ERIE COUNTY LEGAL JOURNAL

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

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Reports of Cases Decided in the Several Courts of Erie County for the Year 2018

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ERIE, PA

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

COURTS OF COMMON PLEAS

HONORABLE JOHN J. TRUCILLA ---------- President Judge
HONORABLE STEPHANIE DOMITROVICH ---------- Judge
HONORABLE WILLIAM R. CUNNINGHAM ---------- Judge
HONORABLE ELIZABETH K. KELLY ---------- Judge
HONORABLE JOHN GARHART ---------- Judge
HONORABLE DANIEL J. BRABENDER, JR. ---------- Judge
HONORABLE JOHN J. MEAD ---------- Judge
HONORABLE JOSEPH M. WALSH, III, ---------- Judge

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In Re: The Name of XYZ

FAMILY LAW / NAME CHANGE / BURDEN OF PROOF

Petitioner seeking to change name of minor child must bear burden of establishing that change would be in best interest of minor child.

FAMILY LAW / NAME CHANGE

Among matters that generally should be considered in determining whether to grant petition to change name of minor child are natural bonds between parent and child, social stigma or respect afforded particular name within community, and, where child is of sufficient age, whether child intellectually and rationally understands significance of changing his or her name.

FAMILY LAW / NAME CHANGE

A court in passing upon petition to change name will exercise its discretion in such a way as to comport with good sense, common decency and fairness to all concerned and to the public.

FAMILY LAW / NAME CHANGE

General allegation that name change would eliminate negative social stigma or lack of respect afforded to the minor child by virtue of not possessing the biological father's surname was insufficient to establish that a name change would be in best interest of minor child from his mother's surname to father's surname.

FAMILY LAW / NAME CHANGE

Petitioner's desires to carry on tradition and custom of patrilineal naming was not a sufficient rational to sustain a conclusion that a name change was in the minor child's best interests.

FAMILY LAW / NAME CHANGE

The natural bonds between each parent and the minor child were developing and were therefore on equal footing since at the time of the name change hearing, the minor child was not yet one year of age.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 13256 – 2017

Appearances: Charbel G. Latouf, Esq., on behalf of Petitioner, AB.
Thomas J. Minarcik, Esq., on behalf of Respondent, YZ.

OPINION

Domitrovich, J. January 29, 2018

The instant matter is before this Trial Court on the Motion for Court Order to Change Name of Minor Child (hereinafter "Petition"), filed by Petitioner AB (hereinafter "Petitioner") on behalf of XYZ (hereinafter "Minor Child"), by and through his counsel, Charbel G. Latouf, Esquire. Following a hearing (hereinafter "Name Change Hearing") before this Trial Court on January 22, 2018, at which Petitioner AB appeared, by and through his counsel, Charbel G. Latouf, Esquire, and at which Respondent YZ (hereinafter "Respondent") appeared by telephone, by and through her counsel, Thomas J. Minarcik, Esquire; at which this Trial Court

heard testimony from AB, Jr., AB, Sr., and YZ; and after a thorough review of the Motion for Court Order to Change Name of Minor Child, and after consideration of oral argument presented by counsel, testimony elicited from the witnesses, and a review of the relevant statutory and case law, this Court makes the following Findings of Fact and Conclusions of Law:

The Minor Child is the biological child of a relationship between Petitioner and Respondent (collectively the "Parents"). Petitioner was nineteen years of age and Respondent was eighteen years of age at the time the Minor Child was born in 2017. The Parents were never married before, during, or after the Minor Child was born. Before the Minor Child was born, the Parents discussed a name for the Minor Child, but the Parents did not come to an agreement as to the Minor Child's name. When the Minor Child was born, Respondent filled out and completed the Minor Child's birth certificate, naming the Minor Child "XYZ." As Petitioner indicated, Petitioner admits he signed said birth certificate fully knowing the Minor Child's name was designated as "XYZ." Additionally, the day after the Minor Child was born, Respondent filled out and completed an Acknowledgement of Paternity for a Child Born to an Unmarried Mother, with the name "XYZ" inserted as the name on the form. Petitioner signed said Acknowledgement of Paternity also knowing the Minor Child's name was designated as "XYZ."

Following the Minor Child's birth, the Parents' relationship began to deteriorate and the Parents ended their relationship approximately six months after the Minor Child's birth. In the summer of 2017, after the Parents were no longer in their relationship, Respondent permanently moved to North Carolina to live with her parents. Petitioner and Respondent voluntarily adhered to an informal custody arrangement for a short time until September 26, 2017, when Petitioner filed a custody action in Erie County, Pennsylvania. According to counsel for Petitioner and Respondent, Respondent also filed a custody action in North Carolina, but the North Carolina court dismissed the action for lack of jurisdiction. By Order dated December 8, 2017, the Honorable John J. Mead issued a Temporary Order contested by the parties temporarily governing the legal and physical custody of the Minor Child pending the outcome of a full custody hearing scheduled in February 2018. Pursuant to said Order, the Parents equally share physical custody of the Minor Child at the time this Name Change Hearing was heard.

On November 20, 2017, Petitioner filed his Motion for Court Order to Change Name of Minor Child wherein he alleged the reason he sought to change the Minor Child's surname: "[I]t is in the best interests of the minor child to change his surname from Z to B reflecting the biological father's surname and creating a cognizable bond between the father and son and further eliminating any negative social stigma or lack of respect afforded to the minor child by virtue of not possessing the biological father's surname." (*See* Petition dated Nov. 6, 2017 at ¶ 7). By Order dated November 7, 2017, this Court scheduled a name change hearing to be held on January 22, 2018. On January 19, 2018, Respondent filed her Motion for Telephone Testimony wherein she requested this Trial Court permit her to testify via telephone at the Name Change Hearing since she would otherwise be required to drive from North Carolina to testify in person. On the same day, by Order dated January 19, 2018, this Trial Court granted Respondent's request to testify via telephone.

At the Name Change Hearing, Petitioner testified to the reasons he desires to change

the Minor Child's name. First, Petitioner testified he believes the Minor Child bearing his grandfather's last name is important since children customarily and traditionally bear the name of the father. In addition, Petitioner testified he believes a stigma will attach to the Minor Child if the Minor Child does not bear the Petitioner's last name and this stigma will cause the Minor Child to be teased in the future by other children. Petitioner also testified the Minor Child bearing a different name than Petitioner would impose an emotional detriment upon the Minor Child. Furthermore, Petitioner testified he is concerned that petitioning to change the Minor Child's last name in the future will have a negative impact on the Minor Child since the Minor Child would wonder why Petitioner did not previously seek to change the Minor Child's name. Petitioner also testified he asked Respondent before and after the Minor Child was born to name the Minor Child with his surname "B," but Respondent refused to do so unless Petitioner and Respondent married or unless Petitioner became more involved in rearing the child. Finally, Petitioner conceded that when Respondent filled out and completed the Minor Child's birth certificate and designated "XYZ" as the Minor Child's name, Petitioner did not object, and signed the birth certificate since Petitioner indicated he did not want to cause a scene at the hospital.

During cross-examination, Petitioner also conceded he is not aware of any negative implications associated with the name "Z." In addition, Respondent's counsel submitted into evidence the Acknowledgement of Paternity for a Child Born to an Unmarried Mother. Respondent's counsel also submitted into evidence a page revealing an exchange of cellular phone text messages between Petitioner and Respondent.

Petitioner's father, AB, Sr. (hereinafter "Mr. B"), testified the B family has been in the Northwestern Pennsylvania region since the 1960's and the name "B" has a good reputation in the community since Mr. B is a law enforcement officer. Mr. B further testified that in his opinion, when he was growing up, he found it important that a child bear the last name of the father. Finally, Mr. B conceded, in his capacity as a law enforcement officer, he was not aware of any criminality associated with the "Z" name.

Lastly, at the Name Change Hearing, Respondent stated Petitioner did not object to the Minor Child bearing the surname "Z" when the Minor Child was born. Respondent indicated the Parents had, for a time before Minor Child was born, planned on naming the Minor Child "B," but since Petitioner was never around during her pregnancy, Petitioner later decided to name the Minor Child with Petitioner's last name, "Z."

Under Pennsylvania law, the "court of common pleas of any county may by order change the name of any person resident in the county." 54 Pa.C.S. § 702(a). When considering a petition to change the surname of a minor child, the "child's best interests unquestionably must control in a proceeding." *Petition of Schidlmeier by Koslof*, 496 A.2d 1249, 1253 (Pa. Super.1985). Where a petition to change the minor child's name is contested:

> **[T]he party petitioning for the minor child's change of name has the burden of coming forward with evidence that the name change requested would be in the child's best interest**, and . . . the court must carefully evaluate all of the relevant factual circumstances to determine if the petitioning parent has established that the change is in the child's best interest."

In Re: Change of Name of E.M.L., 19 A.3d 1068, 1070 (Pa.Super.2010) (citing *In Re:*

C.R.C., 819 A.2d 558, 560 (Pa.Super.2003)) (emphasis added). The petitioner must provide the trial court with sufficient evidence to establish by a **preponderance of the evidence** that the name change is in the child's best interest. *See T.W. v. D.A.*, 127 A.3d 826, 829 (Pa. Super.2015) (emphasis added); *Pennsylvania Game Comm'n v. Fennell,* 149 A.3d 101, 104 (Pa.Commw.2016) (preponderance of the evidence is proof that leads a fact-finder to find the existence of a contested fact is more probable than its nonexistence).

The controlling authority regarding the name change of a minor child is set forth in the Pennsylvania Supreme Court case *In re: Change of Name of Zachary Thomas Andrew Grimes to Zachary Thomas Andrew Grimes-Palaia*, 609 A.2d 158, 161 (Pa. 1992) (hereinafter *"Grimes").* In *Grimes*, the Pennsylvania Supreme Court set forth "general considerations" for a trial court to apply in exercising its discretion to change a child's name. *Id.* at 161. Specifically, the Pennsylvania Supreme Court stated the trial court should consider the following:

[T]he natural bonds between the natural parents and the minor child, the social stigma or respect afforded a particular name within the community, and, where the child is of sufficient age, whether the child intellectually and rationally able to understand the significance of changing his or her name.

Id. In addition, the Pennsylvania Supreme Court noted that trial courts should also consider "good sense, common decency and fairness to all concerned and the public." *Id.* at 392 (*quoting Petition of Falcucci*, 50 A.2d 200, 202 (Pa. 1947)).

Thus, a petitioner's mere allegations that a name change will be in the child's best interests, without any supporting competent evidence, are not sufficient to meet petitioner's burden. *In Re: C.R.C.,* 819 A.2d at 562. For example, where one parent presents evidence that the parent shares equal legal and physical custody of the child, this alone does not provide sufficient evidence that a name change is in the child's best interest. *T.W. v. D.A.,* 127 A.3d 826, 829-30 (Pa.Super.2015) ("In light of the growing prevalence of blended families and the evolving definition of the family structure, we are unable to evaluate the fact that [the petitioner] shares equal custody [with the respondent] as anything but neutral. Absent legislative guidance, we refuse to assign greater weight to a shared custody award."). Moreover, a petitioner does not show a name change is his child's best interest by merely referencing his own desires, beliefs, and concerns, including the desire to change the child's name to further his own interest in the survival of his own surname. *Id.* at 829; *see also Petition of Schidlmeier by Koslof*, 496 A.2d 1249, 1253 (Pa.Super.1985) (concluding that father's petition which "merely allege[ed] generally that it would be in [the child's] best interests to bear the paternal surname [was not] legally sufficient to sustain a conclusion that the name change appellee seeks is in the child's best interests"); *In Re: C.R.C.,* 819 A.2d at 562 ("[T]he tradition and custom of patrilineal naming d[oes] not provide a sufficient rationale to sustain a conclusion that [a] name change [is] in [the child's] best interests.").

This Trial Court finds *T.W. v. D.A.*, 127 A.3d 826 (Pa.Super.2015) is particularly applicable to the case at bar. In that case, the parents of the child equally shared legal and physical custody of the three year old child, who bore the surname of the child's mother, and the father petitioned the trial court to change the child's surname to reflect the father's last name. *Id.* at 827. After the trial court made several findings of fact, that trial court concluded the father did not meet his burden of showing by a preponderance of the evidence the proposed

name change was in the child's best interest and denied the father's petition. *Id.* Specifically, the trial court found the father's preference insufficient to establish that a name change was in the child's best interest since the father presented no evidence that changing the child's surname would strengthen his current bond with the child. *Id.* On appeal, the Superior Court of Pennsylvania affirmed, concluding the father "offered minimal support for the . . . relevant issue of whether the name change would affirmatively be in the child's best interest" since the father's credible evidence merely established the father sought to change the child's name to further the father's own interest in the survival of his surname. *Id.* at 829. Specifically, the Superior Court noted the father's testimony was "replete with references to his own desires, beliefs and concerns, including testimony that his 'only son is able to carry on' his family name, and his belief that his son may be 'embarrassed' or 'bullied' if he has a different surname than father." *Id.*

In this case, as an initial matter, consistent with the "general considerations" set forth in *Grimes*, this Trial Court finds and concludes this Minor Child, who is now approximately one year of age, is not of sufficient age and is not intellectually or rationally able to understand the significance of changing his last name as the child was not one year of age as of the date of this Name Change Hearing. Moreover, this Trial Court finds and concludes the degree of respect afforded to the surnames ─ both "B" and "Z" ─ in the community are on equal footing since a greater degree of respect does not appear to be afforded to the name "B" compared to the name "Z." *See e.g., T.W. v. D.A.*, 127 A.3d 826, 829 (Pa.Super.2015) (finding petitioner's testimony speculative that petitioner's "surname was afforded respect in the community beyond that afforded to child's current surname"). On one hand, evidence exists "B" is a respected name since Petitioner's father is a law enforcement officer and his family has lived in Northwest Pennsylvania since the 1960's, but on the other hand, no evidence was presented that any degree of disrespect is afforded to the name "Z" since even Petitioner's father, in his capacity as a law enforcement officer, stated he was not aware of any criminality associated with the "Z" name. Finally this Trial Court finds and concludes the natural bonds between both Petitioner and Respondent and the Minor Child are developing and therefore are on equal footing since at the time of the Name Change Hearing, the Minor Child was not yet one year of age. Moreover, testimony elicited from all of the witnesses reveals that both parents intend to care for and emotionally and financially provide for the Minor Child.

Furthermore, as in *T.W. v. D.A.*, the testimony elicited from Petitioner and Mr. B offer "minimal support for the . . . issue of whether the name change would affirmatively be in the child's best interest." *T.W. v. D.A.*, 127 A.3d 826, 829 (Pa.Super.2015). Similar to the father in *T.W. v. D.A.*, here the testimony of Petitioner and Mr. B are "replete with references to [their] own desires, beliefs and concerns." *See id.* For example, Petitioner testified that children customarily and traditionally bear the name of the father and that he believes a stigma will attach to the Minor Child if he does not bear the surname of Petitioner. Similarly, Mr. B testified that, in his opinion, when he was growing up, he found it important that children bear the last name of the father. However, Petitioner's desires to carry on this tradition and custom of patrilineal naming is not a sufficient rational to sustain a conclusion that a name change is in the Minor Child's best interests. *See In Re: C.R.C.*, 819 A.2d 558, 562 (Pa. Super.2003).

Moreover, as in *T.W. v. D.A.*, where the trial court found insufficient the father's concerns that the child might be "embarrassed" or "bullied," here Petitioner offers similar concerns since Petitioner testified he was afraid the child might be teased by other children in the future for not bearing the same surname as Petitioner. Finally, also similar to the father in in *T.W. v. D.A.*, here Petitioner presented no evidence that changing the child's surname would strengthen his current bond with the Minor Child. While evidence was presented that Petitioner shares temporary physical and legal custody of the child, "this alone does not provide sufficient evidence that a name change is in the child's best interest." *See id.* Accordingly, this Trial Court finds and concludes Petitioner has failed to meet his burden since Petitioner's "preference that his surname carries on [is] insufficient to establish by a preponderance of the evidence that a name change [is] in the [Minor Child's] best interests." *See id.*

Based on the foregoing analysis, this Trial Court issues the following Order:

ORDER

AND NOW, to-wit, this 29th day of January, 2018, after the scheduled hearing on the Motion for Court Order to Change Name of Minor Child, filed by Petitioner AB, and in accordance with the above Opinion indicating this Trial Court's Findings of Facts and Conclusions of Law, it is hereby **ORDERED, ADJUDGED AND DECREED** that this Motion for Court Order to Change Name of Minor Child is hereby **DENIED**. The name of the Minor Child, XYZ, born January 28, 2017, shall remain XYZ.

