occurred. If the Defendant felt the Petitioner's participation was necessary to the action, he could have acted long before the 1 year 7 months he waited to file the Petition to Strike or Open Judgment. As previously discussed, the Petitioner is not a necessary party or required to be named as a defendant pursuant to the Pennsylvania Rules of Civil Procedure.

Hence, the Defendant failed to promptly file a petition to open, has failed to show a meritorious defense to the allegations in the underlying complaint, and has not provided a reasonable excuse or explanation for failing to file a responsive pleading.

CONCLUSION

Appellants' claims are without merit.

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

COMMONWEALTH OF PENNSYLVANIA
v.
JAMES EARL TROOP

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION NO. 1234 OF 1988

AND

COMMONWEALTH OF PENNSYLVANIA
v.
LARRY TROOP

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION NO. 1235 OF 1988 NO. 1076 OF 1988

PCRA / JURISDICTION AND PROCEEDINGS

A PCRA petition must be filed within one year of the date judgment becomes final unless the petition alleges and the petitioner proves one of the following exceptions apply: (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States; (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively. Any petition invoking any of the above exceptions to the filing time requirement must be filed within sixty days of the date the claim could have been presented.

PCRA – JURISDICTION AND PROCEEDINGS

The Post-Conviction Collateral Relief Act makes clear that where the petition is untimely, it is the petitioner's burden to plead in the petition and prove that one of the exceptions applies. That burden necessarily entails an acknowledgment by the petitioner that the PCRA petition under review is untimely but that one or more of the exceptions apply. It is for the petitioner to allege in his petition and to prove the petitioner falls within one of the exceptions found in 42 Pa. C. S. §9545(b)(1)(i)-(iii).

PCRA – JURISDICTION AND PROCEEDINGS

The Post-Conviction Collateral Relief Act's timeliness requirements are mandatory and jurisdictional in nature, and no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA petition that is filed in an untimely manner.

PCRA – SECOND OR SUBSEQUENT REVIEW

Requests for review of a second or subsequent post-conviction petition will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred. This standard is met only if petitioner can demonstrate either: (a) the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or (b) he is innocent of the crimes charged.

PCRA – SECOND OR SUBSEQUENT REVIEW

A *Lawson* determination is not a merits determination. Like the threshold question of timeliness, whether a second petition satisfies the *Lawson* standard must be decided before a PCRA court may entertain the petition. Like an untimely petition, a *Lawson*-barred petition yields a dismissal. The merits are not addressed.

PCRA – LEGALITY OF SENTENCE

When a petitioner files an untimely PCRA Petition raising a legality-of-sentence claim, the claim is not waived, but the jurisdictional limits of the PCRA itself render the claim incapable of review.

PCRA – INEFFECTIVE ASSISTANCE OF COUNSEL

In order to prevail on a claim of ineffective assistance of counsel, a petitioner must overcome the presumption that counsel is effective by establishing all of the following three elements, as set forth in *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973, 975-76 (Pa. 1987): (1) the underlying legal claim has arguable merit; (2) counsel had no reasonable basis for his or her action or inaction; and (3) the petitioner suffered prejudice because of counsel's ineffectiveness.

PCRA – INEFFECTIVE ASSISTANCE OF COUNSEL

A claim for ineffective assistance of counsel does not save an otherwise untimely petition for review on the merits.

PCRA – NEWLY-DISCOVERED FACTS

Pennsylvania courts have expressly rejected the notion that judicial decisions can be considered newly-discovered facts, as a judicial opinion does not qualify as a previously unknown "fact" capable of triggering the newly-discovered fact exception.

PCRA – AFTER-RECOGNIZED CONSTITUTIONAL RIGHT

Neither the Pennsylvania Supreme Court nor the United States Supreme Court has held that *Alleyne* is to be applied retroactively to cases in which the judgment of sentence had become final.

COMMONWEALTH OF PENNSYLVANIA
v.
JAMES EARL TROOP

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION NO. 1234 OF 1988

Appearance: D. Robert Marion, Jr., Esq., Attorney for Appellee
James Earl Troop, *Pro se*, Appellant

OPINION

Domitrovich, J., February 16th, 2016

The instant matter is currently before the Pennsylvania Superior Court on the Appeal of James Earl Troop (hereafter referred to as "Appellant") from this Trial Court's Opinion and Order dated November 20th, 2015, whereby this Trial Court dismissed Appellant's sixth (6th) Motion for Post-Conviction Collateral Relief and/or Petition to Set Aside/Modify Unlawful Sentencing Order (hereafter referred to as "PCRA Petition"). In his sixth PCRA Petition, Appellant argued (1) the sentencing judge had no authority to impose Appellant's current

sentence of incarceration as the sentencing guidelines and mandatory sentences applied to Appellant's case were suspended; (2) any timeliness issues were attributable to the ineffective assistance of counsel; and (3) the sentencing judge, not the jury, imposed the sentencing and weapon enhancements to Appellant's sentence in violation of *Alleyne v. United States,* 133 S. Ct. 2151 (2013). This Trial Court dismissed Appellant's sixth PCRA Petition as patently untimely since he filed his sixth PCRA Petition twenty-four (24) years after Appellant's judgment of sentence became final, and Appellant failed to argue successfully any of the three (3) timeliness exceptions pursuant to 42 Pa. C. S. §9545(b)(1). Furthermore, assuming *arguendo* Appellant would have filed his sixth PCRA Petition in a timely fashion, this Trial Court properly concluded Appellant would not be entitled to any relief as (1) Appellant failed to sufficiently prove the three elements for ineffective assistance of counsel, i.e. the underlying legal claim has arguable merit; counsel had no reasonable basis for his or her action or inaction; and Appellant suffered prejudice because of counsel's ineffectiveness, and (2) the holding in *Alleyne v. United States* cannot be considered a "newly-discovered fact" in order to raise the newly-discovered evidence timeliness exception pursuant to 42 Pa. C. S. §9545(b)(1)(ii).

Factual and Procedural History

Appellant was found guilty by a jury on November 18th, 1988 of Count 1 – Robbery, in violation of 18 Pa. C. S. §3701(a); Count 2 – Theft by Unlawful Taking or Disposition, in violation of 18 Pa. C. S. §3921; Count 3 – Receiving Stolen Property, in violation of 18 Pa. C. S. §3925; Count 4 - Criminal Conspiracy/Robbery, in violation of 18 Pa. C. S. §903(a)(1); Count 5 – Robbery, in violation of 18 Pa. C. S. §3701(a); Count 6 - Theft by Unlawful Taking or Disposition, in violation of 18 Pa. C. S. §3921; Count 7 - Receiving Stolen Property, in violation of 18 Pa. C. S. §3925; Count 8 – Criminal Conspiracy/Robbery, in violation of 18 Pa. C. S. §903(a)(1); Count 9 – Robbery, in violation of 18 Pa. C. S. §3701(a); Count 10 - Theft by Unlawful Taking or Disposition, in violation of 18 Pa. C. S. §3921; Count 11 - Receiving Stolen Property, in violation of 18 Pa. C. S. §3925; and Count 12 – Criminal Conspiracy/Robbery, in violation of 18 Pa. C. S. §903(a)(1) Thereafter, on January 9th, 1989, Appellant was sentenced by Judge Michael T. Joyce as follows:

- Count 1: Ninety-six (96) to one hundred ninety-two (192) months state incarceration;
- Counts 2 & 3 merged with Count 1 for sentencing purposes;
- Count 4: Eighteen (18) to thirty-six (36) months state incarceration consecutive to Count 1;
- Count 5: Sixty (60) to one hundred twenty (120) months state incarceration consecutive to Count 4;
- Counts 6 & 7 merged with Count 5 for sentencing purposes;
- Count 8: Eighteen (18) to thirty-six (36) months state incarceration consecutive to Count 5;
- Count 9: Ninety-six (96) to one hundred ninety-two (192) months state incarceration consecutive to Count 8;
- Counts 10 & 11 merged with Count 9 for sentencing purposes; and
- Count 12: Eighteen (18) to thirty-six (36) months state incarceration consecutive to Count 9

On January 25th, 1989, Appellant, by and through his counsel, Jack E. Grayer, Esq., filed a Motion for Reconsideration of Sentence. On February 7th, 1989, Appellant filed a Notice of Appeal to the Pennsylvania Superior Court, by and through his counsel, David L. Hunter, Jr., Esq. On March 1st, 1989, Judge Joyce denied Appellant's Motion for Reconsideration of Sentence. On March 19th, 1990, the Pennsylvania Superior Court affirmed the Judgment of Sentence.

Appellant filed his first PCRA Petition on September 11th, 1991. On October 25th, 1991, Anthony A. Logue, Esq., was appointed as Appellant's counsel. Attorney Logue filed an Amended PCRA Petition on December 3rd, 1991. On March 23rd, 1992, Judge Joyce denied Appellant's first PCRA Petition. Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on April 15th, 1992, and the Pennsylvania Superior Court affirmed Judge Joyce's denial of Appellant's first PCRA Petition on April 23rd, 1993.

Appellant, *pro se*, filed his second PCRA Petition on January 28th, 1994. Appellant filed a Supplemental PCRA Brief on September 20th, 1994. Judge Joyce denied Appellant's second PCRA Petition on October 11th, 1995. Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on October 20th, 1995, and the Pennsylvania Superior Court affirmed Judge Joyce's denial of Appellant's second PCRA Petition on November 21st, 1996.

Appellant filed his first "Motion for New Trial based upon After-Discovered Evidence" on April 17th, 1997. Robert A. Sambroak, Jr., Esq., was appointed as Appellant's counsel on May 19th, 1997. Judge Joyce denied Appellant's first "Motion for New Trial based upon After-Discovered Evidence" on December 30th, 1997. Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on January 7th, 1998. Appellant filed his second "Motion for New Trial based on Newly Discovered Evidence" on November 13th, 1998. This Trial Court denied Appellant's second "Motion for New Trial based on Newly Discovered Evidence" on January 7th, 1999. Appellant filed a Motion for Reconsideration on January 13th, 1999. This Trial Court denied Appellant's Motion for Reconsideration on January 21st, 1999. The Pennsylvania Superior Court affirmed Judge Joyce's denial of Appellant's first "Motion for New Trial based upon After-Discovered Evidence" on September 27th, 1999.

Appellant, *pro se*, filed his third "Motion for New Trial based on Newly Discovered Evidence" on December 27th, 1999. This Trial Court denied Appellant's third "Motion for New Trial based on Newly Discovered Evidence" on February 3rd, 2000. Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on February 7th, 2000, and the Pennsylvania Superior Court affirmed this Trial Court's denial of Appellant's third "Motion for New Trial based on Newly Discovered Evidence" on August 11th, 2000.

Appellant filed his third PCRA Petition, by and through his counsel, William J. Hathaway, Esq., on August 26th, 2004. This Trial Court denied Appellant's third PCRA Petition on February 23rd, 2005. Appellant, by and through his counsel, William J. Hathaway, Esq., filed a Notice of Appeal to the Pennsylvania Superior Court on March 17th, 2005, and the Pennsylvania Superior Court affirmed this Trial Court's denial of Appellant's third PCRA Petition on September 15th, 2005.

Appellant, *pro se,* filed his fourth PCRA Petition, *pro se*, on May 12th, 2009. This Trial Court denied Appellant's fourth PCRA Petition on August 18th, 2009. Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on September 11th, 2009, and the Pennsylvania Superior Court affirmed this Trial Court's denial of Appellant's fourth PCRA

Petition on April 9th, 2010.

Appellant, *pro se*, filed a "Motion to Vacate Illegal Sentence," *pro se*, on December 28th, 2011, which this Trial Court treated as Appellant's fifth PCRA Petition. This Trial Court denied Appellant's fifth PCRA Petition on March 5th, 2012.

Appellant, *pro se,* filed a "Petition for Writ of *Habeas Corpus*," *pro se*, with Judge Ernest J. DiSantis, Jr. on March 14th, 2012. Judge DiSantis denied Appellant's "Petition for Writ of *Habeas Corpus*" on March 15th, 2012. Appellant filed a *pro se* Notice of Appeal to the Pennsylvania Superior Court on April 13th, 2012, and the Pennsylvania Superior Court affirmed Judge DiSantis' denial of Appellant's "Petition for Writ of *Habeas Corpus*" on January 18th, 2013.

Appellant filed the instant PCRA Petition, his sixth, by and through his counsel, John E. Cooper, Esq., on June 16th, 2015. By Order dated July 10th, 2015, this Trial Court directed the Commonwealth to respond to Appellant's sixth PCRA Petition within thirty (30) days. The Commonwealth filed its Brief in Opposition to Appellant's sixth PCRA Petition on July 28th, 2015. On October 28th, 2015, this Trial Court notified Appellant of its intention to dismiss his sixth PCRA Petition and Appellant was permitted twenty (20) days to file any Objections. On November 20th, 2015, and with no Objections filed by Appellant or his counsel, this Trial Court dismissed Appellant's sixth PCRA Petition.

On December 21st, 2015, Appellant, by and through his counsel, John E. Cooper, Esq.,[1] filed a Notice of Appeal. This Trial Court filed its 1925(b) Order on December 22nd, 2015. Appellant filed his "Concise Statement of Reasons Complained of on Appeal 42 Pa. R. A. P. 1925(b)," *pro se,* on January 6th, 2016.

Legal Argument

1. **This Trial Court properly dismissed Appellant's sixth PCRA Petition as it is patently untimely and fails to argue successfully any of the timeliness exceptions pursuant to 42 Pa. C. S. §9545(b)(1).**

A PCRA petition must be filed within one year of the date the judgment becomes final unless the petition alleges and the petitioner proves one of the following exceptions applies:

(i) The failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
(ii) The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
(iii) The right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa. C. S. §9545(b)(1)(i)-(iii). Any PCRA Petition invoking any of the above exceptions to the timeliness requirement must be filed within sixty (60) days of the date the claim could have been presented. *42 Pa. C. S. §9545(b)(2)*. The Pennsylvania Supreme Court has

[1] This Trial Court notes that, although John E. Cooper, Esq., did file Appellant's Notice of Appeal to the Pennsylvania Superior Court, Appellant now is proceeding *pro se* as indicated on the Superior Court docket (2021 WDA 2015).

stated the statute makes clear that where, as here, a PCRA Petition is untimely, petitioner carries the burden to plead and prove in his Petition that one of the exceptions of 42 Pa. C. S. §9545(b)(1) applies. *See Commonwealth v. Beasley,* 741 A.2d 1258, 1261 (Pa. 1999). "That burden necessarily entails an acknowledgment by the petitioner that the PCRA Petition under review is untimely but that one or more of the exceptions apply." *Id*. Petitioner is to allege and prove in his Petition that he falls within one of the exceptions found in 42 Pa. C. S. §9545(b)(1)(i)-(iii). *See Commonwealth v. Holmes,* 905 A.2d 507, 511 (Pa. Super. 2006). As the PCRA's timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA Petition that is filed in an untimely manner. *See Commonwealth v. Taylor,* 933 A.2d 1035, 1042-43 (Pa. Super. Ct. 2007).

Additionally, as the instant PCRA Petition is Appellant's sixth PCRA Petition, Appellant is also required to comply with the mandates of *Commonwealth v. Lawson*, 549 A.2d 107, 112 (Pa. 1988) and its progeny. *See Commonwealth v. Palmer,* 814 A.2d 700, 709 (Pa. Super. 2002). As part of its holding in *Palmer*, the Pennsylvania Superior Court stated:

> Requests for review of a second or subsequent post-conviction petition will not be entertained unless a strong *prima facie* showing is offered to demonstrate that a miscarriage of justice may have occurred…. This standard is met only if the petitioner can demonstrate either: (a) the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or (b) he is innocent of the crimes charged.

Id. at 709. Furthermore, in *Palmer*, the Pennsylvania Superior Court also stated:

> A *Lawson* determination is not a merits determination. Like the threshold question of timeliness, whether a second petition satisfies the *Lawson* standard must be decided **before** a PCRA court may entertain the petition. Like an untimely petition, a *Lawson*-barred petition yields a dismissal. The merits are not addressed.

Id. at 709, footnote 18 [emphasis added].

Regarding the instant PCRA Petition, pursuant to 42 Pa. C. S. §9545(b)(3), Appellant's judgment of sentence became final on December 31st, 1990, when the Pennsylvania Supreme Court denied Appellant's Petition for Allowance of Appeal to the Pennsylvania Supreme Court. Therefore, Appellant could have filed a timely PCRA Petition on or before December 31st, 1991, one year after Appellant's judgment of sentence became final. As Appellant now has filed his sixth PCRA Petition nearly twenty-four (24) years after his judgment of sentence became final, his sixth PCRA Petition is clearly untimely, unless Appellant proves one of the three exceptions enumerated in 42 Pa. C. S. §9545(b)(1) applies.

In his sixth PCRA Petition, Appellant failed to argue successfully any of the three (3) timeliness exceptions to the filing requirement, pursuant to 42 Pa. C. S. §9545(b)(1). As initially raised in his sixth PCRA Petition, Appellant again argues the sentencing judge, i.e. Judge Michael T. Joyce, had no statutory authority to impose mandatory minimum and weapon-enhanced sentences upon Appellant as the sentencing guidelines at the time of Appellant's sentence were suspended. Although Appellant vehemently argues his sentence is illegal and unconstitutional in light of the sentencing guidelines being suspended at the

time Appellant's sentence was imposed, this Trial Court properly dismissed Appellant's sixth PCRA as this Trial Court was without jurisdiction to grant the relief requested. When a petitioner files an untimely PCRA Petition raising a legality-of-sentence claim, the claim is not waived, **but the jurisdictional limits of the PCRA itself render the claim incapable of review.** *Commonwealth v. Jones,* 932 A.2d 179, 182 (Pa. Super. 2007) [emphasis added]. Appellant's failure to argue successfully any of three (3) timeliness exceptions to the filing requirement, pursuant to 42 Pa. C. S. §9545(b)(1), apply to his sixth PCRA Petition rendered this Trial Court incapable of reviewing Appellant's arguments; therefore, this Trial Court properly dismissed Appellant's sixth PCRA Petition as patently untimely.

As originally raised in his sixth PCRA Petition and more thoroughly pursued in his "Concise Statement of Reasons Complained of on Appeal 42 Pa. R. A. P. 1925(b)," Appellant alleges the lack of timeliness is attributable to the "ineffective assistance of counsel," in violation of Appellant's sixth Amendment rights under the United States Constitution. In order to prevail on a claim of ineffective assistance of counsel, a petitioner must overcome the presumption that counsel is effective by establishing all of the following three elements, as set forth in *Commonwealth v. Pierce,* 515 Pa. 153, 527 A.2d 973, 975-76 (Pa. 1987): (1) the underlying legal claim has arguable merit; (2) counsel had no reasonable basis for his or her action or inaction; and (3) the petitioner suffered prejudice because of counsel's ineffectiveness. See *Commonwealth v. Chmiel,* 30 A.3d 1111, 1127 (Pa. 2011). However, although Appellant argues "Counsel's ineffectiveness is a bar from being denied collateral relief based on the time limitations of the P.C.R.A," a claim for ineffective assistance of counsel **does not save an otherwise untimely petition for review on the merits.** *Commonwealth v. Gamboa-Taylor,* 753 A.2d 780, 785 (Pa. 2000) [emphasis added]; *see Commonwealth v. Lark,* 746 A.2d 585, 589-90 (Pa. 2000) (holding that couching argument in terms of ineffectiveness cannot save a petition that does not fall into exception to jurisdictional time bar). As stated above, Appellant failed to argue successfully any of three (3) timeliness exceptions to the filing requirement, pursuant to 42 Pa. C. S. §9545(b)(1), applied to his sixth PCRA Petition; therefore, contrary to Appellant's belief, a claim of ineffective assistance of counsel does not overcome the PCRA's timeliness requirements. This Trial Court properly dismissed Appellant's sixth PCRA Petition as patently untimely.

Although not specifically addressed in his "Concise Statement of reasons Complained of on Appeal 42 Pa. R. A. P. 1925(b)," Appellant, in his sixth PCRA Petition, also raised a claim that the sentencing judge, not the jury, applied the sentencing and weapon enhancements and, therefore, the United States Supreme Court's holding in *Alleyne v. United States*, 133 S. Ct. 2151 (2013) was violated and Appellant's sentence must be vacated. Appellant further argued the holding in *Alleyne* constitutes after-discovered evidence. However, Appellant's argument fails for two separate reasons. First, Pennsylvania courts have expressly rejected the notion that judicial decisions can be considered newly-discovered facts, as a judicial opinion does not qualify as a previously unknown "fact" capable of triggering the newly-discovered fact exception. *See Commonwealth v. Cintora,* 69 A.3d 759, 763 (Pa. Super. 2013); *see also Commonwealth v. Brandon,* 51 A.3d 231, 235 (Pa. Super. 2012). In addition, neither the Pennsylvania Supreme Court nor the United States Supreme Court has held that *Alleyne* is to be applied retroactively to cases in which the judgment of sentence had become final. *See Commonwealth v. Miller,* 102 A.3d 988, 995 (Pa. Super 2014). Therefore,

this Trial Court properly dismissed Appellant's sixth PCRA Petition regarding Appellant's allegations of an *Alleyne* violation.

Finally, Appellant was to adhere to the requirements of *Commonwealth v. Lawson*, 549 A.2d 107 (Pa. 1988), as this is Appellant's sixth PCRA Petition. Appellant's arguments, more thoroughly addressed above, fail to raise a strong *prima facie* case to demonstrate either the proceedings resulting in Appellant's conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate, or Appellant is innocent of the crimes charged. As Appellant has failed to meet the *Lawson* standard for second or subsequent PCRA Petitions, this Trial Court properly dismissed Appellant's sixth PCRA Petition.

Conclusion

For all of the foregoing reasons, this Trial Court concludes the instant appeal is without merit and respectfully requests the Pennsylvania Superior Court affirm its Order dated November 20th, 2015.

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

COMMONWEALTH OF PENNSYLVANIA
v.
LARRY TROOP

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION NO. 1235 OF 1988 NO. 1076 OF 1988

Appearance: D. Robert Marion, Jr., Esq., Attorney for Appellee
Larry Troop, *Pro Se*, Appellant

OPINION

Domitrovich, J., February 16th, 2016

The instant matter is currently before the Pennsylvania Superior Court on the Appeal of Larry Troop (hereafter referred to as "Appellant") from this Trial Court's Opinion and Order dated November 20th, 2015, whereby this Trial Court dismissed Appellant's sixth (6th) Motion for Post-Conviction Collateral Relief and/or Petition to Set Aside/Modify Unlawful Sentencing Order (hereafter referred to as "PCRA Petition"). In his sixth PCRA Petition, Appellant argued (1) the sentencing judge had no authority to impose Appellant's current sentence of incarceration as the sentencing guidelines and mandatory sentences applied to Appellant's case were suspended; (2) any timeliness issues were attributable to the ineffective assistance of counsel; and (3) the sentencing judge, not the jury, imposed the sentencing and weapon enhancements to Appellant's sentence in violation of *Alleyne v. United States,* 133 S. Ct. 2151 (2013). This Trial Court dismissed Appellant's sixth PCRA Petition as patently untimely since he filed his sixth PCRA Petition twenty-four (24) years after Appellant's judgment of sentence became final, and Appellant failed to argue successfully any of the three (3) timeliness exceptions pursuant to 42 Pa. C. S. §9545(b)(1). Furthermore, assuming *arguendo* Appellant would have filed his sixth PCRA Petition in a timely fashion, this Trial Court properly concluded Appellant would not be entitled to any relief as (1) Appellant failed to sufficiently prove the three elements for ineffective assistance of counsel, i.e. the underlying legal claim has arguable merit; counsel had no reasonable basis for his or her action or inaction; and Appellant suffered prejudice because of counsel's ineffectiveness, and (2) the holding in *Alleyne v. United States* cannot be considered a "newly-discovered fact" in order to raise the newly-discovered evidence timeliness exception pursuant to 42 Pa. C. S. §9545(b)(1)(ii).

Factual and Procedural History

At docket no. 1076 – 1988, Appellant was found guilty by a jury on November 18th, 1988 of Count 1 – Robbery, in violation of 18 Pa. C. S. §3701(a); Count 2 – Theft by Unlawful Taking or Disposition, in violation of 18 Pa. C. S. §3921; Count 3 – Receiving Stolen Property, in violation of 18 Pa. C. S. §3925; Count 4 - Criminal Conspiracy/Robbery, in violation of 18 Pa. C. S. §903(a)(1); Count 6 – Robbery, in violation of 18 Pa. C. S. §3701(a); Count 7 - Theft by Unlawful Taking or Disposition, in violation of 18 Pa. C. S. §3921; Count 8 - Receiving Stolen Property, in violation of 18 Pa. C. S. §3925; and Count 9 - Criminal Conspiracy/Robbery, in violation of 18 Pa. C. S. §903(a)(1). At docket no. 1235 – 1988, Appellant was found guilty by a jury on November 18th, 1988 of Count 1 – Robbery, in violation of 18 Pa. C. S. §3701(a); Count 4 – Theft by Unlawful Taking or Disposition, in

violation of 18 Pa. C. S. §3921; Count 5 – Receiving Stolen Property, in violation of 18 Pa. C. S. §3925; and Count 6 - Criminal Conspiracy/Robbery, in violation of 18 Pa. C. S. §903(a)(1). Thereafter, on January 9th, 1989, Appellant was sentenced by Judge Michael T. Joyce as follows:

- At docket no. 1076 – 1988:
  - Count 1: Eighty-four (84) to one hundred sixty-eight (168) months state incarceration consecutive to the sentence imposed at docket no. 97 – 1988;
  - Counts 2 & 3 merged with Count 1 for sentencing purposes;
  - Count 4: Twelve (12) to twenty-four (24) months state incarceration consecutive to Count 1;
  - Count 6: Sixty (60) to one hundred twenty (120) months state incarceration consecutive to Count 4;
  - Counts 7 & 8 merged with Count 6 for sentencing purposes; and
  - Count 9: Twelve (12) to twenty-four (24) months state incarceration consecutive to Count 6.
- At docket no. 1235 – 1988:
  - Count 1: Sixty (60) to one hundred twenty (120) months state incarceration consecutive to Count 9 of docket no. 1076 – 1998
  - Counts 4 & 5 merged with Count 1 for sentencing purposes; and
  - Count 6: Twelve (12) to twenty-four (24) months state incarceration consecutive to Count 1.

On January 23rd, 1989, Appellant, by and through his counsel, David G. Ridge, Esq., filed a Motion for Reconsideration of Sentence. On February 3rd, 1989, Appellant filed a Notice of Appeal to the Pennsylvania Superior Court. On March 20th, 1989, Judge Joyce denied Appellant's Motion for Reconsideration of Sentence. On April 20th, 1989, Appellant pled guilty at docket no. 1235 – 1988 to Count 7 – Former Convict not to Own a Firearm, in violation of 18 Pa. C. S. §6105, and was sentenced to one (1) to two (2) years state incarceration concurrent to Count 6 at docket no. 1235 – 1988. On March 9th, 1990, the Pennsylvania Superior Court affirmed the Judgment of Sentence. On December 31st, 1990, the Pennsylvania Supreme Court denied Appellant's Petition for Allowance of Appeal.

Appellant filed his first PCRA Petition on June 14th, 1993. Appellant filed an Amended PCRA Petition on February 10th, 1994. On April 6th, 1994, William J. Hathaway, Esq., was appointed as Appellant's counsel. Attorney Hathaway filed an Amended PCRA Petition on November 6th, 1995. Appellant filed a Supplement to Counsel's Amended PCRA Petition on December 14th, 1995. On June 13th, 1996, Judge Joyce denied Appellant's first PCRA Petition. Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on July 12th, 1996, and the Pennsylvania Superior Court affirmed Judge Joyce's denial of Appellant's first PCRA Petition on March 12th, 1997.

Appellant, *pro se,* filed his second PCRA Petition in September of 1997. Judge Joyce denied Appellant's second PCRA Petition on December 30th, 1997. Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on January 16th, 1998. Sue A. Pfadt, Esq., was appointed as Appellant's appellate counsel on April 1st, 1998, and the Pennsylvania Superior Court affirmed Judge Joyce's denial of Appellant's second PCRA Petition on September 7th, 1999.