BY THE COURT

/s/ **Stephanie Domitrovich, Judge**

ROBERT GARLICK

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION

TRANSPORTATION LAW / OPERATOR'S LICENSE / SUSPENSION / REFUSAL

To sustain a suspension of operating privileges under 75 Pa.C.S. §1547, PennDOT must establish that the licensee: (1) was arrested for driving under the influence by a police officer who had reasonable grounds to believe that the licensee was operating or was in actual physical control of the movement of the vehicle while under influence of alcohol; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was warned that refusal might result in a license suspension. Once PennDOT meets this burden, the licensee must then establish that the refusal was not knowing or conscious or that the licensee physically was unable to take the test.

TRANSPORTATION LAW / OPERATOR'S LICENSE / SUSPENSION & REVOCATION

Section 1547(b)(1)(i) of the Vehicle Code, commonly referred to as the "Implied Consent Law," authorizes suspension of the driving privileges of a licensee where the licensee is placed under arrest for driving under the influence of alcohol, and the licensee refuses a police officer's request to submit to chemical testing.

TRANSPORTATION LAW / OPERATOR'S LICENSE / REFUSAL

The purpose of the "Implied Consent Law" is to inform the licensee of the consequences of refusing to submit to a chemical test in order for the licensee to make a knowing and conscious choice.

TRANSPORTATION LAW / OPERATOR'S LICENSE / SUSPENSION / REFUSAL

A licensee cannot be punished criminally for refusing a police officer's request to submit to a blood test pursuant to the "Implied Consent Law."

GOVERNMENT / LEGISLATION / INTERPRETATION

Where a provision of a statute is invalid for any reason, a court must sever it from the remaining, valid portion of the statute.

SEARCH AND SEIZURE / REASONABLENESS / CONSENT

Pursuant to *Birchfield*, police officers may still validly obtain consent from a licensee based on a warning that refusal would result in a civil license suspension because the United States Supreme Court stated clearly that a civil penalties and evidentiary consequences may be constitutionally imposed, whereas consent based on a warning that refusal would subject a licensee to "the pain of committing a criminal offense" is involuntary, and as such implied consent warnings are now inapplicable.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
NO. 12267 – 2016

Appearances: Chad J. Vilushis, Esq., on behalf of Robert Garlick (Appellant)
Denise H. Farkas, Esq., and Terrance M. Edwards, Esq., on behalf of the Commonwealth of Pennsylvania Department of Transportation, Bureau of Driver Licensing (Appellee)

OPINION

Domitrovich, J. March 6, 2017

The instant matter is before the Pennsylvania Commonwealth Court on Robert Garlick's (hereafter referred to as "Appellant") appeal from this Trial Court's Order dated January 4, 2017, whereby this Trial Court concluded the Department of Transportation's (hereafter referred to as "PennDOT") current amended DL-26B "O'Connell Warnings" Form, which was revised by PennDOT after the United States Supreme Court's decision in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (U.S. 2016) (hereafter referred to as *"Birchfield"*) and eliminated statutory language regarding criminal penalties, adheres correctly to recent case law; therefore, this Trial Court denied Appellant's license suspension appeal, finding and concluding (1) Appellant was arrested for Driving Under the Influence of Alcohol by a police officer who had reasonable grounds to believe Appellant was operating or was in actual physical control of the movement of a vehicle while driving under the influence of alcohol; (2) Appellant was asked to submit to a chemical test; (3) Appellant refused to submit to chemical testing; and (4) Appellant was specifically warned that a refusal to submit to chemical testing would result in the suspension of his operating privileges. This Trial Court further concluded Appellant failed to rebut PennDOT's four-prong burden of proof, and Appellant also failed to sustain his burden of proof that he was incapable of making a knowing and conscious refusal.

Factual and Procedural History

The relevant facts of the instant license suspension appeal are undisputed. When Appellant was transported to the Pennsylvania State Police station, Trooper Timothy McConnell read PennDOT's current amended DL-26B "O'Connell Warnings" Form verbatim in its entirety. *See Notes of Testimony, License Suspension Hearing, November 21, 2016, page 9, lines 12-13*. The DL-26B "O'Connell Warnings" Form Trooper O'Connell read to Appellant on July 17, 2016, *attached hereto as Exhibit A*, was from PennDOT's most current DL-26B Form, which PennDOT had amended after the United States Supreme Court's decision in *Birchfield* and omits statutory language concerning the criminal penalties of 75 Pa. C. S. §3804(c). After being requested by Trooper McConnell to submit to a chemical test of his blood, Appellant refused to submit to chemical testing. *See id, page 9, line 25 – page 10, line 7*.

By Notice dated July 29, 2016, PennDOT suspended Appellant's operating privileges for a period of twelve (12) month due to his refusal to submit to chemical testing, pursuant to 75 Pa. C. S. §1547(b)(1)(i). Appellant, by and through his counsel, Chad J. Vilushis, Esq., filed a Petition for Appeal from a Suspension of Operating Privilege on August 25, 2016. This Trial Court conducted a full hearing on November 21, 2016. Thereafter, Appellant's counsel, Chad J. Vilushis, Esq., agreed to submit a Memorandum of Law within twelve (12) days from the date of the hearing, and counsel for PennDOT, Denise H. Farkas, Esq., agreed to submit a Responsive Memorandum of Law within twelve (12) days after receipt of Attorney Vilushis' Memorandum. Attorney Vilushis submitted his Memorandum of Law on December 1, 2016. Attorney Farkas submitted her Responsive Memorandum of Law on December 13, 2016. By Opinion and Order dated January 4, 2017, this Trial Court denied Appellant's license suspension appeal.

Appellant, by and through Attorney Vilushis, filed a Notice of Appeal to the Pennsylvania

Commonwealth Court on January 11, 2017. By Order dated January 11, 2017, this Trial Court directed Appellant and his counsel to submit a Concise Statement of Matters Complained of on Appeal within twenty-one (21) days from the date of said Order. Appellant filed his Statement of Errors Complained of on Appeal on January 17, 2017.

Rationale and Conclusions

To sustain a suspension of operating privileges under 75 Pa. C. S. §1547, PennDOT must establish that the licensee: (1) was arrested for driving under the influence by a police officer who had reasonable grounds to believe that the licensee was operating or was in actual physical control of the movement of the vehicle while under influence of alcohol; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was warned that refusal might result in a license suspension. *Finney v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing*, 721 A.2d 420, 423 (Pa. Commw. Ct. 1998). Once PennDOT meets this burden, the licensee must then establish that the refusal was not knowing or conscious or that the licensee physically was unable to take the test. *Berman v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing*, 842 A.2d 1025, 1027 (Pa. Commw. Ct. 2004).

Based upon the relevant facts of the instant license suspension appeal, which are undisputed, PennDOT has satisfied its four-pronged burden. However, in rebuttal, Appellant argues his refusal to submit to chemical testing was not "knowing or conscious" because Trooper McConnell did not fulfill his statutory duty under 75 Pa. C. S. §1547(b)(2). Specifically, Appellant argues Trooper McConnell did not notify Appellant that refusal to submit to chemical testing would result in criminal penalties pursuant to 75 Pa. C. S. §3804(c).

The pertinent Pennsylvania statute, 75 Pa. C. S. §1547 of the Vehicle Code, commonly referred to as the "Implied Consent Law," authorizes suspension of the operating privileges of a licensee where the licensee is placed under arrest for driving under the influence of alcohol, and the licensee refuses a police officer's request to submit to chemical testing. *See Quigley v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing*, 965 A.2d 349, 351 [fn.1] (Pa. Commw. Ct. 2009). According to §1547, "it shall be the duty of police officers to inform licensees that: (1) the licensee's operating privilege will be suspended upon refusal to submit to chemical testing; and (2) if the licensee refuses to submit to chemical testing, upon conviction or plea for violation §3802(a)(1), the licensee will be subject to the penalties provided in §3804(c) (relating to criminal penalties)." *See 75 Pa. C. S. §1547(b)(2)(i)-(ii).*

Prior to the United States Supreme Court's decision in *Birchfield*, Paragraph Three of PennDOT's former DL-26B "O'Connell Warnings" Form read as follows:

> Paragraph 3. If you refuse to submit to the chemical test, your operating privilege will be suspended for at least 12 months. If you previously refused a chemical test or were previously convicted of driving under the influence, you will be suspended for up to 18 months. **In addition, if you refuse to submit to the chemical test, and you are convicted of violation Section 3802(a)(1) (relating to impaired driving) of the Vehicle Code, then, because of your refusal, you will be subject to more severe penalties set forth in Section 3804(c)**

> **(relating to penalties) of the Vehicle Code. These are the same penalties that would be imposed if you were convicted of driving with the highest rate of alcohol, which include a minimum of 72 consecutive hours in jail and a minimum fine of $1,000.00, up to a maximum of five years in jail and a maximum fine of $10,000.** [Emphasis added].

It is undisputed that PennDOT's pre-*Birchfield* DL-26B "O'Connell Warnings" Form adhered to the statutory requirements enumerated in §1547(b)(2). However, according to counsel for PennDOT, following the United States Supreme Court's decision in *Birchfield* on June 23, 2016, the Pennsylvania District Attorneys, concerned that the above-bolded language could result in suppression of evidence due to the *Birchfield* decision, "requested PennDOT amend the DL-26B 'O'Connell Warnings' Form for blood testing by eliminating the warning that refusal of a blood test could lead to criminal penalties if the person were convicted of DUI." *See PennDOT's Memorandum of Law, page 4 (filed December 13, 2016)*. Shortly thereafter, PennDOT "complied with this request" and amended Paragraph Three of PennDOT's DL-26B "O'Connell Warnings" Form to remove the above-bolded statutory language of 1547(b)(2)(ii). *See id*.

It is further undisputed that PennDOT's current amended DL-26B "O'Connell Warnings" Form does not conform with the statutory language of 75 Pa. C. S. §1547(b)(2) as there is no mention that refusal to submit to chemical testing will result in criminal penalties. The statutory language of §1547(b)(2) is clear and unambiguous. "When the words of a statute are clear and free from all ambiguity, they are presumed to be the best indication of legislative intent." *Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing v. Weaver*, 912 A.2d 259, 264 (Pa. 2006) *(quoting Hannaberry HVAC v. Workers' Compensation Appeal Board (Snyder, Jr.)*, 834 A.2d 524, 531 (Pa. 2003)). As the Pennsylvania Supreme Court in *Weaver* has stated:

> Subparagraph (ii) **commands** police officers to inform an arrestee that "(ii) upon conviction, plea or adjudication of delinquency for violating section 3802(a), the person will be subject to penalties provided in section 3804(c) (relating to penalties)." The words of this statute are clear and free from all ambiguity; thus, we will glean the legislative intent from those words… The plain language requires only that the officer inform the arrestee that if he is convicted of DUI, refusal will result in additional penalties; it does not require the officer to enumerate all of the possible penalties…

See id [emphasis added]. Finally, in the instant license suspension appeal, it is undisputed that Trooper McConnell read from within the four corners of PennDOT's current amended DL-26B "O'Connell Warnings" Form and did not advise Appellant independently on July 17, 2016 that his refusal to submit to chemical testing would result in the criminal penalties for refusal as enumerated in 75 Pa. C. S. §3804(c). *See N.T., License Suspension Hearing, November 21, 2016, page 17, lines 4-12*.

However, despite the statutory requirements of §1547(b), recent case law has held implied consent laws cannot impose criminal penalties as a result of a refusal to submit to

chemical testing as said criminal penalties are unduly coercive, unconstitutional and are now inapplicable. On June 23, 2016, the United States Supreme Court decided the case of *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). In *Birchfield*, the United States Supreme Court declared implied consent laws that impose criminal penalties for refusing to consent to a blood test are unconstitutional and specifically stated:

> 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.
>
> It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads… **We conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.**

See id at 2185-2186 [emphasis added].

The Pennsylvania Superior Court applied the United States Supreme Court's ruling in *Birchfield* in the case of *Commonwealth v. Evans*, 2016 PA Super 293 (Pa. Super. 2016). In *Evans*, the defendant, David Eugene Evans (hereafter referred to as "Evans"), was arrested on May 19, 2012 and charged with Driving under the Influence, Highest Rate, Third Offense and Driving under the Influence, General Impairment, Third Offense. *See id* at *1. After Evans was read the implied consent warnings, which included a warning that refusal would result in "enhanced criminal penalties," Evans consented to a chemical test of his blood. *See id* at *1-*2. Evans filed a Motion to Suppress, claiming the police coerced his consent by "informing him that if he did not submit to extraction and subsequent testing of his blood, he would face stiffer criminal penalties." *See id* at *2. The trial court in the *Evans* case denied Evans's Motion to Suppress, reasoning Evans "consented to the blood draw after being read his implied consent warnings by the arresting officer." *See id* at *6. Appellant filed a timely appeal and argued the trial court "erred in failing to suppress evidence of Evans's blood alcohol content where his blood was taken without a warrant and in the absence of knowing and voluntary consent." *See id* at *7.

The Pennsylvania Superior Court in *Evans*, considering the United States Supreme Court's decision in *Birchfield*, concluded that, although Pennsylvania's implied consent law does not make the refusal to submit to a blood test a crime in and of itself, the law undoubtedly "imposes criminal penalties on the refusal to submit to such a test," and, therefore, *Birchfield* controls. *See id* at *18. As *Birchfield* held that a state may not impose criminal penalties on the refusal to submit to a warrantless blood test, the Pennsylvania Superior Court in *Evans* concluded the police officer's reading of the implied consent warnings to Evans, which included the warning that refusal would result in criminal penalties, was "partially inaccurate" and, therefore, Evans's consent was involuntary. *See id* at *19. Ultimately, the Pennsylvania Superior Court vacated Evans's judgment of sentence, vacated the Suppression Order and

remanded the case to the trial court to "reevaluate Evans's consent… based on the totality of all the circumstances… and given the partial inaccuracy of the officer's advisory." *See id*.

Although the statutory language of 75 Pa. C. S. §1547(b)(2) requires a police officer to inform a licensee that refusal would result in both a civil license suspension as well as criminal penalties, the current state of case law in the United States and in Pennsylvania clearly indicate otherwise. First, *Birchfield* holds that implied consent laws which impose criminal penalties as a result of a refusal to submit to chemical testing are unduly coercive and unconstitutional, and licensees cannot be deemed to have consented "on the pain of committing a criminal offense." *See Birchfield* at 2186. Furthermore, the Pennsylvania Superior Court in *Evans* concluded Pennsylvania's DUI laws, although not identical to those implicated in *Birchfield*, still impose higher penalties for a refusal to submit to chemical testing, and a police officer's reading of the implied consent warnings, including a warning that refusal would result in criminal penalties, is "partially inaccurate" due to the unconstitutionality of such implied consent laws. *See Evans* at *19. Finally, the Pennsylvania Superior Court, as a clear and definitive answer to this issue, held recently, "pursuant to *Birchfield*, in the absence of a warrant or exigent circumstances justifying a search, **a defendant who refuses to provide a blood sample when requested by police is not subject to the enhanced penalties provided in 75 Pa. C. S. §§3803-3804."** *Commonwealth v. Giron*, 2017 Pa. Super. 23, *9 (Pa. Super. 2017) [emphasis added].

In the instant license suspension appeal, Trooper McConnell, in his reading PennDOT's current amended DL-26B "O'Connell Warnings" Form, correctly advised Appellant that his [Appellant's] refusal to submit to chemical testing would result in a civil license suspension without mentioning that refusal would result in criminal penalties. This is distinguishable from *Evans*, where the police officer advised defendant that refusal would result in both a civil license suspension and criminal penalties. Pursuant to *Birchfield*, police officers may still validly obtain consent from a licensee based on a warning that refusal would result in a civil license suspension because the United States Supreme Court stated clearly that a civil license suspension may be imposed constitutionally, whereas consent based on a warning that refusal would subject a licensee to "the pain of committing a criminal offense" is involuntary, and as such implied consent warnings are now inapplicable. *See Commonwealth v. Fink*, 2016 Pa. Super. Unpub. LEXIS 4704, *13-*14 (Pa. Super. 2016).[1]

After thorough consideration of relevant statutory and case law, this Trial Court concluded that PennDOT's current amended DL-26B "O'Connell Warnings" Form properly adheres to recent case law, as it (1) advises licensees that refusal to submit to chemical testing would result in a civil license suspension, pursuant to 75 Pa. C. S. §1547(b)(2)(i); (2) advises licensees that they have no right to speak with counsel prior to chemical testing, pursuant to *Commonwealth of Pennsylvania, Department of Transportation, Bureau of Traffic Safety v. O'Connell*, 555 A.2d 873 (Pa. 1989); and (3) omits language regarding criminal penalties, which were rendered unconstitutional and inapplicable pursuant to *Birchfield*, *Evans* and *Giron*. Licensees in Pennsylvania are not subject to criminal penalties for refusing to submit to chemical testing; thus, police officers cannot inform licensees of criminal penalties for

[1] *Commonwealth v. Fink* is a non-precedential, unpublished Pennsylvania Superior Court Opinion decided on December 27, 2016. It is being cited as persuasive, and not precedential, case law.

refusing to submit to chemical testing as such warnings are unduly coercive and deceivingly inaccurate. *See Evans* at *19; *see also Giron* at *9. This Trial Court accordingly concluded that Trooper McConnell performed his required duty under recent case law and obtained Appellant's implied consent constitutionally by limiting the warning to Appellant that refusing to submit to chemical testing would result in a civil license suspension, and PennDOT imposed a civil suspension of Appellant's operating privileges properly by Notice dated July 29, 2016 based upon Appellant's refusal to submit to a chemical test of blood. To conclude otherwise would be to extract unduly coercive consent from licensees and would be in direct contravention to the holdings of *Birchfield* and other relevant Pennsylvania case law.

For all of the reasons as set forth above, this Trial Court respectfully requests the Pennsylvania Commonwealth Court affirm its Order dated January 4, 2017.

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

COMMONWEALTH OF PENNSYLVANIA
v.
MATHEW ROBERT CRAFT, Defendant

COMMONWEALTH OF PENNSYLVANIA
v.
TYLER KRISTIAN MANGEL, Defendant

EVIDENCE / WRITINGS-DEMONSTRATIVE EVIDENCE / AUTHENTICATION

Generally, the requirement of authentication or identification as a condition precedent to the admissibility of evidence is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. *See* Pa.R.E. 901(a).

EVIDENCE / WRITINGS-DEMONSTRATIVE EVIDENCE / AUTHENTICATION

The process for authenticating social media evidence should be evaluated on a case-by-case basis to determine whether there has been an adequate foundational showing of said evidence's relevance and authenticity.

EVIDENCE / WRITINGS-DEMONSTRATIVE EVIDENCE / AUTHENTICATION

Similar to ordinary documents, authentication of electronic communications requires more than mere confirmation that the number or address belonged to a particular sender. For example, circumstantial evidence tending to corroborate the identity of the sender may serve to authenticate an electronic communication.

EVIDENCE / WRITINGS-DEMONSTRATIVE EVIDENCE / AUTHENTICATION

Although the Commonwealth produced evidence allegedly linking the Defendant to the Facebook page in question, including a name, hometown, school district and certain pictures, this information was insufficient to connect the Defendant to posts and messages authored on a Facebook page.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
NO. CR 2939 of 2016 and NO. CR 2940 of 2016

Appearances: Mark W. Richmond, Esq., for the Commonwealth, Appellant
Garrett A. Taylor, Esq., for Mathew Robert Craft, Appellee
Kenneth A. Bickel, Esq., for Tyler Kristian Mangel, Appellee

OPINION[1]

Domitrovich, J. July 10, 2017

The instant matter is currently before the Pennsylvania Superior Court on the appeal of the Commonwealth (hereafter referred to as "Appellant") from this Trial Court's Order dated May 8, 2017, wherein this Trial Court, at the time of trial before jury selection, dismissed the Commonwealth's Motion *in Limine* regarding introduction of Facebook posts and messages allegedly belonging to Defendant Tyler Kristian Mangel's (hereafter referred to as "Defendant

[1] Consistent with the Pennsylvania Superior Court's Order dated June 12, 2017, wherein the Superior Court consolidated the appeals at 703 WDA 2017 (Defendant Mangel) and 704 WDA 2017 (Defendant Craft) *sua sponte*, this Trial Court offers this single Trial Court Opinion for these two consolidated Pennsylvania Superior Court dockets.

Mangel") Facebook page. On appeal, the Commonwealth raises three (3) issues, which this Trial Court consolidates and summarizes as the following two (2) issues: (1) whether this Trial Court erred in applying Pennsylvania Rule of Evidence 901 and *Commonwealth v. Koch*, 39 A.3d 996 (Pa. Super. 2011), as the proper standard for authentication of electronic communications in the Commonwealth of Pennsylvania; and (2) whether this Trial Court erred after applying Pennsylvania Rule of Evidence 901 and *Koch* in finding and concluding the Commonwealth failed to corroborate the identity of the sender of the Facebook posts and messages, i.e. Defendant Mangel, pursuant to *Koch*, and the Commonwealth failed to produce sufficient extrinsic evidence to prove to a reasonable degree of scientific and technical certainty that the Facebook posts and messages were authored by Defendant Mangel; rather, the Commonwealth only produced Detective Anne Styn without other corroborating evidence to demonstrate the Facebook posts and messages were authored by this Defendant Mangel in order to thereafter be presented for the jury's consideration.

The Commonwealth has appealed this Trial Court's Order dated May 8, 2017, certifying and claiming properly that said Order has either terminated or substantially handicapped the prosecution of the instant consolidated criminal cases. *See Pa. R. A. P. 311(d).*

CR 2939 of 2016

On October 19, 2016, the District Attorney's Office filed a Criminal Information, charging Mathew Robert Craft (hereafter referred to as "Defendant Craft") with Aggravated Assault, in violation of 18 Pa. C. S. §2702(a)(1); Simple Assault, in violation of 18 Pa. C. S. §2701(a)(1); and Harassment, in violation of 18 Pa. C. S. §2709(a)(1)

At the time of jury selection and trial on May 8, 2017, the Commonwealth, by and through Assistant District Attorney Mark W. Richmond (hereafter referred to as "ADA Richmond"), presented for the first time a Motion *in Limine* (and Memorandum of Law in Support) to introduce Facebook conversations and photographs allegedly belonging to Defendant Mangel's Facebook page. After hearing argument from all counsel and after review of relevant case law, this Trial Court issued an Order denying the Commonwealth's Motion *in Limine* after finding and concluding the Commonwealth did not produce sufficient extrinsic evidence to demonstrate the Facebook posts and messages were authored by Defendant Mangel, pursuant to Pa. R. E. 901 and relevant case law, in order to thereafter be presented for the jury's consideration.

On May 9, 2017, the Commonwealth, by and through ADA Richmond, filed a Notice of Appeal to the Pennsylvania Superior Court, pursuant to Pennsylvania Rule of Appellate Procedure 311(d), claiming this Trial Court's Order denying the Commonwealth's Motion *in Limine* terminated or substantially handicapped the prosecution of the instant criminal cases. This Trial Court filed its 1925(b) Order on May 9, 2017. The Commonwealth filed its Concise Statement of Errors Complained of on Appeal on May 30, 2017.

CR 2940 of 2016

On October 19, 2016, the District Attorney's Office filed a Criminal Information, charging Defendant Mangel with Aggravated Assault, in violation of 18 Pa. C. S. §2702(a)(1); Simple Assault, in violation of 18 Pa. C. S. §2701(a)(1); and Harassment, in violation of 18 Pa. C. S. §2709(a)(1).

The Commonwealth presented a Motion for Provider to Provide Subscriber Information to 18 U.S.C. §2703(c) and 18 Pa. C. S. §5743(c) and (d) [**Facebook, Inc.**] on March 15, 2017 in Motion Court, which was granted by the Honorable Daniel J. Brabender, Jr. the

same day. The Commonwealth presented two (2) additional Motions for Provider to Provide Subscriber Information to 18 U.S.C. §2703(c) and 18 Pa. C. S. §5743(c) and (d) [**Spring Spectrum, LP** and **Verizon Wireless**] in Motion Court on April 4, 2017, which this Trial Court granted the same day.

At the time of jury selection for the Criminal Jury Trial on May 8, 2017, the Commonwealth, by and through ADA Richmond, presented for the first time a Motion *in Limine* (and Memorandum of Law in Support) to introduce Facebook conversations and photographs allegedly belonging to Defendant Mangel's Facebook page. After hearing argument from all counsel and after review of relevant case law, this Trial Court issued an Order denying the Commonwealth's Motion *in Limine* after finding and concluding the Commonwealth did not produce sufficient extrinsic evidence to demonstrate the Facebook posts and messages were authored by Defendant Mangel, pursuant to Pa. R. E. 901 and relevant case law, in order to thereafter be presented for the jury's consideration.

On May 9, 2017, the Commonwealth, by and through ADA Richmond, filed a Notice of Appeal to the Pennsylvania Superior Court, pursuant to Pennsylvania Rule of Appellate Procedure 311(d), claiming this Trial Court's Order denying the Commonwealth's Motion *in Limine* terminated or substantially handicapped the prosecution of the instant criminal cases. This Trial Court filed its 1925(b) Order on May 9, 2017. The Commonwealth filed its Concise Statement of Errors Complained of on Appeal on May 30, 2017.

Rationale and Conclusions

Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion. *Commonwealth v. Mosely*, 114 A.3d 1072, 1081 (Pa. Super. 2015). Generally, the requirement of authentication or identification as a condition precedent to the admissibility of evidence is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. *Id; see also Pa. R. E. 901(a).*

With regard to the admissibility of electronic communication, "such messages are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity." *Mosley* at 1081 (*quoting In the Interest of F. P.*, 878 A.2d 91, 96 (Pa. Super. 2005)). Authentication of electronic communications, like documents, requires more than mere confirmation that the number or address belonged to a particular person; circumstantial evidence, which tends to corroborate the identity of the sender, is required. *Commonwealth v. Koch*, 39 A.3d 996, 1005 (Pa. Super.2011).

The issue of authenticity of Facebook posts and messages and what constitutes sufficient evidence for authenticity, which is the focus of the instant appeal, has presented itself in a number of courts. In the United States Court of Appeals, Third Circuit, case of *United States v. Browne*, 834 F.3d 403 (2016), five (5) Facebook chat logs were entered into evidence under a Certificate of Authenticity, demonstrating illicit communications between the defendant and five (5) minor females. *See id* at 405-406. The defendant in *Browne* argued the Facebook records were not properly authenticated as the Government failed to establish the defendant had authored the communications. *See id* at 408. The United States Court of Appeals, Third Circuit, concluded authorship could be established for authentication purposes by way of extrinsic evidence. *See id* at 411. Ultimately, the United States Court of Appeals, Third

Circuit, held the Facebook records were properly authenticated by numerous pieces of extrinsic evidence, including (1) the minor females' testimony regarding the exchanges made on Facebook, consistent with the content of the chat logs; (2) the minor females' testimony that, after conversing with an individual on Facebook, they met the individual in person, who was identified as the defendant; (3) the defendant's voluntary statement of owning the Facebook account; (4) the defendant's voluntary statement that he conversed with the minor females; (5) the defendant voluntarily providing the passwords to the Facebook account; (6) the biographical information contained on the Facebook account, which was consistent with the defendant's biographical information; and (7) the Certificate of Authenticity attesting to the maintenance of the account by Facebook. *See id* at 413-415.

Relevant case law in Pennsylvania discusses a particular issue with authentication of electronic messages, namely the ease of abuse or manipulation of electronic information. *See Koch*, 39 A.3d at 1004 (the difficulty that frequently arises in electronic communications is establishing authorship, as often more than one person can access an e-mail address or social-networking account without permission). Further, relevant cases in other states' appellate courts, which are being cited to by this Trial Court for their persuasive values, have taken positions similar to *Koch* and *Browne* regarding authenticity of Facebook and other electronic messages and what constitutes sufficient evidence for authenticity of electronic communications. *See e.g. Dering v. State*, 465 S.W.3d 668, 671 (Tex. Ct. App. 2015) (the fact that an electronic communication on its face purports to originate from a certain person's social networking account is generally insufficient, standing alone, to authenticate that person as the author of the communication); *Sublet v. State*, 113 A.3d 695, 721 (Md. 2015) (social network messages were properly authenticated as there was circumstantial evidence connecting the defendant to the messages, the victim testified the defendant wrote the messages and distinct characteristics indicated the messages were authored by the defendant); *Griffin v. State*, 19 A.3d 415, 423 (Md. 2011) (pages taken from the defendant's girlfriend's social network profile were not properly authenticated as the State did not question if the profile was hers and if its contents were authored by her; further, the picture, birth date and location were not authenticating distinctive characteristics, given the prospect for abuse and manipulation of a social-networking website by someone other than the purported creator or user); *State v. Smith*, 192 So.3d 836, 842 (La. Ct. App. 2016) (the State failed to properly authenticate evidence derived from social networking service as it failed to present evidence sufficient to support a reasonable jury conclusion that evidence it sought to introduce was what the State purported it to be); *Commonwealth v. Williams*, 926 N.E.2d 1162, 1172 (Mass. 2010) (social network messages were not properly authenticated as foundational testimony did not establish the person who actually sent the messages, whether anyone other than alleged writer could communicate from the social network site, how secure the social network site was, who could access it, and whether codes were needed for access).

Prior to jury selection for the instant Criminal Jury Trial on May 8, 2017 (the first day of trial), this Trial Court heard testimony on the Commonwealth's Motion *in Limine* from Anne Styn, a detective with the Erie County District Attorney's Office, who had been qualified as an expert in the area of computer forensics, with no objection from defense counsel. *See Notes of Testimony, Motion in Limine, May 8, 2017, page 7, line 9-16.* Detective Styn indicated she "conducted a search on Facebook for Tyler Mangel in which only one name populated at that time," and then "issued a court order to Facebook for that particular account." *See id, page 8,*

lines 5-8. Detective Styn then stated she "compared the information that [she] received" with "the information that populated on the screen from the Facebook account," noting "the name was the same and the pictures on the side of the Facebook account, some were the same, and that they had both listed the individual living in Meadville, Pennsylvania." *See id, page 9, lines 14-19*. The Commonwealth introduced Exhibit 1, which Detective Styn described as a "screenshot of Tyler Mangel's Facebook homepage listing his information, that he went to Meadville High School, lives in Meadville, Pennsylvania," with a profile picture and other pictures associated with the account. *See id, page 10, lines 17-22; see also Commonwealth's Exhibit 1*. The Commonwealth also introduced subscriber records from Facebook, which indicate the name of the individual who created the account was "Tyler Mangel" with registered e-mail addresses of mangel17@facebook.com and tyler14tkm@hotmail.com. *See id, page 11, lines 15-23; see also Commonwealth's Exhibit 1*. Finally, the Commonwealth introduced posts and messages from "Tyler Mangel's" Facebook account, which the Commonwealth attributed to the incident involving the alleged assault. *See Commonwealth's Exhibits 2 and 3*.

However, when Detective Styn was questioned by the undersigned judge as to whether she [Detective Styn] could say with a reasonable degree of certainty that Defendant Mangel authored the posts and messages offered as Commonwealth's Exhibits Two and Three, Detective Styn acknowledged she could not:

THE COURT: Well, I'm the gatekeeper of admissibility. So I want to know, first of all, can you even testify to a reasonable degree of computer and scientific certainty the answer to that question? I mean, can you do that? And this is a criminal case. This is not the probability. This is certainty and you know what that is.

MS. STYN: Correct.

THE COURT: So, can you do that, first of all?

MS. STYN: Based on my training and experience, in this particular instance I would solely base my testimony off of the records that I received from Facebook and Verizon.

THE COURT: And you could do that with a reasonable degree of certainty that it is what? Mr. Mangel that did all of this?

MS. STYN: That this account was registered under Tyler Mangel's account and --

THE COURT: No. That Mr. Mangel actually did this. You can do that with a reasonable degree of certainty? You can say that he did this? That no one else intervened or someone else grabbed the account? You can do that?

MS. STYN: I cannot, Judge.

See N.T., May 8, 2017, page 20, lines 1-24.