Appellant, *pro se*, filed an "Application for Leave of Court to File Supplemental/Amended Motion for New Trial After-Discovered Evidence," *pro se*, in March of 2000. This Trial Court denied Appellant's "Application for Leave of Court to File Supplemental/Amended Motion for New Trial After-Discovered Evidence" on April 12th, 2000. Appellant filed a *pro se* Notice of Appeal to the Pennsylvania Superior Court on May 4th, 2000, and the Pennsylvania Superior Court affirmed this Trial Court's denial of Appellant's "Application for Leave of Court to File Supplemental/Amended Motion for New Trial After-Discovered Evidence" on February 26th, 2001.

Appellant filed his third PCRA Petition, by and through his counsel, William J. Hathaway, Esq., on August 26th, 2004. This Trial Court denied Appellant's third PCRA Petition on February 23rd, 2005. Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on March 17th, 2005, and the Pennsylvania Superior Court affirmed this Trial Court's denial of Appellant's third PCRA Petition on September 15th, 2005.

Appellant, *pro se*, filed his fourth PCRA Petition on May 12th, 2009. This Trial Court denied Appellant's fourth PCRA Petition on August 18th, 2009. Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on September 11th, 2009, and the Pennsylvania Superior Court affirmed this Trial Court's denial of Appellant's fourth PCRA Petition on April 9th, 2010.

Appellant, *pro se,* filed a "Motion to Vacate Illegal Sentence" on December 28th, 2011, which this Trial Court treated as Appellant's fifth PCRA Petition. This Trial Court denied Appellant's fifth PCRA Petition on March 5th, 2012.

Appellant, *pro se,* filed a "Petition for Writ of *Habeas Corpus*" with Judge Ernest J. DiSantis, Jr. on March 14th, 2012. Judge DiSantis denied Appellant's "Petition for Writ of *Habeas Corpus*" on March 15th, 2012. Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on April 13th, 2012, and the Pennsylvania Superior Court affirmed Judge DiSantis' denial of Appellant's "Petition for Writ of *Habeas Corpus*" on January 18th, 2013.

Appellant filed the instant PCRA Petition, his sixth, by and through his counsel, John E. Cooper, Esq., on June 16th, 2015. By Order dated July 10th, 2015, this Trial Court directed the Commonwealth to respond to Appellant's sixth PCRA Petition within thirty (30) days. The Commonwealth filed its Brief in Opposition to Appellant's sixth PCRA Petition on July 28th, 2015. On October 28th, 2015, this Trial Court notified Appellant of its intention to dismiss his sixth PCRA Petition, and Appellant was permitted twenty (20) days to file any Objections. On November 20th, 2015, and with no Objections filed by Appellant or his counsel, this Trial Court dismissed Appellant's sixth PCRA Petition.

On December 21st, 2015, Appellant, by and through his counsel, John E. Cooper, Esq.,[1] filed a Notice of Appeal. This Trial Court filed its 1925(b) Order on December 22nd, 2015. Appellant filed his "Concise Statement of Reasons Complained of on Appeal 42 Pa. R. A. P. 1925(b)" on January 6th, 2016.

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[1] This Trial Court notes that, although John E. Cooper, Esq., did file Appellant's Notice of Appeal to the Pennsylvania Superior Court, Appellant now is proceeding pro se as indicated on the Superior Court docket (2021 WDA 2015).

Legal Argument

1. **This Trial Court properly dismissed Appellant's sixth PCRA Petition as it is patently untimely and fails to argue successfully any of the timeliness exceptions pursuant to 42 Pa. C. S. §9545(b)(1).**

A PCRA petition must be filed within one year of the date the judgment becomes final unless the petition alleges and the petitioner proves one of the following exceptions applies:

(i) The failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) The right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa. C. S. §9545(b)(1)(i)-(iii). Any PCRA Petition invoking any of the above exceptions to the timeliness requirement must be filed within sixty (60) days of the date the claim could have been presented. *42 Pa. C. S. §9545(b)(2).* The Pennsylvania Supreme Court has stated the statute makes clear that where, as here, a PCRA Petition is untimely, petitioner carries the burden to plead and prove in his Petition that one of the exceptions of 42 Pa. C. S. §9545(b)(1) applies. *See Commonwealth v. Beasley,* 741 A.2d 1258, 1261 (Pa. 1999). "That burden necessarily entails an acknowledgment by the petitioner that the PCRA Petition under review is untimely but that one or more of the exceptions apply." *Id*. Petitioner is to allege and prove in his Petition that he falls within one of the exceptions found in 42 Pa. C. S. §9545(b)(1)(i)-(iii). *See Commonwealth v. Holmes*, 905 A.2d 507, 511 (Pa. Super. 2006). As the PCRA's timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA Petition that is filed in an untimely manner. *See Commonwealth v. Taylor,* 933 A.2d 1035, 1042-43 (Pa. Super. Ct. 2007).

Additionally, as the instant PCRA Petition is Appellant's sixth PCRA Petition, Appellant is also required to comply with the mandates of *Commonwealth v. Lawson*, 549 A.2d 107, 112 (Pa. 1988) and its progeny. *See Commonwealth v. Palmer,* 814 A.2d 700, 709 (Pa. Super. 2002). As part of its holding in *Palmer*, the Pennsylvania Superior Court stated:

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Id. at 709, footnote 18 [emphasis added].

Regarding the instant PCRA Petition, pursuant to 42 Pa. C. S. §9545(b)(3), Appellant's judgment of sentence became final on April 18th, 1990, when the Pennsylvania Supreme Court denied Appellant's Petition for Allowance of Appeal to the Pennsylvania Supreme Court. Therefore, Appellant could have filed a timely PCRA Petition on or before April 18th, 1991, one year after Appellant's judgment of sentence became final. As Appellant now has filed his sixth PCRA Petition nearly twenty-four (24) years after his judgment of sentence became final, his sixth PCRA Petition is clearly untimely, unless Appellant proves one of the three exceptions enumerated in 42 Pa. C. S. §9545(b)(1) applies.

In his sixth PCRA Petition, Appellant failed to argue successfully any of the three (3) timeliness exceptions to the filing requirement, pursuant to 42 Pa. C. S. §9545(b)(1). As initially raised in his sixth PCRA Petition, Appellant again argues the sentencing judge, i.e. Judge Michael T. Joyce, had no statutory authority to impose mandatory minimum and weapon-enhanced sentences upon Appellant as the sentencing guidelines at the time of Appellant's sentence were suspended. Although Appellant vehemently argues his sentence is illegal and unconstitutional in light of the sentencing guidelines being suspended at the time Appellant's sentence was imposed, this Trial Court properly dismissed Appellant's sixth PCRA as this Trial Court was without jurisdiction to grant the relief requested. When a petitioner files an untimely PCRA Petition raising a legality-of-sentence claim, the claim is not waived, **but the jurisdictional limits of the PCRA itself render the claim incapable of review**. *Commonwealth v. Jones,* 932 A.2d 179, 182 (Pa. Super. 2007) [emphasis added]. Appellant's failure to argue successfully any of three (3) timeliness exceptions to the filing requirement, pursuant to 42 Pa. C. S. §9545(b)(1), apply to his sixth PCRA Petition rendered this Trial Court incapable of reviewing Appellant's arguments; therefore, this Trial Court properly dismissed Appellant's sixth PCRA Petition as patently untimely.

As originally raised in his sixth PCRA Petition and more thoroughly pursued in his "Concise Statement of Reasons Complained of on Appeal 42 Pa. R. A. P. 1925(b)," Appellant alleges the lack of timeliness is attributable to the "ineffective assistance of counsel," in violation of Appellant's sixth Amendment rights under the United States Constitution. In order to prevail on a claim of ineffective assistance of counsel, a petitioner must overcome the presumption that counsel is effective by establishing all of the following three elements, as set forth in *Commonwealth v. Pierce,* 515 Pa. 153, 527 A.2d 973, 975-76 (Pa. 1987): (1) the underlying legal claim has arguable merit; (2) counsel had no reasonable basis for his or her action or inaction; and (3) the petitioner suffered prejudice because of counsel's ineffectiveness. *See Commonwealth v. Chmiel,* 30 A.3d 1111, 1127 (Pa. 2011). However, although Appellant argues "Counsel's ineffectiveness is a bar from being denied collateral relief based on the time limitations of the P.C.R.A," a claim for ineffective assistance of counsel **does not save an otherwise untimely petition for review on the merits.** *Commonwealth v. Gamboa-Taylor,* 753 A.2d 780, 785 (Pa. 2000) [emphasis added]; *see Commonwealth v. Lark,* 746 A.2d 585, 589-90 (Pa. 2000) (holding that couching argument in terms of ineffectiveness cannot save a petition that does not fall into exception to jurisdictional time bar). As stated above, Appellant failed to argue successfully any of three (3) timeliness exceptions to the filing requirement, pursuant to 42 Pa. C. S. §9545(b)(1), applied to his sixth PCRA Petition; therefore, contrary to Appellant's belief, a claim of ineffective assistance of counsel does

not overcome the PCRA's timeliness requirements. This Trial Court properly dismissed Appellant's sixth PCRA Petition as patently untimely.

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Finally, Appellant was to adhere to the requirements of *Commonwealth v. Lawson*, 549 A.2d 107 (Pa. 1988), as this is Appellant's sixth PCRA Petition. Appellant's arguments, more thoroughly addressed above, fail to raise a strong *prima facie* case to demonstrate either the proceedings resulting in Appellant's conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate, or Appellant is innocent of the crimes charged. As Appellant has failed to meet the *Lawson* standard for second or subsequent PCRA Petitions, this Trial Court properly dismissed Appellant's sixth PCRA Petition.

Conclusion

For all of the foregoing reasons, this Trial Court concludes the instant appeal is without merit and respectfully requests the Pennsylvania Superior Court affirm its Order dated November 20th, 2015.

BY THE COURT
/s/ **Stephanie Domitrovich, 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.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 12667 OF 2013

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.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 12191 OF 2014

Appearances: David L. Hunter, Esquire for the Plaintiff
Frances J. Klemensic, Esquire for the Defendants

SPOLIATION OF EVIDENCE / MEDICAL MALPRACTICE

While a party is free to undertake investigatory work without notice to any other party, there are unnecessary risks created when the party secures an order authorizing an autopsy from a judge other than the presiding judge, who ruled on all pretrial matters. That risk is compounded when a party performs the autopsy in secret after the close of discovery without notice to any other party. The risk taken in this case resulted in the preclusion of evidence of the autopsy by the offending party.

"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).

An autopsy performed without notice to any other party results in the spoliation of evidence because it precludes any other party from observing the original and best evidence of the decedent before the disruption caused by the autopsy. Spoliation is exacerbated when a party removes an organ which is central to the issues presented in pending and/or future medical malpractice litigation.

Requiring any defense expert to form an opinion by accepting as true the methods and conclusions of the Plaintiffs' expert is fundamentally unfair because it places the defense expert in an inherently subordinate position.

The degree of fault, the form of prejudice and the availability of lesser sanctions should be considered in determining the appropriate sanction for the spoliation of evidence.

Because the unilateral actions of the Plaintiff created a decided advantage for their expert, the appropriate sanction is to remove the advantage and level the playing field by precluding the Plaintiff from calling the pathologist as a witness.

OPINION

Cunningham, J., July 20, 2016

The present matter is a Motion for Sanctions filed by the Defendants. After an evidentiary hearing, it is hereby **ORDERED** no evidence obtained from the autopsy conducted by Dr. Cyril Wecht on July 24, 2014 shall be admitted at trial by the Plaintiffs at Docket Number 12667 of 2013 or Docket Number 12191 of 2014.

BACKGROUND

On August 4, 2012, Kent Pattison presented to UPMC Hamot Medical Center ("Hamot") with atypical chest pain and was admitted for additional testing. An endoscopic exploratory surgery was conducted on August 6, 2012 and Mr. Pattison was cleared for further surgery.

On August 9, 2012, Lauren Donatelli-Seyler, D.O. ("Dr. Donatelli-Seyler") performed a laparoscopic cholecystectomy at Hamot to remove Mr. Pattison's gallbladder. By Dr. Donatelli-Seyler's own description, the dissection of the gallbladder was "extremely difficult" and the area around the gallbladder, specifically the cystic duct and artery, was "extremely fibrosed."

Postoperatively, Mr. Pattison developed extensive complications. After a number of tests, Mr. Pattison was returned to the operating room for Dr. Malaspina to perform an exploratory laparotomy. Mr. Pattison continued to experience post-operative complications and died on August 12, 2012 at 3:20 a.m. No autopsy was performed and Mr. Pattison was buried on August 15, 2012.

On September 17, 2013, Judy Pattison, individually and as Administratrix of the Estate of Kent Pattison (the "Plaintiffs") filed a Complaint against Hamot, Dr. Donatelli-Seyler, and Great Lakes Surgical Associates, Inc. (together, the "Defendants") alleging medical malpractice. The Plaintiffs claim Dr. Donatelli-Seyler damaged Mr. Pattison's common bile duct during laparoscopic surgery causing a bile leak and failed to transition to an open procedure to assess the leak, leading to peritonitis and death.

The Defendants filed Preliminary Objections on October 2, 2013. After oral argument, the Preliminary Objections were overruled. On January 6, 2014, the Defendants filed an Answer and New Matter. Discovery commenced and a number of depositions were completed, including that of Dr. Donatelli-Seyler and Dr. Malaspina. Discovery closed on July 2, 2014.

On July 17, 2014, without notice to the Defendants, the Plaintiffs presented a Motion in Orphans' Court seeking to exhume the body of Kent Pattison (hereafter, the "Decedent") to perform an autopsy. The Plaintiffs' Motion was granted by Order of the Honorable Judge Robert Sambroak dated July 17, 2014. The Decedent was exhumed by the Plaintiffs on July 24, 2014. Cyril Wecht, M.D. performed an autopsy and removed certain portions of the Decedent's anatomy. The Decedent was reburied the same day.

As a result of the findings of Dr. Wecht's autopsy, the Plaintiffs filed a Complaint on August 7, 2014, initiating a second lawsuit against the Defendants at Docket Number 12191 of 2014 and adding Paul J. Malaspina, M.D. as a defendant. The first notice the Defendants had of the Wecht autopsy was email correspondence dated August 3, 2014 informing them of the intent to file the second action.

In the second action the Plaintiffs changed the theory of negligence based on information gleaned from the Wecht autopsy. Rather than alleging Dr. Donatelli-Seyler lacerated the common bile duct during surgery and then failed to transition to an open procedure to assess

the leak, the Plaintiffs assert the hepatic duct was lacerated during surgery. The Plaintiffs further aver Dr. Malaspina ignored the patient's clinical changes and failed to address the bile leak in a timely manner. The Plaintiffs also claim the nurses were dilatory in notifying the attending doctor(s) of the rapidly declining condition of the Decedent.

The Defendants filed a Motion for Sanctions against the Plaintiffs in both cases on September 15, 2014 because of the lack of notice of the autopsy and alleged spoliation caused by the permanent alterations to the Decedent.

After discovery on the issue and oral argument, the Motion for Sanctions was denied on November 24, 2014 without prejudice. The Court found the possibility of spoliation existed because notice was not provided to the Defendants, but there remained a factual dispute as to the ability of the Defendants to conduct a similar investigation through a second autopsy.

On January 20, 2015, the Defendants filed a Petition for the Exhumation and Autopsy of the Remains of Kent Pattison. The Petition was granted on January 21, 2015 and the Defendants were given permission to exhume the Decedent as well as reasonable access to any portions of his body that were removed at the first autopsy. William Manion, M.D. conducted the second autopsy.

On July 27, 2015, the Defendants filed a second Motion for Sanctions, along with Dr. Manion's report, claiming their ability to defend against the current action has been irrevocably impaired because the Decedent's remains have been permanently and significantly altered by Dr. Wecht's July 24, 2014 autopsy. The Plaintiffs filed an Answer on August 17, 2015. On September 1, 2015, the Motion was held in abeyance until December 1, 2015 to allow for the continuation of discovery. An evidentiary hearing was held March 1, 2016 on the Defendants' Motion for Sanctions. Dr. Wecht testified in support of the Plaintiffs' position and Dr. Manion testified on behalf of the Defendants. The parties subsequently filed proposed findings of fact and conclusions of law.

DISCUSSION

A. Significant Alteration of the Decedent's Body Prejudiced the Defendants

"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). In these cases, the Decedent's corpse is perhaps the most important piece of evidence. It is undisputed Dr. Cyril Wecht conducted an autopsy of the Decedent on July 24, 2014 on behalf of the Plaintiffs without notice to the Defendants.

Dr. Wecht began his autopsy with an external examination. *Motion for Sanctions Hearing Transcript, March 1, 2016 ("H.T.") p. 94.* He noted the post mortem burial procedures that occurred, such as the addition of embalming fluid, sawdust and cosmetic alterations. *H.T. pp. 94-95.* Dr. Wecht then considered external evidence of past surgical procedures. *H.T. p. 95.* The Decedent's body had a 30 centimeter vertical midline surgical incision in his gastric region along with other older surgical scars. *H.T. pp. 95-96.*

Dr. Wecht then proceeded with the internal examination, beginning with the brain. *H.T. p. 96.* Dr. Wecht used the Virchow method in conducting the autopsy. *H.T. p. 100.* This method involves visualizing the organs within the anatomy as a whole, removing each in turn. He next weighed, measured, palpated and serially sectioned the organs in different ways. *H.T. p. 100.* Each organ was sectioned on the dissection table differently depending on its shape and the nature of the organ. *H.T. p. 101.* After using this method to examine the

brain, Dr. Wecht moved to the abdomen. *H.T. pp. 96-97.* Dr. Wecht made a standard Y-shaped thoracoabdominal incision, reflected the soft tissue and removed the sternum and breastbone to expose the abdominal and chest organs. *H.T. p. 97.* After removing the plastic drainage tubes, plastic sheeting and a green sponge-like material found in the abdominal cavity, Dr. Wecht conducted the same procedure of observing, removing, weighing, examining and dissecting each organ in the gastrointestinal tract and abdominal cavity. *H.T. pp. 98-102.* As the gallbladder had been removed premortem, Dr. Wecht made observations about the area in which the gallbladder would have been found. *H.T. p. 103.*

Dr. Wecht deviated from the Virchow method when dealing with the liver and instead removed it *en bloc* using a modified Rokitansky method. *H.T. p. 104.* Dr. Wecht also chose not to engage in the serial sectioning he would ordinarily do. *H.T. p. 105*. Had he chosen to typically section it, the liver would have been so mangled that "the greatest anatomic surgeon in the world would not be able to put anything together." *H.T. pp. 104-105*.

Despite this precaution, the fact is Dr. Wecht significantly altered the Decedent's body for purposes of this case. The autopsy and removal of the liver *en bloc,* all unbeknownst to the Defendants, meant the Defendants lost the opportunity to observe the Decedent's anatomy in its native position *in situ* and the operative field *in situ*. The unilateral decision by Dr. Wecht to remove the liver, while well-intended, is at the crux of the problem created by the lack of notice in this case because it eliminated any opportunity for any defense expert to do an independent examination of the Decedent and make separate professional opinions based on actual observations rather than rely on the conclusions of Dr. Wecht. A defense expert may have differed with Dr. Wecht as to the chosen methodology or what areas to observe, photograph, section, dissect and/or remove. It is entirely possible that had a defense expert participated in the first autopsy, the defense expert's inspections and observations may have led to different conclusions than Dr. Wecht.

The Plaintiffs argue the Defendants have not been prejudiced because the liver still can be examined in its original state by a defense expert. This argument is unpersuasive. The liver is no longer in its original state now that it has been removed from the body. Further, no one was there from the defense to observe what Dr. Wecht did or did not do to the original anatomy before or during the removal of the liver. By Dr. Wecht's own admission, any time the anatomy is touched or dissected, change occurs. *H.T. p. 118*. In addition, the Decedent's liver had been stored in a plastic bag for some nine months before being shipped to Dr. Manion. The possibility of change(s) to the liver during storage and/or the shipping process cannot be ignored given the delicate nature of the questions raised in these cases.[1]

Plaintiffs' argument also overlooks the relationship between the liver, gallbladder, pancreas, intestines and connecting ducts.

Prior to the Decedent's death, his gallbladder, which stores bile created in the liver, was removed. Bile is transported to and from the gallbladder through the common hepatic duct and common bile duct, which are connected to the gallbladder by the cystic duct. The hepatic duct is integrally connected to the liver and the left and right hepatic ducts are positioned within the liver. The common bile duct begins at the intersection of the common hepatic

[1] Nothing within this Opinion/Order constitutes an indictment or criticism of the methodology or conclusions of Dr. Wecht in his autopsy.

duct and the cystic duct and transports bile stored in the gallbladder down to the pancreas and small intestine.

Given the proximity of the liver, gallbladder, pancreas, intestines and connecting ducts in the context of what is at issue in these cases, it is imperative that a pathologist observe all of these organs and ducts *in situ* to determine the unique nature of what occurred to the Decedent because of his medical treatment. Dr. Manion had difficulty even orienting the liver parts removed by Dr. Wecht. *H.T. p. 71.* Dr. Manion was not able to section the hepatic duct to determine if and/or when it was lacerated. *H.T. pp. 71-72.* These impediments were the direct result of the exclusion of a defense pathologist from the first autopsy.

The Plaintiffs also contend that even if the autopsy resulted in significant alteration, there is no prejudice to the Defendants because any laceration to the Decedent is easily distinguishable as premortem or postmortem. This argument misses the greater context of these cases.

At issue in these cases is whether Dr. Donatelli-Seyler negligently damaged the common bile duct or whether Dr. Malaspina lacerated the hepatic duct. The Plaintiffs also claim the Defendants failed to discover the cause of the bile leak and treat it appropriately. Thus, the prejudice caused by the Wecht autopsy is not limited to whether certain lacerations are premortem or postmortem. Instead, the issues are more global and require an examination of the undisturbed abdominal cavity as a whole to investigate the medical decisions made during and after the two surgeries performed on the Decedent.

The best investigatory technique is to observe firsthand the native placement and status of the anatomical structures within the Decedent's abdominal cavity. To adequately conduct a thorough investigation, a pathologist must view the same area *in situ* as observed by Dr. Wecht. Without this opportunity, there is not a level playing field.

Nearly all medical malpractice cases involve a battle between the views of opposing experts. Hence, the credibility of a party's expert is crucial.

The Plaintiffs' unilateral actions have created a decided advantage for the credibility of Dr. Wecht versus the credibility of any defense pathologist. One of the main factors in determining the credibility of an expert is the basis for the opinion rendered. While subsequent autopsies are possible, the Plaintiffs created a singular and exclusive benefit for Dr. Wecht of examining unaltered evidence. No other pathologist can be similarly situated to the benefit afforded Dr. Wecht.

Inherent in the Plaintiffs' argument is the subordinate position of the defense expert who was foreclosed by the Plaintiffs from rendering an opinion based on observations of the original evidence and who is left to bolster the credibility of Dr. Wecht by relying on his findings to render an opinion for the defense. These circumstances are untenable and fundamentally unfair to the Defendants.

Hence, by exhuming the Decedent and conducting an autopsy without notice to the Defendants, the Plaintiffs have seriously impeded the ability of the Defendants to present a defense.

B. Sanctions

In determining the proper response to the spoliation of evidence, the Pennsylvania Supreme Court has identified three relevant factors to be considered, including "(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by

the opposing party, and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct." *Gicking v. Joyce Int'l, Inc.*, 719 A.2d 357, 358 (Pa. Super. 1998) *citing Schroeder v. Department of Transportation*, 710 A.2d 23, 26 (Pa. 1998).

Evaluation of the first prong requires consideration of the extent of the offending party's responsibility, and whether the offending party acted in bad faith. *Creazzo v. Medtronic, Inc.*,903 A.2d 24, 29 (Pa. Super. 2006).The offending party is responsible if it (1) "knows that litigation against the defendants is pending or likely; and (2) it is foreseeable that [altering] the evidence would be prejudicial to the defendants." *Id.*

The Plaintiffs clearly knew litigation related to the Decedent was pending as the Plaintiffs initiated it. The Plaintiffs knew the importance of the evidence in question and that an autopsy could result in alteration of that evidence, even if significant alteration was unintended. The possible prejudice to the Defendants was foreseeable by the Plaintiffs.

The Plaintiffs did not seek the approval for the first autopsy from this Court despite the fact this Court, as the assigned judge, presided over all matters presented in the first case filed by the Plaintiffs. Instead, without notice to anyone, the Plaintiffs went to Orphan's Court and received an order from a judge who was not assigned to this case. This action was beyond the discovery deadline in the first case and the Defendants would have no reason to suspect the exhumation. Judge Sambroak's Order was dated July 17, 2014 but was not filed until August 4, 2014 after the Wecht autopsy on July 24, 2014. All of this conduct manifested the Plaintiffs' intent to keep the Defendants in the dark about the autopsy. In so doing, the Plaintiffs unnecessarily placed the Defendants at a distinct disadvantage.

The resulting prejudice to the Defendants is irreversible. While the evidence has not been lost or utterly destroyed, as is frequently the case for spoliation, the Defendants' ability to conduct a full and independent autopsy has been limited to examination of the anatomy as altered or removed during the Wecht autopsy. The Defendants were denied the opportunity to examine the evidence in its original unaltered state. These circumstances were easily avoidable had the Plaintiffs put the Defendants on notice of the autopsy such that Dr. Manion, or any other defense expert, could have participated side by side with Dr. Wecht in the first autopsy.

The final consideration is the availability of a lesser sanction that will protect the opposing party's rights and deter similar conduct. Potential remedies for spoliation range from allowing the jury to apply its common sense and draw an "adverse inference" against that party to summary judgment in the cases of egregious conduct. *Creazzo*, 903 A.2d at 29. The sanction must be specifically tailored to the unique factual circumstances and to remedy the prejudice inflicted. In this case, the appropriate remedy lies between these two extremes.

Upon consideration of the severity of the actions by the Plaintiffs, the importance of the evidence, and the technical nature of the case, a jury instruction is not a helpful remedy. The Plaintiffs' actions have created an unfair advantage to Dr. Wecht. To proceed to trial with the Defendants' expert unable to fully examine critical evidence in its original position/condition is prejudicial. The proper step is to eliminate that difference and allow the parties to proceed on equal footing. The appropriate course is to preclude the introduction of evidence by the Plaintiffs obtained from the Wecht autopsy at Docket Number 12667 of 2013 and Docket Number 12191 of 2014. However, this does not prevent the Plaintiffs from retaining another

pathology expert to examine the Decedent's remains and/or any notes created by Dr. Wecht during the first autopsy.

This sanction levels the field and places both parties on equal footing going forward.

CONCLUSIONS

The autopsy conducted on July 24, 2014 by Dr. Cyril Wecht significantly altered the Decedent's body and resulted in substantial prejudice to the Defendants. Thus, no evidence related to that autopsy shall be admitted by the Plaintiffs at trial at Docket Number 12667 of 2013 or Docket Number 12191 of 2014.

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

GERALD T. UHT, SR., PLAINTIFF
v.
AIMEE BAUMANN AND LAWRENCE BAUMANN, DEFENDANTS

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 13045 OF 2014

APPEARANCES: Robert C. LeSuer, Esquire for the Plaintiff
Arthur D. Martinucci, Esquire for the Defendants

SUMMARY JUDGMENT / STATUTORY INTERPRETATION

Summary judgment is appropriate when all of the relevant facts are not in dispute.

When there are conflicting provisions between the Judicial Code and the Uniform Commercial Code, the latter prevails. Therefore, the applicable statute of limitations for the enforcement of the negotiable instrument in this case is found in the UCC.

The UCC statute of limitations bars the enforcement of the terms of a negotiable instrument payable on demand commenced more than six years after a demand is made or more than ten years after the execution of the negotiable instrument if no demand or payment is made.

The acknowledgment doctrine can toll or remove the bar of the statute of limitations for all "clear, distinct, and unequivocal" promises to pay a debt created by a negotiable instrument.

Two handwritten notes unequivocally expressing an intent to repay the principal debt in full, accompanied by four payments, all occurring after the statute of limitations expired, trigger the acknowledgment doctrine such that the Plaintiff is entitled to collect the principal debt from the Defendants.

OPINION

Cunningham, J., August 17, 2016

AND NOW, to-wit, this 17th day of August, 2016, after oral argument, the Motion for Summary Judgment as filed by the Plaintiff is hereby **GRANTED** in part. The Motion for Summary Judgment as filed by the Defendants is hereby **GRANTED** in part and **DENIED** in part.