Furthermore, on cross-examination, Detective Styn admitted she did not obtain an IP address, which Detective Styn acknowledged could determine which computer or network a particular piece of information is coming from. *See id, page 23, line 18 – page 24, line 1*. Detective Styn further acknowledged, when she inserted the name "Tyler Mangel" as search criteria, only one individual showed up at that time. *See id, page 24, lines 2-7*. This is contradicted by the search performed by Defendant Craft's counsel, Garrett A. Taylor, Esq., which indicated five (5) Facebook accounts for the name of "Tyler Mangel," and Defendant's Exhibit A, which indicates four (4) Facebook accounts for the name of "Tyler Mangel." *See also Defendants' Exhibit A.*

After review of the evidence presented by the Commonwealth, this Trial Court found and concluded the Commonwealth failed to produce sufficient evidence to corroborate that the sender of the Facebook posts and messages was, in fact, Defendant Mangel, which is required by relevant Pennsylvania case law and has been required in relevant case law from other states' appellate courts. *See Koch*, 39 A.3d at 1005; *see also Sublet*, 113 A.3d at 721; *see also Williams*, 926 N.E.2d at 1172. Defendant Mangel did not himself state at any time that the Facebook account in question was his own personal Facebook account and/or that he authored the posts and messages on the Facebook account, and the Commonwealth did not introduce subsequent testimony from any other knowledgeable party[2] to substantiate the Facebook page (and, by association, the posts and messages contained therein) belonged to Defendant Mangel. *Compare Browne*, 834 F.3d at 413-415. Moreover, the Commonwealth did not obtain the username or password for the Facebook account to confirm its authenticity. *Id*. Although the Commonwealth did produce evidence allegedly linking Defendant Mangel to the Facebook page in question, including a name, hometown, school district and certain pictures, this information has generally been held to be insufficient to connect a defendant to posts and messages authored on a Facebook page. *See Dering*, 465 S.W.3d at 671; *see also Griffin*, 19 A.3d at 423. In fact, following a search on Facebook for the name of "Tyler Mangel" by Attorney Taylor, five (5) "Tyler Mangel" Facebook accounts appeared in response to the search, one of which has the same hometown of "Meadville, Pennsylvania," which contradicts Detective Styn's testimony that only one (1) "Tyler Mangel" Facebook account appeared during her search. *See id, page 24, lines 2-11; see also Defendants' Exhibit A.*

A thorough review of the Facebook posts and messages themselves raises specific issues. First, the evidence presented by the Commonwealth does not indicate the date and exact time the posts and messages were made. *See Commonwealth's Exhibits 2 and 3*. The incident which brought about the instant criminal charges occurred allegedly on June 26, 2016, according to the Criminal Information. The lack of a date and timestamps raises a significant question regarding the connection of the posts and messages to the alleged incident on June 26, 2016. Furthermore, the "Tyler Mangel" who allegedly authored the Facebook posts and messages does not specifically reference himself in the incident on June 26, 2016; rather, other individuals, many of whom are not directly involved in the instant criminal case, reference a "Tyler Mangel" in response to a post made and in subsequent conversations

[2] Contrary to the Commonwealth's assertion on page 26 of the Motion *in Limine* Hearing transcript, the individual "Matty Iceburgh" (incorrectly spelled "Maddy Iceburgh") is not a knowledgeable third party who can substantiate Defendant Mangel authored the Facebook posts and messages; rather, "Matty Iceburgh," according to the Commonwealth, is the Co-Defendant in the instant criminal case, Defendant Matthew Robert Craft.

about an alleged assault. Moreover, the Facebook posts and messages are very ambiguous, containing slang and other nonsensical words with "Like" replies, and do not specifically and directly relate to the alleged incident on June 26, 2016. Finally, the Commonwealth did not produce evidence as to distinct characteristics of the posts and messages which would indicate Defendant Mangel was the author. *See Sublet*, 113 A.3d at 721.

Also, as part of Commonwealth's Exhibit 2, the Commonwealth introduced a black and white copy of a Facebook picture of a hand, which is allegedly bloody and bruised. *See Commonwealth's Exhibit 2*. However, this picture was posted by a Facebook user named "Justin Jay Sprejum Hunt," who makes no reference to Defendants Mangel or Craft. Therefore, this Facebook exhibit offered by the Commonwealth is not relevant regarding authentication of the Facebook posts and messages.

In the "Memorandum of Law in Support of Commonwealth's Use of Facebook Photos and Posts as Substantive Evidence," the Commonwealth cites the case of *Tienda v. Texas*, 358 S.W.3d 633 (Tex. Crim. App. 2012), which holds, regarding the authentication of electronic messages, photographs and music, there must be "sufficient circumstantial evidence to establish a *prima facie* case such that a reasonable juror could have found [the electronic information] were created and maintained by the appellant." *See id* at 642. Although the Commonwealth asserts the *Tienda* standard has been widely-accepted across the United States, the Commonwealth acknowledges the language of *Tienda* closely mirrors the language of *Commonwealth v. Koch, supra*. However, the Commonwealth has not fully interpreted the language of *Koch*, which holds circumstantial evidence demonstrating the **identity of the sender** of the electronic communication is required for authentication. *See id* at 1005 [emphasis added]. Therefore, *Koch*, which is current legal precedent in the Commonwealth of Pennsylvania, requires more than *Tienda*, which is merely persuasive in the Commonwealth of Pennsylvania.

The Commonwealth, by and through its Notice of Appeal, is stating essentially that the Facebook posts and messages are the only evidence connecting the Defendants to the alleged incident. This notion is supported by the Affidavit of Probable Cause, attached to both Criminal Complaints, which indicates the victim "was struck in the back of the head and knocked to the ground" by an unknown individual and, while on the ground, was allegedly "kicked and punched by [Defendants Mangel and Craft]." Furthermore, the victim indicated he "did not know [the Defendants], nor had he been in contact with [the Defendants] during the night, but was "able to identify [the Defendants] as a result of being shown Facebook pictures by [the victim's] family." Although this Trial Court acknowledges the severity of the victim's injuries, including facial lacerations, a broken nasal bone, a broken Maxilla bone and seven (7) missing teeth, the authentication and introduction of these instant Facebook posts and messages, based solely upon the testimony of Detective Styn and the information received by this Trial Court prior to jury selection and trial, could not have been deemed harmless error[3] as such would have been so prejudicial to the Defendants as to outweigh significantly any probative value, pursuant to Pennsylvania Rule of Evidence 403, and would

[3] "Harmless error exists when the error did not prejudice the defendant or the prejudice was *de minimis* or the erroneously admitted evidence was merely cumulative of other untainted evidence, which was substantially similar to the erroneously admitted evidence." *Koch*, 39 A.3d at 1007 (*quoting Commonwealth v. Passmore*, 857 A.2d 697, 711 (Pa. Super. 2004)).

also have constituted inadmissible hearsay.

Therefore, the Commonwealth failed to corroborate the identity of the sender of the Facebook posts and messages, i.e. Defendant Mangel, and failed to produce sufficient extrinsic evidence to prove to a reasonable degree of scientific and technical certainty that the Facebook posts and messages were authored by Defendant Mangel, pursuant to Pennsylvania Rule of Evidence 901, *Commonwealth v. Koch* and other relevant case law. For all of the foregoing reasons, this Trial Court respectfully requests the Pennsylvania Superior Court affirm this Trial Court's Order dated May 8, 2017.

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

COMMONWEALTH OF PENNSYLVANIA

v.

MARQUIS P. KNIGHT, Defendant

CRIMINAL PROCEDURE / ARD

Under Pennsylvania law, district attorneys have the sole discretion in any criminal case, including drunk driving cases, to move for the admission of a defendant into ARD.

CRIMINAL PROCEDURE / ARD

Admission to an ARD program is not a matter of right, but a privilege.

CRIMINAL PROCEDURE / ARD

When the district attorney denies a defendant's admission into the ARD program, the trial court's role is limited to whether the Commonwealth abused its discretion.

CRIMINAL PROCEDURE / ARD

Although a district attorney has broad discretion to accept or reject a candidate for ARD, the district attorney's authority is subject to the following judicially imposed restrictions: (1) an open, on-the-record specification of reasons which are (2) related to society's protection or the defendant's rehabilitation.

CRIMINAL PROCEDURE / ARD

A district attorney may not reject a candidate for ARD where the decision to reject the candidate is wholly, patently, and without doubt unrelated to the protection of society or the likelihood of a candidate's success in rehabilitation, such as race, religion, or other such obviously prohibited considerations.

CRIMINAL PROCEDURE / ARD

Although the reasons for denying a candidate into the ARD program may be subject to disagreement as to their wisdom, such reasons do not amount to an abuse of discretion so long as said reasons are related to society's protection or the defendant's rehabilitation.

CRIMINAL PROCEDURE / ARD

The Commonwealth does not bear the burden of proving the absence of abuse of discretion; rather, the defendant has the burden of proving the Commonwealth's denial of his request to participate in ARD was based on prohibited reasons.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. CR 2013 of 2016

Appearances: Michael W. Harmon, Esq., on behalf of Marquis P. Knight (Defendant)
John H. Daneri, District Attorney, on behalf of the Commonwealth

OPINION

Domitrovich, J. April 4, 2018

The matter before this Trial Court is Defendant Marquis P. Knight's "Motion to Compel Admission to ARD Program," wherein Defendant Marquis P. Knight ("Defendant") requests permission to participate in the District Attorney's Accelerated Rehabilitative Disposition ("ARD") Program. The issue is whether the District Attorney has abused his discretion in not accepting Defendant's request for admission into the District Attorney's ARD Program.

This Trial Court provides the following analysis:

The District Attorney's ARD Program is a pretrial diversionary program as provided by the Pennsylvania Rules of Criminal Procedure and statutory case law. *See* Pa.R.Crim.P. 300-320; *see also* 75 Pa.C.S.A. § 1552. When a defendant successfully completes the ARD Program by complying with all ARD conditions, absent an objection by the Commonwealth, the "judge shall thereafter dismiss the charges against the defendant." Pa.R.Crim.P. 319. "When the judge orders the dismissal of the charges against the defendant, the judge also shall order the expungement of the defendant's arrest record." Pa.R.Crim.P. 320(A); *see also Commonwealth v. Armstrong*, 434 A.2d 1205, 1208 (Pa. 1981) (holding that a petitioner who successfully completes the ARD Program is entitled to expungement). On the other hand, where a defendant is not accepted into the ARD Program and is convicted of a criminal offense, the procedure for expungement is generally more onerous under the Criminal Record Information Act than the expungement procedure pursuant to the ARD rules. *See* 18 Pa.C.S.A. § 9122.

A criminal complaint was filed against Defendant on April 20, 2016. Thereafter, Defendant filed an application for the ARD Program on July 6, 2016. On August 23, 2016, the Erie County District Attorney's Office filed an Information charging Defendant with (1) DUI-General Impairment; and (2) DUI-Highest Rate. Defendant was initially approved for the ARD Program; however, on November 30, 2016, the docket indicates the "event track [was] changed to [a] standard court case from ARD" due to Defendant's new charges at Docket Number 3771 of 2016: (1) First Degree Murder; (2) Aggravated Assault; (3) Recklessly Endangering Another Person; and (4) Possessing Instruments of a Crime.

Throughout the pendency of the proceedings at Docket Number 3771 of 2016, counsel for Defendant, Michael W. Harmon, Esq., filed motions to continue at the above-referenced docket number on the following dates: February 21, 2017, April 25, 2017, September 6, 2017, November 30, 2017, and March 21, 2018. Defense counsel and Defendant continually averred in each motion to continue that Defendant was "zealously defending the charges filed against him at Docket No. 3771 of 2016 and believe[d], and therefore aver[d], that he [would] receive a favorable outcome at his trial." (*See e.g.* Defendant's Motion to Continue at ¶ 5, filed Feb. 21, 2017). Defense counsel and Defendant further averred the purpose of continuing the instant case was "to re-apply for the ARD program in the above-captioned matter following a favorable outcome at Docket No. 3771 of 2016." (*Id.* at ¶ 7). On December 8, 2017, following a jury trial on the homicide-related charges, Defendant was acquitted of all criminal charges at Docket Number 3771 of 2016.

By letter dated January 24, 2018, Defendant, by and through Attorney Harmon, resubmitted Defendant's original ARD application originally filed July 6, 2016, to the District Attorney's Office. However, by letter dated February 22, 2018, Erie County District Attorney John H. Daneri denied Defendant's new request to be accepted into the ARD Program. District Attorney Daneri provided the following reasons in support thereof in his letter dated February 22, 2018:

> Defendant perjured himself during his homicide trial; Defendant is a member of an Erie gang; Defendant refused to cooperate with authorities in the homicide investigation.

On March 15, 2018, in response to District Attorney Daneri's letter, Attorney Harmon filed

the instant Motion to Compel Admission to ARD Program. A hearing was held on Defendant's Motion to Compel Admission to ARD Program on March 29, 2018, at which Defendant was present and represented by his counsel, Attorney Harmon, and District Attorney Daneri appeared on behalf of the Commonwealth. At said hearing, Defendant called as a witness Eric V. Hackwelder, Esq., who was Defendant's counsel for the homicide trial at Docket Number 3771 of 2016. Defendant then testified on his own behalf at said hearing. Defendant testified he was not affiliated with any gang-related activity. In addition, Defendant testified he was previously employed as a drug and alcohol counselor before his DUI arrest in the instant matter and that before he could return to his counseling position, his criminal record needed to be expunged.

Under Pennsylvania law, district attorneys "have the sole discretion in any criminal case, including drunk driving cases, to move for the admission of a defendant into ARD." *Commonwealth v. Lutz*, 495 A.2d 928, 932 (Pa. 1985). A defendant's admission into ARD is not a matter of right, but is a privilege as stated in well-established case law. *Id.* (citing *Commonwealth v. Armstrong*, 434 A.2d 1205, 1208 (Pa. 1981) ("Our rules give district attorneys broad discretion to select which crimes and which individuals qualify for diversion into ARD")). Thus, when the Commonwealth denies a defendant's admission into the ARD program, the trial court's role is limited to whether the Commonwealth abused its discretion. *Commonwealth v. Sohnleitner*, 884 A.2d 307, 313 (Pa. Super. 2005). "While the district attorney's discretion is broad, and appellate review of such decisions is narrow, the district attorney's power is not completely unfettered and is subject to the following judicially imposed restrictions: 1) an open, on-the-record specification of reasons which are 2) related to society's protection or the defendant's rehabilitation." *Commonwealth v. Morrow*, 650 A.2d 907, 910–11 (Pa. Super. 1994).

Indeed, "a district attorney may base a decision to grant or deny admission to ARD on **any** consideration related to the protection of society and the rehabilitation of the defendant" unless such decision is "wholly, patently and **without doubt unrelated** to the protection of society or the likelihood of a person's success in rehabilitation, such as race, religion or other such obviously prohibited considerations." *Sohnleitner*, 884 A.2d at 313 (quoting *Commonwealth v. Jagodzinski*, 739 A.2d 173, 176 (Pa. Super. 1999)) (emphasis in original). Any policy by the District Attorney which is "rationally related to society's protection or an individual's ability to succeed under the program is acceptable and is not considered an abuse of discretion." *Morrow*, 650 A.2d at 911. The Commonwealth does not bear the burden of proving the absence of abuse of discretion; instead, the defendant has the burden of proving the Commonwealth's denial of his request to participate in ARD was based on the aforementioned prohibited reasons. *Id.* As such, so long as the district attorney's decision is related to the "protection of society or the likelihood of a person's success in rehabilitation," the trial court is not in a position to inquire further and the district attorney's decision will stand. *Id.*

In the instant case, at Defendant's homicide trial at Docket Number 3771 of 2016, and at the hearing held on March 29, 2018, Defendant testified in both instances that he had no gang affiliations. District Attorney Daneri disagreed and argued that Defendant is involved in gang-related activities. District Attorney Daneri stated law enforcement authorities had data and other intelligence provided by the Erie City Police Department showing Defendant's

involvement in gang-related activities. District Attorney Daneri defined a "gang" as an affiliation of individuals who are criminally associated. District Attorney Daneri stated that if Defendant were accepted into the ARD Program, Defendant would similarly be untruthful with his probation officer concerning efforts to rehabilitate Defendant pursuant to the ARD Program's objectives, and Defendant would not cooperate with directives from probation officers.

Moreover, District Attorney Daneri indicated that, in the past, individuals associated with gangs have been rejected for consideration for the ARD Program. Based on the aforementioned intelligence gathered by the Erie County Police Department, District Attorney Daneri enumerated various gangs in Erie, including "Shid Nation" and "Four Nation." District Attorney Daneri stated he knows from the data and intelligence about Defendant's involvement with the gang known as "Shid Nation." District Attorney Daneri also concluded his refusal to allow Defendant to participate in the ARD Program was for the protection of society. Thus, his policy of refusing individuals associated with gang-related activities into the ARD Program is "rationally related to society's protection or [Defendant's] ability to succeed under the [ARD] program," and District Attorney Daneri's policy is, therefore, an acceptable basis upon which to deny any defendant's—including this Defendant's—admission into the ARD Program. *See Morrow*, 650 A.2d at 911.

Furthermore, Attorney Harmon argued District Attorney Daneri refused Defendant's admission into the ARD Program based on "personal reasons." District Attorney Daneri insisted he did not abuse his decision by rejecting Defendant's admission into the ARD Program on any prohibited factor, such as race or religion. Rather, District Attorney Daneri articulated specifically in both his letter and in open court his reasons for denying Defendant's request for admission into the ARD Program, and his reasons are clearly related to the protection of society and the likelihood of Defendant's successful rehabilitation. *See Commonwealth v. Jagodzinski*, 739 A.2d 173, 176 (Pa. Super. 1999) (internal quotations omitted) ("District attorneys are . . . required openly to specify their reasons for not submitting a particular case to ARD, and those reasons, while they may be subject to disagreement as to their wisdom, do not amount to an abuse of discretion.").