BACKGROUND

The following facts are not in dispute by the parties. The Defendants are the daughter and son-in-law of the Plaintiff. In exchange for a Demand Note executed on April 16, 2002 by the Defendants, the Plaintiff provided the sum of $35,000 (thirty-five thousand dollars) to the Defendants. The Demand Note is reproduced fully as follows.

DEMAND NOTE

$35,000.00

For Value Received, the undersigned promises to pay to the order of Gerard T. Uht, Sr. the sum of thirty five thousand dollars ($35,000.00), with annual interest at 4% on the unpaid balance from the date hereof. The full unpaid principal and any unearned interest shall be fully due and immediately payable UPON DEMAND of any holder of this note.

Upon failure to make payment within 30 days of demand, and should this note be turned over for collection, the undersigned shall pay all reasonable legal fees and costs of collection.

All parties to this note, whether as maker, endorser, guarantor, or surety waive presentment, demand, notice of nonpayment, protest, and notice of protest, and agree to remain fully bound notwithstanding the release of any party or extension, renewal, indulgence, modification of terms or discharge or substitution of any collateral for this note.

This note shall be enforced in accordance with the laws of the Commonwealth of Pennsylvania. All payments hereunder shall be made to such address as any holder may from the time to time designate.

Signed this 16 day of April, 2002

/s/ Aimee Baumann
/s/ Lawrence Baumann

In September, 2013, the Plaintiff contacted the Defendants seeking immediate payment of the amount due under the Demand Note.[1] In November, 2013, due to the lack of response or payment from the Defendants, the Plaintiff left a voice mail message indicating he would be pursuing a legal resolution to compel repayment. To this point in time the Defendants had not made any payment(s) of any type since the execution of the Demand Note.

On January 16, 2014, a check in the amount of $5,000 signed by Aimee Baumann was sent the Plaintiff. Included with the check was a handwritten note from Aimee Baumann on the check stub stating "I will send what I can every month until you get all your money back. Aimee."

A short time later, a second handwritten note dated January 24, 2014 was sent to the Plaintiff stating: "I will pay you at least $3,000.00 per month until you receive all your money back. Aimee Baumann." Subsequently, Plaintiff received payments of $3000.00 on March 11, 2014, $3,000.00 on April 15, 2014 and $3,000.00 on May 14, 2014. No payments were made thereafter once the Defendants were informed their payments were applied to interest and other purported enforcement costs.

The Plaintiff filed a Complaint on October 31, 2014 claiming breach of contract, unjust enrichment and seeking repayment of the $35,000.00 principal along with interest, attorney fees, and cost of suit. On December 16, 2014, the Defendants filed an Answer and New Matter. The Plaintiff filed a Reply to New Matter on January 13, 2015.

On April 29, 2016 the Defendants filed a Motion for Summary Judgment arguing the statute of limitations set forth in the Uniform Commercial Code ("UCC") bars the Plaintiff's ability to recover under the Demand Note.[2] The Plaintiff filed a Response to Defendants' Motion for Summary Judgment on May 27, 2016 contending the Judicial Code, rather than the UCC, governed the Demand Note. In addition, the Plaintiff cites the acknowledgment doctrine as an exception to any statute of limitations.

On June 7, 2016, Plaintiff filed a Motion for Summary Judgment. The Defendants filed a Response to the Plaintiff's Motion for Summary Judgment on July 6, 2016. The Plaintiff

[1] Plaintiff also claims he made a demand for repayment in the summer of 2002, however the parties agree no payment was made and no action was commenced.

[2] 13 Pa. C.S.A. § 3118(b) provides "if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of ten years."

filed a Reply on July 22, 2016. Oral argument was held on these Motions on July 25, 2016.

DISCUSSION

Summary judgment may be granted only where the record clearly shows that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Varner-Mort v. Kapfhammer*, 109 A.3d 244, 246 (Pa.Super. 2015). The moving party has the burden of proving that no genuine issue of material fact exists. *Rush v. Philadelphia Newspaper*, 732 A.2d 648, 650 (Pa.Super. 1999). Only when the facts are so clear that reasonable minds cannot differ may a trial court properly enter summary judgment. *Basile v. H & R Block, Inc.*, 761 A.2d 1115, 1118 (Pa. 2000). In determining whether to grant summary judgment, the trial court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. *Davis v. Res. for Human Dev., Inc.*, 770 A.2d 353, 357 (Pa. 2001).

A. Statute of Limitations

The threshold determination is which statute of limitations governs the Demand Note. The Plaintiff contends the statute of limitations found in the Judicial Code is applicable and does not expire until May 14, 2018.[3] Conversely, the Defendants argue the UCC statute of limitations applies because the Demand Note is a negotiable instrument as defined by 13 Pa.C.S.A. § 3104(a), which states:

> (a) Definition of "negotiable instrument"— . . . [A] "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:
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> (1) is payable to bearer **or to order** at the time it is issued or first comes into possession of a holder;
> (2) **is payable on demand** or at a definite time; and
> (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain:
>
> (i) an undertaking or power to give, maintain or protect collateral to secure payment;
> (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral; or
> (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

Emphasis added.

Here, the Demand Note is a written instrument establishing an unconditional promise of the Defendants to pay the Plaintiff $35,000.00 plus interest. The Demand Note is payable on demand to the order of Gerald T. Uht. Payment is not conditioned on any act or additional

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[3] 42 PA. C.S.A. § 5525 states where an action upon a negotiable or nonnegotiable bond, note, or other similar instrument in writing "is payable on demand, the time within which an action on it must be commenced shall be computed from the later of either demand or any payment of principal or interest on the instrument." The Defendants last made payments on the instrument on May 14, 2014.

promise and there is no provision excluding the instrument from governance by Title 13. Thus, it satisfies each of the requirements to be a negotiable instrument under 13 Pa.C.S.A. § 3104.

The UCC and the Judicial Code each have a statute of limitation applicable to negotiable instruments like the Demand Note. The application of the UCC statute results in this matter being time barred. The statute of limitations in the Judicial Code does not bar the present lawsuit.

The Judicial Code resolves this issue. As stated in 42 Pa. C.S.A. § 5501, "[t]he provisions of Title 13 (relating to commercial code), to the extent that they are inconsistent with [Chapter 42], shall control over the provisions of [Chapter 42]." Hence, 13 Pa. C. S. A. §3118(b) sets forth the applicable statute of limitations in this case.

The instant action was commenced when the Plaintiff filed a Complaint on October 31, 2014. As a result, the Plaintiff's claim is barred by the UCC statute of limitations under either version of the facts set forth by the parties.[4] Therefore, this case was filed after the applicable statute of limitations expired.

B. Acknowledgment Doctrine

Although an action filed after the expiration of the statute of limitations is generally barred, the statute of limitations may be tolled or its bar removed by a promise to pay the debt, pursuant to the acknowledgment doctrine. *See Huntingdon Fin. Corp. v. Newtown Artesian Water Co.*, 659 A.2d 1052, 1054 (Pa. Super. 1995). The acknowledgment of an existing obligation must be "clear, distinct, and unequivocal" and "must be referable to the very debt upon which the action is based." *Id. quoting Gurenlian v. Gurenlian*, 595 A.2d 145, 151 (Pa. Super. 1991). Moreover, a mere willingness to pay at some future time is insufficient as it is more of a desire to pay rather than a promise. *Id.* Thus, the acknowledgment doctrine must be strictly construed and limited to the amount promised to be repaid. *See Id.*

Aimee Baumann clearly acknowledged the debt when she signed the January 16, 2014 check in the amount of $5,000.00 payable to the order of Gerard T. Uht and sent it to him accompanied with a handwritten note expressly stating her intent to pay all of the money back. Mrs. Baumann's acknowledgment of the debt and her intent to repay in full was expressly stated a second time in her handwritten note dated January 24, 2014: "I will pay you at least $3,000 per month until you receive all your money back."

"There can be no more clear and unequivocal acknowledgment of debt than actual payment." *Id.* While partial payment of a debt is not always sufficient as a clear acknowledgment, a partial payment may toll the statute of limitations when it "constitute[s] a constructive acknowledgment of the debt from which a promise to pay the balance may be inferred." *Id. at 1054-1055*.

Here, the note sent with the payment of $5,000 and the subsequent note dated January 24, 2014 go beyond what is required and serve as actual acknowledgment of the debt. *See Complaint, Exhibit B & Exhibit C*. Aimee Baumann twice expressed a specific intent to repay the entirety of Plaintiff's money back. In her January 24, 2014 note, Mrs. Baumann promised a minimum monthly payment of $3,000.00. This promise was effectuated by the

[4] The Plaintiff contends a demand for repayment was first made in the summer of 2002. If that is the case, the action must have been initiated by the summer of 2008 and was thus filed 6 years too late. If no demand for payment was made until September 2013 as the Defendants argue, then the suit is barred because no demand or payment of principal or interest was made within 10 continuous years after the Demand Note was executed.

actual payments of $3,000.00 made in March, April, and May, 2014.

It is undisputed the Demand Note is the only debt owed by the Defendants to the Plaintiff. The four payments totaling $14,000.00 were not a gift or loan to the Plaintiff or some other transaction between the parties. Instead these were payments on the Demand Note that were intended to continue until the Plaintiff "receive[d] all [his] money back." By making these payments and sending the handwritten notes Aimee Baumann acknowledged the principal debt and made an unequivocal promise to repay.

However, at no time did either Defendant acknowledge or promise to pay any more than the original principal. As the acknowledgment doctrine must be construed narrowly, so too must any interpretation of the promise to pay. Each note referenced a promise to pay the Plaintiff "your money back." The plain meaning of Aimee Baumann's notes is her intent to repay the principal. The payment of attorney fees, costs of suit and interest was not referenced or accepted by Aimee Baumann in her notes to her father. These additional fees were not monies paid by the Plaintiff at the original time of the contract. Payment of these amounts would not constitute payment "back" to the Plaintiff.

Additionally, the Defendants ceased making payments to the Plaintiff after they were informed the payments went to interest and other costs. Aimee Baumann's intent, as acknowledged by the Plaintiff, was to repay the $35,000.00 principal loan. *See Plaintiff's Motion for Summary Judgment, para. 21-23*. Thus, the only debt for which the statute of limitations is tolled under the acknowledgment doctrine is the principal amount of $35,000.00.

The Defendants' argument the acknowledgment doctrine does not apply to 13 Pa. C.S.A. § 3118(b) is unpersuasive. The Defendants do not provide any legal support for their position or reason to differentiate the UCC statute of limitations from any other statute of limitations subject to the acknowledgment doctrine.

"The acknowledgment doctrine serves a very useful purpose to both parties in that the creditor receives payment on a debt that would otherwise be unenforceable and the debtor satisfies a moral obligation to make payments pursuant to a contract where no legal obligation exists . . ." *Huntingdon*, 659 A.2d at 1055. The Defendants' position is inconsistent with the *raison d'être* of the acknowledgment doctrine, particularly since this case involves a debt among family members. Further, the Defendants' argument means there is no legal significance to the two handwritten notes and four payments manifesting Aimee Baumann's unequivocal intent to pay her father back in full despite the expiration of the statute of limitations.

Thus, Aimee Baumann's acknowledgment of the principal debt of $35,000 removes the time bar set forth in the UCC as to this amount. Accordingly, the Plaintiff's Motion for Summary Judgement is hereby **GRANTED** regarding repayment of the principal amount. The Defendants' Motion for Summary Judgment is **GRANTED** regarding the payment of any sums other than the principal amount and **DENIED** as it relates to the principal amount.

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

LOMBO, INC. (License No. R-4221) LOMBARDO'S TAVERN, Appellant
v.
PENNSYLVANIA LIQUOR CONTROL BOARD, Appellee

LIQUOR CODE / PRELIMINARY PROVISIONS

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.

GOVERNMENTS / STATE & TERRITORIAL GOVERNMENTS / LICENSES

Renewal of a licensee's liquor license is not an automatic procedure.

LIQUOR CODE / LICENSE & REGULATIONS / LIQUOR, ALCOHOL AND MALT AND BREWED BEVERAGES / GENERAL PROVISIONS

The Pennsylvania Liquor Control Board has the authority to refuse to renew a liquor license pursuant to Section 4-470(a.1) 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 licensees, 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.

GOVERNMENTS / STATE & TERRITORIAL GOVERNMENTS / LICENSES

When an appeal is taken from a Board decision, pursuant to 47 Pa. C. S. §4-464, a trial court hears the matter *de novo* and fashions its own Trial Court Findings of Fact and Conclusions of Law. A trial court must receive the record of the proceedings below, if offered, and may hear new evidence. A trial court may make its own Findings of Fact and reach its own Conclusions of Law based on those Findings of Fact, even when the evidence it hears is substantially the same as the evidence presented to the Board. A trial court may reverse the Board's decision to deny a license renewal where the trial court's findings are supported by substantial evidence in the record as a whole.

LIQUOR CODE / LICENSE & REGULATIONS / LIQUOR, ALCOHOL AND MALT AND BREWED BEVERAGES / GENERAL PROVISIONS

The Board may deny renewal of a liquor license if the licensee, its shareholders, directors, officers, association members, servants, agents or employees have one or more adjudicated citations. Even a single past citation is sufficient to support the Board's decision to deny renewal of a liquor license, and the Board may consider a licensee's entire citation history

to determine whether a pattern emerges and may consider all past Liquor Code violations, no matter when they occurred,

GOVERNMENTS / STATE & TERRITORIAL GOVERNMENTS / LICENSES

A trial court is permitted to consider the corrective measures a licensee took in response to its citations, and to substitute its discretion for that of the Board in determining whether those corrective measures warranted the renewal of Licensee's license.

GOVERNMENTS / STATE & TERRITORIAL GOVERNMENTS / LICENSES

Although a citation for a single violation of the Liquor Code can authorize the non-renewal of a license, the typical non-renewal involves multiple violations of the Liquor Code and a string of violent disturbances inside or near the licensed premises.

LIQUOR CODE / LICENSE & REGULATIONS / LIQUOR, ALCOHOL AND MALT AND BREWED BEVERAGES / GENERAL PROVISIONS

The Board, in deciding whether to renew a liquor license, may consider activity that occurred on or about the licensed premises or in areas under the licensee's control.

GOVERNMENTS / STATE & TERRITORIAL GOVERNMENTS / LICENSES

A trial court, similar to the Board, can consider whether any substantial steps were taken to address the activity occurring on or about the premises.

GOVERNMENTS / STATE & TERRITORIAL GOVERNMENTS / LICENSES

Although a licensee is required to take substantial affirmative measures to prevent misconduct, a licensee is not required to do everything possible to prevent criminal activity on the premises, act as its own police force or close its business.

GOVERNMENTS / STATE & TERRITORIAL GOVERNMENTS / LICENSES

A trial court properly reverses the Board’s decision denying renewal of liquor license upon finding that the criminal activity on or near the licensed premises was due to the location of the premises in a high-crime area rather than the fault of the licensee.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION NO. MD 31 OF 2016

Appearances: Robert M. Barbato Jr., Esq., appearing on behalf of Appellant, James J. Lombardo, Manager-of-Record of Lombo, Inc. t/a Lombardo’s Tavern
Michael J. Plank, Esq., appearing on behalf of Appellee, Pennsylvania Liquor Control Board, Bureau of Licensing

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Domitrovich, J., June 16th, 2016

After thorough consideration of the entire record regarding Appellant’s Petition and the Pennsylvania Liquor Control Board’s decision not to renew Appellant’s liquor license, including, but not limited to, the testimony and evidence presented at the Administrative Hearing before the Hearing Examiner on October 6th, 2015 and the Civil *De Novo* Trial before this Trial Court on April 28th, 2016, 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 reversing the Pennsylvania Liquor Control Board's decision not to renew Appellant's liquor license:

FINDINGS OF FACT

I. Factual and Procedural History[1]

1. Jason Lombardo is the manager-of-record for Lombo, Inc. t/a Lombardo's Tavern (hereafter referred to as "Appellant"), located at 915 West 21st Street, Erie, Pennsylvania 16502.

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. On June 8th, 2015, Appellant, by and through Gary A. Lombardo, owner of Lombo, Inc. t/a Lombardo's Tavern, filed a timely application with the Board for renewal of Liquor License No. R-4221 (LID 23693) with all of the supporting documents and appropriate filing fees, for the licensing period of August 1st, 2015 through July 31st, 2017. *See PLCB's Exhibit B-1*.

4. By letter dated July 20th, 2015, the Board advised Appellant that "a preliminary review of the history of operation and/or citation may indicate abuse of the licensing privilege, and a hearing would be conducted to determine whether the following objections constitute egregious activity warranting non-renewal of [Appellant's] license." Specifically, the Board's letter states:

   a. It is alleged that you have abused your licensing privilege, and pursuant to Section 470 of the Liquor Code (47 P.S. §4-470), you may no longer be eligible to hold a license based upon:

      i. Violations of the Liquor Code relative to Citation Number 14-0724, 13-0442, 12-1804, 12-1744, 06-1797, 06-0672 and 95-0649; and

      ii. The improper conduct of your licensed establishment as there have been approximately nine (9) incidents of disturbances at or immediately adjacent to your licensed establishment during the time period August 1st, 2013 to present reported to the City of Erie Police Department. This activity includes, but is not limited to, shootings, homicide, stabbings, fights, drugs, visibly intoxicated patrons, and disorderly operations. (*See PLCB's Exhibit B-2*)

5. The following is the history of adjudicated citations for which Appellant filed a Statement of Waiver, Admission, and Authorization or a hearing was conducted and the charges were sustained:

   a. Citation No. 95-0649, which was issued on April 11th, 1995, contained two counts – one count of fortified, adulterated and/or contaminated liquor, in violation of 47 P.S.§4-491(10), and one count of selling alcoholic beverages on credit in contravention of the provisions of the Liquor Code and Title 40 of the Pennsylvania Code, in violation of 47 P.S. §4-493(2). Appellant executed a Statement of Waiver,

[1]Although this Trial Court requested the transcript of the April 28th, 2016 Civil *De Novo* Trial from the court stenographer, this Trial Court relied on its own notes as the court stenographer's notes were not transcribed and, therefore, were unavailable for this Trial Court to cite. This Trial Court has only cited to the October 6th, 2015 Administrative Hearing transcript, which is the only available written transcript.

Admission and Authorization admitting to the charges. The Administrative Law Judge sustained the charges and Appellant was fined three hundred fifty dollars and 00/100 ($350.00);

b. Citation No. 06-0672, which was issued on March 29th, 2006, contained one count of sale, furnishing or providing alcoholic beverages to minors, in violation of 47 P.S. §4-493(1). Appellant executed a Statement of Waiver, Admission and Authorization admitting to the charge. The Administrative Law Judge sustained the charge and Appellant was fined one thousand, two hundred dollars and 00/100 ($1,200.00);

c. Citation No. 06-1797, which was issued on August 2nd, 2006, contained one count of sale, furnishing or providing alcoholic beverages to minors, in violation of 47 P.S. §4-493(1). Appellant executed a Statement of Waiver, Admission and Authorization admitting to the charge. The Administrative Law Judge sustained the charge and Appellant was (1) fined one thousand, five hundred dollars and 00/100 ($1,500.00) and (2) was directed to participate in mandatory Responsible Alcohol Management (R.A.M.P) training as set forth in §471.1 of the Liquor Code;

d. Citation No. 12-1744, which was issued on December 21st, 2012, contained two counts – one count of refilling empty liquor bottles, in violation of 47 P.S. §4 491(10) and one count of failing to break empty liquor bottles within twenty-four (24) hours, in violation of 47 P.S. §4-491(5). Appellant executed a Statement of Waiver, Admission and Authorization admitting to the charges. The Administrative Law Judge sustained the charges and Appellant was fined five hundred dollars and 00/100 ($500.00);

e. Citation No. 12-1804, which was issued on January 9th, 2013, contained one count of failing to break empty liquor bottles within twenty-four (24) hours, in violation of 47 P.S. §4-491(5). Appellant executed a Statement of Waiver, Admission and Authorization admitting to the charge. The Administrative Law Judge sustained the charge and Appellant was fined two hundred fifty dollars and 00/100 ($250.00);

f. Citation 13-0442, which was issued on March 11th, 2013, contained two counts – one count of permitting smoking in a public place where smoking is prohibited, in violation of 47 P.S. §4-471 and 35 P.S. §637.6(a)(2) ("the Clean Air Act"), and one count of sale, furnishing or providing alcoholic beverages to a visibly intoxicated patron, in violation of 47 P.S. 4-493(1). Appellant executed a Statement of Waiver, Admission and Authorization admitting to the charges. The Administrative Law Judge sustained the charges and Appellant was (1) fined one thousand, six hundred fifty dollars and 00/100 ($1,650.00) and (2) directed to participate in mandatory Responsible Alcohol Management (R.A.M.P) training as set forth in §471.1 of the Liquor Code;

g. Citation No. 14-0724, which was issued on April 21st, 2014, contained two counts – one count of failing to comply with the Order of the Administrative Law Judge at Citation No. 13-0442 mandating responsible alcohol management training, in violation of 47 P.S. §4-471(d), and one count of failing to devote

full time and attention to the operation of the licensed business, in violation of 40 Pa. Code §5.23(a). An administrative hearing was conducted on May 13th, 2015. The Administrative Law Judge concluded Appellant violated the above references statutes and Appellant was fined five hundred fifty dollars and 00/100 ($550.00). Appellant failed to pay the fine within twenty (20) days; therefore, a Supplemental Order was issued on July 29th, 2015, whereby Appellant's restaurant liquor license was suspended for at least one (1) day beginning at 7:00 a.m. on Tuesday, September 8th, 2015 and continuing until the fine in the amount of five hundred fifty dollars and 00/100 ($550.00) was paid. (*See PLCB's Exhibit B-3*).

6. Thereafter, pursuant to 47 Pa. C. S. § 4-464, the Board scheduled a hearing to address Appellant's liquor license Renewal Application. Appellant received notice of that hearing by the Board's letter dated September 8th, 2015. (*See PLCB's Exhibit B-4*).

7. The scheduled license renewal hearing occurred at the Homewood Suites by Hilton, 2084 Interchange Road, Erie, Pennsylvania 16501, on October 6th, 2015 before Hearing Examiner Michele Santicola, Esq., who was appointed by the Board, at which Jason Lombardo, as manager-of-record of Appellant, appeared and was represented by his counsel, Richard A. Vendetti, Esq. The Board was represented by its counsel, Michael J. Plank, Esq. (*See Respondent's Exhibit 5*).

8. By letter and Order January 13th, 2016, the Board denied Appellant's application for renewal of its liquor license. (*See Respondent's Exhibit 1 and 2*).

9. Appellant filed an appeal of the Board's denial of its Application of Renewal on January 15th, 2016.

10. The Board filed an Opinion in support of its Order on March 7th, 2016.

11. A Civil *De Novo* trial was held on April 28th, 2016 in Courtroom G, Room 222, Erie County Courthouse, Erie, Pennsylvania, before the undersigned judge, at which several witnesses personally appeared to present live testimony on behalf of Appellant; transcripts were admitted regarding testimony by witnesses and other evidence and exhibits presented before Hearing Examiner Michele Santicola, Esq.; stipulations and exhibits were entered; and arguments were heard. Jason Lombardo, manager-of-record of Appellant, appeared and was represented by counsel, Robert M. Barbato Jr., Esq. The Board was represented by its counsel, Michael J. Plank, Esq.

12. Following the Civil *De Novo* Trial, this Trial Court entered an Order to permit the attorneys to file proposed Findings of Fact and Conclusions of Law. Both attorneys filed their proposed Findings of Fact and Conclusions of Law on June 10th, 2016.

II. Findings of Fact by this Trial Court from the Transcript of Testimony of Witnesses appearing before the Hearing Examiner at the Administrative Hearing, October 6th, 2015

A. Jason Lombardo

13. Jason Lombardo is the manager-of-record of Lombo, Inc. t/a Lombardo's Tavern, which was started by Jason's father and current owner, Gary A. Lombardo, who resides in Fort Lauderdale, Florida. *Notes of Testimony, Administrative Hearing, October 6th, 2015, pg. 10, lines 11-17.*

14. As of the date of the Administrative Hearing, Jason Lombardo had been involved in the operation of Lombardo's Tavern for thirteen (13) years, since January 1st, 2002. *Id., pg. 10, line 25 – pg. 11, line 2.*

15. Jason Lombardo stated the trouble started in this neighborhood in the late summer of 2012 and has progressively worsened. *Id., pg. 11, lines 13-18.*

16. Lombardo's Tavern is an older establishment, dating back to June 22nd, 1977. *Id., pg. 12, lines 2-9.*

17. On June 12th, 2013, Jason Lombardo, an assistant track and field coach with the City of Erie School District at the time, was loading track equipment into his truck and had already given last call in the establishment around 1:30 when he heard three (3) gunshots. *Id., pg. 14, line 16 – pg. 15, line 11.*

18. Jason Lombardo explained the victim was shot in retaliation or retribution as the victim had stolen some firearms earlier that evening and the other individuals were waiting for the victim outside of the establishment. *Id., pg. 15, lines 18-25.*

19. Jason Lombardo asserted the incident on June 12th, 2013 had nothing to do with anything that happened inside his establishment or with his establishment in general. *Id., pg. 15, line 25 – pg. 16, line 2.*

20. During an evening shift from 6:00 p.m. until closing, Jason Lombardo stated three people work the establishment – himself, a bartender and a general help individual, who works the kitchen, at the bar or in the back of the establishment. *Id., pg. 19, lines 5-10.*

21. The establishment has a lengthy citation history with mostly minor citations. *See PLCB's Exhibit B-3.*

22. Jason Lombardo acknowledged the two enhanced underage citations in 2006, but asserted the second citation was due to his bartender, who was the niece of a primary candidate for the County Executive position, calling her underage friends for a party at the establishment while Jason Lombardo was away at a dart league event. Jason Lombardo said this incident was "washed under the rug until after election time." *Id., pg. 20, lines 6-20.*

23. Jason Lombardo indicated, other than the visibly intoxicated person citation, no other enhanced citations were issued thereafter to the establishment. *Id., pg. 21, lines 23-25.*

24. Jason Lombardo currently has five (5) internal video cameras and three (3) external video cameras, which record on a seven (7) day loop. *Id., pg. 22, lines 15-19.*

25. Eight (8) video cameras cover one hundred percent (100%) of his bar and seating areas with very little blind or blank spots. *Id., pg. 24, lines 10-19.*

26. As of the date of the Administrative Hearing, Jason Lombardo indicated the employees and servers/sellers are one hundred percent (100%) R.A.M.P. compliant, and he and his father, Gary A. Lombardo, have owner/manager R.A.M.P. certifications. *Id., pg. 24, line 24 – pg. 25, line 1.*

27. Jason Lombardo stated he would have no problem closing early, if such a condition were imposed, except during dart leagues, which constitute sixty percent (60%) of his establishment's business. *Id., pg. 25, lines 13-23.*

28. Jason Lombardo stated the establishment now has dart leagues on Monday, Tuesday, Wednesday, Thursday and Sunday, along with pool leagues on Tuesday. *Id., pg. 26, lines 1-10.*

29. Individuals involved with dart and pool leagues are of a better clientele than those

involved in the police incident reports. *Id., pg. 26, lines 19-22.*

30. Jason Lombardo, in response to allegations he has not been cooperative during investigations, asserted there were no incidents inside his bar and he always has provided police with his security camera footage for incidents happening near his establishment, including a shooting and stabbing, and incidents happening down the block at the Country Fair nearby. *Id., pg. 27, line 20 – pg. 28, line 23.*

31. In two major incidences, Jason Lombardo stated there was not even a loud voice spoken inside the establishment and nothing whatsoever happened inside his establishment at all. *Id., pg. 29, lines 3-10.*

32. Jason Lombardo acknowledged crime in the vicinity of Lombardo's Tavern itself has increased thirty percent (30%) in the last five (5) years. *Id., pg. 29, lines 23-24.*

33. As other bars have closed in the area, Jason Lombardo stated patrons all gravitate to Lombardo's Tavern, as well as to Luigi's Bar and Reno's Bar. *Id., pg. 30, line 22 – pg. 31, line 1.*

34. Jason Lombardo acknowledged his establishment does not have doormen or bouncers, but indicated he is at the door checking ID's, even during leagues. *Id., pg. 31, lines 7-17.*

35. Jason Lombardo stated his establishment does not have a transaction scan device, but he would gladly purchase a transaction scan device as a required condition. *Id., pg. 32, lines 1-8.*

36. Jason Lombardo indicated although the victim of the shooting, Denairo Price, was drinking an undisclosed amount of alcohol prior to the shooting, nothing happened inside his establishment. *Id., pg. 33, line 25 – pg. 34, line 15.*

37. Three individuals worked at his establishment on June 12th, 2013 – Nicole Torres, Lindsay Sloan and Josh Nientimp – and these individuals told police an argument or disturbance occurred inside his establishment, which Jason Lombardo claims "was a disagreement over a baseball game on television." *Id., pg. 34, line 16 – pg. 35, line 22.*

38. Jason Lombardo acknowledged Josh Nientimp, who was just helping out that evening, and Lindsay Sloan, an employee, were drinking that evening, but the bartender, Nicole Torres, was not drinking. *Id., pg. 35, line 23 – pg. 36, line 19.*

39. Jason Lombardo stated the assailant who shot Denairo Price appeared from a shaded area in front of his building and shot forward, as if he was waiting for Mr. Price. *Id., pg. 40, lines 1-13.*

40. Regarding exterior lighting, a large lit sign exists on the front of the building, a Lombardo's sign on the side and five (5) spotlights in the back of his building. *Id., pg. 42, lines 6-11.*

41. Jason Lombardo indicated he was unaware of the April 27th, 2014 incident until Officer Mitchell contacted him, told him there was an incident outside and requested video recordings, which Jason Lombardo provided. *Id., pg. 44, lines 4-10.*

42. The police report for the April 27th, 2014 incident indicates an altercation with pushing, shoving and arguing, which included the victim, Jesse Holmes, occurred inside the establishment, which Jason Lombardo could not agree or disagree with as he was not present. *Id., pg. 45, lines 7-15.*

43. The police report for the April 27th, 2014 indicates an individual named either Lance Thompson or Lance Johnson was working as an employee or security, which Jason Lombardo

disagreed with. *Id., pg. 45, line 22 – pg. 46, line 7.*

44. An individual named "Lance" and Nicole Torres informed the police a fight occurred inside the establishment, which included the victim and a group of unknown black males, and Lance and Nicole kicked the group out of the bar. *Id., pg. 46, lines 11-25.*

45. Jason Lombardo stated he knows an individual named Jeremy McCall, who was listed in the police report for the April 27th, 2014 incident, and had no reason to dispute he was nineteen (19) years of age, but disputed Jeremy McCall was inside the bar due to the establishment's policy, which prohibits anybody under 21 years of age to be in the establishment and individuals "who look under 30" are carded. *Id., pg. 47, line 9 – pg. 48, line 5.*

46. Jason Lombardo indicated he has a metal detecting wand and generally wands patrons, especially on weekends. *Id., pg. 48, line 16 – pg. 49, line 12.*

47. The metal detecting wand detects steel, nickel, cobalt, etc., and would indicate if a patron was carrying a firearm or knife. *Id., pg. 49, lines 20-24.*

48. If the metal detecting wand detects a firearm or knife, the patron is asked to leave immediately. *Id., pg. 50, line 24 – pg. 51, line 2.*

49. Jason Lombardo purchased the metal detecting wand in 2014 following the establishment's last annual PLCB inspection, at which the PLCB officer **liked the improvement to the security cameras and suggested purchasing a metal detecting wand**. *Id., pg. 51, lines 5-11 [emphasis added].*

50. Jason Lombardo stated he provides security and works nights seven (7) days per week, generally from 7:00 p.m. until 2:00 p.m., unless he leaves for league; then, he always returns by 10:00 p.m. *Id., pg. 51, lines 13-24.*

51. When Jason Lombardo is not present, bartenders will card all patrons. His girlfriend, Amanda, would wand customers at the door. *Id., pg. 52, lines 11-17.*

52. Jason Lombardo indicated he is willing to implement security when he is not there, but he has found through "trial and error" that security personnel cause more problems and he would rather diffuse the situation without causing a disturbance. *Id., pg. 53, lines 7-16.*

53. Prior to working at Lombardo's Tavern, Jason Lombardo was the manager-of-record for "Strandatta Corporation" in Allegheny County and the "Ivory Cum Latta," a large night club that had fifty-seven (57) bouncers, and every problem that occurred at these bars were caused by bouncers ninety percent (90%) of the time. *Id., pg. 53, lines 17-24.*

54. Jason Lombardo stated his intent was to limit the "problem crowd's" access to the establishment. *Id., pg. 55, lines 10-12.*

55. Jason Lombardo discussed earlier closing hours with his father prior to the administrative hearing. *Id., pg. 56, lines 5-8.*

56. Jason Lombardo was told Lieutenant Stan Green of the Erie Nuisance Task Force wanted to meet with him about implementing additional items to make the establishment less of a nuisance problem, which Jason Lombardo and his father agreed to do. *Id., pg. 56, line 25 – pg. 57, line 15.*

57. Jason Lombardo believed Jesse Holmes was stabbed five (5) or six (6) times on April 27th, 2014, but the case was *nolle prossed* because no one would testify. *Id., pg. 59, lines 9-22.*

58. Regarding the April 27th, 2014 stabbing, Officer Mitchell came to see Jason Lombardo

the next day about the incident, and then both Officer Mitchell and Detective Suchi returned the day after that to download the video footage. *Id., pg. 62, lines 20-25*.

59. Jason Lombardo acknowledged he was concerned that only one female employee was working by herself on April 27th, 2014 and that a fight occurred which resulted in a stabbing. *Id., pg. 64, lines 13-19*.

60. The female bartender, who chose to leave shortly after the incident, was reprimanded harshly by Jason Lombardo, and Jason Lombardo fully cooperated with the police as to this April 27th, 2014 incident. *Id., pg. 64, line 22 – pg. 65, line 6*.

III. Live Testimony heard before the Trial Judge at the Civil *De Novo* Trial, April 28th, 2016

A. Detective Dennis Obroski, City of Erie Police Department.

61. Dennis Obroski is a police detective with the City of Erie Police Department, and has worked in that capacity for seventeen (17) years.

62. Detective Obroski aided the investigation of the June 12th, 2013 shooting, where a black male was shot outside of the establishment by an unknown shooter in the crowd due to prior "exchange of words" inside the establishment.

63. Detective Obroski met with Jason Lombardo and inquired as to the June 12th, 2013 incident, during which Jason Lombardo was "very cooperative" and provided video footage to the police.

64. Detective Obroski acknowledged he was not sure what Jason Lombardo could have done to avoid further shootings, as he indicated that anything below West 18th Street is a "high crime area" and Lombardo's Tavern is located in close proximity to said "high crime area."

65. Detective Obroski stated he did not see Jason Lombardo pass his metal detecting wand over patrons, but also stated he has not really noticed metal detecting wands being used in other bars in Erie.

66. Detective Obroski acknowledged he could not be sure if there was any security working on June 12th, 2013, but he was not sure if security inside the establishment would have prevented the shooting, since the shooting occurred outside of the establishment.

67. Detective Obroski recalled the shooting occurred near the stop sign, twelve (12) to fifteen (15) feet from the establishment, and the security cameras only captured what happened inside the establishment, not outside.

B. Detective Michael Suchy, City of Erie Police Department

68. Michael Suchy is a major crimes detective with the City of Erie Police Department, and has been working in this capacity for thirteen (13) years.

69. Jason Lombardo was cooperative with Detective Suchy during all investigations occurring at or near Lombardo's tavern.

70. Detective Suchy recalled Jason Lombardo has five (5) to six (6) security cameras and outside lighting, and always provided discs of his establishment's security footage following an incident.

71. Detective Suchy stated a stabbing occurred on April 27th, 2014 towards the rear of the establishment, and the victim, Jesse Holmes, had a punctured lung and other injuries. The assailants were eventually discovered and charged.

72. Detective Suchy acknowledged Jason Lombardo was cooperative throughout the

investigation and no altercation occurred inside the establishment.

73. Detective Suchy did not indicate the area around Lombardo's Tavern was a "high violence area;" in fact, Detective Suchy recalled he investigated only three (3) incidents in the area of this establishment.

C. Jason Lombardo

74. Jason Lombardo is the manager-of-record for Lombardo's Tavern, where he is responsible for opening and closing the establishment, and has worked in that capacity for two (2) years; prior to working as manager-of-record, Jason Lombardo worked as the night manager of the establishment since 2002.

75. Jason Lombardo classified the area around the establishment as being "on the verge of a bad neighborhood," but not being a "warzone," and most of the crime (shootings, stabbings, drugs, prostitution, robberies, thefts, etc.) have occurred towards West 18th Street, which is further north of his establishment.

76. Initially, Lombardo's Tavern had a two (2) camera system, but now has an eight (8) camera system, with five (5) internal cameras and three (3) external cameras.

77. On June 12th, 2013, Jason Lombardo, an assistant track and field coach for the City of Erie School District, was loading track and field equipment into his vehicle when he heard three (3) gunshots; thereafter, the assailant left quickly in a vehicle which pulled up after the vehicle waited up the street.

78. Jason Lombardo provided information regarding this shooting to the police and downloaded video footage from his security cameras to assist the police.

79. Jason Lombardo indicated the August 29th, 2013 incident of "shots fired" did not happen and no police investigation ensued.

80. Jason Lombardo provided video footage of the April 27th, 2014 "stabbing" incident and stated nothing happened inside his establishment and that he was unaware of the incident until the next morning, when he was informed by Officer Peter Mitchell.

81. Jason Lombardo notified the police regarding the May 16th, 2014 "fight," provided video footage of the incident to the police and banned the patrons involved from the establishment.

82. Jason Lombardo took reasonable action by banning two (2) female and 1 (male) patrons, who were not "regulars," following a "fight" on November 11th, 2015.

83. Regarding the May 20th, 2015 incident, Jason Lombardo had denied a patron entrance into the establishment, so the individual pulled out a handgun, after which Jason Lombardo quickly closed the bar door, locked the door and called the police, who apprehended the individual shortly thereafter.

84. Jason Lombardo acknowledged two (2) "Disorderly House" violations – first, on May 26th, 2015, an argument occurred outside the establishment for which an individual, not Jason Lombardo, called the police for an "altercation;" and second, on May 30th, 2015, police officers arrived during a warrant sweep and found drug paraphernalia (cigarette wrappers only), after which the police conducted a thorough search of the establishment and found nothing else.

85. Jason Lombardo indicated Lombardo's Tavern has a capacity for forty-nine (49) patrons and he considered hiring security, but he could not afford security every night due to the high cost of between two hundred ($200) to three hundred ($300) dollars per night.

86. To prevent disturbing the neighbors with excessive noise, Jason Lombardo began closing his establishment at 1:00 a.m. on weekends, stopped carrying certain types of low quality alcohol and changed the music selections in the jukebox.

87. When Nicole Torres was bartending during some of the incidents and requested several patrons leave, she did not inform to Jason Lombardo of any issues inside the establishment.

88. Jason Lombardo stated Officer Steven De Luca was present during the May 30th, 2015 warrant sweep, but Officer De Luca was displeased with the amount of patrons inside the establishment (50-75). Officer De Luca also alleged Jason Lombardo was high on cocaine on May 30th, 2015; however, Jason Lombardo denied any drug use as he is an assistant track and field coach for the City of Erie School District and is randomly drug tested.

89. Officer De Luca's allegations that the officer smelled marijuana, saw marijuana smoke, and found plastic baggies and blunt shavings were heavily disputed by Jason Lombardo.

90. In his Police Report, Officer De Luca alleged he did not see anyone working security, did not see patrons being searched via a metal detecting wand and did not see anyone checking patron's ID's.

91. Animosity exists between Jason Lombardo and Officer De Luca, and Officer De Luca, indicated during the May 26th, 2015 incident, stated he [Officer De Luca] would "shut the bar down." Animosity stems from Jason Lombardo terminating his relationship with Officer De Luca's sister when they were in high school together.

92. Jason Lombardo properly took reasonable and appropriate steps by dismissing bartender Nicole Torres, as there were several incidents that occurred while she was bartending.

93. Jason Lombardo still patrols the perimeter of his establishment to pick up trash and bottles as well as to mow the lawns of surrounding neighbors to preserve the neighborhood and his relationship with the neighbors.

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). The Pennsylvania Liquor Control Board has the authority to refuse to renew a liquor license pursuant to Section 4-470(a.1) 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 licensees, 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].

When an appeal is taken from a Board decision, pursuant to 47 Pa. C. S. §4-464, a trial court hears the matter *de novo* and fashions its own Trial Court Findings of Fact and Conclusions of Law. *See Goodfellas, Inc. v. Pennsylvania Liquor Control Board*, 921 A.2d 559, 565 (Pa. Commw. Ct. 2007) (*citing Two Sophia's, Inc. v. Pennsylvania Liquor Control Board*, 799 A.2d 917, 919 (Pa. Commw. Ct. 2002). A trial court must receive the record of the proceedings below, if offered, and may hear new evidence. *See id*. A trial court may make its own Findings of Fact and reach its own Conclusions of Law based on those Findings of Fact, even when the evidence it hears is substantially the same as the evidence presented to the Board. *See Pennsylvania Liquor Control Board v. Bartosh*, 730 A.2d 1029, 1032 (Pa. Commw. Ct. 1999). A trial court may reverse the Board's decision to deny a license renewal where the trial court's findings are supported by substantial evidence in the record as a whole. *See BCLT, Inc. v. Pennsylvania Liquor Control Board*, 2015 Pa. Commw. LEXIS 281 (Pa. Commw. Ct. 2015) [emphasis added].

By its letter dated July 20th, 2015, the Board objected to the renewal of Appellant's liquor license and based its objections upon Appellant's adjudicated citation history and nine (9) reported incidents occurring on or near Appellant's premises. *See PLCB's Exhibit B-2*. In the instant case, this Trial Court finds and concludes the Board erred in refusing to renew Appellant's liquor license, in view of the following distinct bases:

1. Appellant's Citation History

Between April 11th, 1995 and April 21st, 2014, Appellant has received seven (7) adjudicated citations:

a. Citation No. 95-0649, which was issued on April 11th, 1995, contained two counts – one count of fortified, adulterated and/or contaminated liquor, in violation of 47 P.S. §4-491(10), and one count of selling alcoholic beverages on credit in contravention of the provisions of the Liquor Code and Title 40 of the Pennsylvania Code, in violation of 47 P.S. §4-493(2);
b. Citation No. 06-0672, which was issued on March 29th, 2006, contained one count of sale, furnishing or providing alcoholic beverages to minors, in violation of 47 P.S. §4-493(1);
c. Citation No. 06-1797, which was issued on August 2nd, 2006, contained one count of sale, furnishing or providing alcoholic beverages to minors, in violation of 47 P.S. §4-493(1);

d. Citation No. 12-1744, which was issued on December 21st, 2012, contained two counts – one count of refilling empty liquor bottles, in violation of 47 P.S. §4 491(10) and one count of failing to break empty liquor bottles within twenty four (24) hours, in violation of 47 P.S. §4-491(5);
e. Citation No. 12-1804, which was issued on January 9th, 2013, contained one count of failing to break empty liquor bottles within twenty-four (24) hours, in violation of 47 P.S. §4-491(5);
f. Citation 13-0442, which was issued on March 11th, 2013, contained two counts – one count of permitting smoking in a public place where smoking is prohibited, in violation of 47 P.S. §4-471 and 35 P.S. §637.6(a)(2) ("the Clean Air Act"), and one count of sale, furnishing or providing alcoholic beverages to a visibly intoxicated patron, in violation of 47 P.S. 4-493(1);
g. Citation No. 14-0724, which was issued on April 21st, 2014, contained two counts – one count of failing to comply with the Order of the Administrative Law Judge at Citation No. 13-0442 mandating responsible alcohol management training, in violation of 47 P.S. §4-471(d), and one count of failing to devote full time and attention to the operation of the licensed business, in violation of 40 Pa. Code §5.23(a)

See PLCB's Exhibit B-3. These adjudicated citations, standing alone, can be reason enough for the Board to deny renewal of Appellant's liquor license. *See 47 Pa. C. S. § 4-470(a.1)(2)* (the Board may deny renewal of a liquor license if the licensee, its shareholders, directors, officers, association members, servants, agents or employees have one or more adjudicated citations); *see also St. Nicholas Greek Catholic Russian Aid Society v. Pennsylvania Liquor Control Board*, 41 A.3d 953, 959 (Pa. Commw. Ct. 2012) (reinforcing the proposition that even a single past citation is sufficient to support the Board's decision to deny renewal of a liquor license, and the Board may consider a licensee's entire citation history to determine whether a pattern emerges and may consider all past Liquor Code violations, no matter when they occurred). However, a trial court is permitted to consider the corrective measures a licensee took in response to its citations, and to substitute its discretion for that of the Board in determining whether those corrective measures warranted the renewal of Licensee's license. *See Goodfellas, Inc.,* 921 A.2d 559, 566 (Pa. Commw. Ct. 2007). Although a citation for a single violation of the Liquor Code can authorize the non-renewal of a license, the typical non-renewal involves multiple violations of the Liquor Code and a string of violent disturbances inside or near the licensed premises. *Allison v. Pennsylvania Liquor Control Board*, 131 A.3d 1075, 1081 (Pa. Commw. Ct. 2016).

First, this Trial Court notes that, in nineteen (19) years of operation, Appellant has only received three (3) enhanced citations – two counts of sale, furnishing or providing alcoholic beverages to minors, in violation of 47 P.S. §4-493(1) [Citation Nos. 06-0672 and 06-1797] and one count of sale, furnishing or providing alcoholic beverages to a visibly intoxicated patron, in violation of 47 P.S. 4-493(1) [Citation No. 13-0442]. Furthermore, none of the three (3) enhanced citations occurred during the most recent licensing period [August 1st, 2013 to July 31st, 2015], as Citation No. 13-0442 for sale of alcoholic beverages to a visibly intoxicated person occurred on March 11th, 2013, while Citation Nos. 06-0672 and 06-1797 for sale of alcoholic beverages to a minor occurred on March 29th, 2006 and

August 2nd, 2006 respectively. Finally, this Trial Court notes the Board granted renewal of Appellant's liquor license following adjudication of these "enhanced citations," which did not substantially warrant the Board to reject renewal of Appellant's liquor license.

Furthermore, this Trial Court finds and concludes the remaining violations, including fortified/adulterated/contaminated liquor, selling alcoholic beverages on credit, refilling empty liquor bottles, failing to break empty liquor bottles within twenty-four (24) hours, permitting smoking in a public place where smoking is prohibited, failing to comply with the Order of the Administrative Law Judge and failing to devote full time and attention to the operation of the licensed business, do not establish a pattern of violations requiring non-renewal of Appellant's liquor license. Appellant's manager-of-record, Jason Lombardo, has taken substantial remedial measures following receipt of these citations, including terminating employees involved in the citations, installing several security cameras to monitor the purchasing of alcoholic beverages and achieving R.A.M.P. certification for all of its employees. Jason Lombardo's steps to take action occurred without any formal Conditional Licensing Agreement in place to ensure Jason Lombardo would be responsible; in fact, no Conditional Licensing Agreement has ever existed at this establishment. Consideration of Appellant's less-than-egregious citation history, together with Jason Lombardo's credible testimony regarding his substantial and reasonable remedial measures to avoid further citations, supports this Trial Court's decision to renew Appellant's liquor license.

2. Incidents and/or Disturbances On or Near Appellant's Premises.

Between June of 2013 and May of 2015, ten (10) reported incidents occurring on or near Appellant's premises as summarized by this Trial Court:

a. On June 12th, 2013, several City of Erie police officers, including Detective Dennis Obroski, responded to a homicide (shooting) in the location of Lombardo's Tavern. Officer Obroski indicated Jason Lombardo, who was present during the shooting, was "very cooperative" and offered video footage from inside the establishment to aid the police in their investigation. *See PLCB Exhibit B-13*;

b. On August 29th, 2013, several City of Erie Police officers responded to a report of "gunshots fired" near Lombardo's Tavern. Officer Theresa Anderson spoke with Joshua Nientimp, an alleged employee of Lombardo's Tavern, who stated he was inside the establishment and saw "a black male shooting a gun at a vehicle." The assailant, Anthony L. Lloyd, was apprehended. *See PLCB Exhibit B-14*;

c. On April 27th, 2014, several City of Erie Police officers, including Detective Michael Suchy, responded to a report of a stabbing at Lombardo's Tavern. Police officers spoke with Jeremy McCall, who stated his friend, Jesse Holmes (victim), got into an altercation with several black males outside the establishment and was stabbed outside of the establishment after being kicked out. Police officers also spoke with an individual named "Lance," an alleged employee of Lombardo's Tavern, and Nicole Torres, a bartender, both of whom stated they kicked out a group of patrons prior to this stabbing. Detective Suchy stated Jason Lombardo was cooperative throughout the investigation and provided security footage of the incident. *See PLCB Exhibit B-15*;

d. On May 16th, 2014, Detective Lorah and Patrolman Williams responded to a report of a fight at Lombardo's Tavern. The victim, Brian Edinger, was assaulted after

confronting several males making racist remarks to a female patron. The case has been listed as "inactive" as the witnesses were not cooperating and video footage of the incident could not be obtained from "Josh." *See PLCB Exhibit B-16*;

e. On January 18th, 2015, Corporal Stoker and Patrolman McLellan responded to a report of a fight at Lombardo's Tavern. Lindsay Sloan, a bartender, stated William Stewart, who was being loud and causing a disturbance, got into an altercation with Jim Baker, resulting in Stewart punching Baker in the face. Baker wanted nothing done and would not talk to the police. Stewart was advised by police he was not permitted to re-enter the establishment. *See PLCB Exhibit B-17*;

f. On February 20th, 2015, Officers Steven and Goozdich responded to a report of a fight at Lombardo's Tavern. Jason Lombardo stated two females and a male were fighting with another female and male couple. The black male (Akao Thompson) was very intoxicated and was charged with Public Drunkenness. *See PLCB Exhibit B-18*;

g. On April 15th, 2015, several City of Erie Police officers responded to a report of a disturbance near Lombardo's Tavern. As police officers arrived, a gunshot was heard. Two black males, Broom and Thorton (both standing on the porch at 914 West 21st Street), were detained and a black semi-automatic handgun and a spent shell casing were found near where the black males were standing. *See PLCB Exhibit B-19*;

h. On May 20th, 2015, several City of Erie Police officers responded to a report of a patron waving a gun at Lombardo's Tavern. Officer Theresa Anderson spoke with Jason Lombardo, who stated he saw a patron (Kamran Lopez Herbstritt) selling "little bags of white powder," knocked the bags out of the patron's hand, and pushed the patron out of the establishment. The patron then pulled out a silver handgun and began waving it around. Jason Lombardo called 9-1-1 and identified the patron with the ID left at the establishment. *See PLCB Exhibit B-20*;

i. On May 26th, 2015, several City of Erie Police Officers, including Officer Steven De Luca, responded to a report of a disturbance at Lombardo's Tavern. Police officers arrived at the scene and began dispersing a large crowd of between twenty (20 and thirty (30) people, who were arguing amongst each other. One male (Tyshaun Gunn) argued with the police and was detained due to his drunken state and disorderly conduct. In his Report, Officer De Luca did state "*Lombardo's Tavern is an on-going problem for EPD units as there are dozens of calls for service related to unwanted guests, fights, drunks, shots fired, shootings and at least one unsolved homicide.*" Jason Lombardo was cited with a "Disorderly House" ordinance violation. S*ee PLCB Exhibit B-21*; and

j. On May 30th, 2015, several City of Erie Police Officers, including Officers De Luca and Stadler, responded to a report of a fight at Lombardo's Tavern. Police officers noticed a large group of males outside the establishment in front and on the side of the establishment. Thereafter, Officers De Luca and Stadler entered the establishment and noted fifty (50) to seventy-five (75) patrons inside the bar, smelled marijuana, saw marijuana clouds, and noticed plastic baggies and blunt shavings all over. In his Report, Officer De Luca stated "*Lombardo was approached and advised about the on-going problems and immediately stated that it has nothing to do with his bar and was argumentative. He was again advised about the nuisance bar issue and still*

> *denied any problems. Lombardo had been advised by this officer on several occasions but continued to allow his patrons to run his bar*." Jason Lombardo was cited with a "Disorderly House" ordinance violation. *See PLCB Exhibit B-22*.

These incidents on or near Appellant's premises, standing alone, may be reason enough for the Board to deny renewal of Appellant's liquor license. *See 47 P.S. §4-470(a.1)(4)* (the Board, in deciding whether to renew a liquor license, may consider activity that occurred on or about the licensed premises or in areas under the licensee's control). However, a trial court, similar to the Board, can consider whether any substantial steps were taken to address the activity occurring on or about the premises. *See id.* Furthermore, although a licensee is required to take substantial affirmative measures to prevent misconduct, a licensee is not required to do everything possible to prevent criminal activity on the premises, act as its own police force or close its business. *See I.B.P.O.E. of West Mount Vernon Lodge 151 v. Pennsylvania Liquor Control Board*, 969 A.2d 642, 651 (Pa. Commw. Ct. 2009).

First, this Trial Court finds and concludes that, although the severity of these incidents cannot be downplayed, very few of the ten (10) incidents involved either intoxicated patrons or Appellant's service of alcoholic beverages in general. In fact, the vast majority of the incidents occurred outside of the establishment and was simply altercations that continued outside of the establishment. The two (2) most severe incidents – the June 12th, 2013 shooting and the April 27th, 2014 stabbing – occurred outside of Lombardo's Tavern and appeared to be premeditated by the assailants. According to Jason Lombardo, who was present during the June 12th, 2013 shooting, the assailant "came off of a shaded area in front of the building and shot forward, as if he was waiting for [the victim]," and fled in a vehicle shortly thereafter. *See N.T., pg. 40, lines 1-13*. Also, according to an individual named "Lance," an alleged employee of Lombardo's Tavern, and Nicole Torres, a bartender, both of whom were present during the April 27th, 2014 stabbing, the individuals who assaulted and stabbed the victim, Jesse Holmes, did so only after the victim left voluntarily and their group had been kicked out of the establishment. *See PLCB Exhibit B-15*.

Furthermore, Appellant has instituted substantial remedial measures in order to prevent further incidents and substantially cooperated with the police in their investigation to prevent further incidents occur. Following the June 12th, 2013 shooting, Jason Lombardo installed an eight (8) camera security system, which included five (5) interior cameras, to cover one hundred percent (100%) of the interior of the establishment, and three (3) external cameras. In the event an incident occurs and the police require Appellant's security footage, several police officers, including Detectives Obroski and Suchy stated Jason Lombardo has always been cooperative in providing footage and even helping the police download the footage onto their system. In addition, Jason Lombardo personally works the door every evening, checking each patron's identification and scanning each patron with a metal detecting wand. If Jason Lombardo is not present, the bartenders check patrons for identification. Jason Lombardo's girlfriend, Amanda, scans each patron with the metal detecting wand. *N.T, pg. 52, lines 11-17*. Jason Lombardo has also ensured that he, his father, Gary A. Lombardo (owner) and all of Appellant's employees have current R.A.M.P. certifications. Regarding security, Jason Lombardo has considered the idea of hiring security, but is hesitant for two (2) reasons. First, during the time Jason Lombardo was manager-of-record for the "Strandatta Corporation" in Allegheny County and the "Ivory Cum Latta," every problem that occurred at these bars were caused by bouncers ninety percent (90%) of the time. *See id., pg. 53, lines*

17-24. Second, hiring security, which would cost between $200 and $300, would place a significant financial hardship on Appellant.