Based on the foregoing reasons, this Trial Court enters the following Order:

ORDER

AND NOW, to-wit, this 4th day of April, 2018, at the time of the scheduled hearing on the Motion to Compel Admission to ARD Program, filed by Defendant, by and through his counsel, Michael W. Harmon, Esq.; at which Defendant Marquis Knight was present and represented by his counsel, Michael W. Harmon, Esq., and District Attorney John H. Daneri appeared on behalf of the Commonwealth; and after hearing testimony from Eric V. Hackwelder, Esq., as well as testimony from Defendant; and after oral argument from both counsel; and upon review of the relevant statutory and case law; and consistent with the foregoing analysis in the above Opinion, it is hereby **ORDERED, ADJUDGED AND DECREED** that Plaintiff's Motion to Compel Admission to ARD Program is **DENIED**.

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

VINEYARD OIL AND GAS COMPANY, Appellant

v.

NORTH EAST TOWNSHIP ZONING HEARING BOARD, Appellee

v.

CAPITAL TELECOM HOLDINGS, LLC, Intervenor

ZONING / SCOPE OF REVIEW

If the record below includes findings of fact made by the governing body, board or agency whose decision or action is brought up for review and the court does not take additional evidence, the findings of the governing body, board or agency shall not be disturbed by the court if supported by substantial evidence. *See* 53 P.S. § 11005-A.

ZONING / SCOPE OF REVIEW

Where a trial court does not take any additional evidence, the trial court is limited to determining whether the zoning board committed a manifest abuse of discretion or an error of law in granting the variance. An abuse of discretion is established where the findings are not supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

ZONING / DIMENSIONAL VARIANCE

A dimensional variance involves a request to adjust zoning regulations to use the property in a manner consistent with such regulations, as opposed to a use variance, which involves a request to use property in a manner that is wholly outside zoning regulations.

ZONING / DIMENSIONAL VARIANCE / UNNECESSARY HARDSHIP

In determining whether unnecessary hardship has been established to justify the grant of a dimensional variance, courts may consider multiple factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements, and the characteristics of the surrounding neighborhood.

ZONING / DIMENSIONAL VARIANCE / UNNECESSARY HARDSHIP

The quantum of evidence required to establish an unnecessary hardship is lesser when a dimensional variance, rather than a use variance, is sought.

ZONING / SPECIAL EXCEPTION

A special exception is not an exception to a zoning restriction, but, rather, a use that is expressly permitted, so long as the applicant can show the absence of a detrimental effect on the community.

ZONING / SPECIAL EXCEPTION

An 'exception' in a zoning ordinance is one allowable where facts and conditions detailed in the ordinance, as those upon which an exception may be permitted, are found to exist. Thus, an exception has its origin in the zoning ordinance itself. It relates only to such situations as are expressly provided for and enunciated by the terms of the ordinance. The rules that determine the grant or refusal of the exception are enumerated in the ordinance itself. The function of the board when an application for an exception is made is to determine that such specific facts, circumstances and conditions exist which comply with the standards of the ordinance and merit the granting of the exception.

TELECOMMUNICATIONS / LOCAL GOVERNMENT REGULATION

Under the Telecommunications Act of 1996, state and local governments retain authority

over zoning and land use issues; however, the Telecommunications Act places several procedural and substantive limitations on such authority when exercised in relation to personal wireless service facilities. 47 U.S.C. § 332(c)(7)(A) and (B).

TELECOMMUNICATIONS / LOCAL GOVERNMENT REGULATION

To show a violation of Section 332(c)(7)(B)(i)(II) of the Telecommunications Act of 1996, an unsuccessful provider applicant must show (1) its telecommunications facility will fill an existing significant gap in the ability of remote users to access the national telephone network; and (2) the manner in which the applicant proposes to fill the significant gap in service is the least intrusive means of remedying that gap.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 13050 – 2017

Appearances: Michael Musone, Esq., - Vineyard Oil & Gas Company (Appellant)
John J. Shimek, III, Esq., - North East Township Zoning Hearing Board (Appellee)
Joseph J. Perotti, Jr., Esq., - Capital Telecom Holdings, LLC (Applicant/ Intervenor)

OPINION

Domitrovich, J. April 16, 2018

The matter before this Trial Court is Vineyard Oil and Gas Company's Notice of Land Use Appeal from the October 6, 2017, decision of the North East Township Zoning Hearing Board ("Zoning Hearing Board") granting Intervenor Capital Telecom Holdings, LLC's application for dimensional/setback variances to erect a proposed wireless communications facility and a special exception use to construct a self-supporting tower in lieu of a monopole tower. The issue before this Trial Court is whether substantial evidence exists to support the North East Township Zoning Hearing Board's decision to grant Capital Telecom Holdings, LLC's application for the dimensional variances and special exception use. This Trial Court provides the following analysis:

I. Procedural/Factual Background

Vineyard Oil and Gas Company's ("Vineyard") is the owner of real property located at 10299 West Main Street, North East, Pennsylvania 16428, which is directly adjacent to the north of the subject property owned by Jacob R. Jones located at 10325 West Main Street, North East, Pennsylvania 16428 ("Subject Property"). The North East Township Zoning Hearing Board ("ZHB") operates within North East, Pennsylvania and is governed by Article IX of the Pennsylvania Municipalities Planning Code, 53 P.S. § 10901 *et seq.*, and North East Township Zoning Ordinance No. 2014-001. Capital Telecom Holdings, LLC ("Capital") is a Limited Liability Company operating within the Commonwealth of Pennsylvania and constructs, owns, and manages wireless communications facilities in Pennsylvania and elsewhere.

The Subject Property, which contains 5.58 acres, is located in the B-2 Industrial District of North East Township, and the construction of a wireless communications facility is a permitted use under the Township Zoning Ordinance. *See* N.E. Twp. Ord. Art. XI, § 1103.2.

The Subject Property contains a salvage yard, septic tank, gas well, and an automobile repair business. Mr. Jones, the owner of the Subject Property, also owns adjacent real property located to the south and southwest of the Subject Property. On September 19, 2016, Mr. Jones and Capital entered into an "Option and Telecommunications Facility Lease Agreement." Under said Agreement, Capital Telecom leased a portion of the Subject Property for the purpose of erecting and operating a wireless communications facility thereon.

Pursuant to Section 1106.1 of the North East Township Ordinance, if an application proposes to build an antenna support structure, the applicant must establish the existence of certain requirements and must comply with certain performance standards. *See* N.E. Twp. Ord. Art. XI, § 1106.1. In particular, if a new antenna support structure is erected, the minimum distance between the base of the support structure and any adjacent property must be equal to the maximum height of the antenna and antenna support structure. *See id.* at § 1106.1(E). In addition, a monopole antenna support structure is ordinarily required pursuant to the Ordinance; however, the Zoning Hearing Board may approve the use of a free-standing support structure where the applicant can establish the existence of certain additional requirements. *See id.* at § 1104.1(F) and (L).

Capital submitted an application dated July 6, 2017, to the North East Township Zoning Hearing Board requesting a variance from the setback requirements under the Township's Ordinance and for the construction of a free-standing antenna support structure in lieu of a monopole support structure ("Application"). Said Application stated Capital proposed to construct a 195' tower designed to accommodate collocation by other telecommunications carriers and emergency services. Since the North East Township's Ordinance ordinarily requires the base of the proposed tower to be placed at a distance not less than 195' from adjoining properties under North East's Zoning Ordinance, Capital's Application sought approval for the following distances between the base of the proposed tower and the adjoining properties: 54' 4" to the north; 132' 4" to the south; 113' 5" to the east; and 114' 3" to the southwest. (R.R. at 39). Thus, the dimensional variances sought by Capital were: 140' 8" to the north; 62' 8" to the south; 81' 7" to the east; and 80' 9" to the southwest. (R.R. at 2). In addition, Capital indicated its intent to have the proposed tower accompanied by a fenced compound surrounding the tower wherein all associated equipment would be installed. Capital intends to have an access/utility easement to access the property.

A hearing was held before the North East Township Zoning Hearing Board on August 22, 2017. At said hearing, Capital presented evidence in the form of expert testimony from Verizon Wireless Radio Frequency Engineer Matt Wierzchowski concerning the details of Capital's Application. Scott Von Rein, a representative from Capital, also presented testimony on behalf of Capital, and Rich Hanson, a site acquisition specialist, was also present at the hearing. Mr. Jones, the owner of the Subject Property, also provided testimony. In addition, the Zoning Hearing Board called Russ LaFuria, the North East Zoning Officer to testify. Vineyard was represented at said hearing by Timothy S. Watcher, Esq., who cross-examined witnesses for Capital and raised objections on behalf of Vineyard. At the conclusion of said hearing, the Zoning Hearing Board unanimously voted in favor of granting Capital the setback variance and structure-type special exception request. On October 6, 2017, the Zoning Hearing Board issued its specific "Findings of Fact, Conclusions of Law, and Decision" ("ZHB Decision").

On October 27, 2017, Vineyard, by and through its counsel Michael Musone, Esq., filed its Notice of Land Use Appeal. A Writ of *Certiorari* was issued on October 31, 2017. On November 9, 2017, the North East Township Zoning Hearing Board filed the record from the hearing before Zoning Hearing Board on August 22, 2017. Capital, by and through its counsel, Joseph J. Perotti, Esq., filed a Notice of Intervention. A Case Management Conference was held before the undersigned judge on January 31, 2018, at which both counsel for Vineyard and Capital stipulated that no additional evidence was required. Thus, this Trial Court directed the parties to submit their Memoranda of Law and scheduled argument for March 21, 2018.

At the hearing held on March 21, 2018, however, this Trial Court raised a concern as to how the record, as submitted, was organized by the Zoning Hearing Board. By Order dated March 21, 2018, this Trial Court rescheduled Argument for March 28, 2018 in order to provide additional time for counsel of the Zoning Hearing Board to submit a more comprehensive, delineated, and reproduced record utilizing Bates stamping. Said Order also directed both counsel for Vineyard and Capital to re-submit Memoranda of Law to reflect notations to the Bates stamping in the resubmitted comprehensive, delineated, and reproduced record. Thus, on March 22, 2018, the Zoning Hearing Board, by and through its counsel, John J. Shimek, III, Esq., properly re-filed the record in accordance with said Order dated March 21, 2018. In addition, on March 26, 2018, Vineyard and Capital properly submitted Amended Memoranda of Law reflecting notations to the Bates stamping found in the resubmitted record.

Argument was held before this Trial Court on March 28, 2018, at which Michael Musone, Esq., appeared on behalf of Vineyard; Joseph J. Perotti, Esq., appeared on behalf of Capital; and John J. Shimek, III, Esq., appeared on behalf of the Zoning Hearing Board.

II. <u>Standard of Review</u>

This Trial Court's standard of review in a zoning hearing board appeal is specified in the Pennsylvania Municipalities Planning Code:

> If the record below includes findings of fact made by the governing body, board or agency whose decision or action is brought up for review and the court does not take additional evidence or appoint a referee to take additional evidence, the findings of the governing body, board or agency shall not be disturbed by the court if supported by **substantial evidence**.

53 P.S. § 11005-A (emphasis added); *see also Marshall v. City of Philadelphia*, 97 A.3d 323, 331 (Pa. 2014). Where a trial court does not take any additional evidence, the trial court is limited to determining whether the zoning board committed a manifest abuse of discretion or an error of law in granting the variance. *Marshall*, 97 A.3d at 331. An abuse of discretion is established where the findings are not supported by substantial evidence. *Collier Stone Co. v. Twp. of Collier Bd. of Comm'rs*, 735 A.2d 768, 772, n.9 (Pa.Cmwlth. 1999). "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637, 640 (Pa. 1983). Determinations as to the credibility of witnesses and the weight to be given evidence are matters solely within the authority of the zoning board in the performance of its fact-finding role. *In re: Cutler Group, Inc.*, 880 A.2d 39, 46 (Pa. Commw. Ct. 2005).

The role of the trial court is to determine whether "there is some basis for the [zoning hearing board's] action, or in other words, that the action of the zoning board was not arbitrary and capricious." *In re: Appeal of Lieb*, 116 A.2d 860, 866 (Pa. Super. 1955).

III. Law and Analysis

A. The Zoning Hearing Board Did Not Abuse its Discretion or Commit an Error of Law in Granting Capital's Dimensional Variance Request.

The North East Township's Ordinance governing the dimensional requirement for wireless communication service facilities states:

> If a new antenna support structure is constructed (as opposed to mounting the antenna on an existing structure), the minimum distances between the base of the support structure or any guy wire anchors and any property line or right-of-way line shall be equal to the maximum height of the antenna and antenna support structure.

N.E. Twp. Ord. Art. XI, § 1106.1(E). A dimensional variance involves a request to adjust zoning regulations to use the property in a manner consistent with regulations, as opposed to a use variance, which involves a request to use property in a manner that is wholly outside zoning regulations. *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 721 A.2d 43, 47 (Pa. 1998). Pursuant to Section 703 of the North East Township Ordinance, the Zoning Hearing Board may grant a variance provided that all of the following findings are made where relevant in a given case:

(1) That there are unique physical circumstances or conditions including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property or use, and that unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the Zoning Ordinance in the neighborhood or district in which the property or use is located;

(2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the Zoning Ordinance, and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;

(3) That such unnecessary hardship has not been created by the applicant;

(4) The variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor weaken the validity of the zoning, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare; and

(5) The variance, if authorized, will represent the minimum variance that will afford

relief and will represent the least deviation from the regulation in issue.

N.E. Twp. Ord. Art. VII, § 703; *see also* 53 P.S. § 10910.2; *Southeastern Chester Cty. Refuse Auth. v. Zoning Hearing Bd. of London Grove Twp.*, 898 A.2d 680, 688 (Pa.Cmwlth. 2006). "The overriding standard for a variance is unnecessary hardship." *Doris Terry Revocable Living Trust v. Zoning Board of Adjustment of City of Pittsburgh*, 873 A.2d 57, 63 (Pa. Commw. Ct. 2005). In determining whether unnecessary hardship has been established to "justify the grant of a dimensional variance, courts may consider multiple factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood." *Hertzberg*, 721 A.2d at 50. Importantly, the quantum of evidence required to establish an unnecessary hardship is lesser when a dimensional variance, rather than a use variance, is sought. *Id.* at 47-48.

In this case, Capital's intended use of the Subject Property is permitted under North East's existing Zoning Ordinance. As this case pertains to whether the Zoning Hearing Board abused its discretion in granting Capital's request for dimensional variances, Capital was only required to demonstrate the zoning requirements work an unreasonable hardship in Capital's pursuit of a permitted use. *See Hertzberg*, 721 A.2d at 47. With respect to the Zoning Hearing Board's decision to grant Capital's request for dimensional variances, Vineyard argues the Zoning Hearing Board abused its discretion and committed errors of law by concluding:

(1) The stream bisecting the Subject Property, the floodplain conditions on the western portion of the Subject Property, and the size of the Subject Property create an unnecessary hardship on Capital.

(2) Because of the unnecessary hardship . . . , Capital cannot construct the proposed tower in strict conformance with the required setbacks.

(3) The unnecessary hardship was not created by Capital or the owner of the Subject Property.

(4) The requested dimensional variances . . . are the minimum variances necessary to afford relief to Capital.

(*See* ZHB Decision at ¶ 9-11, 13; *see also* Vineyard's Notice of Land Use Appeal at ¶ 20(a)-(d)).

Based on the testimony and Exhibits presented at the hearing, as well as the documents set forth in Capital's variance Application, the Zoning Hearing Board's conclusions were amply supported by substantial evidence demonstrating the stream bisecting the Subject Property, the floodplain conditions on the western portion of the Subject Property, and the Subject Property's size create the unnecessary hardship. Specifically, Mr. Von Rein provided credible testimony regarding the rationale behind the physical placement of the tower on the Subject Property due to environmental and safety concerns created by the physical characteristics

attendant to the property. Mr. Von Rein stated a stream encroaches on the western portion of the Subject Property which bisects the Subject Property with the adjoining property to the west also belonging to Mr. Jones. (R.R. at 135; *see also* R.R. at 46). Also, Mr. LaFuria indicated Exhibit B-5, an image extracted from a GIS Mapping System, portrayed an aerial view of the Subject Property along with the floodplain designated by FEMA. (R.R. 150-51; R.R. at 91). Finally, Attorney Perotti noted the "parcel is irregularly shaped," and pointed to the "Site Plan" depicting an aerial view of the irregular shape of the Subject Property. (R.R. at 139; R.R. 46).