Finally, a major contributor to the incidents occurring on or near Appellant's premises is the increase in crime near the area of West 21st Street and Brown Avenue, unrelated to Lombardo's Tavern. According to the credible testimony of Jason Lombardo, crime in the area of Lombardo's Tavern has increased thirty percent (30%) in the last five (5) years. *Id., pg. 29, lines 23-24*. Jason Lombardo further classified the area around the establishment as being "on the verge of a bad neighborhood," but not being a "warzone," and most of the crime (shootings, stabbings, drugs, prostitution, robberies, thefts, etc.) have occurred towards West 18th Street, further north of Lombardo's Tavern. Jason Lombardo stated several establishments have closed down over the years and the patrons who once occupied those establishments now patronize Lombardo's Tavern, bringing their problems with them. *See id., pg. 30, line 22 – pg. 31, line 1*. In addition, Detective Obroski indicated "anything below 18th Street is a 'high crime area' and Lombardo's Tavern is located in close proximity to said 'high crime area.'" Appellant has also placed more emphasis on its dart and pool leagues, which bring in a "different clientele" far better than those involved in the police incident reports. *See id., pg. 26, lines 19-22*. Appellant's location in a "high-crime area" is a major contributor to the incidents on or near the establishment; however, to place a majority of the blame on Appellant's alleged remedial deficiencies, which are no fault of Appellant, would be improper. *See Rosing, Inc. v. Pennsylvania Liquor Control Board*, 690 A.2d 758, 759 (Pa. Commw. Ct. 1997) (a trial court properly reversed the Board's decision denying renewal of liquor license, finding that the criminal activity on or near the licensed premises was due to **the location of the premises in a high-crime area** rather than the fault of the licensee). Considering the nature and circumstances of these incidents, all of the substantial and appropriate reasonable remedial measures implemented and enforced by Jason Lombardo, Appellant's manager-of-record, and the location of Appellant's establishment in a "high-crime area" supports this Trial Court's decision to renew Appellant's liquor license.

For all of the foregoing reasons, this Court enters the following Order and reserves to add further Findings of Fact and Conclusions of Law, if necessary in the future:

ORDER

AND NOW, to wit, this 16th day of June, 2016, after thorough consideration of the entire record, including, but not limited to, the testimony and evidence presented at the Administrative Hearing before the Administrative Judge on October 6th, 2015 and the Civil De Novo Trial before this Trial Court on April 28th, 2016, 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 **GRANTED** consistent with this Trial Court's Findings of Fact and Conclusions of Law set forth above. The Order of the Pennsylvania Liquor Control Board dated January 13th, 2016 denying Appellant's request to renew its liquor license is hereby **REVERSED**.

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

COMMONWEALTH OF PENNSYLVANIA
v.
JEFFREY ALLAN WAID

CRIMINAL PROCEDURE / DRIVING UNDER THE INFLUENCE

In order to justify a vehicle stop, a law enforcement officer must have either **reasonable suspicion** of a motor vehicle **violation that must be investigated** or **probable cause** of a **completed violation** of the motor vehicle code.

EVIDENCE / SUPPRESSION MOTION

It is the sole province of the suppression court to weigh the credibility of witnesses. As such, courts are entitled to believe all, part or none of the evidence presented.

CRIMINAL PROCEDURE / DRIVING ON ROADWAYS LANED FOR TRAFFIC

Brief and momentary touching of lines is permissible (*de minimus* in nature). 75 Pa.C.S.A. §3309 does not require perfect driving, only "driving nearly as practicable" within single lane.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION NO. 11 OF 2016

Appearances: Paul S. Sellers, Esquire for the Commonwealth
Chad J. Vilushis, Esquire for the Defendant

Brabender, J. August 23, 2016

The matter is before the Court on the Defendant's Omnibus Pre-Trial Motion. Following a hearing, and upon consideration of the parties' briefs, the Motion shall be **GRANTED**.

FINDINGS OF FACT

1. The Defendant, Jeffrey Allan Waid, was charged with two counts of Driving Under the Influence (First Offense, and Highest Rate, First Offense)[1]. The Criminal Complaint also originally included the summary offenses of Driving on Right Side of Roadway, Driving on Roadways Laned for Traffic, and Careless Driving[2].

2. The charges arose from a stop of a 2007 GMC Canyon operated by the Defendant on State Route 19 in Waterford Township, Pennsylvania, on October 1, 2015. The Defendant was headed north on Route 19 in the evening when he was pulled over by Pennsylvania State Police Troopers Jeffrey Vincent and Kyle Callahan, and ultimately charged with DUI.

3. On May 24, 2016, the Defendant filed an Omnibus Pre-Trial Motion, alleging the stop was illegal because the police lacked the requisite reasonable suspicion and/or probable cause to pull the Defendant over. Alternately, the Defendant asserts the driving violations for which the Defendant was stopped were *de minimis* in nature.

4. A hearing on the motion was held on June 22, 2016. The Commonwealth presented the testimony of Trooper Jeffrey Vincent. The Commonwealth played the mobile video recording (MVR) of the alleged traffic violations. The MVR was taken by a recording system in the

[1] 75 Pa.C.S.A. §3301, 75 Pa.C.S.A. §3309, and 75 Pa.C.S.A. §3714(a).

[2] 75 Pa.C.S.A. §§3802(a)(1) and 3802(c).

police vehicle. The recording was admitted in evidence as Commonwealth Exhibit "1".

5. Following the hearing, the parties submitted written briefs in support of their respective positions.

6. The Defendant asserts the traffic stop was based upon alleged completed motor vehicle violations, rather than an investigation of a possible DUI, therefore, the "probable cause" standard applies. The Defendant asserts probable cause of a completed violation of the Motor Vehicle Code was lacking, because at best, the MVR established three (3) touchings of the double yellow lines over a two (2)-mile observation period, with no traffic in the vicinity during any of the alleged line touchings. Defendant asserts any line touchings were *de minimis* in nature, and not illegal.

7. Officer Vincent, on direct examination, testified the traffic stop was initiated because the Defendant's vehicle wove within the roadway; crossed the center line on three occasions; and drifted within its lane toward the center line, causing a vehicle traveling in the opposite direction to move to the right. On cross-examination, Officer Vincent admitted he did not observe the tires of Defendant's vehicle cross the center line, and, at most, observed three (3) "touches" of the center line. The officer clarified his earlier testimony during direct examination that he defined "touchings" as "crossings" of the line. The officer admitted the Defendant maintained travel within his own lane when an oncoming vehicle in the opposing lane moved over to the right, and it was at this time the officers decided to stop the Defendant's vehicle.

8. In the written brief submitted after the suppression hearing, the Commonwealth asserted the Defendant touched or drove on the painted lines several times, and Defendant's vehicle drifted within his lane of travel toward the middle line as a semi-tractor-trailer passed in the opposite direction and shifted within its own lane. The Commonwealth asserts this evidence should provide sufficient basis for the stop of Defendant's vehicle.

CONCLUSIONS OF LAW

1. "Once a motion to suppress has been filed, it is the Commonwealth's burden to prove, by a preponderance of the evidence, that the challenged evidence was not obtained in violation of the defendant's rights." *Commonwealth v. Wallace,* 42 A.3d 1040, 1047-1048 (Pa. 2012). *See also, Pa.R.Crim.P. 581(H)*.

2. As the Commonwealth contends the manner in which Defendant operated the vehicle violated sections of the Motor Vehicle Code, probable cause was required to justify the traffic stop. *See Commonwealth v. Feczko,* 10 A.3d 1285, 1290-1291 (Pa.Super. 2010).

3. "Probable cause to arrest exists 'when the facts and circumstances within the police officer's knowledge and of which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested. Probable cause justifying a warrantless arrest is determined by the totality of the circumstances. It is the facts and circumstances within the personal knowledge of the police officer that frames the determination of the existence of probable cause.'" *Commonwealth v. Salter, supra* at 996-997, *citing Commonwealth v. Williams,* 941 A.2d 14, 27 (Pa.Super. 2008).

4. The facts as articulated by Officer Vincent and as demonstrated on the MVR are insufficient to establish probable cause warranting a traffic stop of the Defendant's vehicle.

Under all of the circumstances, including the *de minimis* nature of the Defendant's alleged actions, the absence of erratic driving, and the facts the Defendant maintained travel within his own lane at all times and, at best touched the center line on three occasions, the stop was unlawful. See *Commonwealth v. Garcia,* 859 A.2d 820, 823 (Pa.Super. 2004); *Commonwealth v. Battaglia*, 802 A.2d 652, 655-656 (Pa.Super. 2002).

5. The Commonwealth failed to establish, by a preponderance of the evidence, probable cause a completed motor vehicle violation occurred. All evidence seized or obtained as a result of the unlawful stop, including all evidence of driving under the influence, must be suppressed as fruit of the poisonous tree. Defendant's Omnibus Pre-Trial Motion must be **GRANTED**.

BY THE COURT:
/s/ **Daniel J. Brabender, Jr., Judge**

COMMONWEALTH OF PENNSYLVANIA
v.
DEREK ANTHONY MOORE

CRIMINAL PROCEDURE / SUPPRESSION OF EVIDENCE / BURDEN OF PROOF

Pennsylvania Rule of Criminal Procedure 581 governs the suppression of evidence. Pursuant to Rule 581, the Commonwealth, not the defendant, shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights. The Commonwealth's burden is by a preponderance of the evidence and has been defined as "the burden of producing satisfactory evidence of a particular fact in issue and the burden of persuading the trier of fact that the fact alleged is indeed true."

CONSTITUTIONAL LAW / SEARCH AND SEIZURE / GENERAL

Article I, section 8 of Pennsylvania Constitution provides that "the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizure, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."

CONSTITUTIONAL LAW / SEARCH AND SEIZURE / EXCLUSIONARY RULE

The exclusionary rule provides a remedy to protect the rights created by the U.S. and Pennsylvania Constitutions. The exclusionary rule under Article I, Section 8 of the Pennsylvania Constitution has been interpreted by the Pennsylvania Supreme Court to serve the dual purposes of safeguarding privacy and ensuring that warrants are issued only upon probable cause.

CONSTITUTIONAL LAW / SEARCH AND SEIZURE / STATE ACTION

Warrantless entries or searches are per se unreasonable under our federal and state Constitutions, albeit subject to certain delineated exceptions. Both the Fourth Amendment to the United States Constitution and Article I, §8 of the Pennsylvania Constitution protect individuals from unreasonable searches and seizures by the government or its agents; however, the proscriptions of the Fourth Amendment and Article I, §8 do not apply to searches and seizures conducted by private individuals.

CONSTITUTIONAL LAW / SEARCH AND SEIZURE / STATE ACTION

The critical factor for purposes of determining whether state action is involved is whether a private individual, in light of all the circumstances, must be regarded as having acted as an "instrument" or agent of the state. Where the relationship between the individuals committing the wrongful acts and the government is such that those acts can be viewed as emanating from the authority of the state, case law dictates a finding of state action. *Id.* In making such a determination, a court must consider the purpose of the search, the party who initiated it, and whether the government acquiesced in it or ratified it.

CONSTITUTIONAL LAW / SEARCH AND SEIZURE / REASONABLE EXPECTATIONS OF PRIVACY

In order to prevail upon a suppression motion, the defendant has a preliminary burden to show that the challenged police conduct implicated a reasonable expectation of privacy he had in the area searched or item seized. In order to have a reasonable expectation of privacy,

one must intend to exclude others and must exhibit that intent. The privacy test is twofold: the expectation must not only be an actual expectation of privacy, but also one that society is prepared to recognize as reasonable.

CONSTITUTIONAL LAW / SEARCH AND SEIZURE / REASONABLE EXPECTATION OF PRIVACY

To prove a legitimate expectation of privacy in a structure, a defendant must establish that he has either a possessory interest or a legitimate presence, or he must establish some factor from which a reasonable and justified expectation of privacy can be deduced. A defendant can establish a legitimate expectation of privacy, despite lacking a common-law interest in the real property, if he demonstrates certain characteristics of ownership. A defendant can establish a legitimate expectation of privacy, despite lacking a common-law interest in the real property, if he demonstrates certain characteristics of ownership.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION NO. CR 1598 of 2016

Appearances: G. Michael Garcia, Esq. for the Commonwealth
James A. Pitonyak, Esq., for the Defendant

Domitrovich, J. September 6, 2016

After thorough consideration of the entire record regarding Defendant's Omnibus Pre-trial Motion for Relief, including, but not limited to, the testimony and evidence presented during the August 18, 2016 Suppression Hearing, as well as an independent review of the relevant statutory and case law, this Trial Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Amanda Keller, who owns and resides at 11 Deer Street, Albion, Pennsylvania 16401, met Derek Anthony Moore (hereafter referred to as "Defendant") in July or August of 2015.
2. Defendant began living at 11 Deer Street, Albion, Pennsylvania 16401 in September of 2015, when he lived outside the property in a tent, but was later allowed to move into an 8'x4' cubby hole in the attached garage, which contained an entrance to the home.
3. Defendant kept several of his things in the cubby hole and was permitted to put up a makeshift wall of cardboard and wood, install a door with no lock (but was held shut with a chain hanging down from the ceiling), and install insulation in the cubby hole.
4. There was no lease agreement between Mrs. Keller and Defendant, although Defendant did pay rent "off-and-on" in the amount of five hundred dollars and 00/100 ($500.00), which was used by Mrs. Keller for food, bills and rent, and was permitted occasional access to the home.
5. Mrs. Keller never went into Defendant's living area nor did she ask to go into the cubby hole; however, her husband would, but only when Defendant was there as well.
6. Mrs. Keller noticed "large burns" on Defendant's arm and often noticed the police going past her home; these activities made Mrs. Keller suspicious and she warned Defendant not to have any controlled substance, including methamphetamines, in her home.
7. In February of 2016, Mrs. Keller was contacted by the Pennsylvania State Police at

work and was told to come home as her children were home alone.

8. When Mrs. Keller arrived home, she observed five (5) police vehicles at her home, and her husband and his friend were detained in a police car because they had broken into the nearby Albion Mill for the purpose of setting up a methamphetamine lab.

9. Later, Mrs. Keller received a call from Officer Duell, Albion Borough Police Department, and was told to do a "sweep" through the home to ensure the safety of her and her children.

10. Officer Duell described what Mrs. Keller should look for, including pipes, bags, salt, battery strips and "anything out of the ordinary."

11. On February 13, 2016, Mrs. Keller went into Defendant's cubby hole during a time Defendant was not there, as the door was closed, but not locked.

12. Mrs. Keller described the smell in the cubby hole as "acidic" and "musty."

13. In the cubby hole, Mrs. Keller found a glass pipe and two (2) 2'x2' toolboxes, one gray in color and one red in color, both of which were locked and also smelled "acidic" and "musty."

14. Mrs. Keller removed the toolboxes from Defendant's cubby hole with the assistance of her mother, Deana Brockett, and a friend, Matthew Neary, took them upstairs and opened them with a screwdriver.

15. Inside the toolboxes, Mrs. Keller discovered ionized salt, coffee filters, batteries and a gas syphoning hose.

16. After Mrs. Keller discovered these items, she immediately called the police, who informed her that a police officer would be dispatched to her home.

17. Officer Andrew Miller, Albion Borough Police Department, was dispatched to Mrs. Keller's home for investigation into a possible methamphetamine lab.

18. Officer Miller arrived at Mrs. Keller's home and met Mrs. Keller, who advised him about Defendant's living arrangements, the incident the night before, her conversation with Officer Duell, and her search through Defendant's room and possessions, including the two (2) toolboxes.

19. Thereafter, Officer Miller accompanied Mrs. Keller to Defendant's room where he observed the red toolbox, which contained a garbage bag containing cold packs, coffee filters, salt, liquid siphoning tools and other items.

20. Mrs. Keller also informed Officer Miller she noticed battery strips, pseudoephedrine blister packs and more coffee filters in a white trash can in Defendant's room.

21. Based upon his training and experience, Officer Miller knew these items to be utilized in the manufacturing of methamphetamines using the "Nazi One-Pot" method.

22. Following his search, Officer Miller contacted Assistant District Attorney Erin C. Connelly, the duty ADA, to see if a search warrant was required, to which ADA Connelly stated a search warrant was required given the fact that Defendant's room was rented and not in a common area of the residence.

23. Thereafter, Officer Miller obtained and executed a search warrant at 11 Deer Street, Albion, Pennsylvania 16401, and several items were seized from Defendant's room.

24. On June 20, 2016, the District Attorney's Office filed a Criminal Information, charging Defendant with Possession with Intent to Deliver, in violation of 35 Pa. C. S. §780-113(a)(30); Liquefied Ammonia Gas-Precursors and Chemicals, in violation of 35 Pa. C. S. §780-

113.1(a)(3); Illegal Dumping of Methamphetamine Waste, in violation of 35 Pa. C. S. §780-113.4(b)(1); and Possession of Drug Paraphernalia, in violation of 35 Pa. C. S. §780-113(a)(32).

25. On July 26, 2016, Defendant, by and through his counsel, James A. Pitonyak, Esq., filed an Omnibus Pre-trial Motion for Relief.

26. A hearing on Defendant's Omnibus Pre-trial Motion for Relief was held on August 18, 2016, during which this Trial Court heard testimony from Amanda Keller and Officer Andrew Miller, received evidence and heard argument from both counsel. Defendant appeared and was represented by his counsel, James A. Pitonyak, Esq., and Assistant District Attorney G. Michael Garcia appeared on behalf of the Commonwealth.

CONCLUSIONS OF LAW

Pennsylvania Rule of Criminal Procedure 581 governs the suppression of evidence. Pursuant to Rule 581, the Commonwealth, not the defendant, shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights. *See Pa. R. Crim. P. 581(h)*. The Commonwealth's burden is by a preponderance of the evidence. *Commonwealth v. Bonasorte*, 486 A.2d 1361, 1368 (Pa. Super. 1984); *see also Commonwealth v. Jury*, 636 A.2d 164, 169 (Pa. Super. 1993) (the Commonwealth's burden of proof at suppression hearing has been defined as "the burden of producing satisfactory evidence of a particular fact in issue; and . . . the burden of persuading the trier of fact that the fact alleged is indeed true.").

A. The search of Defendant's room was unreasonable and, therefore, all evidence seized during the unreasonable search should be suppressed.

Article I, section 8 of the Pennsylvania Constitution provides that "the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant." *Pa. Const. Art. I, §8*. The exclusionary rule provides a remedy to protect the rights created by the U.S. and Pennsylvania Constitutions. *Commonwealth v. Davido*, 106 A.3d 611, 622 (Pa. 2014). The exclusionary rule under Article I, Section 8 of the Pennsylvania Constitution has been interpreted by the Pennsylvania Supreme Court to serve the dual purposes of safeguarding privacy and ensuring that warrants are issued only upon probable cause. *See id*.

i. The initial search of Defendant's room was unreasonable as it was conducted without a warrant by Albion Borough Police Officer Andrew Miller and Amanda Keller, both of whom were acting as "agents of the Commonwealth."

Warrantless entries or searches are per se unreasonable under our federal and state Constitutions, albeit subject to certain delineated exceptions. *Id*. Both the Fourth Amendment to the United States Constitution and Article I, §8 of the Pennsylvania Constitution protect individuals from unreasonable searches and seizures by the government or its agents; however, the proscriptions of the Fourth Amendment and Article I, §8 do not apply to searches and seizures conducted by private individuals. *See Commonwealth v. Elmobdy*, 823 A.2d 180, 183-84 (Pa. Super. 2003). The critical factor for purposes of determining whether state action is involved is whether a private individual, in light of all the circumstances, must be regarded as having acted as an "instrument" or agent of the state. *Id* at 184. Where the relationship between the individuals committing the wrongful acts and the government

is such that those acts can be viewed as emanating from the authority of the state, case law dictates a finding of state action. *Id*. In making such a determination, a court must consider the purpose of the search, the party who initiated it, and whether the government acquiesced in it or ratified it. *Id; see also Commonwealth v. Riedel*, 651 A.2d 135, 138 (Pa. 1994).

This Trial Court concludes the search of Defendant's room was unreasonable as it was conducted by "agents of the Commonwealth." First, Officer Andrew Miller is clearly an "agent of the Commonwealth" as he is employed with the Albion Borough Police Department as a police officer and performs several law enforcement duties for Albion Borough, Erie County, Pennsylvania. Furthermore, Amanda Keller, while not employed as a law enforcement officer, was clearly acting as an "agent of the Commonwealth" when she performed a search of Defendant's room. Following her husband's arrest for attempting to set up a methamphetamine lab in the Albion Bill, Amanda Keller was contacted by Albion Borough Police Officer Duell, who directed her to perform a "sweep" through her home and described what she should look for, including pipes, bags, salt, battery strips and "anything out of the ordinary." Although Mrs. Keller testified the purpose of the search was to ensure her and her children's safety, the specific description of these items sought by Officer Duell seems to indicate ulterior motives; specifically, to locate further contraband in Mrs. Keller's home. Based upon the directives of Officer Duell, Mrs. Keller went to Defendant's room to conduct her search, including opening two (2) locked toolboxes in Defendant's room. In addition, when Officer Miller arrived at Mrs. Keller's home, Mrs. Keller told Officer Miller what she had found in Defendant's room and personally took him to Defendant's room so Officer Miller could conduct his own search. This Trial Court notes that Officer Miller did not obtain a search warrant prior to performing his search of Defendant's room and only requested a search warrant after discussing the situation with Assistant District Attorney Erin C. Connelly, who informed Officer Miller a search warrant was required due to the nature of Defendant's living arrangements, and no exception to the warrant requirement or other exigent circumstances existed at the time of the warrantless search.

Upon consideration that Officer Duell initiated the search by Mrs. Keller, the specific purpose of the search by Mrs. Keller, and Officer Miller acquiescing to the search of Mrs. Keller by receiving information obtained by Mrs. Keller resulting from the search and being led directly to the area being searched by Mrs. Keller, this Trial Court concludes the search of Defendant's room was conducted by "agents of the Commonwealth" acting without a search warrant, an exception to the search warrant requirement or other exigent circumstances, and, therefore, is unreasonable.

ii. Defendant had a "legitimate expectation of privacy" in his room as it was enclosed by walls with a door installed and Defendant had paid rent for use of the room.

In order to prevail upon a suppression motion, the defendant has a preliminary burden to show that the challenged police conduct implicated a reasonable expectation of privacy he had in the area searched or item seized. *Commonwealth v. Millner*, 888 A.2d 680, 691 (Pa. 2005). In order to have a reasonable expectation of privacy, one must intend to exclude others and must exhibit that intent. *Commonwealth v. Lowery,* 451 A.2d 245, 247 (Pa. Super. 1982). The privacy test is twofold: the expectation must not only be an actual expectation of privacy, but also one that society is prepared to recognize as reasonable. *See id*.

The characteristics of Defendant's room demonstrate a legitimate expectation of privacy. To prove a legitimate expectation of privacy in a structure, a defendant must establish that he

has either a possessory interest or a legitimate presence, or he must establish some factor from which a reasonable and justified expectation of privacy can be deduced. *Commonwealth v. Gordon*, 683 A.2d 253, 257-58 (Pa. 1996). A defendant can establish a legitimate expectation of privacy, despite lacking a common-law interest in the real property, if he demonstrates certain characteristics of ownership. *Id* at 258. A defendant can establish a legitimate expectation of privacy, despite lacking a common-law interest in the real property, if he demonstrates certain characteristics of ownership. *Id.* Amanda Keller described Defendant's living area as an 8'x4' cubby hole located in the attached garage area. Defendant kept several of his possessions in the cubby hole and was permitted to put up a makeshift wall of cardboard and wood, install insulation and install a door with no lock, but was held shut with a chain hanging down from the ceiling. Although Defendant has use of the residence, Mrs. Keller indicated Defendant's access to the residence was occasional. These descriptions of Defendant's living arrangements paint the picture of an enclosed area solely accessible to Defendant and would be able to effectively close off the room from the rest of the world.

Defendant also paid rent to Mrs. Keller for use of the cubby hole in the amount of five hundred dollars and 00/100 ($500.00), which Mrs. Keller stated was used by her for food, bills and her own rent. The payment of rent has been held to demonstrate a legitimate expectation of privacy in an area. *See United States v. Davis,* 932 F.2d 752, 757 (9th Cir. 1991) (concluding a defendant had legitimate expectation of privacy in a friend's apartment where he had a key to the apartment, was free to come and go as he pleased, stored items in a safe there, and paid a portion of the rent).

After considering the evidence and reviewing the relevant case law, this Trial Court concludes Defendant enjoyed a legitimate expectation of privacy in his living area within Mrs. Keller's home, which was violated by the unreasonable search of Officer Miller and Mrs. Keller, acting as an "agent of the Commonwealth," without a search warrant, an exception to the warrant requirement or other exigent circumstances.

III. Conclusion

Therefore, this Trial Court concludes the search of Defendant's room was unreasonable as Defendant had a legitimate expectation of privacy in the room and the initial search was conducted by Officer Miller and Amanda Keller, who was acting as an "agent of the Commonwealth," without a search warrant, an exception to the warrant requirement or other exigent circumstances. For all of the foregoing reasons, this Court enters the following Order:

ORDER

AND NOW, to wit, this 6th day of September, 2016, after thorough consideration of the entire record regarding Defendant's Omnibus Pre-trial Motion for Relief, including, but not limited to, the testimony and evidence presented during the August 18th, 2016 Suppression Hearing, as well as an independent review of the relevant statutory and case law and the Findings of Fact and Conclusions of Law set forth above pursuant to Pennsylvania Rule of Criminal procedure 581, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendant's Omnibus Pre-trial Motion for Relief is hereby **GRANTED** and all evidence seized from the search of Defendant's room at 11 Deer Street, Albion, Pennsylvania 16401 is hereby **SUPPRESSED**.

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

COMMONWEALTH OF PENNSYLVANIA
v.
ANTHONY N. MALONE, Defendant

COURTS / JUDICIAL PRECEDENTS / RETROACTIVITY

Where an appellate decision overrules prior law and announces new principle, unless the decision specifically declares the ruling to be prospective only, the new rule is to be applied retroactively to cases where the issue in question is properly preserved at all stages of adjudication up to and including any direct appeal.

CONSTITUTIONAL LAW / SEARCH AND SEIZURE / EXCLUSIONARY RULE

Violations of privacy interests under the Fourth Amendment requires exclusion of evidence under the "exclusionary rule," a judicially-created sanction specifically designed as a "windfall" remedy to deter future Fourth Amendment violations. The sole purpose of the exclusionary rule is to deter misconduct by law enforcement. Exclusion of evidence in such a case is not warranted where the police were acting in reasonable reliance on binding legal precedent.

CRIMINAL PROCEDURE / ARD / DISCRETION

The sole decision to submit a case for ARD rests in the sound discretion of a district attorney.

JUDICIAL PROCEDURE / PROCEEDINGS AND OTHER MATTERS GENERALLY / MODIFICATION OF ORDERS

Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 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.

VEHICLES / IMPLIED CONSENT

The United States Supreme Court in *Birchfield* specifically held prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION No. CR 408 of 2016

Appearances: Jared M. Trent, Esq. for the Commonwealth
Gene P. Placidi, Esq. for the Defendant

OPINION

Domitrovich, J., September 23, 2016

The instant matter is currently before this Trial Court on Anthony N. Malone's (hereafter referred to as "Defendant") Motion to Reconsider and Amend ARD Disposition, filed on July 11, 2016 by and through Defendant's counsel, Gene P. Placidi, Esq. In his Motion to Reconsider and Amend ARD Disposition, Defendant argues his blood test was illegally obtained as the taking of Defendant's blood was an unlawful search and seizure under the Fourth Amendment to the United States Constitution and Article I, §8 of the Pennsylvania

Constitution, pursuant to the United States Supreme Court's holding in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (U.S. 2016) (holding that blood tests are significantly intrusive and, therefore, police officers must secure a search warrant prior to taking blood for chemical testing; failure to do so would result in an unlawful search and seizure under the Fourth Amendment of the United States Constitution). Defendant argues *Birchfield* should be applied retroactively to Defendant's ARD, thereby reducing the charge to DUI: General Impairment and eliminating the sixty (60) day license suspension.

The relevant facts are as follows: Defendant filed an Application for Disposition under Program of Accelerated Rehabilitative Disposition ("ARD") on February 25, 2016. On March 3, 2016, the District Attorney's Office filed a Criminal Information, charging Defendant with Driving under the Influence of Alcohol-Highest Rate, First Offense, in violation of 75 Pa. C. S. §3802(c).

On June 1, 2016, Defendant was admitted in the ARD Program and this Trial Court imposed ARD conditions, including a lab fee of one hundred thirty-four dollars and 00/100 ($134.00), one (1) year of probation and sixty (60) days' license suspension.

On June 23, 2016, the United States Supreme Court decided the case of *Birchfield v. North Dakota*, 136 S. Ct. 2160 (U.S. 2016), holding that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests.

Defendant, by and through his counsel, Gene P. Placidi, Esq., filed a Motion to Reconsider and Amend ARD Disposition on July 11, 2016[1]. On July 14, 2016, the Commonwealth, by and through District Attorney John H. Daneri, filed its Response to Defendant's Motion to Reconsider and Amend ARD Disposition. A hearing was scheduled for August 1, 2016, but was continued to August 29, 2016 at the request of Defendant's counsel. At the August 29, 2016 hearing, the parties mutually agreed to a continuance to September 9, 2016 to allow additional time for the District Attorney's Office to determine whether a recent issue of inaccurate viability of blood testing by the Pennsylvania State Police involved the instant criminal case. The District Attorney's Office submitted a correspondence on August 31, 2016, indicating this instant criminal case was not one of the cases impacted by invalid blood testing. At the September 9, 2016 hearing, this Trial Court reserved its ruling after hearing argument from both counsel to make these findings of fact and conclusions of law.

Defendant relies on the case of *Commonwealth v. Cabeza*, 469 A.2d 146 (Pa. 1983) to support his argument that *Birchfield* should be applied retroactively. In *Cabeza*, the defendant, found guilty of first-degree murder, appealed his judgment of sentence, specifically concerning the issue of improper cross-examination of character witnesses. *See id* at 146. The Pennsylvania Superior Court reversed on the basis of the decision of *Commonwealth v. Scott*, 436 A.2d 607 (1981), which was decided while the defendant's case was on appeal, and the Commonwealth appealed. *See id.* The Pennsylvania Supreme Court affirmed, holding that, where an appellate decision overrules prior law and announces new principle, unless the decision specifically declares the ruling to be prospective only, the new rule is to be applied retroactively to cases where the issue in question is properly preserved at all stages of

[1] This Trial Court also notes that Defendant filed a Petition for Appeal from Suspension of Operating Privilege/ Denial of Driver's License and Request for Supersedeas on July 11, 2016. A hearing on said Petition is scheduled for September 28, 2016.

adjudication up to and including any direct appeal. *Id* at 148. However, the instant criminal action is distinguishable from *Cabeza*. Defendant in the instant criminal case was not on direct appeal at the time *Birchfield* was decided. Defendant filed an Application for ARD on February 25, 2016 and was accepted into the ARD Program on June 1, 2016. *Birchfield* was decided on June 23, 2016, twenty-two (22) days after Defendant was accepted into the ARD Program and conditions were imposed. No direct appeal was taken after Defendant was accepted into the ARD Program and the time for filing a direct appeal to the Pennsylvania Superior Court has elapsed. *See Pa. R. A. P. 903(a)*. Defendant's criminal case was not on direct appeal when the United States Supreme Court decided *Birchfield*; therefore, *Birchfield* does not apply retroactively to Defendant, who was only admitted into the ARD Program before *Birchfield* was decided.

This Trial Court's decision in the instant criminal case is consistent with the decisions rendered by other Erie County Court of Common Pleas judges. *See Opinion & Order, Hon. William R. Cunningham, Commonwealth v. Lesert*, *CR 578 of 2016* (the court denied a defendant's Motion to Withdraw Plea, concluding *Birchfield* was not to be given retroactive effect as the defendant's criminal case was not on direct appeal when *Birchfield* was decided).

Furthermore, to give *Birchfield* retroactive effect would be against long-standing judicial precedent. The issues decided in *Birchfield* involve privacy interests in one's blood and the need for protection of those interests by requiring police to obtain a search warrant before the taking of blood for chemical testing. Violations of privacy interests under the Fourth Amendment requires exclusion of evidence under the "exclusionary rule," a judicially-created sanction specifically designed as a "windfall" remedy to deter **future** Fourth Amendment violations. *See Davis v. United States*, 131 S. Ct. 2419, 2433-34 (U.S. 2011) [emphasis added]. The sole purpose of the exclusionary rule is to deter misconduct by law enforcement. *Id* at 2432. In the instant criminal case, the actions of the police officers did not constitute misconduct; rather, the police officers who took Defendant's blood for chemical testing did so in reliance that their actions were proper and lawful based on legal precedent at the time. Exclusion of evidence in such a case is not warranted where the police were acting in reasonable reliance on binding legal precedent. *See id* at 2429. The decision in *Birchfield* means only to deter police misconduct, i.e. taking blood for chemical testing without securing a search warrant, from June 23, 2016 forward, and does not apply to police conduct occurring prior to *Birchfield*.

The sole decision to submit a case for ARD rests in the sound discretion of a district attorney. *See Commonwealth v. Fleming*, 955 A.2d 450, 453 (Pa. Super. 2008) (citing *Commonwealth v. Darkow*, 626 A.2d 1173, 1176 (Pa. Super. 1993)). Following the decision in *Birchfield*, Erie County District Attorney John H. Daneri instituted a policy wherein all DUI: High Rate of Alcohol and DUI: Highest Rate of Alcohol cases involving a chemical test of blood would be reduced to DUI: General Impairment, thereby eliminating any license suspension. However, District Attorney Daneri has indicated this policy only includes cases where a defendant was admitted into the ARD Program **after** the *Birchfield* decision. As this instant Defendant was admitted into the ARD Program **before** the *Birchfield* decision, District Attorney Daneri's policy does not apply to the instant criminal case, and this Trial Court is adhering to District Attorney Daneri's policy as ARD is within the sole discretion of the District Attorney. *See Fleming*, 955 A.2d at 453.

In addition, this Trial Court is without jurisdiction to modify Defendant's ARD as more than thirty (30) days have passed before Defendant filed this Motion to Reconsider and Amend ARD Disposition. Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 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. *42 Pa. C. S. §5505*. Defendant was accepted into the ARD Program on June 1, 2016, and filed his Motion on July 11, 2016, forty (40) days after the Order was entered admitting Defendant into the ARD Program. Therefore, on the date Defendant filed his Motion to Reconsider and Amend ARD Disposition, this Trial Court was without jurisdiction to modify Defendant's ARD.

Finally, this Trial Court notes that *Birchfield* does not impact civil penalties for refusal to submit to chemical testing. The United States Supreme Court in *Birchfield* specifically held: "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them." *Birchfield*, 131 S. Ct. 2160, 2185 (U.S. 2016).

Therefore, for all of the reasons set forth above and others stated on the record, this Trial Court enters the following Order:

ORDER

AND NOW, to-wit, this 23rd day of September, 2016, after the scheduled hearing on September 9, 2016 regarding the Motion to Reconsider and Amend ARD Disposition, filed on July 11, 2016 by Anthony N. Malone, by and through his counsel, Gene P. Placidi, Esq., after hearing argument from both counsel and after thorough consideration of relevant case law, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendant's Motion to Reconsider and Amend ARD Disposition is hereby **DENIED**.

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

COMMONWEALTH OF PENNSYLVANIA
v.
WILLIAM E. DENIAL

PCRA / JURISDICTION / TIME FOR FILING

A PCRA petition must be filed within one year of the date judgment becomes final unless the petition alleges and the petitioner proves one of the following exceptions applies: (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States; (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

PCRA / JURISDICTION / TIME FOR FILING

Any PCRA Petition invoking any of the above exceptions to the timeliness requirement must be filed within sixty (60) days of the date the claim could have been presented.

PCRA / JURISDICTION / TIME FOR FILING

The Pennsylvania Supreme Court has stated the statute makes clear that where, as here, a PCRA Petition is untimely, it is the petitioner's burden to plead in the Petition and prove that one of the exceptions of 42 Pa. C. S. §9545(b)(1) applies. That burden necessarily entails an acknowledgment by the petitioner that the PCRA Petition under review is untimely but that one or more of the exceptions apply. It is for the petitioner to allege in his Petition and to prove that he falls within one of the exceptions found in 42 Pa. C. S. §9545(b)(1)(i)-(iii).

PCRA / JURISDICTION / TIME FOR FILING

As the PCRA's timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA Petition that is filed in an untimely manner.

PCRA / NEWLY DISCOVERED EVIDENCE / GENERAL

To invoke the "newly-discovered evidence" exception to the PCRA time-bar successfully, a petitioner must establish that: (1) the evidence has been discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) the evidence is not being used solely to impeach credibility; and (4) the evidence would likely compel a different verdict.

PCRA / NEWLY DISCOVERED EVIDENCE / JUDICIAL OPINIONS

Pennsylvania courts have expressly rejected the notion that judicial decisions can be considered newly-discovered facts which would invoke the protections afforded by 42 Pa. C. S. §9545(b)(1)(ii). A judicial opinion does not qualify as a previously unknown 'fact' capable of triggering the timeliness exception set forth in 42 Pa. C. S. §9545(b)(1)(ii), which applies only if a petitioner has uncovered facts that could not have been ascertained through due diligence, and judicial determinations are not facts.

PCRA / LEGALITY OF SENTENCE

Although legality of sentence is always subject to review within the Pennsylvania Post-Conviction Relief Act, claims must still first satisfy the PCRA's time limits or one of the

exceptions thereto. Even within the PCRA, the time limits described in 42 Pa. Cons. Stat. Ann. § 9545 have been held to apply to questions raising the legality of sentence.

PCRA / JURISDICTION / LAWSON STANDARD

The Pennsylvania Superior Court has stated requests for review of a second or subsequent post-conviction petition will not be entertained unless a strong *prima facie* showing is offered to demonstrate that a miscarriage of justice may have occurred… This standard is met only if the petitioner can demonstrate either: (a) the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or (b) he is innocent of the crimes charged. A *Lawson* determination is not a merits determination. Like the threshold question of timeliness, whether a second petition satisfies the *Lawson* standard must be decided before a PCRA court may entertain the petition. Like an untimely petition, a *Lawson*-barred petition yields a dismissal. The merits are not addressed.

COURTS / RETROACTIVITY

A new constitutional rule applies retroactively in a collateral proceeding only if (1) the rule is substantive, i.e. rules that decriminalize conduct or prohibit punishment against a class of persons, or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

COURTS / RETROACTIVITY / ALLEYNE

Neither the United States Supreme Court nor the Pennsylvania Supreme Court has held that *Alleyne* is to be applied retroactively to cases in which the judgment of sentence had become final.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION No. 1957 – 1993, 1958 – 1993

Appearances: William E. Denial, *Pro se*, Appellant
Elizabeth A. Hirz, Esq. for the Commonwealth, Appellee

OPINION

Domitrovich, J., April 1, 2016

The instant matter is currently before the Pennsylvania Superior Court on the Appeal of William E. Denial (hereafter referred to as "Appellant") from this Trial Court's Opinion and Order dated January 25, 2016, whereby this Trial Court dismissed Appellant's fifth Post-Conviction Relief Act Petition (hereafter referred to as "PCRA Petition"). In his fifth PCRA Petition, Appellant argued the mandatory minimum outlined in 42 Pa. C. S. §9718 and applied to his sentence is unconstitutional in light of the Pennsylvania Supreme Court's decision in *Commonwealth v. Hopkins*, 98 MAP 2013 (June 15, 2013), a progeny of *Alleyne v. United States*, 133 S. Ct. 2151 (2013). This Trial Court dismissed Appellant's fifth PCRA Petition as patently untimely since he filed said PCRA Petition nearly twenty (20) years after his judgment of sentence became final, and Appellant failed to argue successfully that the "newly-discovered evidence" timeliness exception, pursuant to 42 Pa. C. S. §9545(b)(1)(ii), applied to his fifth PCRA Petition; specifically, Appellant had argued that the Pennsylvania Supreme

Court's decision in *Commonwealth v. Hopkins* constituted newly-discovered evidence" and this Trial Court concluded that argument was without merit as related to Pennsylvania case law, which has continuously rejected judicial decisions as "newly-discovered evidence" for the purpose of invoking 42 Pa. C. S. §9545(b)(1)(ii).

Factual and Procedural History

On April 20, 1994, Appellant was found guilty at docket nos. 1957 – 1993 and 1958 – 1993. On June 1, 1994, this Trial Court sentenced Appellant as follows:

- At docket no. 1957 – 1993:
  - Count 1 (IDSI – Forcible Compulsion, in violation of 18 Pa. C. S. §3123(a)(1)) – five (5) to ten (10) years' incarceration;
  - Count 2 (Terroristic Threats, in violation of 18 Pa. C. S. §2706) – six (6) to twenty four (24) months' incarceration consecutive to Count 1;
  - Count 3 (Indecent Assault without Consent, in violation of §3126(1)) – merged with Count 1; and
  - Count 4 (Endangering Welfare of Children, in violation of 18 Pa. C. S. §4304) – five (5) years' probation consecutive to Count 4 of docket no. 1958 – 1993.
- At docket no. 1958 – 1993:
  - Count 1 (Aggravated Indecent Assault without Consent, in violation of 18 Pa. C. S. §3125(1)) – three and one-half (3 ½) to ten (10) years' incarceration consecutive to Count 2 of docket no. 1957 – 1993;
  - Count 2 (Indecent Assault without Consent, in violation of §3126(1)) – merged with Count 1;
  - Count 3 (Endangering Welfare of Children, in violation of 18 Pa. C. S. §4304) – five (5) years' probation consecutive to Count 4 of docket no. 1957 – 1993; and
  - Count 4 (Terroristic Threats, in violation of 18 Pa. C. S. §2706) – six (6) to twenty four (24) months' incarceration consecutive to Count 1 of docket no. 1957 – 1993.

On June 7, 1994, Appellant, by and through his counsel, Dennis V. Williams, Esq., filed a Notice of Appeal to the Pennsylvania Superior Court regarding his judgment of sentence. On November 14, 1995, the Pennsylvania Supreme Court denied Appellant's Petition for Allowance of Appeal. On December 4, 1995, the Pennsylvania Superior Court affirmed Appellant's judgment of sentence.

On June 27, 1996, Appellant, by and through his counsel, Dennis V. Williams, Esq., filed his first PCRA Petition. On October 16, 1996, Appellant, by and through his counsel, Dennis V. Williams, Esq., filed a Notice of Appeal to the Pennsylvania Superior Court. On October 17, 1996, this Trial Court denied Appellant's first PCRA Petition. On July 31, 1997, Appellant filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, which was denied on April 6, 1998. On April 8th, 1998, the Pennsylvania Superior Court affirmed this Trial Court's denial of Appellant's first PCRA Petition.

On November 13, 2001, Appellant filed his second PCRA Petition, *pro se*. On January 31, 2002, this Trial Court dismissed Appellant's second PCRA Petition. On February 21, 2002, Appellant filed a *pro se* Notice of Appeal to the Pennsylvania Superior Court. On December 20, 2002, Appellant filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, which was denied on April 30, 2003. On May 2, 2003, the Pennsylvania

Superior Court affirmed this Trial Court's dismissal of Appellant's second PCRA Petition.

On May 9, 2003, Appellant filed his third PCRA Petition, *pro se*. On May 12, 2003, William J. Hathaway, Esq., was appointed as Appellant's PCRA counsel. On June 7, 2003, this Trial Court dismissed Appellant's third PCRA Petition and granted Attorney Hathaway's Petition for Leave of Court to Withdraw as Counsel. On July 28, 2003, Appellant filed a *pro se* Notice of Appeal to the Pennsylvania Superior Court. On June 16, 2004, Appellant filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, which was denied on February 4, 2005. On February 4, 2005, the Pennsylvania Superior Court affirmed this Trial Court's dismissal of Appellant's third PCRA Petition.

On October 25, 2010, Appellant filed his fourth PCRA Petition, *pro se*. On May 9, 2011, this Trial Court dismissed Appellant's fourth PCRA Petition. On May 19, 2011, Appellant filed a *pro se* Notice of Appeal to the Pennsylvania Superior Court. On April 10, 2012, the Pennsylvania Superior Court affirmed this Trial Court's dismissal of Appellant's fourth PCRA Petition.

On May 11, 2015, Appellant filed a Petition to Assign Counsel and Funds for a Psychiatric Evaluation. On June 8, 2015, this Trial Court dismissed Appellant's Petition to Assign Counsel and Funds for a Psychiatric Evaluation. On August 13, 2015, Appellant filed his fifth PCRA Petition. On September 29, 2015, the Erie County District Attorney's Office filed its Response to Appellant's fifth PCRA Petition. On October 22, 2015, Appellant filed his Response to Commonwealth's Answer to Appellant's fifth PCRA Petition. On December 29, 2015, this Trial Court notified Appellant of its intention to dismiss his fifth PCRA Petition. Appellant filed Objections to this Trial Court's Notice of Intent to Dismiss on January 14, 2016. On January 25, 2016, this Trial Court dismissed Appellant's fifth PCRA Petition.

Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on February 5, 2016. This Trial Court filed its 1925(b) Order on February 9, 2016, and Appellant filed his Concise Statement of Errors Complained of on Appeal on February 23, 2016.

Legal Argument

1. **This Trial Court properly dismissed Appellant's fifth PCRA Petition as it is patently untimely and fails to argue successfully any of the timeliness exceptions pursuant to 42 Pa. C. S. §9545(b)(1).**

A PCRA petition must be filed within one year of the date judgment becomes final unless the petition alleges and the petitioner proves one of the following exceptions applies:

> (i) The failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) The right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa. C. S. §9545(b)(1)(i)-(iii). Any PCRA Petition invoking any of the above exceptions to the timeliness requirement must be filed within sixty (60) days of the date the claim could have been presented. *42 Pa. C. S. §9545(b)(2)*. The Pennsylvania Supreme Court has stated the statute makes clear that where, as here, a PCRA Petition is untimely, it is the petitioner's burden to plead in the Petition and prove that one of the exceptions of 42 Pa. C. S. §9545(b)(1) applies. *See Commonwealth v. Beasley*, 741 A.2d 1258, 1261 (Pa. 1999). "That burden necessarily entails an acknowledgment by the petitioner that the PCRA Petition under review is untimely but that one or more of the exceptions apply." *Id*. It is for the petitioner to allege in his Petition and to prove that he falls within one of the exceptions found in 42 Pa. C. S. §9545(b)(1)(i)-(iii). *See Commonwealth v. Holmes*, 905 A.2d 507, 511 (Pa. Super. 2006). As the PCRA's timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA Petition that is filed in an untimely manner. *See Commonwealth v. Taylor*, 933 A.2d 1035, 1042-43 (Pa. Super. Ct. 2007).

Pursuant to 42 Pa. C. S. §9545(b)(3), Appellant's judgment of sentence became final on November 14, 1995, when the Pennsylvania Supreme Court denied Appellant's Petition for Allowance of Appeal. Therefore, Appellant could have filed a timely PCRA Petition on or before November 14, 1996. As Appellant filed his fifth PCRA Petition on August 13, 2015, nearly twenty (20) years after his judgment of sentence became final, Appellant failed to timely file his fifth PCRA Petition. However, Appellant argued his fifth PCRA Petition fell within the "newly-discovered evidence" exception, pursuant to 42 Pa. C. S. §9545(b)(1)(ii). Specifically, Appellant argued the mandatory minimum sentence outlined in 42 Pa. C. S. §9178 and applied to his sentence is unconstitutional in light of the Pennsylvania Supreme Court's decision in *Commonwealth v. Hopkins*, 98 MAP 2013 (June 15, 2015).

To invoke the "newly-discovered evidence" exception to the PCRA time-bar successfully, a petitioner must establish that: (1) the evidence has been discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) the evidence is not being used solely to impeach credibility; and (4) the evidence would likely compel a different verdict. *See Commonwealth v. Holmes*, 905 A.2d 507, 511 (Pa. Super. 2006); *see also Commonwealth v. Medina*, 92 A.3d 1210, 1216 (Pa. Super. 2014). However, an analysis of these elements is unnecessary as Appellant relies on the Pennsylvania Supreme Court's decision in *Commonwealth v. Hopkins* as his "newly-discovered evidence." Pennsylvania courts have expressly rejected the notion that judicial decisions can be considered newly-discovered facts which would invoke the protections afforded by 42 Pa. C. S. §9545(b)(1)(ii). *See Commonwealth v. Cintora*, 69 A.3d 759, 763 (Pa. Super 2013). "A judicial opinion does not qualify as a previously unknown 'fact' capable of triggering the timeliness exception set forth in 42 Pa. C. S. §9545(b)(1)(ii), which applies only if a petitioner has uncovered facts that could not have been ascertained through due diligence, and judicial determinations are not facts." *See Commonwealth v. Watts*, 23 A.3d 980, 986 (Pa. 2011). Therefore, Appellant's reliance on *Commonwealth v. Hopkins* is not sufficient to invoke the "newly-discovered evidence" timeliness exception to the PCRA filing requirements as a judicial decision does not qualify as a "fact" or "evidence" for the purpose of 42 Pa. C. S. §9545(b)(1)(ii) and this Trial Court properly dismissed Appellant's fifth PCRA Petition.

Although Appellant's fifth PCRA Petition focuses on an allegedly illegal and unconstitutional sentence, which generally are not waivable, Appellant's fifth PCRA Petition nevertheless fails as patently untimely. Although legality of sentence is always subject to review within the Pennsylvania Post-Conviction Relief Act, claims must still first satisfy the PCRA's time limits or one of the exceptions thereto. *See Commonwealth v. Voss*, 838 A.2d 795, 800 (Pa. Super. 2003). Even within the PCRA, the time limits described in 42 Pa. Cons. Stat. Ann. § 9545 have been held to apply to questions raising the legality of sentence. *See id*. Therefore, as Appellant's fifth PCRA Petition does not meet the filing requirements and does not meet any of the timeliness exceptions to the filing requirement, Appellant's fifth PCRA, although raising a legality of sentence claim, still fails as untimely and this Trial Court properly dismissed Appellant's fifth PCRA Petition.

Additionally, as the instant PCRA Petition is Appellant's fifth PCRA Petition, Appellant is also required to comply with the mandates of *Commonwealth v. Lawson*, 549 A.2d 107, 112 (Pa. 1988) and its progeny. *See Commonwealth v. Palmer*, 814 A.2d 700, 709 (Pa. Super. 2002). As part of its holding in *Palmer*, the Pennsylvania Superior Court has stated:

> Requests for review of a second or subsequent post-conviction petition will not be entertained unless a strong *prima facie* showing is offered to demonstrate that a miscarriage of justice may have occurred… This standard is met only if the petitioner can demonstrate either: (a) the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or (b) he is innocent of the crimes charged.

Id. at 709. Furthermore, in *Palmer*, the Pennsylvania Superior Court stated:

> A *Lawson* determination is not a merits determination. Like the threshold question of timeliness, whether a second petition satisfies the Lawson standard must be decided **before** a PCRA court may entertain the petition. Like an untimely petition, a *Lawson*-barred petition yields a dismissal. The merits are not addressed.

Id. at 709, footnote 18 [emphasis added]. In his fifth PCRA Petition, Appellant fails to offer a strong *prima facie* demonstrating either the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate or that he is innocent of the crimes charged. Therefore, as Appellant has failed to meet the *Commonwealth v. Lawson* standard, Appellant's fifth PCRA Petition is barred from review. This Trial Court properly dismissed Appellant's fifth PCRA Petition as it is patently untimely and Appellant has failed to state any grounds for which relief may be granted.

2. **Assuming *arguendo* Appellant's fifth PCRA was timely filed, Appellant would not be entitled to relief as the United States Supreme Court's decision in *Alleyne v. United States* has not been held to apply retroactively.**

A new constitutional rule applies retroactively in a collateral proceeding only if (1) the rule is substantive, i.e. rules that decriminalize conduct or prohibit punishment against a class of persons, or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *See Commonwealth v. Riggle*, 119 A.3d 1058, 1065 (Pa. Super. 2015) *(citing Whorton v. Bockting*, 549 U.S. 406 (2007)).

Assuming *arguendo* Appellant did timely file his fifth PCRA Petition, Appellant would

not be entitled to relief as *Alleyne v. United States* has not been held to apply retroactively to cases whose judgments of sentence have become final. The Pennsylvania Superior Court has continuously held the decision of *Alleyne v. United States* is not substantive as it does not prohibit punishment for a class of offenders, nor does it decriminalize conduct; rather, the holding in *Alleyne* procedurally mandates the inclusion of facts in an indictment or information, which will increase a mandatory minimum sentence, and a determination by a fact finder of those facts beyond a reasonable doubt. *See Riggle*, 119 A.3d at 1065. Nor does the holding in *Alleyne* constitute a watershed procedural rule. *See id*.

Finally, assuming the holding in *Alleyne* did announce a new constitutional right, neither the United States Supreme Court nor the Pennsylvania Supreme Court has held that *Alleyne* is to be applied retroactively to cases in which the judgment of sentence had become final. *See Commonwealth v. Miller*, 102 A.3d 988, 995 (Pa. Super 2014). Therefore, Appellant's argument that the holding in *Alleyne v. United State*s applies retroactively and this Trial Court abused its discretion by not allowing *Alleyne* to be applied retroactively is without merit.

Conclusion

For all of the foregoing reasons, this Trial Court concludes the instant appeal is without merit and respectfully requests the Pennsylvania Superior Court affirm its Order dated January 25, 2016.

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

COMMONWEALTH OF PENNSYLVANIA
v.
NATHANIEL LESERT

CRIMINAL PROCEDURE / POST-TRIAL PROCEDURE

The failure to timely file a post-sentence motion or direct appeal means there is no jurisdiction to act on the Defendant's motion filed 42 days after sentencing. The Court has no jurisdiction to act after judgment of sentence becomes final.

Birchfield v. North Dakota is not retroactive to cases not on direct appeal before it was decided June 23, 2016.

Com. v. Cabeza created a limited window of time allowing for the retroactive application of new case law for cases involved on direct appeal addressing the same issue. However, the Defendant's reliance on *Com. v. Cabeza* is misplaced since the Defendant missed the opportunity to file a direct appeal raising *Birchfield* issues.

The Defendant does not assert his innocence, challenge the validity of his pleas or cite any police misconduct in support of his request to withdraw his plea. Therefore he has failed to establish a manifest injustice occurred requiring the withdrawal of his plea.

The rationale for *Birchfield* does not compel retroactivity. *Birchfield* was decided on the privacy interests protected under the Fourth Amendment. The longstanding remedy for Fourth Amendment violations in criminal cases is the exclusion of evidence. The sole purpose of the exclusionary rules is to deter police misconduct. In this case, there was no police misconduct.

Because deterrence is a prospective policy, the police cannot be deterred from conduct which already occurred. Thus, *Birchfield* can only deter those police officers involved in DUI investigations from June 23, 2016 onward.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
NO. 578 OF 2016

Appearances: Erie County District Attorney's Office for the Commonwealth
Nicole Sloane, Esquire for the Defendant

OPINION

Cunningham, J., September 26, 2016

The present matter is a “Motion to Withdraw Plea in Response to *Birchfield*” filed by the Defendant, Nathaniel Lesert. After oral argument, the Defendant’s Motion is DENIED.

PROCEDURAL HISTORY

On April 27, 2016, the Defendant pled guilty to general impairment DUI, his second offense, based on his refusal to submit to a blood test. *75 Pa.C.S.A. §3802(a)(1)*. On June 8, 2016, the Defendant was sentenced to 60 months of restrictive intermediate punishment including 90 days of electronic monitoring and $1,500.00 in costs and fines. The Defendant did not file a post-sentence motion or a direct appeal.

On June 23, 2016, the United States Supreme Court issued its decision in *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016), holding the Fourth Amendment does not permit

warrantless blood tests incident to arrest for drunk driving and that the warrant requirement is not circumvented by consent given on pain of committing a criminal offense.

On July 20, 2016, the Defendant filed the instant Motion seeking to withdraw his guilty plea and enter a guilty plea to general impairment, second offense. Given the procedural posture, the Defendant's Motion is untimely leaving this court without jurisdiction to act on it. Further, *Birchfield* does not provide retroactive relief to the Defendant.

THE DEFENDANT'S MOTION IS UNTIMELY

In fairness to the Defendant, when *Birchfield* was decided on June 23, 2016, the ten-day time period for him to file a post-sentence motion already expired. *Pa.R.Crim.P. 720(A)(3)*. Yet, there was no request to file a post-sentence motion nunc pro tunc.

There were fifteen days left for the Defendant to file a direct appeal (on or before July 8, 2016). No direct appeal was filed nor was there a request to reinstate appellate rights nunc pro tunc.

On July 20, 2016, some twelve days after the time to take a direct appeal expired, the Defendant filed the present Motion seeking to withdraw his plea and enter a guilty plea to a DUI charge of general impairment. Because the Defendant's conviction became a final judgment on July 9, 2016, his Motion is untimely. *See 42 Pa.C.S.A. §9545(b)(3)*(a judgment becomes final upon the expiration of time for filing a direct appeal).