Furthermore, the Zoning Hearing Board properly concluded the existence of said hardships creates a situation in which Capital cannot construct the proposed tower in strict conformance with the setback requirements. For instance, Mr. Von Rein stated the stream existing on the property is "primarily a wetlands," and that the proposed tower requires a setback distance of no less than fifty feet from the stream. (R.R. at 135, 138). Mr. Von Rein explained the existence of the stream, along with the setback requirement, created an additional obstacle Capital was required to overcome in selecting a location on the Subject Property for the proposed tower. (R.R. at 144-46). Indeed, Mr. Schuyler, a member of the Zoning Hearing Board, acknowledged at the hearing that the existence of the stream creates a situation in which Capital cannot construct the proposed tower in strict conformance with the setback requirements. Mr. Schuyler noted a primary concern regarding the need for a setback variance was not due to the proximity of the adjoining properties but due to the setback distances to the existing stream on the Subject Property. Specifically, Mr. Schuyler noted:

> [T]he property boundary on the south and west are sort of irrelevant because the owner of the property is the same as the parcel you're on. The only thing that would be relevant would be the stream, itself, and making sure that either a setback or a variance . . . were permitted.

(R.R. at 139).[1] In addition, Attorney Perotti stated since the "parcel is irregularly shaped," regardless of where the tower is located on the parcel, the setback requirements under the Ordinance cannot be satisfied despite the fact the proposed tower is a permitted use on the Subject Property. (R.R. at 139; *see also* R.R. 46).

Moreover, the Zoning Hearing Board had substantial evidence to support its conclusion that physical characteristics attendant to the Subject Property were not created by Capital or Mr. Jones. Although Vineyard argues Capital created the hardship since it selected a property with an existing commercial business including a building, salvage yard, septic tank, and gas well, the Zoning Hearing Board did not conclude an unnecessary hardship resulted due to the existence of the commercial business. Rather, the Zoning Hearing Board

[1] Although not raised by the parties, ordinarily, "where the applicant for a variance owns other property adjoining the lot for which a dimensional variance is in issue, and a merger of the two properties would allow the latter lot to be given a use permitted by the zoning ordinance, then no unnecessary hardship has been shown to justify the grant of a variance." *Berger v. Zoning Hearing Bd. of Cheltenham Twp.*, 54 Pa.Cmwlth. 405, 410, 422 A.2d 219, 222 (1980). However, in the instant case, Mr. Jones owns both the Subject Property and the adjoining property located to the west and southwest. As this is not a case where both properties are undeveloped, the Zoning Hearing Board of North East Township was justified in concluding unnecessary hardships exist on the Subject Property notwithstanding the above rule. *See BCL, Inc. v. W. Bradford Twp., by Bd. of Sup'rs*, 36 Pa.Cmwlth. 96, 101, 387 A.2d 970, 973 (1978) (noting courts should distinguish between developed and undeveloped properties).

properly concluded, based on the substantial evidence presented, that the hardships attendant to the property resulted from the existence of the "stream bisecting the Subject Property, the floodplain conditions on the western portion of the Subject Property, and the size of the Subject Property." (*See* ZHB Decision at ¶ 9). Thus, the Zoning Hearing Board's conclusion that the unnecessary hardships were not created by Capital or Mr. Jones is supported by substantial evidence.

Finally, the Zoning Hearing Board properly concluded the requested dimensional variances are the minimum variances necessary to afford relief to Capital based on the evidence and testimony offered at the hearing. For instance, Mr. Von Rein emphasized that adjusting the location of the proposed tower southwest of the property would not eliminate Capital's need for the dimensional variances and may raise environmental and safety concerns due to the proximity of the proposed tower's location to the stream. (R.R. at 138, 144-46). Accordingly, this Trial Court concludes the Zoning Hearing Board did not commit a manifest abuse of discretion or an error of law in granting Capital's request for dimensional variances.

B. The Zoning Hearing Board Did Not Abuse its Discretion or Commit an Error of Law in Granting Capital's Request for a Special Exception to Construct a Self-Supporting Tower in Lieu of a Monopole Support Structure.

Vineyard argues the Zoning Hearing Board abused its discretion and committed errors of law by finding Capital satisfied the requirements for a special use exception under the North East Township's Zoning Ordinance. Under the North East Township's Zoning Ordinances, a monopole antenna support structure is required except where a special exception use is sought. *See* N.E. Twp. Ord. Art. XI, § 1106.1(E); *See also id.* at § 1106.1(L) ("Except as hereinafter provided, in all cases, monopole antenna support structures shall be required.").

For the Zoning Hearing Board to grant the use of a free-standing antenna support structure in lieu of a monopole, the applicant must establish the following for such approval:

(1) Cost of erecting a monopole would preclude the provision of adequate service to the public, or erection of a safe antenna support structure requires a type other than a monopole;

(2) The proposed antenna structure would have the least practical adverse visual impact on the environment and closely resembles a monopole; and

(3) The proposed antenna support structure is architecturally compatible with surrounding buildings and land use through location and design, and blends in with the existing characteristics of the site to the extent practical.

N.E. Twp. Ord. Art. XI, § 1106.1(F)(1)-(3); R.R. 209-210).

A special exception is not an exception to a zoning restriction, but, rather, a use that is expressly permitted, so long as the applicant can show the absence of a detrimental effect on the community. *Southdown, Inc. v. Jackson Twp. Zoning Hearing Bd.*, 809 A.2d 1059, 1063 (Pa. Cmwlth. 2002).

> "An 'exception' in a zoning ordinance is one allowable where facts and conditions detailed in the ordinance, as those upon which an exception may be permitted, are found to exist." Thus, an exception has its origin in the zoning ordinance itself. It relates only to such situations as are expressly provided for and enunciated by the terms of the ordinance. The rules that determine the grant or refusal of the exception are enumerated in the ordinance itself. The function of the board when an application for an exception is made is to determine that such specific facts, circumstances and conditions exist which comply with the standards of the ordinance and merit the granting of the exception.

Greth Dev. Grp., Inc. v. Zoning Hearing Bd. of Lower Heidelberg Twp., 918 A.2d 181, 186 (Pa.Cmwlth. 2007) (quoting *Broussard v. Zoning Board of Adjustment of City of Pittsburgh*, 831 A.2d 764, 769 (Pa.Cmwlth.2003) (citations omitted). An applicant seeking a special exception bears both the burden of moving forward with the evidence and of persuasion at a hearing before the zoning hearing board and must prove the proposed use satisfies the objective requirements of a special exception. *Id.* (citing *Manor Healthcare Corporation v. Lower Moreland Twp. Zoning Hearing Board*, 139 Pa.Cmwlth. 206, 590 A.2d 65 (1991)). Once an applicant has established a prima facie case, the burden shifts to any objectors to present sufficient evidence that the proposed use has a detrimental effect on the public health, safety, and welfare. *Greth Dev. Grp., Inc.*, 918 A.2d at 186.

In this case, with respect to the Zoning Hearing Board's decision to grant Capital's request for the special exception, Vineyard argues the Zoning Hearing Board abused its discretion and committed errors of law in concluding:

(1) Although Capital did present testimony relating to the cost of the project, the cost difference between a monopole and the self-supporting tower was not proffered as a reason for the self-supporting tower. However, the nature of the monopole, which can sway and vibrate in the wind, compromises the quality of the cellular service, especially microwave service.

(2) The proposed self-supporting structure would not have any adverse visual impact on the industrial environment surrounding the Subject Property, especially because of the more than one thousand-foot distance between the proposed tower and the commercial corridor on West Main Road. Furthermore, aesthetic considerations are not sufficient to deny a use by special exception.

(3) The proposed self-support structure is architecturally compatible with the auto repair shop on the Subject Property, with the Norfolk & Western Railroad tracks to the south, to the farmland to the east, and to the vacant land to the north and to the west of the proposed tower location. Furthermore, aesthetic considerations are not sufficient to deny a use by special exception.

(*See* ZHB Decision at ¶ 9-11, 13; *see also* Vineyard's Notice of Land Use Appeal at ¶ 21).

First, the Zoning Hearing Board properly concluded the erection of a safe antenna support structure requires a type other than a monopole is supported by substantial evidence. At the

hearing, Mr. Von Rein stated: "Coming from a common-sense perspective, if you have a three-legged structure that has a wider base, as opposed to a narrower structure . . . the self-support tower is less wind loading because [the tower is] smaller and because [the tower] allows the wind to go through it all at once." (R.R. at 174-75). In addition, although not cited as a reason for requesting the special exception, Mr. Von Rein indicated the difference in cost between a monopole and self-support structure is roughly $25,000 in favor of the self-supporting tower on the structure alone. (R.R. at 177). Mr. Von Rein stated the lesser cost of the self-support structure was at least one of the factors in determining the type of structure selected for this particular project. (R.R. at 177). Moreover, a letter from structural engineer Robert E. Beacom was attached to Capital's Application wherein Mr. Beacom certified and proposed a self-supporting tower, as opposed to a monopole structure, be erected in accordance with the Telecommunications Industry Association Standards and the "Structural Standard for Antenna Supporting Structures and Antennas." (R.R. at 56). Said letter stated the proposed tower would withstand a wind speed of ninety miles per hour with no ice and forty miles per hour with "3/4" radial ice." (R.R. at 56). Lastly, Attorney Perotti explained that an advantage of a self-supporting tower was "for structural purposes" and that the "reason for submitting the self-supporting tower in lieu of the monopole [was for] safety concerns." (R.R. at 172) ("[T]his tower was the number one pick just based on safety concerns."). In particular, Attorney Perotti indicated the design of the self-support tower will afford safety to nearby properties because if the tower were to topple, the tower would collapse upon itself. (R.R. at 171).

Furthermore, the Zoning Hearing Board had substantial evidence to support its conclusion that the proposed antenna structure would have the least practical adverse visual impact on the environment and closely resembles a monopole. Mr. Von Rein stated the "aesthetics" of a self-support structure are "basically to the eye of the beholder," but that it may be more attractive to some since the tower is less solid and one can see through the a self-support structure. (R.R. at 173). Regardless, aesthetics considerations alone cannot support the denial of a special exception. *Heck v. Zoning Hearing Bd. for Harvey's Lake Borough*, 39 Pa.Cmwlth. 570, 577, 397 A.2d 15, 19 (1979). As such, based on the evidence presented, the Zoning Hearing Board properly concluded the proposed self-supporting structure would not have any adverse visual impact on the industrial environment surrounding the Subject Property.

Finally, the Zoning Hearing Board properly concluded that a self-support structure is architecturally compatible with surrounding buildings and land use through location and design, and blends in with the existing characteristics of the site to the extent practical. Specifically, the Zoning Hearing Board concluded the proposed tower would be architecturally compatible with the auto repair shop on the Subject Property, with the Norfolk & Western Railroad tracks to the south, to the farmland to the east, and to the vacant land to the north and to the west of the proposed tower location. Based on the "Site Plan" included in Capital's Application, images of the property and the vehicle storage facility, as well as the testimony from Mr. Jones, Mr. Von Rein, and Attorney Perotti, the Zoning Hearing Board was presented with substantial evidence concerning the surrounding buildings, land use, and existing characteristics of the site. (R.R. at 46, 91, 137). Indeed, Attorney Watcher, who appeared at the hearing on behalf of Vineyard, stated the Subject Property is developed,

is currently being used for a business, and that the addition of a telecommunications tower would be "merely an additional use of the property." (R.R. at 157). Additionally, Attorney Perotti noted the Subject Property was zoned by the Township to account for communications towers; therefore, the Township contemplated the property would have a communications tower on it one day. (R.R. at 176). As the construction of the proposed communication tower is a permissible use on the Subject Property and blends into the existing commercial use of the property as well as the surrounding buildings and land use, the Zoning Hearing Board's conclusion in this regard is supported by substantial evidence.

Accordingly, this Trial Court concludes the Board did not commit a manifest abuse of discretion or an error of law in granting Capital's request for a special exception use regarding Capital's request to erect a free-standing antenna support structure in lieu of a monopole.

C. The Zoning Hearing Board's Decision Granting Capital's Application is in Accord With the Telecommunications Act of 1996.

Lastly, Capital contends the Zoning Hearing Board's approval of Capital's Application to erect a telecommunications tower facility in North East Township is pursuant to and consistent with the Telecommunications Act of 1996 ("TCA").[2] Under the Telecommunications Act of 1996, state and local governments retain authority over zoning and land use issues, however, the TCA imposes limitations on such authority. 47 U.S.C. § 332(c)(7)(A) and (B). In essence, the TCA attempts to "strike[] a balance between two competing aims—to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers." *Omnipoint Comm'ns, Inc. v. City of White Plains*, 430 F.3d 529, 531 (2d Cir. 2005) (internal quotations omitted). Section 332(c)(7)(B) sets forth the limitations placed on state and local governments in decisions regarding the placement, construction, and modification of personal wireless services facilities:

> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—
>
> > (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
> >
> > (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

47 U.S.C. § 332(c)(7)(B)(i).

The Third Circuit has held that in order to show a violation of Section 332(c)(7)(B)(i)(II), "an unsuccessful provider applicant must show two things. First, the provider must show that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network." *APT Pittsburgh Ltd. P'ship v. Penn Twp. Butler*

[2] Vineyard contends this Court is precluded from considering the TCA's applicability since the Zoning Hearing Board did not issue findings of fact or conclusions of law regarding the TCA. However, the TCA mandates only that a ***denial*** of a request to construct a wireless service facility shall be in writing. 47 U.S.C. § 332(c)(7)(B)(iii).

Cty. of Pennsylvania, 196 F.3d 469, 480 (3d Cir. 1999). Regarding this first requirement, the applicant must show the existence of a gap in coverage, defined as "a gap in the service available to remote users," and must proffer "evidence that the area the new facility will serve is not already served by another provider." *Id.* Second, the provider applicant must also show that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." *Id.* Regarding this second requirement, the applicant is required to show "that a good faith effort has been made to identify and evaluate less intrusive alternatives, e.g., that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc." *Id.*

In this case, regarding the first requirement, Capital presented substantial evidence showing Capital's facility will fill an existing significant gap in the ability of remote users to access the national telephone network. Specifically, Verizon Radio Frequency Engineer Matt Wierzchowski indicated a lack of indoor wireless coverage exists, and illustrated said gap in coverage using an aerial map of the region centered on the Subject Property. (R.R. 121-23). Mr. Wierzchowski, using a computer-generated map entitled "Existing Network Coverage," presented evidence to the board of the existing gap in Verizon's coverage for indoor wireless service and, using a map entitled "Future Network Coverage," illustrated how the proposed wireless services facility would fill the existing gap in coverage. (R.R. 79-80, 121-23). Thus, substantial evidence was presented to support a conclusion that the proposed tower will fill an existing significant gap in the ability of remote users to access Verizon's network.

Regarding the second requirement, at the hearing Capital provided substantial evidence showing the manner in which Verizon proposed to fill the significant gap in service is the least intrusive means of remedying that gap. In particular, Mr. Wierzchowski stated Verizon considered every site within a four-mile radius of the Subject Property but was unable to find a suitable collocation site, and presented the Zoning Hearing Board with a map of the nearby collocation opportunities. (R.R. at 81, 125). In particular, Mr. Wierzchowski stated Verizon dismissed two structures located within the four-mile radius since said structures were "well outside [Verizon's] coverage objective." (R.R. at 125). Mr. Wierzchowski also pointed to two additional structures within the four-mile radius. (R.R. at 125). However, these towers were only 150 feet, and Mr. Wierzchowski stated this height is not sufficient to overcome the challenges of the topography of the region, and at least one of the towers is not structurally sufficient to support Verizon's antennas. (R.R. at 128-29). Thus, substantial evidence was presented to support a conclusion that Verizon made a good faith effort to identify and evaluate less intrusive alternatives.

Accordingly, to the extent Capital relies on the TCA to further justify the Zoning Hearing Board's decision to grant Capital's request for dimensional variances and a special exception use, this Trial Court concludes substantial evidence was presented to support the conclusion the Zoning Hearing Board's decision is in accord with the TCA. Thus, based on the foregoing analysis, this Trial Court hereby enters the following Order of Court:

ORDER

AND NOW, to-wit, this 16th day of April, 2018, after the scheduled Argument on Vineyard Oil and Gas Company's Land Use Appeal from the North East Township Zoning Hearing Board's decision granting Capital Telecom Holding, LLC's variance and special exception requests; at which Michael Musone, Esq., appeared on behalf of Appellant Vineyard Oil and Gas Company; John J. Shimek, III, Esq., appeared on behalf of Appellee North East Township Zoning Hearing Board, and Joseph J. Perotti, Jr., Esq., appeared on behalf of Intervenor Capital Telecom Holdings, LLC; and after thorough review of the entire record, including, but not limited to, the resubmitted record filed by counsel for the Zoning Hearing Board, review of the Zoning Hearing Board's "Findings of Fact, Conclusions of Law, and Decision," oral argument from counsel on March 28, 2018, and Memoranda of Law submitted by both counsel for Vineyard and Capital, it is hereby **ORDERED, ADJUDGED AND DECREED** that the decision of the Zoning Hearing Board is hereby **AFFIRMED** for the reasons as set forth in the Opinion attached.