Pursuant to *42 Pa.C.S.A. §5505*, a court may modify or rescind any order within thirty (30) days after its entry if no appeal from such order has been taken or allowed. Once this 30-day period expires, the trial court is without jurisdiction to alter or modify an order. Within the 30-day time period, the Court can correct a mistake that is patent or obvious. *Com. v. Martz*, 926 A.2d 514 (Pa.Super. 2007)(internal citations omitted); *Pa.R.Crim.P. 720.* A challenge to the legality of a sentence may be raised as a matter of right, is not subject to waiver, and may be entertained as long as the reviewing court has jurisdiction. *Com. v. Foster*, 960 A.2d 160, 163 (Pa.Super. 2008). However, the Defendant's Motion does not allege nor does he argue there were any patent or obvious mistakes in his case. The Defendant does not contest the legality of his sentence.

Based on the foregoing, this Court does not have jurisdiction to act on the Defendant's Motion. *See also, e.g., Com. v. Martinez*, 141 A.3d 485 (2016).

***BIRCHFIELD* CANNOT PROVIDE RETROACTIVE RELIEF TO THE DEFENDANT**

Assuming *arguendo* jurisdiction exists, the Defendant is not entitled to retroactive relief pursuant to *Birchfield*.

The Defendant relies on *Com. v. Cabeza*, 503 Pa. 228, 469 A.2d 146 (1983) to assert a claim for retroactive relief. In *Cabeza*, *supra*., the Pennsylvania Supreme Court held that when two cases are virtually identical save for one case being decided first, the first case should receive retroactive treatment. The applicable law "should not be determined by the fortuity of who first has his case decided by an appellate court." *Cabeza*, pp. 233, 148.

The Defendant also tenders a number of other appellate decisions best summarized by this observation: "Defendants are generally entitled to the retroactive applicability of decisions when they are pursuing an identical issue on direct appeal," provided the issue was properly preserved at all stages of litigation. *Com. v. Lofton*, 57 A.3d 1270, 1276 (Pa. Super. 2012).

These cases create a narrow window of procedural time for the retroactive application of

new case law. However, these cases are not helpful for the Defendant since he is not within the requisite window of procedural time.

The Defendant's case was not on direct appeal at the time *Birchfield* was decided. The Defendant had time to take a direct appeal seeking *Birchfield* relief but failed to do so. The Defendant is not seeking a nunc pro tunc opportunity to file a direct appeal.

As a result, this is not a case in which two similarly situated cases both raising the same issue on direct appeals resulted in a different outcome by mere chance.

The Defendant is also not entitled to withdraw his guilty plea based on more general legal principles. After a sentence has been imposed, a defendant can withdraw a guilty plea "only where necessary to correct a manifest injustice." *Com. v. Prendes*, 97 A.3d 337, 352 (Pa. Super. 2014) *quoting Com. v. Starr*, 301 A.2d 592, 595 (Pa. 1973).

The Defendant does not allege or argue that his plea must be withdrawn because a manifest injustice occurred in his case. The Defendant is not asserting he is innocent of the crime for which he pled guilty, or that his plea was not knowing or voluntary. The Defendant admitted at the time of the plea, and still admits, he was under the influence of alcohol while driving. Within his own motion to withdraw his guilty plea, the Defendant seeks to enter a guilty plea to general impairment.

Additionally, the Defendant does not contest the validity or factual basis for the plea. At the time of the Defendant's refusal to consent to a blood draw, the officers who informed him of the criminal consequences of refusal were acting legally. When the Defendant entered a guilty plea and was sentenced, the statute which provided sanctions as a result of a refusal to submit to a blood draw was the governing law in Pennsylvania. Thus, the Defendant has not sought or demonstrated the need to correct a manifest injustice.

Lastly, the rationale for the *Birchfield* holding does not compel retroactivity. *Birchfield* was decided on the privacy interests protected under the Fourth Amendment. The longstanding remedy for Fourth Amendment violations involving police misconduct in criminal cases is the exclusion of the evidence. The sole purpose of the exclusionary rule is to deter police misconduct. *Utah v. Strieff*, ___ S.Ct.___, June 20, 2016.

In this case, there was no police misconduct since the police were acting in compliance with existing Pennsylvania and federal law. Further, deterrence is inherently a prospective policy. The police cannot be deterred from conduct which already occurred. Accordingly, *Birchfield* can only deter those police officers involved in DUI investigations from June 23, 2016 onward. Therefore the Defendant is not entitled to retroactive relief.

CONCLUSION

Because the Defendant has not set forth a jurisdictional or legal basis for the withdrawal of his guilty plea, the Motion to Withdraw Plea in Response to *Birchfield* is DENIED.

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

ROBERT M. KOPIN, Plaintiff

v.

LAURA ANNE NIELSEN, a/k/a LAURA NIELSEN, Defendant

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS / GENERAL

Preliminary objections, the end result of which would be dismissal of a cause of action, should be sustained only in cases that are clear and free from doubt. The test on preliminary objections is whether it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief.

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS / DEMURRER

When ruling on preliminary objections in the nature of a demurrer, a court must overrule the objections if the complaint pleads sufficient facts which, if believed, would entitle the petitioner to relief under any theory of law. All material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purpose of this review. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it.

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS / CAPTION

Every pleading shall contain a caption setting forth the name of the court, the number of the action and the name of the pleading. The caption of a complaint shall set forth the form of the action and the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side in the complaint with an appropriate indication of other parties.

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS / NOTICE TO DEFEND

Every complaint filed by a plaintiff and every complaint filed by a defendant against an additional defendant shall begin with a Notice to Defend in substantially the form set forth in Pa. R. Civ. P. 1018.1(b). The Pennsylvania Superior Court has held that every complaint must include a Notice to Defend, and a defendant has no duty to respond to a complaint that does not contain a Notice to Defend, pursuant to Pa. R. Civ. P. 1026.

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS / PARAGRAPHING

Every pleading shall be divided into paragraphs numbered consecutively. Each paragraph shall contain as far as practicable only one material allegation. The test of compliance with Pa. R. Civ. P. 1022 is the difficulty or impossibility one has in answering the complaint, and mere length, complexity, and verbosity do not in themselves violate Rule 1022 if the subsidiary facts averred fit together into a single allegation.

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS / VERIFICATION

Every pleading containing an averment of fact not appearing of record in the action or containing a denial of fact shall state that the averment or denial is true upon the signer's personal knowledge or information and belief and shall be verified. The signer need not aver the source of the information or expectation of ability to prove the averment or denial at the trial. A pleading may be verified upon personal knowledge as to a part and upon information and belief as to the remainder. The verification requirement is not waivable, since courts, under the scheme of the procedural rules, are not permitted to act upon unverified assertions.

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS / FACTUAL SPECIFICITY

The material facts on which a cause of action or defense is based shall be stated in a concise and summary form. The primary purpose of a pleading is to form a clear and distinct issue for the trial between the parties. Pleadings serve the purpose of giving notice to an opponent of the propositions to be confronted at trial so as to avoid any unfair surprise. The rules of procedure simply do not permit the plaintiff to delegate their duty of pleading a specific claim to opposing parties or the court.

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS / AVERMENTS OF TIME AND PLACE

Averments of time, place and items of special damage shall be specifically stated.

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS / LEGAL SPECIFICITY

Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief.

CIVIL PROCEDURE / PRELIMINARY OBJECTIONS / JOINDER OF NECESSARY / INDISPENSABLE PARTY

Preliminary objections may be filed against a pleading regarding non-joinder of a necessary or indispensable party. An indispensable party is one whose rights or interests are so pervasively connected with the claims of the litigants that no relief can be granted without infringing on those rights or interests. The absence of an indispensable party renders any decree or order in the matter void for lack of jurisdiction.

CIVIL PROCEDURE / PRELIMINARY OBJECTION / JOINDER OF NECESSARY/ INDISPENSABLE PARTY

In determining whether a party is indispensable, the court should consider “at least” the following: (1) does the absent party have a right or interest related to the claim?, (2) if so, what is the nature of that right or interest?, (3) is that right or interest essential to the merits of the issue?, and (4) can justice be afforded without violating the due process rights of the absent party?

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION NO. 11307 of 2016

Appearances: Robert M. Kopin, *pro se*
Gary K. Schonthaler, Esq., for the Defendant

OPINION AND ORDER

Domitrovich, J. September 13, 2016

AND NOW, to-wit, this 13th day of September, 2016, upon consideration of the oral arguments on September 7, 2016 regarding Defendants’ Preliminary Objections and Brief in Support of Preliminary Objections, and after a thorough review of relevant statutory and case law, Defendant’s Preliminary Objections are hereby sustained for the following reasons:

I. Procedural History

On May 12th, 2016, Robert M. Kopin (hereafter referred to as "Plaintiff") filed a Notice of Appeal from a judgment rendered by Magistrate District Judge Paul A. Bizzarro on April 14, 2016 against Plaintiff and in favor of Laura Anne Nielsen a/k/a Laura Nielsen (hereafter referred to as "Defendant"). *See docket no. MJ-06104-CV-0000044-2016.* Defendant was served with Plaintiff's Notice of Appeal on May 23, 2016.

Plaintiff filed a document entitled "Bob Kopin Complaint" on May 31, 2016. Defendant, by and through her counsel, Gary K. Schonthaler, Esq., filed a Ten Day Notice on June 8th, 2016, requiring Plaintiff to file a Civil Complaint within ten (10) days from the date of said Notice.[1] Defendant filed Preliminary Objections on July 5, 2016 and filed a Brief in Support of Preliminary Objections on August 4, 2016. A hearing on Defendant's Preliminary Objections was held on September 7, 2016, at which this Trial Court heard argument from Plaintiff Robert M. Kopin and Defendant's counsel, Gary K. Schonthaler, Esq.

II. Legal Discussion

a. Standard for Preliminary Objections

Preliminary objections, the end result of which would be dismissal of a cause of action, should be sustained only in cases that are clear and free from doubt. *Bourke v. Kazaras*, 746 A.2d 642, 643 (Pa. Super. 2000). The test on preliminary objections is whether it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief. *Id.* When ruling on preliminary objections in the nature of a demurrer, a court must overrule the objections if the complaint pleads sufficient facts which, if believed, would entitle the petitioner to relief under any theory of law. *Gabel v. Cambruzzi*, 616 A.2d 1364, 1367 (Pa. 1992). All material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purpose of this review. *Clevenstein v. Rizzuto*, 266 A.2d 623, 624 (Pa. 1970). The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. *Hoffman v. Misericordia Hospital of Philadelphia*, 267 A.2d 867, 868 (Pa. 1970). Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it. *Gabel*, 616 A.2d at 1367 (Pa. 1992).

b. Plaintiff's Complaint fails to adhere to the pleading requirements pursuant to the Pennsylvania Rules of Civil Procedure.

Plaintiff's Complaint fails to adhere to several requirements of the Pennsylvania Rules of Civil Procedure and, therefore, is a deficient pleading. First, Plaintiff's Complaint does not contain a proper caption. Rule 1018 of the Pennsylvania Rules of Civil Procedure provides:

> Every pleading shall contain a caption setting forth the name of the court, the number of the action and the name of the pleading. The caption of a complaint shall set forth the form of the action and the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side in the complaint with an appropriate indication of other parties.

[1] At the September 7, 2016 Preliminary Objection hearing, Attorney Schonthaler admitted he filed the Ten-Day Notice in error, as Plaintiff had already filed a Complaint prior to the Ten-Day Notice being filed.

See Pa. R. Civ. P. 1018. Plaintiff's Complaint is entitled "Bob Kopin Complaint" and does not set forth the name of the court, i.e. the Court of Common Pleas of Erie County – Civil Action, or the number of the action, i.e. No. 11307 – 2016. As Plaintiff's Complaint does not contain a proper caption, it is deficient as a civil pleading.

Furthermore, Plaintiff's Complaint does not contain a Notice to Defend. Rule 1018.1 of the Pennsylvania Rules of Civil Procedure provides "every complaint filed by a plaintiff and every complaint filed by a defendant against an additional defendant shall begin with a Notice to Defend in substantially the form set forth in subdivision (b)." *See Pa. R. Civ. P. 1018.1(a).* The Pennsylvania Superior Court has held that every complaint must include a Notice to Defend, and a defendant has no duty to respond to a complaint that does not contain a Notice to Defend, pursuant to Rule 1026. *See Mother's Restaurant, Inc. v. Krystkiewciz,* 861 A.2d 327, 338 (Pa. Super. 2004). Plaintiff has failed to attach a Notice to Defend to his Complaint; therefore, the Complaint is deficient as a civil pleading.

In addition, Plaintiff's Complaint does not adhere to the paragraphing requirements of the Pennsylvania Rules of Civil Procedure. Rule 1022 provides "every pleading shall be divided into paragraphs numbered consecutively. Each paragraph shall contain as far as practicable only one material allegation." *Pa. R. Civ. P. 1022.* The test of compliance with Rule 1022 is the difficulty or impossibility one has in answering the complaint, and mere length, complexity, and verbosity do not in themselves violate Rule 1022 if the subsidiary facts averred fit together into a single allegation. *See General State Authority v. Sutter Corp*., 356 A.2d 377, 394 (Pa. Commw. Ct. 1976). Plaintiff's Complaint is more akin to a narrative letter than a civil pleading, as it does not contain separate allegations in individually-numbered paragraphs; rather, the Complaint seems to contain several allegations, which are difficult to discern from what is provided. As Plaintiff's Complaint does not contain individual paragraphs with separate allegations, it is deficient as a civil pleading.

Finally, Plaintiff's Complaint does not contain any verification as to the truthfulness and accuracy of the pleading. Rule 1024 of the Pennsylvania Rules of Civil Procedure provides:

> Every pleading containing an averment of fact not appearing of record in the action or containing a denial of fact shall state that the averment or denial is true upon the signer's personal knowledge or information and belief and shall be verified. The signer need not aver the source of the information or expectation of ability to prove the averment or denial at the trial. A pleading may be verified upon personal knowledge as to a part and upon information and belief as to the remainder.

Pa. R. Civ. P. 1024. The verification requirement is not waivable, since courts, under the scheme of the procedural rules, are not permitted to act upon unverified assertions. *Siegel v. Stahlfield,* 64 Pa. D. & C. 2d 132, 139 (Pa. C.P. 1973). Plaintiff's Complaint does not contain a separate "Verification" document, nor does his Complaint contain any averments that the Complaint has been verified by the Plaintiff or another party with personal knowledge. Without verification, Plaintiff's Complaint amounts to mere narration, and this Trial Court cannot act upon it.

Therefore, for all of the reasons stated above, Defendant's Preliminary Objections under Rule 1028(a)(2) regarding failure to adhere the pleading requirements are sustained.

c. Plaintiff's Complaint does not plead with sufficient factual specificity.

Pursuant to Rule 1019(a), the material facts on which a cause of action or defense is based

shall be stated in a concise and summary form. *Pa. R. Civ. P. 1019(a)*. The primary purpose of a pleading is to form a clear and distinct issue for the trial between the parties. *Rex v. Wellspan Health,* 8 Pa. D. & C. 5th 573, 575 (Pa. C.P. 2009). Pleadings serve the purpose of giving notice to an opponent of the propositions to be confronted at trial so as to avoid any unfair surprise. *Id.* The rules of procedure simply do not permit the plaintiff to delegate their duty of pleading a specific claim to opposing parties or the court. *Krajsa v. Keypunch, Inc.*, 622 A.2d 355, 357 (Pa. Super. 1993). As stated above, Plaintiff's Complaint is clearly narrative in nature and does not set forth Plaintiff's claims in a concise and summarized form. Absent a concise and summarized form of Plaintiff's claims, Defendant does not have proper notice of the issues to be confronted at trial and cannot properly form a defense to those issues.

Furthermore, Plaintiff's Complaint fails to make specific averments of time and place. Pursuant to Rule 1019(f), averments of time, place and items of special damage shall be specifically stated. *See Pa. R. Civ. P. 1091(f)*. Plaintiff's Complaint does indicate the date when Defendant purchased the various collectible toys and cars from him, i.e. April 1, 2014. However, Plaintiff's Complaint lacks any further specific averments of time and place, including where the collectible toys and cars were purchased, when payment was made on the collectible toys and cars, when the checks were returned unpaid and designated as "Stop Payment," when he filed suit with Magistrate District Judge Paul A. Bizzarro, when the MDJ civil judgment was rendered, when Plaintiff appealed the MDJ civil judgment, etc. Absent specific averments of time and place, Defendant cannot prepare a proper defense to the claims raised by Plaintiff in his Complaint.

Therefore, for all of the reasons stated above, Defendant's Preliminary Objections under Rule 1028(a)(3) regarding factual insufficiency are sustained.

d. Plaintiff's Complaint does not plead with sufficient legal specificity.

Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. *Feingold v. Hendrzak*, 15 A.3d 937, 941 (Pa. Super. 2011). When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. *Id*. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. *Id*.

Plaintiff's Complaint, in an improper narrative form, maintains Defendant purchased several collectible toys and cars from Plaintiff and these items were paid with several checks, which were all returned unpaid and designated "Stop Payment." Plaintiff's Complaint does not specifically indicate the causes of action Plaintiff is pursuing against Defendants; rather, Plaintiff's Complaint, within its summarized narrative, seemingly raises several causes of action, including, but not limited to, breach of contract and fraudulent inducement. Furthermore, Plaintiff's Complaint does not specifically designate the facts to be able to prove the various claims Plaintiff raises. Without proper designation of the specific causes of action and a specific factual basis to prove a cause of action, Defendants are not properly notified of the issues and cannot prepare a proper defense.

Therefore, for all of the reasons stated above, Defendant's Preliminary Objections under Rule 1028(a)(4) in the nature of a demurrer regarding legal insufficiency are sustained.

e. Plaintiff's Complaint fails to join a necessary or indispensable party, i.e. the Estate of James R. Nielsen, to the cause of action.

Finally, Plaintiff's Complaint is deficient as it fails to join a necessary or indispensable party to the instant civil action, i.e. the Estate of James R. Nielsen. Pursuant to Rule 1028, preliminary objections may be filed against a pleading regarding non-joinder of a necessary or indispensable party. *See Pa. R. Civ. P. 1028(a)(5)*. An indispensable party is one whose rights or interests are so pervasively connected with the claims of the litigants that no relief can be granted without infringing on those rights or interests. *Hubert v. Greenwald*, 734 A.2d 977, 979 (Pa. Super. 1999). The absence of an indispensable party renders any decree or order in the matter void for lack of jurisdiction. *Id* at 980. In determining whether a party is indispensable, the court should consider "at least" the following:

1) Does the absent party have a right or interest related to the claim?
2) If so, what is the nature of that right or interest?
3) Is that right or interest essential to the merits of the issue?
4) Can justice be afforded without violating the due process rights of the absent party?

Id at 980; see also Cry, Inc. v. Mill Service, Inc., 640 A.2d 372, 375 (Pa. 1994).

Upon consideration of the questions above, this Trial Court concludes the Estate of James R. Nielsen is an indispensable party to the instant civil action. In his Complaint, Plaintiff alleges "James R. Nielsen and Laura Anne Nielsen purchased items from me," and these items consisted of "collectible toys and cars." Furthermore, the copies of the checks attached to Plaintiff's Complaint are all signed by "James R. Nielsen." James R. Nielsen passed away on January 28, 2015. However, the caption for the instant civil action only has "Laura Anne Nielsen a/k/a Laura Nielsen" as a defendant, and the Proof of Service of Notice of Appeal and Rule to File Complaint, filed by Plaintiff on May 23, 2016, lists only "Laura Nielsen" as appellee. The Estate of James R. Nielsen is an indispensable party to the instant civil action as any judgment entered against Laura Nielsen would greatly affect the essential financial rights and interests of the Estate of James R. Nielsen and justice cannot be afforded without violating the due process rights of this indispensable party. *See Hubert*, 734 A.2d at 980; *see also Cry, Inc.*, 640 A.2d at 375.

Therefore, for all of the reasons stated above, Defendant's Preliminary Objections under Rule 1028(a)(5) in the nature of a demurrer regarding failure to join a necessary or indispensable party are sustained.

III. Conclusion

Therefore, for all of the reasons set forth above and others stated on the record, this Trial Court sustains Defendant's Preliminary Objections in the Nature of a Demurrer to Plaintiff's Civil Complaint and enters the following Order:

ORDER

AND NOW, to-wit, this 13th day of September, 2016, upon consideration of the oral arguments on September 7, 2016 regarding Defendants' Preliminary Objections and Brief in Support of Preliminary Objections, and after review of relevant statutory and case law, it is hereby **ORDERED, ADJUDGED AND DECREED** as follows:

1. Defendants' Preliminary Objection regarding Plaintiff's Complaint failing to adhere to the pleading requirements of the Pennsylvania Rules of Civil Procedure, pursuant to Rule 1028(a)(2), is hereby **SUSTAINED**;

2. Defendants' Preliminary Objection regarding the insufficient factual specificity of Plaintiff's Complaint, pursuant to Rule 1028(a)(3), is hereby **SUSTAINED**;

3. Defendants' Preliminary Objection regarding the insufficient legal specificity of Plaintiff's Complaint, pursuant to Rule 1028(a)(4), is hereby **SUSTAINED;**

4. Defendants' Preliminary Objection regarding failure to join a necessary or indispensable party, pursuant to Rule 1028(a)(5), is hereby **SUSTAINED**; and

5. Plaintiff's Civil Complaint is hereby **DISMISSED with prejudice.**

BY THE COURT:
/s/ Stephanie Domitrovich, Judge

COMMONWEALTH OF PENNSYLVANIA, Appellee
v.
FREDERICK W. KARASH, Appellant

APPEALS / STANDARD OF REVIEW

The Pennsylvania Superior Court's scope of review where a trial court has heard the case *de novo* is to determine whether or not the findings of fact are supported by competent evidence and to correct conclusions of law erroneously made; and the action of a trial court will not be disturbed on appeal except for a manifest abuse of discretion.

CRIMINAL PROCEDURE / DEFECTS IN FORM, CONTENT OR PROCEDURE

A defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, citation, summons, or warrant, or a defect in the procedures of these rules, unless the defendant raises the defect before the conclusion of the trial in a summary case or before the conclusion of the preliminary hearing in a court case, and the defect is prejudicial to the rights of the defendant.

CRIMINAL PROCEDURE / DEFECTS IN FORM, CONTENT OR PROCEDURE

Pennsylvania courts employ the test of whether the crimes specified in the original complaint, citation, summons, or warrant involve the same basic elements and evolved out of the same factual situation as the crimes specified in the amended complaint, citation, summons, or warrant. If so, then a defendant is deemed to have been placed on notice regarding his alleged criminal conduct.

CRIMINAL PROCEDURE / SUMMARY CASES / DE NOVO REVIEW

When a defendant appeals after the entry of a guilty plea or a conviction by an issuing authority in any summary proceeding… the case shall be heard *de novo* by the judge of the court of common pleas sitting without a jury.

CRIMINAL PROCEDURE / SUMMARY CASES / ISSUANCE OF CITATIONS

When a criminal proceeding in a summary case is instituted by issuing a citation to the defendant… the law enforcement officer contemporaneously shall give the defendant a paper copy of the citation containing all the information required by Rule 403.

CRIMINAL PROCEDURE / SUMMARY CASES / TRIAL DE NOVO

When a defendant appeals after the entry of a guilty plea or a conviction by an issuing authority, said issuing authority must file transcripts and other required papers from the lower court. A "transcript" before the Issuing Authority must contain (1) the date and place of hearings; (2) the names and addresses of the prosecutor, defendant and witnesses; (3) the names and office addresses of counsel in the proceeding; (4) the charge against the defendant as set forth in the prosecutor's complaint; (5) the date of issuance of any citation, summons or warrant of arrest and the return of service thereon; (6) a statement whether the parties and witnesses were sworn and which of these persons testified; (7) when the defendant was held for court, the amount of bail set; (8) the nature of the bail posted and the name and address of the corporate surety or individual surety; (9) a notation that the defendant has or has not been fingerprinted; (10) a specific descripting of any defect properly raised in accordance with Rule 109; (11) a notation that the defendant was advised of the right to apply for the assignment of counsel; (12) the defendant's plea of guilty or not guilty, the decision that was rendered in the case and the date thereof, and the judgment of sentence

and place of confinement, if any; and (13) any other information required by the Rules to be in the Issuing Authority's transcript.

CRIMINAL PROCEDURE / SUMMARY CASES / TRIAL DE NOVO

At the time of sentencing, the trial judge shall… issue a written order imposing sentence, signed by the trial judge and including the information specified in paragraphs (g)(1) through (g)(3), and a copy of the order shall be given to the defendant.

CRIMINAL PROCEDURE / SUMMARY AND COURT CASES / CONTINUANCES

A trial court or issuing authority may, in the interests of justice, grant a continuance, on its own motion, or on the motion of either party. When the matter is in the court of common pleas, the trial judge shall on the record identify the moving party and state of record the reasons for granting or denying the continuance. In appeals from summary proceedings arising under the Vehicle Code or local traffic ordinances, other than parking offenses, the law enforcement officer who observed the alleged offense must appear and testify. The failure of a law enforcement officer to appear and testify shall result in the dismissal of the charges unless … the trial judge determines that good cause exists for the law enforcement officer's unavailability and grants a continuance.

JUDICIAL CONDUCT / PERFORM DUTIES IMPARTIALLY

A judge shall hear and decide matters assigned to the judge, except where the judge has recused himself or herself or when disqualification is required by Rule 2.11 or other law. There are several circumstances where a judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including where the judge (1) has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding; (2) knows they are a party in the proceeding; (3) knows they have an economic interest in the proceedings; (4) knows a party has made contributions to the judge's campaign; (5) made a public statement committing the judge to rule a particular way in the proceeding; or (6) served as an attorney, governmental employee or material witness in the proceeding.

VEHICLES / SPEED LIMITS / BURDEN OF PROOF

To sustain a conviction for speeding, the Commonwealth must show beyond a reasonable doubt that: (1) an accused was driving in excess of the speed limit; (2) the speed timing device was approved by the Department of Transportation; and (3) the device was calibrated and tested for accuracy within the prescribed time period by a station which has been approved by the Department of Transportation.

VEHICLES / SPEED LIMITS / BURDEN OF PROOF

In sustaining its burden of proof, the Commonwealth need not produce a certificate from PennDOT which expressly indicates approval of a particular speed timing device; rather, the Pennsylvania Legislature has considerably lessened the Commonwealth's evidentiary burden by enabling a trial court to take judicial notice of the fact that the device has been approved by PennDOT, provided that the approval has been published in the Pennsylvania Bulletin.

VEHICLES / SPEED LIMITS / SPEED TIMING DEVICES

A certificate from the station showing that the calibration and test were made within the required period and that the device was accurate shall be competent and prima facie evidence of those facts in every proceeding in which a violation of this title is charged.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
NO. SA 74 OF 2015

APPEARANCES: Frederick W. Karash, *Pro se* (Appellant)
Nathaniel E. Strasser, Esq., on behalf of the Commonwealth of Pennsylvania (Appellee)

OPINION

Domitrovich, J., October 26, 2015

The instant matter is before the Pennsylvania Superior Court on Frederick W. Karash's (hereafter referred to as "Appellant") appeal from this Trial Court's Order dated August 5, 2015, whereby this Trial Court found, at the *de novo* trial, Appellant guilty of the summary charge of Maximum Speed Limits, at TR 317-2015, in violation of 75 Pa. C. S. §3362(a)(2) at 73 m.p.h. in a 55 m.p.h. zone, and imposed a sentence of a $61.00 fine, $10.00 EMS, $45.00 Surcharge, $10.00 Judicial Computer and all court costs. Appellant's speed was detected by a Pennsylvania State Police trooper using a speed timing device properly approved by the Commonwealth of Pennsylvania Department of Transportation, as well as appropriately calibrated and tested for accuracy within the prescribed time period by a station approved by the Department of Transportation.

I. Factual and Procedural History

On March 29, 2015, Pennsylvania State Police Trooper Joshua David Deitle was monitoring traffic speeds on Route 8 in Union Township, Erie County, Pennsylvania. *Notes of Testimony, Summary Conviction Appeal hearing, August 5, 2015, pg. 16, lines 5-8*. Trooper Deitle was in a marked police cruiser and was in full Pennsylvania State Police uniform. *Id., pg. 16, lines 10-13*. Trooper Deitle was also using a hand-held speed timing device, identified as a Decatur Electronics "Genesis" model with a serial number of GHD17653. *Id., pg. 16, line 17 – pg. 17, line 1*.

On that date, a Mitsubishi Outlander, black in color and traveling northbound on Route 8, came into the speed timing device's field of influence traveling at initially 73 miles per hour. *Id., pg. 18, line 24 – pg. 19, line 2*. Once the vehicle passed the police cruiser, Trooper Deitle pulled out and initiated a traffic stop of the Mitsubishi Outlander. *Id., pg. 19, lines 2-3*. Trooper Deitle discovered the vehicle was being operated by Appellant Frederick W. Karash, whose identity was confirmed by his Pennsylvania Driver's License. *Id., pg. 19, lines 4-7*. Prior to the traffic stop on March 29, 2015, Trooper Deitle had no other interaction with Appellant. *Id., pg. 20, lines 2-7*. Trooper Deitle advised Appellant he was exceeding the maximum speed limit, but cited Appellant for a lower speed in order to "cut him [Appellant] a little bit of a break" and due to Appellant recording the traffic stop. *Id., pg. 20, line 17 – pg. 21, line 21*. Trooper Deitle cited Appellant for traveling 60 miles per hour in a 55 mile per hour zone. *Id., pg. 21, lines 11-12*.

On April 21, 2015, Assistant District Attorney and Trooper Deitle amended the traffic citation at Appellant's hearing in front of Magisterial District Judge Carol L. Southwick. *Id., pg. 23, lines 2-4*. The traffic citation was amended before a hearing had commenced, with Appellant present, and was amended to reflect 73 miles per hour in a 55 mile per hour zone, the speed Appellant was actually traveling when Trooper Deitle timed his vehicle. *Id., pg.*

23, lines 5-15. Appellant was found guilty by Magisterial District Judge Carol L. Southwick of violating 75 Pa. C. S. §3362(a)(2) at 73 m.p.h. in a 55 m.p.h. zone, and sentence was properly imposed.

Appellant filed both a Notice of Summary Appeal and a Motion to Quash Citation "Exceeding Maximum Speed Limits" on May 11, 2015. A Summary Conviction Appeal hearing was scheduled before this Trial Court for July 7, 2015. Assistant District Attorney Nathaniel E. Strasser filed a Motion to Reschedule Summary Appeal Hearing on June 9, 2015, which was granted by this Trial Court on June 11, 2015. Appellant's Summary Conviction Appeal hearing was rescheduled for August 5, 2015 before this Trial Court, at which testimony was taken and evidence was received. Following the Summary Conviction Appeal *de novo* hearing, this Trial Court found Appellant guilty of violating 75 Pa. C. S. §3362(a)(2) at 73 m.p.h. in a 55 m.p.h. zone, and sentence was properly imposed.

Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on August 25, 2015. This Trial Court filed its 1925(b) Order on August 25, 2015. Appellant filed his "Precise Statement of Matters to be Raised on Appeal" on September 1, 2015.

II. Legal Argument

The Pennsylvania Superior Court's scope of review where a trial court has heard the case *de novo* is to determine whether or not the findings of fact are supported by competent evidence and to correct conclusions of law erroneously made; and the action of a trial court will not be disturbed on appeal except for a manifest abuse of discretion. *See Commonwealth v. Kittelberger*, 616 A.2d 1, 2 (Pa. Super. 1992).

In his "Precise Statement of Matters to be Raised on Appeal," Appellant raises twelve (12) separate issues on appeal, which this Trial Court will summarize into ten (10) issues as follows:

1. **As to Appellant's first, fourth and eighth issues, the traffic citation, issued by Pennsylvania State Police Trooper Joshua David Deitle to Appellant on March 29, 2015, was properly amended to reflect 73 miles per hour in a 55 mile per hour zone, the actual speed Appellant was traveling when Trooper Deitle timed Appellant's vehicle.**

Rule 109 of the Pennsylvania Rules of Criminal Procedure states:

> A defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, citation, summons, or warrant, or a defect in the procedures of these rules, unless the defendant raises the defect before the conclusion of the trial in a summary case or before the conclusion of the preliminary hearing in a court case, and the defect is prejudicial to the rights of the defendant.

Pa. R. Crim. P. 109; see Commonwealth v. Palmer, 482 A.2d 1318, 1319 (Pa. Super. 1984). Pennsylvania courts employ the test of whether the crimes specified in the original complaint, citation, summons, or warrant involve the same basic elements and evolved out of the same factual situation as the crimes specified in the amended complaint, citation, summons, or warrant. *See Palmer* at 1320 (*citing Commonwealth v. Stanley*, 401 A.2d 1166 (Pa. Super. 1979)). If so, then a defendant is deemed to have been placed on notice regarding his alleged criminal conduct. *See id.*

Appellant argues the traffic citation itself states Appellant was traveling at a speed of 60

miles per hour in a 55 mile per hour zone and, pursuant to 75 Pa. C. S. §3368, said speed "is not a convictable offense." At the time of the *de novo* hearing, Trooper Deitle clearly stated that, on March 29, 2015, Appellant's vehicle was traveling 73 miles per hour northbound on Route 8 in Union City, Pennsylvania. *N.T., pgs. 16-19*. Trooper Deitle, using an approved Decatur Electronics model hand-held speed timing device, rather than citing Appellant for the initial speed of 73 miles per hour, gave Appellant "a break" on his original citation at 60 miles per hour in a 55 mile per hour zone. *Id., pgs. 20-21*. Prior to the hearing commencing before Magistrate District Judge Carol L. Southwick, the Commonwealth amended Appellant's traffic citation to reflect 73 miles per hour in a 55 mile per hour zone – the original speed Appellant was timed by Trooper Deitle. The amended traffic citation formed the basis of Appellant's conviction before Magistrate District Judge Carol L. Southwick on April 21, 2015 and before this Trial Court on August 5, 2015. Furthermore, the amendment to the traffic citation was proper as the same basic elements were involved and the traffic citation arose from the same factual situation – Appellant traveling in excess of the maximum speed limit, which was timed by a Pennsylvania State Police trooper using an approved speed timing device. *See Palmer*, 482 A.2d at 1320.

Therefore, Appellant's argument that traveling 60 miles per hour in a 55 mile per hour zone "is not a convictable offense" is not relevant because Appellant's traffic citation was properly amended to the original speed timed by Trooper Deitle – 73 miles per hour. As the amended traffic citation for traveling 73 miles per hour in a 55 mile per hour zone formed the basis of Appellant's conviction, Appellant's first issue is without merit.

2. The Trial Court properly denied Appellant's Motion to Quash Citation.

Appellant argues the Trial Court refused to acknowledge his Motion to Quash Citation and, by doing so, ignored the provisions of Rules 109 and 403 of the Pennsylvania Rules of Criminal Procedure.

First and foremost, this Trial Court did acknowledge Appellant's Motion to Quash Citation during the Summary Conviction Appeal hearing on August 5, 2015. Prior to any testimony, this Trial Court provided Appellant ample time to argue his Motion to Quash Citation and then provided the Commonwealth's attorney time to respond to Appellant's Motion to Quash Citation. *N.T., pgs. 6-13*. Ultimately, this Trial Court denied Appellant's Motion to Quash Citation, stating:

> THE COURT: Okay. And the Court has heard from both sides. I think we thoroughly had you discuss your arguments and the Court will rule that the Motion to Quash is denied.

Id., pg. 13, lines 8-11.

Furthermore, this Trial Court had a proper basis for denying Appellant's Motion to Quash Citation. As stated above, the amendment to Appellant's traffic citation to cure a defect in the citation was proper as the same basic elements were involved and the amended citation arose from the same factual situation – Appellant traveling in excess of the maximum speed limit, which was timed by a Pennsylvania State Police trooper using an approved speed timing device. *See Palmer*, 482 A.2d at 1320.

Therefore, this Trial Court did acknowledge Appellant's Motion to Quash Citation and properly denied Appellant's Motion prior to the beginning of testimony, and Appellant's

second issue is without merit.

3. **Appellant's assertion of "intimidating, threatening or coercive" behavior of the Commonwealth's attorney during initial plea negotiations is not relevant to Appellant's conviction for violation 75 Pa. C. S. §3362(a)(2).**

Appellant argues this Trial Court allowed "the Prosecuting Attorney's narrative regarding 'amending the citation' secondary to my [Appellant's] refusal to plead guilty." Appellant also argues the Commonwealth's attorney was intimidating and threatening in his behavior during pleas negotiations.

Rule 462 of the Pennsylvania Rules of Criminal Procedure states "when a defendant appeals after the entry of a guilty plea or a conviction by an issuing authority in any summary proceeding… the case shall be heard *de novo* by the judge of the court of common pleas sitting without a jury." *See Pa. R. Crim. P. 462(a)*.

During cross-examination of Trooper Deitle, Appellant elicited testimony regarding plea negotiations occurring between the Commonwealth's attorney and Appellant prior to the hearing before Magistrate District Judge Carol L. Southwick. *N.T., pgs. 28-31*. Ultimately, this Trial Court indicated the Summary Conviction Appeal hearing was *de novo*; therefore, any prior plea negotiations were not relevant to the charge Appellant had allegedly violated. *Id., pg. 30, lines 11-13, 20-22; pg. 31, lines 1-3*. In addition, any "intimidating, threatening, or coercive" negotiations are not relevant as Appellant did not plead guilty before Magistrate District Judge Carol L. Southwick due to said negotiations and did not plead guilty before this Trial Court due to said negotiations. Appellant's third issue is without merit.

4. **Appellant was issued the original traffic citation and had notice of the amended traffic citation.**

Appellant argues the amended traffic citation was never "issued" to him in violation of Rule 405 of the Pennsylvania Rules of Criminal Procedure. Appellant also argues he "rejects the theory that an issuing authority, rather than an officer, can amend a citation."

Rule 405 of the Pennsylvania Rules of Criminal Procedure states "when a criminal proceeding in a summary case is instituted by issuing a citation to the defendant… the law enforcement officer contemporaneously shall give the defendant a paper copy of the citation containing all the information required by Rule 403."

Following the traffic stop on March 29, 2015, Trooper Deitle issued a traffic citation to Appellant containing all the information required by Pa. R. Crim. P. 403, which indicated Appellant was traveling 60 miles per hour in a 55 mile per hour zone. *N.T., pg. 20, lines 19*. Prior to the hearing before Magistrate District Judge Carol L. Southwick and in the presence of Appellant, the Commonwealth orally amended the traffic citation to indicate Appellant was traveling 73 miles per hour in a 55 mile per hour zone, the speed originally timed by Trooper Deitle. *Id., pg. 23, lines 2-15*. Furthermore, both the original citation, which indicated 60 miles per hour, and the orally amended citation, which indicated 73 miles per hour, was both made part of the record.

Therefore, as the original citation was provided to Appellant at the time of the violation, as required by Rule 405 of the Pennsylvania Rules of Criminal Procedure, and Appellant had notice of the amendment to the traffic citation prior to the hearing commencing before

Magistrate District Judge Carol L. Southwick, Appellant's fourth issue is without merit.

5. Upon Appellant's Notice of Appeal, transcripts from the Magistrate District Judge hearing were filed pursuant to Pa. R. Crim. P. 462; however, Rule 462 does not require the Magistrate District Judge to note Appellant's objections.

Appellant argues that, upon the filing of his Notice of Summary Conviction Appeal, transcripts from the Magistrate District Judge hearing were not forwarded and his objections from said hearing were not noted, as required by Rule 462 of the Pennsylvania Rules of Criminal Procedure.

Rule 462 of the Pennsylvania Rules of Criminal Procedure states, when a defendant appeals after the entry of a guilty plea or a conviction by an issuing authority, said issuing authority must file transcripts and other required papers from the lower court. *See Pa. R. Crim. P. 462(a)*. Furthermore, Rule 135 of the Pennsylvania Rules of Civil Procedure states a "transcript" before the Issuing Authority must contain (1) the date and place of hearings; (2) the names and addresses of the prosecutor, defendant and witnesses; (3) the names and office addresses of counsel in the proceeding; (4) the charge against the defendant as set forth in the prosecutor's complaint; (5) the date of issuance of any citation, summons or warrant of arrest and the return of service thereon; (6) a statement whether the parties and witnesses were sworn and which of these persons testified; (7) when the defendant was held for court, the amount of bail set; (8) the nature of the bail posted and the name and address of the corporate surety or individual surety; (9) a notation that the defendant has or has not been fingerprinted; (10) a specific descripting of any defect properly raised in accordance with Rule 109; (11) a notation that the defendant was advised of the right to apply for the assignment of counsel; (12) the defendant's plea of guilty or not guilty, the decision that was rendered in the case and the date thereof, and the judgment of sentence and place of confinement, if any; and (13) any other information required by the Rules to be in the Issuing Authority's transcript. *See Pa. R. Crim. P. 135*.

Contrary to Appellant's assertion, a review of the docket clearly reveals "Transcripts from Lower Court Filed" were filed on May 18, 2015. Filing of the lower court transcripts on May 18, 2015 satisfies the requirements of Rule 462(a). There is no requirement that the lower court transcripts be forwarded to Appellant or anyone else; rather, the filing of said transcripts satisfies Rule 462(a). In addition, Rule 462(a) does not require objections from the lower court be noted. Finally, "transcripts" from the Issuing Authority does not mean "a typed copy of testimony given orally or an official record of proceedings in a trial or hearing." *See Black's Law Dictionary, 1636 (9th Ed. 2009)*.

Therefore, as the Transcripts from the lower court, pursuant to Rule 462(a), were properly filed after Appellant filed his Notice of Summary Conviction Appeal. Therefore, Rule 462(a) of the Pennsylvania Rules of Criminal Procedure was satisfied. Appellant's fifth issue is without merit.

6. This Trial Court did issue both an oral and written Order at the time of sentencing following Appellant's Summary Conviction Appeal hearing.

Appellant argues this Trial Court failed to provide Appellant with a written Order or follow the Pennsylvania Rules of Criminal Procedure in that regard.

Rule 462(g) of the Pennsylvania Rules of Criminal Procedure states "at the time of

sentencing, the trial judge shall… issue a written order imposing sentence, signed by the trial judge and including the information specified in paragraphs (g)(1) through (g)(3), and a copy of the order shall be given to the defendant." *See Pa. R. Crim. P. 462(g)(4)*.

Appellant's Summary Conviction Appeal hearing was held before this Trial Court on August 5, 2015. After hearing testimony and receiving evidence from Appellant and the Commonwealth, this Trial Court announced its decision orally from the bench and found Appellant guilty of violating 75 Pa. C. S. §3363(a)(2). The Trial Court imposed the appropriate sentence. Following said hearing, a written Order was prepared and was signed by the undersigned judge. Said Order included the information specified in Rule 462(g)(1) through (g)(3), as it stated (1) the date on which payment of Appellant's fines, costs and fees were due and (2) the right to appeal to the Superior Court within 30 days of the imposition of sentence, and that, if an appeal is filed, the execution of sentence will be stayed.[1] Finally, a copy of this Trial Court's Order was supplied to Appellant via mail.

Therefore, as this Trial Court did issue both an oral and written Order at the time of sentencing, which included the information specified in Rule 462(g)(1) through (g)(3), and a copy of said Order was supplied to Appellant, the requirements of Rule 462(g) of the Pennsylvania Rules of Criminal Procedure were satisfied. Appellant's sixth issue is without merit.

7. **This Trial Court properly granted the Commonwealth's Motion for Continuance of Summary Hearing, filed prior to the scheduled Summary Conviction Appeal hearing with good cause shown, and properly denied Appellant's Motion to Continue, made during the rescheduled Summary Conviction Appeal hearing.**

Rule 106 of the Pennsylvania Rules of Criminal Procedure states "a trial court or issuing authority may, in the interests of justice, grant a continuance, on its own motion, or on the motion of either party." *See Pa. R. Crim. P. 106(a)*. "When the matter is in the court of common pleas, the trial judge shall on the record identify the moving party and state of record the reasons for granting or denying the continuance." *See Pa. R. Crim. P. 106(c)*.

Furthermore, Rule 462 states:

> In appeals from summary proceedings arising under the Vehicle Code or local traffic ordinances, other than parking offenses, the law enforcement officer who observed the alleged offense must appear and testify. The failure of a law enforcement officer to appear and testify shall result in the dismissal of the charges unless:
>
> …
>
> (3) The trial judge determines that good cause exists for the law enforcement officer's unavailability and grants a continuance.

See Pa. R. Crim. P. 462(c)(3).

Prior to the originally scheduled Summary Conviction Appeal hearing on July 7, 2015, Assistant District Attorney Nathaniel E. Strasser filed a Motion to Reschedule Summary Appeal Hearing. In said Motion, Attorney Strasser averred (1) a Summary Conviction Appeal

[1] As a sentence of imprisonment was not imposed by this Trial Court for Appellant's violation of 75 Pa. C. S. §3362(a)(2), the information specified in Rule 462(g)(3) was not required in this Trial Court's Order dated August 5, 2015.

hearing was scheduled for July 7, 2015; (2) the affiant, Trooper Joshua David Deitle, would be unavailable on this date; and (3) there were no prior continuances in this matter. This Trial Court concluded there was good cause for granting the Commonwealth's Motion as Trooper Deitle was required to appear and testify, pursuant to Pa. R. Crim. P. 462(c); no prior continuances had been granted; and a continuance was necessary in the interest of justice. *Pa. R. Crim. P. 106(a)*. By Order dated June 11, 2015, this Trial Court granted the Commonwealth's Motion and rescheduled the Summary Conviction Appeal hearing for August 5, 2015, and a copy of said Order was provided to Appellant via mail.

At the rescheduled Summary Conviction Appeal hearing, after a pause in the middle of the proceedings, Appellant requested a continuance. *See N.T., pg. 38, lines 1-2*. Appellant requested a continuance he had "a lot more evidence to bring into the nature of this case in order to prepare his defense" and he "hadn't been apprised of any crime until now." *Id., pg. 38, lines 15-19*. The Commonwealth's attorney responded by noting Appellant had not stated any "extraordinary circumstance" for continuing the hearing other than not having all of his evidence ready; Appellant was present during the hearing before Magistrate District Judge Carol L. Southwick; and Appellant was provided the citation and all of the paperwork provided to Magistrate District Judge Carol L. Southwick. *Id., pg. 38, line 23 – pg. 39, line 12*. This Trial Court ultimately denied Appellant's request for a continuance since this Summary Conviction Appeal hearing had already commenced and good cause was not shown by Appellant. *Id., pg. 39, line 13*.

Therefore, the Commonwealth, prior to the initial Summary Conviction Appeal hearing, did show good cause for a continuance. Appellant, during the rescheduled Summary Conviction Appeal hearing, failed to show good cause for a continuance. This Trial Court properly granted the Commonwealth's continuance and properly denied Appellant's request for a continuance. Appellant's seventh issue is without merit.

8. This Trial Court was not required to recuse herself from Appellant's Summary Conviction Appeal hearing as there was no evidence of impartiality, bias or the appearance of impropriety.

Rule 2.7 of Chapter 33 "Code of Judicial Conduct" states "a judge shall hear and decide matters assigned to the judge, except where the judge has recused himself or herself or when disqualification is required by Rule 2.11 or other law." *Pa. Code Judicial Conduct 2.7*. Furthermore, Rule 2.11 of Chapter 33 "Code of Judicial Conduct" provides several circumstances where a judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. *See Pa. Code Judicial Conduct 2.11(a)(1)-(6)*.[2]

After the Summary Conviction Appeal had commenced, but prior to the commencement of testimony, Appellant indicated the undersigned judge had a responsibility to recuse herself from the instant case. *See N.T., pg. 13, lines 13-15*. The reason behind Appellant's request

[2]According to Rule 2.11(a), a judge must recuse himself or herself where said judge: (1) has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding; (2) knows they are a party in the proceeding; (3) knows they have an economic interest in the proceedings; (4) knows a party has made contributions to the judge's campaign; (5) made a public statement committing the judge to rule a particular way in the proceeding; or (6) served as an attorney, governmental employee or material witness in the proceeding.

for the undersigned judge's recusal was an investigation by the Judicial Conduct Board because of a Complaint Appellant filed, of which the undersigned judge had no notice of. *Id., pg. 13, lines 17-22*. After hearing Appellant's argument, the undersigned judge did not recuse herself from the instant case. *Id., pg. 14, lines 11-21*.

Appellant did not raise any of the provisions of Rule 2.11(a), which would require the undersigned judge to disqualify or recuse herself from the instant case, at the August 5, 2015 Summary Conviction Appeal hearing, and does not raise any of the provisions in his "Precise Statement of Matters to be Raised on Appeal." In fact, Appellant only requested the undersigned judge recuse herself because of a Complaint Appellant filed against the undersigned judge, and Appellant did not raise any argument to further support his request for recusal. There are no requirements within Rule 2.11(a) requiring a judge to recuse simply because a litigant has filed a Judicial Conduct Board Complaint against said judge.

Therefore, as Appellant has failed to raise any specific requirement which would have required the undersigned judge to recuse herself from the instant case, other than Appellant's Complaint filed against her, the undersigned judge properly denied Appellant's request for recusal. Appellant's eighth issue is without merit.

9. This Trial Court conducted a proper *de novo* Summary Conviction Appeal hearing on August 5, 2015.

First, Appellant argues the amended citation was not only illegal, but also moot. As stated above numerous times, the amendment of the traffic citation before Magistrate District Judge Carol L. Southwick was proper as the same basic elements were involved and the traffic citation arose from the same factual situation – Appellant traveling in excess of the maximum speed limit, which was properly timed by a Pennsylvania State Police trooper using an approved speed timing device. *See Pa. R. Crim. P. 109; see also Palme*r, 482 A.2d at 1320. In addition, the amended citation, along with the original citation, were both made part of the record, and it was proper for this Trial Court to consider the amended citation at Appellant's *de novo* proceeding.

Second, Appellant argues the Commonwealth's attorney's "intimidating, threatening and coercive" plea negotiations at the Magistrate District Judge level shows deprivation of due process. As stated above, said negotiations were not relevant to the *de novo* hearing before this Trial Court as the plea negotiations had no bearing on Appellant's violation of 75 Pa. C. S. §3362(a)(2). Also, whether the plea negotiations were "intimidating, threatening and coercive" are not relevant as Appellant did not plead guilty before Magistrate District Judge Carol L. Southwick or before this Trial Court.

Third, Appellant argues this Trial Court ignored evidence of the Commonwealth's attorney and the Issuing Authority undertaking *ex parte* communications. Although Trooper Deitle stated he never witnessed the Commonwealth's attorney engage in *ex parte* communications with Magistrate District Judge Carol L. Southwick, *see N.T., pg. 22, line 8 – pg. 23, line 1*, and Appellant did not offer any testimony on direct or cross-examination to refute Trooper Deitle's testimony regarding no *ex parte* communications, this Trial Court concludes any alleged *ex parte* communications are not relevant to Appellant's *de novo* hearing regarding this amended citation at 75 Pa. C. S. §3362(a)(2).

Finally, Appellant argues his original written citation has an area "where fines are

delineated, but it does not add up." A review of this Trial Court's Order dated August 5, 2015, a copy of which was served upon Appellant, clearly indicates the fines, costs and fees imposed after Appellant's Summary Conviction Appeal hearing and when the fines, costs and fees are to be paid.

Therefore, the citation was properly amended and received by this Trial Court, and any plea negotiations, *ex parte* communications and alleged mathematical errors on the citations are not relevant to Appellant's *de novo* hearing regarding his violation of 75 Pa. C. S. §3362(a)(2). Appellant's ninth issue is without merit.

10. The Commonwealth has met its burden of proof regarding Appellant's violation of 75 Pa. C. S. §3362(a)(2).

Appellant argues the Commonwealth failed to meet its burden of proof following the Summary Conviction Appeal hearing before this Trial Court.

To sustain a conviction for speeding, the Commonwealth must show beyond a reasonable doubt that: (1) an accused was driving in excess of the speed limit; (2) the speed timing device was approved by the Department of Transportation; and (3) the device was calibrated and tested for accuracy within the prescribed time period by a station which has been approved by the Department of Transportation. *Commonwealth v. Kittelberger*, 616 A.2d 1, 3 (Pa. Super. 1992); *see also Commonwealth v. Hamaker*, 541 A.2d 1141, 1142 (Pa. Super. 1988).

Trooper Deitle stated, on March 29, 2015, he was monitoring traffic speeds along Route 8 in Union City, Pennsylvania. *N.T., pg. 16, lines 5-8*. Trooper Deitle was using a hand-held speed timing device, identified as a Decatur Electronics "Gensis" model with a serial number of GHD17653, to time traffic speeds. *Id., pg. 16, line 17 – pg. 17, line 1*. A Mitsubishi Outlander, black in color and traveling northbound on Route 8, came into the speed timing device's field of influence traveling at initially 73 miles per hour. *Id., pg. 18, line 24 – pg. 19, line 2*. Trooper Deitle discovered the vehicle was being operated by Appellant, whose identity was confirmed by his Pennsylvania Driver's License. *Id., pg. 19, lines 4-7*. Therefore, as Trooper Deitle indicated Appellant was driving in excess of the maximum speed limit, i.e. 73 miles per hour in a 55 mile per hour zone, the first element has been sustained.

In sustaining its burden of proof, the Commonwealth need not produce a certificate from PennDOT which expressly indicates approval of a particular speed timing device; rather, the Pennsylvania Legislature has considerably lessened the Commonwealth's evidentiary burden by enabling a trial court to take judicial notice of the fact that the device has been approved by PennDOT, provided that the approval has been published in the Pennsylvania Bulletin. *Kittelberger*, 616 A.2d at 3. According to 44 Pa. Bulletin 8064, dated December 27th, 2014, the Genesis GHD model hand-held speed timing device, manufactured by Decatur Electronics, has been approved for use by the Pennsylvania State Police. *See. 44 Pa.B. 8064*. Therefore, as this Trial Court may take judicial notice of the notice of approved speed timing devices, published in the Pennsylvania Bulletin, the second element has been satisfied.

A certificate from the station showing that the calibration and test were made within the required period and that the device was accurate shall be competent and prima facie evidence of those facts in every proceeding in which a violation of this title is charged. 75 Pa. C. S. 3368(d). The Commonwealth offered a copy of the Certificate of Accuracy for the particular

speed timing device used by Trooper Deitle on March 29, 2015 as Commonwealth's Exhibit A. *N.T., pg. 18, lines 3-5*. Said Certificate stated the Genesis GHD model hand-held speed timing device used by Trooper Deitle was last calibrated for accuracy on October 22, 2014 and was signed by the individuals who completed the testing. *Id., pg. 18, lines 6-13*. Finally, Appellant's own subpoenaed witness, James Bonaparte of WISCO Calibration Services[3] who signs all of the calibration certificates for "this side of the State," stated he signed the Certificate of Accuracy as an individual qualified to calibrate said devices. *Id., pg. 47, line 16 – pg. 49, line 2*. Mr. Bonaparte stated the only qualification the Commonwealth of Pennsylvania requires for calibrating speed timing devices in the acquisition of an electrical engineering degree, which Mr. Bonaparte has attained. *N.T., pg. 49, lines 3-15*. Based upon Appellant's own questioning, Mr. Bonaparte stated there was no possibility of operator error with the hand-held speed timing device Trooper Deitle was using on March 29, 2015, either at a distance or on a hill. *Id., pg. 50, lines 2-20*. Therefore, based upon the Certificate of Accuracy and the testimony of James Bonaparte, the third element has been sustained.

The Commonwealth has shown beyond a reasonable doubt that: (1) Appellant was driving in excess of the speed limit; (2) the speed timing device used by Trooper Deitle to time Appellant's speed was approved by the Department of Transportation; and (3) said device was calibrated and tested for accuracy within the prescribed time period by a station which has been approved by the Department of Transportation. The Commonwealth met its burden of proof regarding Appellant's violation of 75 Pa. C. S. §3362(a)(2). Appellant's tenth issue is without merit.

III. <u>Conclusion</u>

For all of the foregoing reasons, this Trial Court concludes the instant appeal is without merit and respectfully requests the Pennsylvania Superior Court affirm its Order dated August 5, 2015.

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