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

BRADEN ABBEY, Plaintiff

v.

ERIE INSURANCE EXCHANGE, Defendant

INSURANCE COVERAGE / STATUTORY STACKING OF UNDERINSURANCE COVERAGE

An auto insurance policy which insures more than one vehicle contains stacked coverage for uninsured and/or underinsured claims unless the insured executes a rejection of stacked coverage waiver form.

INSURANCE COVERAGE / WAIVER OF STACKED UNDERINSURANCE COVERAGE

An insurance company has the statutory duty to provide it's insured with an opportunity to waived stacked coverage when a vehicle is added to an existing multi-vehicle policy.

The insurer's failure to provide an opportunity for the insured to waive stacked coverage when a vehicle is added means the existing auto policy retains stacked coverage for all insured vehicles.

INSURANCE CONTRACTUAL CLAUSES / APPLICABILITY OF "AFTER-ACQUIRED VEHICLE" CLAUSE

The mere existence of an "after-acquired vehicle clause" in an auto policy, without any evidence of its applicability to the insured's transaction, does not discharge the insurer of its responsibilities under the UIM statute.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW
NO. 12388 – 2015

Appearances: Adam E. Barnett, Esquire on behalf of the Plaintiff
Amy M. Kirkham, Esquire on behalf of the Defendant

OPINION

Cunningham, J. April 26, 2018

The presenting matter is whether the Plaintiff, Braden Abbey, is entitled to stacked underinsured coverage pursuant to an automobile policy issued by the Defendant, Erie Insurance. The parties agree the material facts are not in dispute and this matter is ripe for disposition as a matter of law through competing Motions for Summary Judgment. Upon consideration of the Briefs, applicable law and after oral argument, Summary Judgment is hereby entered in favor of Braden Abbey.

FACTUAL HISTORY

On July 29, 2011, Braden Abbey was involved in a motor vehicle collision at a time when he was insured under Automobile Insurance Policy Number Q07-0706069 ("Abbey policy") issued by Erie Insurance. The Abbey policy was purchased by Braden's parents, Brian and Roxanne Abbey, with whom he resided at the time of the collision.

The Abbeys are longtime customers of Erie Insurance dating back to July 7, 2007. On March 1, 2010, Erie Insurance agent Timothy Kolakowski ("Agent Kolakowski") became the Erie Insurance agent for Brian Abbey ("Mr. Abbey"). At that time, Mr. Abbey's policy

with Erie Insurance insured one vehicle, a 2007 Suzuki Grand Vitara, with $100,000.00 per person and $300,000.00 per accident, stacked underinsured ("UIM") coverage. Upon review of this policy, Agent Kolakowski informed Mr. Abbey that he was paying for stacked coverage on one vehicle. Agent Kolakowski opined that it did not make financial sense for Mr. Abbey to pay extra for stacked coverage since there was only one insured vehicle. Mr. Abbey accepted Agent Kolakowski's suggestion, thus on June 16, 2010, he signed a rejection of stacking form. A Declarations page was issued by Erie Insurance consistent with Mr. Abbey's decision to reject stacked UIM coverage.

The next change to the Abbey policy occurred on August 31, 2010, when Mr. Abbey's son, Braden Abbey, was added as an insured driver under the policy. A Declarations page was issued by Erie Insurance reflecting this change.

On September 24, 2010, a 1977 Ford F-150 4WD was added to the Abbey policy. Mr. Abby informed Agent Kolakowski before the purchase of this vehicle of his desire to add it to his existing policy. In fact, the 1977 Ford F-150 4WD was added to the Abbey policy the same day it was purchased. A Declarations page was issued by Erie Insurance notifying Mr. Abbey of the new premium for the additional car. However, at that time, Erie Insurance did not provide Mr. Abbey an opportunity to accept or reject stacked UIM coverage for his two vehicles.

On July 29, 2011, Braden Abbey was severely injured in a motor vehicle collision involving the second insured vehicle, the 1997 Ford F-150 4WD. Because his injuries exceeded available insurance coverages, Braden Abbey made an underinsured motorist claim under the Abbey policy with Erie Insurance. Thereafter, a dispute arose regarding the amount of UIM benefits available on this claim, which resulted in the present litigation.

It is the position of Erie Insurance that Braden Abbey's coverage is limited to unstacked UIM benefits in the amount of $100,000.00. Braden Abbey argues he is entitled to stacked UIM benefits in the amount of $200,000.00.

On January 30, 2018, Erie Insurance filed a Motion for Summary Judgment, Brief in Support of Summary Judgment and Motion for Oral Argument. On January 31, 2018, Braden Abbey filed a Motion for Summary Judgment and Brief in Support of Motion for Summary Judgment.

On March 1, 2018, Braden Abbey filed a Reply to the defense Motion for Summary Judgment and Brief in Opposition thereto. On March 2, 2018, Erie Insurance filed a Reply Brief in Opposition to its opponent's Motion for Summary Judgment and a Reply Brief on March 9, 2018.

Also on March 9, 2018, Braden Abbey filed a Reply Brief to his opponent's Brief in Opposition to Plaintiff's Motion for Summary Judgment.

Oral argument was held on April 3, 2018 regarding the respective Motions for Summary Judgment.

SUMMARY OF ARGUMENTS

Because Erie Insurance did not obtain a signed stacking waiver from Mr. Abbey when he added the second vehicle to the policy, Braden Abby contends the Abbey policy provides stacked UIM coverage by operation of law. In response, Erie Insurance argues the addition of a new vehicle does not trigger the statutory waiver requirement because its policy extends

continuous coverage for an "after-acquired vehicle." In addition, Erie Insurance maintains that Mr. Abbey was aware of the stacking option, elected to unstack this policy on June 16, 2010 and never requested to change back to stacked benefits when he added a second vehicle to the policy on September 24, 2010.

Distilled, these arguments pit the statutory requirements for stacking against the policy language of the insurance contract. Given the facts of this case, Erie Insurance cannot circumvent its responsibilities as statutorily mandated by the use of its "after-acquired vehicle clause," or by putting the onus on the insured to specifically request the stacking option.

THE STATUTORY OPTION TO WAIVE UIM COVERAGE

The Pennsylvania legislature squarely addressed the issue of consumer choice for stacking within a multi-vehicle policy by legislation titled "Stacking of Uninsured and Underinsured Benefits and Option to Waive" 75 Pa.C.S.A. §1738 *et seq.* ("the UIM statute").

The UIM statute is grounded on the assumption that an automobile policy involving multiple vehicles provides stacked UIM coverage. The stated limit for UIM coverage "shall apply separately to each vehicle so insured. The limits of coverages available under this subchapter for an insured shall be the sum of the limits for each motor vehicle as to which the injured person is an insured." *Id.* at §1738(a). Braden Abbey cites this provision to contend he is entitled to the sum of the UIM limits for each of the two vehicles within the Abbey policy.

The UIM statute then provided a mechanism for the consumer to waive stacked coverage by mandating that each named insured "shall be provided the opportunity to waive the stacked limits of coverage and instead purchase coverage" that is unstacked for a premium "reduced to reflect the different cost of such coverage." *Id.* at §1738(c). This provision imposes a statutory duty upon the insurer to provide the insured with the opportunity to waive stacked UIM coverage.

The UIM statute not only mandates that each insured be given the opportunity to waive stacked coverage, but also that any waiver be in writing on a rejection form prescribed by the legislature. *Id.* at §1738(d). The legislature drafted separate rejection forms for Uninsured Coverage and Underinsured Coverage.

The legislature also directed that its waiver forms "must be signed by the first named insured and dated to be valid. Any rejection form that does not comply with this section is void." *Id.* at §1738(e).

If the waiver requirements are met, "the limits of coverage available under the policy for an insured shall be the stated limits for the motor vehicle as to which the injured person is an insured." *Id.* at §1738(b). Erie Insurance relies on this provision to argue that Braden Abbey is entitled to a $100,000.00 UIM limit.

The legislative intent is unequivocal: an automobile policy covering multiple vehicles is stacked unless the first named insured executes in writing and dates one of the rejection forms specifically drafted by the legislature.

The crux of the dispute herein is <u>when</u> Erie Insurance was required to give the Abbeys an opportunity to execute a rejection of stacked coverage waiver form as prescribed in the UIM statute.

According to Erie Insurance, the opportunity to reject stacked coverage was given to and

exercised by Mr. Abbey on June 16, 2010 when he signed a waiver form. Braden Abbey contends the opportunity to reject stacked coverage should have occurred on September 24, 2010, when a second vehicle was added to the policy converting it from a single-vehicle to a multi-vehicle policy subject to the requirements of the UIM statute. The Abbey position is supported by the facts, the plain reading of the UIM statute and the inapplicability of the "after-acquired vehicle clause" within the Abbey policy.

THE STATUTORY TIME FRAME CONTROLS, NOT THE POLICY

The question of when the UIM statute is applicable is directly answered within the statute. Specifically, it applies whenever a policy covers multiple vehicles:

"(a) Limit for each vehicle. – WHEN MORE THAN ONE VEHICLE is insured under one or more policies providing uninsured or underinsured motorist coverage… (the limits of coverage are the sum total of all insured vehicles)." 75 Pa.C.S.A. §1738(a) *(emphasis by capital letters is added).*

"More than one vehicle" is plural, meaning the UIM statute applies to multi-vehicle policies. The legislature omitted any reference to a single-vehicle policy, which the Abbeys had on June 16, 2010 when Mr. Abbey signed the rejection of stacking waiver. On September 24, 2010 the Abbey policy became a "more than one vehicle…insured under one" policy within the ambit of the UIM statute.

Separately, there is no provision within the UIM statute limiting the insurer's responsibilities to any particular point in time during the life of the policy. Nor does the UIM statute provide that once an insured opts to waive stacked coverage, no further opportunity needs to be given to the insured to change that election, regardless of any material change in the insured's circumstances.

Likewise, there is no language in the UIM statute granting authority to the insurer to determine if and when its responsibilities exist thereunder.

Glaringly absent in the analysis by Erie Insurance is any reference to or reliance on any provision within the UIM statute. Instead, Erie Insurance focuses solely on its interpretation of the insurance contract it drafted for the Abbeys.

As a matter of common sense consistent with the provisions of the UIM statute, at a minimum Erie Insurance was required to provide Mr. Abbey an opportunity to reject stacked coverage on September 24, 2010 when the Abbey policy became a multi-vehicle policy. The failure to provide such an opportunity means the UIM benefits within the Abbey policy remained stacked at the time of Braden Abbey's accident.

MR. ABBEY NEVER WAIVED STACKED COVERAGE FOR A 2nd VEHICLE

Erie Insurance argues that Mr. Abbey was given an opportunity to reject stacked coverage in June, 2010 when he discussed stacking with Agent Kolakowski and signed a rejection of stacking form. However, at that time, Mr. Abbey was only insuring one vehicle, which prompted his agent to recommend unstacked coverage.

Between June and September, 2010, the Abbeys' circumstances materially changed twice. On August 31, 2010, Braden Abbey was added as a named insured; and on September 24, 2010, a second vehicle was added to the Abbey policy. As a result, the number of drivers insured under the Abbey policy increased and the number of insured vehicles doubled.

By the terms of the policy drafted by Erie Insurance, the addition of a new driver or the addition of a new vehicle were each a significant change to the Abbey policy. Under the heading of "HOW YOUR POLICY MAY BE CHANGED," Erie Insurance identifies eight situations significant enough to warrant a change in the policy premium. Identified as change Number 6 is the addition of a vehicle to the Abbey policy. Next, change Number 7 is the addition of a licensed driver in the Abbey household. *See Plaintiff's Exhibit 1, Motion for Summary Judgment, p. 10.* By September 24, 2010, the Abbey policy had incurred two unrelated, significant changes regarding the number of drivers and vehicles, with each change affecting the policy premium.

The significant changes in the Abbeys' circumstances constituted ample reasons for Mr. Abbey to be given an opportunity to decide whether he wanted to continue to unstack his UIM coverage. The same reasoning Agent Kolakowski used to suggest Mr. Abbey unstack his policy in June, 2010 should have compelled him to recommend Mr. Abbey consider stacking in September, 2010, since the policy now covered two vehicles and a third driver. However, Agent Kolakowski failed to discuss stacking with Mr. Abbey in September, 2010, and Erie Insurance did not give him the opportunity to waive stacking. This failure is in direct contravention of the statutory requirement that the first named insured be given an opportunity to reject stacking for a multi-vehicle policy.

Erie Insurance counters that Mr. Abbey was an informed consumer of automobile policies who was well aware of his stacking choices and chose to maintain unstacked coverage consistent with his signed June 16, 2010 waiver despite adding an additional driver and vehicle to his policy. Erie Insurance faults Mr. Abby for not asking about stacking in September, 2010, or informing Erie Insurance of his desire to change his policy back to stacking.

This argument is unpersuasive as the UIM statute does not make a distinction regarding the knowledge or savviness of the consumer. In fact, the statute presumes to know the preference of the consumer by establishing the policy is stacked and placing the responsibility on the insurer to provide the insured with an opportunity to consider rejecting stacked coverage for a less expensive rate. The framework of the UIM statute treats the most knowledgeable consumer the same as the least knowledgeable consumer by putting the onus on the insurer to provide the insured the opportunity to reject stacked UIM coverage.

Furthermore, the choice Mr. Abbey would have made if given the statutory opportunity to keep stacked coverage is a matter of speculation. Up through September 24, 2010, Mr. Abbey had elected both stacked and unstacked coverages at various times within his Erie Insurance policies. Hence, it is not automatic, as Erie Insurance presumes herein, that Mr. Abbey would have continued with unstacked coverage on September 24, 2010, if his agent would have directed Mr. Abbey's attention to this decision by giving him the opportunity to re-stack his policy. Keep in mind, Mr. Abbey heeded the advice of Agent Kolakowski to unstack his policy in June, 2010. It is equally possible Agent Kolakowski would have recommended re-stacking the Abbey policy in September, 2010 and that Mr. Abbey would have again accepted his agent's advice. Notably, Braden Abbey was described by Erie Insurance in its Declarations as an "unmarried occasional male driver age 17 without driver training." Having a 17-year-old male without driver's training added to the Abbey policy is sufficient reason to give Mr. Abbey the statutory opportunity to return to stacked UIM coverage.

It is the duty of the insurer to provide the insured an opportunity to waive stacked coverage that matters under the UIM statute. It is not the statutory duty of the insurer to decide what the insured wants based on a prior choice made by the insured. Erie Insurance cannot unilaterally usurp Mr. Abbey's opportunity to sign a rejection of stacked coverage waiver form when his policy went from a single to a multi-vehicle policy and also added a 17-year-old male driver without driver training.

THE INTERNAL ERIE INSURANCE WAIVER POLICY

The posture of Erie Insurance in this case is in direct conflict with its internal policy requiring rejection of stacked coverage forms be provided to an insured when a vehicle is added to an existing policy. As a factual matter, perhaps the most persuasive evidence of when the requirements of the UIM statute applied to this case was directly answered by Agent Kolakowski:

Q: And after the '97 Ford F-150 was added to the policy, did your office send Mr. Abbey a rejection of stacking waiver form?

A: That was our policy that we send, whenever there's a – whenever there's a change made, like we added a vehicle, the unstacked rejection forms are signed, are printed and we would send them to the customer.

Q: Okay. Why do you do that?

A: To see if they want stacking or unstacking, to see if they want to keep the stacking and the unstacking option the same.

Q: Now, it's your policy to send it. Do you call the individual to discuss?

A: We did not at that time, no.

……

Q: Okay. Did they receive any form of cover letter with the forms?

A: At that time, I believe we were just putting sticky notes saying these are the uninsured motorist forms, please sign.

Q: All right. Does your office keep any record of the sending out of such forms?

A: Other than putting – not a formal – at that time, we were not keeping a formal list-

Q: Okay.

A: --of anything like that. We would just send the forms out.

Q. Okay. And did your office, do they conduct any type of follow-up if the forms are not – if no response is received that they're sending out the forms?

A. Not at that time.

Q: All right. Have those policies changed within your office?

A: We are now keeping better track – we're keeping track of if they're sent out, and we would send a follow-up.
……..

Q: Okay. All right. Does Erie Insurance, do they mandate you to provide stacking waivers when a vehicle is added?

A: Yes, the system prints them out.

Tim Kolakowski Deposition, pp. 20-22, Exhibit 4.

It was the internal policy of Erie Insurance in September, 2010 that its agents were to treat the addition of another vehicle to an existing policy as a change in the policy requiring the UIM rejection of stacking forms be provided to the insured. Indeed, Erie Insurance's "system prints them out." This internal policy provided the insured the opportunity to change course on stacking in situations like the Abbeys, who now had more insured drivers and vehicles.

Erie Insurance cannot reconcile its present argument regarding when its responsibilities arise under the UIM statute with its actual policy mandating the opportunity to sign the statutory waiver form upon the addition of another vehicle to an existing policy. This fact alone is dispositive in this case.

THE "AFTER-ACQUIRED VEHICLE CLAUSE"

Erie Insurance argues the Abbey policy provided "continuous" coverage for all vehicles acquired thereafter. Relying on what it calls its "after-acquired vehicle clause," Erie Insurance contends there was not a new policy issued to the Abbeys in September, 2010 that triggered the statutory requirement for an opportunity to reject stacked coverage.

There is no provision in the Abbey policy titled or otherwise identified as the "after-acquired-vehicle clause." Instead, innocuously placed within the definitional section of the policy, Erie Insurance defines an "additional auto" as "any **private passenger auto**…that **you** acquire, purchase or lease during the policy period. For coverage to apply, **we** must insure all **private passenger autos you** own on the date **you** acquire, purchase or lease an **additional auto**." *Abbey Policy, p. 2 (All of the emboldened words are in the policy, there is no emphasis added herein).*

The definition further imposes upon the insured the requirement to notify Erie Insurance of the acquisition of the vehicle for coverage to occur: "**You** must notify **us** during the policy period of **your** intention to have this policy apply to an **additional auto** or an **additional trailer**." *Id.* There is a time deadline put on the insured for notifying Erie Insurance, to-wit

"during the policy period" (unless the vehicle was acquired within 30 days prior to the end of the policy period). *Id.*

The policy provides "the broadest coverage **you** have purchased" for the time between acquiring the vehicle and the insured's notification to Erie Insurance of the intention to have the policy apply to the additional auto. *Id.* This provision means there is a window of time between purchasing a vehicle and notifying Erie Insurance that existing coverage is in place. By implication, if the insured fails to notify Erie Insurance, there is no coverage.

These provisions comprise what Erie Insurance calls, but does not identify by title within its policy, the "after-acquired vehicle clause." However, this clause was never triggered in this case and is irrelevant to the duties Erie Insurance owed the Abbeys under the UIM statute.

THE AFTER-ACQUIRED CLAUSE IS A LEGAL FICTION

As proffered in this case, the "after-acquired vehicle clause" is a legal fiction which has no factual or legal bearing on the resolution of Braden Abbey's claim for UIM benefits. A review of the mandates for automobile insurance under Pennsylvania law establishes how infrequent is the legal need for this clause.

It has been a longstanding requirement under Pennsylvania law that a vehicle owner maintains insurance, *i.e.* financial responsibility: "Every motor vehicle of the type required to be registered under this title which is operated or currently registered shall be covered by financial responsibility." 75 Pa.C.S.A. §1786(a).

From the moment Mr. Abbey drove away from the place of purchase of the 1997 Ford F-150 4WD on September 24, 2010, he was required to have proof of financial responsibility for this vehicle. If Mr. Abbey did not have insurance, the law provides a host of sanctions against him, including, *inter alia*, fines, suspension of registration and/or suspension of driving privileges. *Id.* at §1786(d). These sanctions are in place to provide incentives for vehicle owners to purchase insurance when buying a vehicle so that there is an immediate funding source for those injured in vehicular accidents.

Separately, for vehicles sold by licensed new and/or used car entities in Pennsylvania, there is a legal duty to have the buyer show proof of financial responsibility as part of the transaction. 67 Pa.Code §43.5(d)(2)(i). The failure of the selling licensee to require production of such proof exposes it to the suspension or loss of the sales license. *Id.* at §53.9.

The combination of all of these legal mandates in Pennsylvania means seldom should there be a situation wherein a vehicle is sold without the immediate purchase or proof of financial responsibility. As a matter of law, the situations that the "after-acquired vehicle clause" is needed are, in theory, rare.

That is not to say that the after-acquired vehicle clause does not have a place in the insurance marketplace. It can be invoked by an insured to allow a brief period of time to decide where and under what terms the insured wants to place automobile insurance. "The after-acquired vehicle clause extends temporary, stop-gap coverage, thereby protecting the insured until the policy can be amended." *Pergolese v. Standard Fire Insurance Co.*, 162 A.3d 481, 488 (Pa.Super. 2017). Importantly, the "after-acquired vehicle clause" was not needed by the Abbeys.

There is no dispute that Mr. Abbey notified Erie Insurance of his intent to purchase the

1997 Ford F-150 4WD even before buying it. Mr. Abbey provided Agent Kolakowski with all of the relevant information, including the model, year and Vehicle Identification Number. As a result, Erie Insurance added the Ford F-150 4WD to the Abbey policy on September 20, 2010, simultaneous to the time Mr. Abbey purchased it.

There was never a window of time between the purchase of the Ford F-150 4WD vehicle and Mr. Abbey's notification to Erie Insurance to add this second vehicle to his policy. Accordingly, there was never a moment in time when the second Abbey vehicle needed to be covered by the "after-acquired vehicle clause." This clause was never triggered and is therefore irrelevant to Braden Abbey's claim.

There is also no reference in any of the documents in this case, including all of the Declaration pages issued by Erie Insurance after September 24, 2010, that the 1997 Ford F-150 4WD was covered under the "after-acquired vehicle clause" of the Abbey policy. Nor did Erie Insurance ever inform the Abbeys they were covered under the "after-acquired vehicle clause." The omission of any reference to this clause by Erie Insurance is an implicit recognition it was never triggered or applicable to the Abbey policy.

THE ACCIDENT WAS AFTER NOTIFICATION BY THE INSURED

There is another salient factual reason the "after-acquired vehicle clause" is of no relevance in this case: Braden Abbey's claim did not occur during a time after the second vehicle was purchased but before Mr. Abbey notified Erie Insurance to add it to the policy. Hence, any relevance the "after-acquired vehicle clause" may have had in this case ceased the moment Mr. Abbey notified Erie Insurance on September 24, 2010 of his intent to add the second vehicle to his existing policy. Braden Abbey's unfortunate accident occurred on July 29, 2011, long after the "after-acquired vehicle clause" had any potential relevance to this case.

Because the "after-acquired vehicle clause" was never triggered in this case, it is irrelevant and cannot be used to relieve Erie Insurance of the duty owed to Mr. Abbey under the UIM statute to provide him with an opportunity to reject stacked coverage upon adding a second vehicle to his policy. This argument is simply a fiction used by Erie Insurance to avoid responsibility for violating its internal policy or complying with the legislative mandates of the UIM statute.

APPELLATE INTERPRETATIONS OF THE UIM STATUTE

The Pennsylvania appellate courts have addressed the UIM statute in a trio of cases frequently referenced as the *Sackett* trilogy. The Pennsylvania Supreme Court decided cases cited as *Sackett v. Nationwide Mutual Insurance Co.*, 591 Pa. 416, 919 A.2d 194 (2007) *("Sackett I)*; and *"Sackett II"* at 596 Pa. 11, 940 A.2d 329 (2007). *Sackett* was addressed a third time, this time by the Pennsylvania Superior Court, referenced as *"Sackett III"* at 4 A.3d 637 (Pa. Super. 2010). The parties also rely on a host of other Superior Court cases decided post-*Sackett*.

The facts of this case are aligned with the rulings by the Pennsylvania Supreme Court in *Sackett I* and *Sackett III* as well as several Superior Court cases, all recognizing the after-acquired vehicle clause was never triggered and is thus irrelevant to the insurer's duties under the UIM statute.

The underlying facts in *Sackett* involved a policy covering two vehicles wherein the insured waived stacking under the UIM statute. Thereafter, the insured added a third vehicle to the same policy and the insurer did not provide the insured with an opportunity to waive stacked coverage. Later, there was an accident involving the third vehicle. The resulting litigation raised the question of whether the insurer's failure to provide an opportunity to reject stacking when the third vehicle was added meant that the insured was entitled to stacking under the UIM statute.

In what became known as *Sackett I*, the Pennsylvania Supreme Court held the addition of another vehicle to an existing multi-vehicle policy required the insurer to provide the insured with an opportunity to reject stacking. The failure to provide such an opportunity meant the policy contained stacked coverage for all three vehicles under the UIM statute. Thus, under the analysis of *Sackett I*, the Abbey policy included stacked UIM benefits for both vehicles.

The Pennsylvania Supreme Court later granted re-argument to clarify the breadth of its ruling. In what became known as *Sackett II*, the Pennsylvania Supreme Court affirmed its prior ruling that an after-acquired vehicle clause which provides coverage within a specified period of time, *e.g.* 30 days, is a "finite" clause. Such a clause does not absolve the insurer of the obligation to provide an opportunity for the insured to reject stacked coverage under the UIM statute.

The *Sackett II* Court then created an exception to its ruling in *Sackett I* limited to situations when the additional vehicle is added to a multi-vehicle policy pursuant to the after-acquired vehicle clause and provides "continuous" coverage until the insured notifies the insurer of the intent to add the additional vehicle to the existing policy. In this setting, there is a grace period to allow the insured time to either purchase other insurance, or to notify the current insurer of the intent to place the additional vehicle on the existing policy. Because the after-acquired vehicle clause is actually utilized by the insured for a brief period, to the benefit of the insured (and the public as insurance remains in place), the *Sackett II* Court found the insurer does not have to provide the insured with an opportunity to waive stacked coverage under the UIM statute.

Erie Insurance contends its after-acquired vehicle clause in the Abbey policy fits within the *Sackett II* exception. Erie Insurance argues the waiver of stacked coverage exercised by Mr. Abbey on June 16, 2010 remains in effect under the "continuous" terms of the policy pursuant to the after-acquired vehicle clause. Thus, there was no obligation under the UIM statute to provide the Abbeys with any subsequent opportunity to reject stacking under the UIM statute. However, this position is untenable because *Sackett II* is fundamentally distinguishable from the case *sub judice*.

In *Sackett II*, the Pennsylvania Supreme Court intentionally restricted its analysis to the addition of a vehicle to an existing multi-vehicle policy. The *Sackett II* Court specifically declined to resolve "arguments concerning situations involving additions to single-vehicle policies." *Id.* at 334, FN. 5. Therefore, the *Sackett II* Court did not address the circumstances of this case, to-wit when a single-vehicle policy became a multi-vehicle policy with a recently added 17-year-old male driver with no driver training.

Secondly, the *Sackett II* exception is limited to situations where the existing insurance is extended through the use of the after-acquired vehicle clause and not through endorsements

or declarations under the general terms of the policy. ("We hold that the extension of coverage under the after-acquired-vehicle provision to a vehicle added to a pre-existing multi-vehicle policy…" *Sackett II*, 940 A.2d at 344).

The *Sackett II* analysis factually assumes the insured invoked the after-acquired vehicle clause to gain a grace period between the purchase of the vehicle and the insured's final decision regarding where to place the insurance. By stark contrast, Mr. Abbey never invoked or needed the after-acquired vehicle clause to provide a grace period to acquire coverage. Furthermore, Braden Abbey's accident happened long after the Abbeys satisfied any duty owed to notify Erie Insurance pursuant to the after-acquired vehicle clause. Hence, the after-acquired clause never came into play, or if it did, the clause ceased to be relevant on September 24, 2010 upon Mr. Abbey's notice to Erie Insurance of his intent to add the second vehicle to his existing policy.

The *Sackett III* Court recognized this important distinction in its reliance on *Sackett I* to find in favor of the insured. The *Sackett III* Court described the exception the *Sackett II* Court carved from its prior ruling as a "minor modification" in which the insurer "extends coverage to an insured's new vehicle on a pre-existing policy pursuant to an after-acquired-vehicle clause…" *Sackett III*, 4 A.3d at 639.[1] The insurance coverage for the third Sackett vehicle did not occur through the after-acquired vehicle clause; rather, it was extended under the general terms of the policy via endorsements. In other words, the after-acquired vehicle clause was never utilized as a means to provide coverage. Because this clause was never triggered, pursuant to *Sackett I*, the insurer had the obligation under the UIM statute to afford the insured an opportunity to reject stacked coverage upon adding a vehicle to an existing policy. The failure to provide such an opportunity results in the automatic stacking of the policy under the UIM statute.

The *Sackett III* rationale applies to the Abbey policy because the Abbeys added the second vehicle to their existing policy simultaneously to its purchase. There was never a need for the after-acquired vehicle clause by the Abbeys or Erie Insurance. Instead, Erie Insurance provided coverage to both of the Abbey vehicles through various Declarations to their policy without any reference to the after-acquired vehicle clause.

In addition, under the *Sackett* trilogy of cases, Mr. Abbey's decision to waive stacked coverage in June, 2010 is meaningless. At the time the Sacketts added the third vehicle, the Sacketts had previously executed rejection of stacked coverage forms for their two insured vehicles. This fact was disregarded by all three *Sackett* Courts in situations, like the instant one, where the after-acquired vehicle clause was inapplicable. Consequently, the reliance by Erie Insurance on the June 16, 2010 waiver signed by Mr. Abbey is of no moment, as the UIM statute still required Erie Insurance to give the Abbeys an opportunity to reject stacked coverage in September, 2010.

Perhaps the most startling difference between *Sacket II* and the present case is that the *Sackett II* exception was not utilized by Erie Insurance as a matter of internal policy. Rather, Erie Insurance required its agents to provide rejection of stacking forms whenever a vehicle was added to an existing policy, consistent with the UIM statute. Not only did Erie Insurance require its agents to provide the forms, its system automatically printed them out for the

[1] The description of *Sackett II* as a "minor modification" is perhaps indicative of the infrequency of use and if used, the stop-gap nature of the after-acquired vehicle clause.

agents to dispense. This internal policy distinguishes all of the cases relied upon by Erie Insurance in this case.[2]

The Superior Court has addressed the UIM statute in several cases after the *Sackett* trilogy of cases. In *Bumbarger v. Peerless Indem. Ins. Co.*, 93 A.3d 872 (Pa. Super. 2014) (*en banc*), a third and fourth vehicle was added to an unstacked two-vehicle policy. When the third vehicle was purchased, the insured notified her insurance agent and requested that the vehicle be added to her existing policy. The coverage for the third vehicle on the existing policy was effective on the same day, July 24, 2007, that it was purchased by the insured. At that time, there was no opportunity given to the insured to waive stacked coverage despite the expansion of the policy to cover three vehicles. Over two years later, the insured was in an accident with the third vehicle.

In finding there was stacked coverage under the UIM statute, the Superior Court held the after-acquired vehicle clause was never triggered:

> [I]n both *Sackett* and this case, the vehicles were added to an existing policy; they were not added to replace a vehicle already covered under the policy. Moreover, although the policies in both *Sackett* and the instant case had after-acquired vehicle clauses, because the additional cars were added on pursuant to the policy's endorsement provision immediately after being purchased and were placed on the policy's declarations' page, the after-acquired vehicle clauses became irrelevant.

Bumbarger, supra. at 878.

The result in *Bumbarger* was later summarized by the Superior Court as follows:

> In *Bumbarger v. Peerless Indem. Ins. Co.*, 93 A.3d 872 (Pa. Super. 2014) (*en banc*), this courts' most recent *en banc* pronouncement on the stacking issue, we held that when an insured takes ownership of a vehicle and simultaneously informs his insurer of the new vehicle, the language and purpose of the after-acquired vehicle provision in the policy is never triggered. An after-acquired vehicle provision merely extends existing coverage until the insured notifies the insurer that he wishes to insure the new vehicle under his policy with the insurer. The after-acquired vehicle clause extends temporary, stop-gap coverage, thereby protecting the insured until the policy can be amended. The addition of the vehicle to the policy by the insurer, pursuant to *Sackett I* and *III*, requires a new stacking waiver. In *Bumbarger*, we did not need to look to the analysis of *Sackett II* which only addressed the implication of the after-acquired vehicle clause.

Pergolese v. Standard Fire Insurance Co., 162 A.3d 481, 488 (Pa. Super. 2017).

The *Bumbarger* analysis was also employed in *Pergolese, supra.*, wherein a multi-vehicle policy was previously unstacked. At different times, the insureds had three or four vehicles on the policy (with four being the maximum number allowed by the insurer). On April 8, 1998, there were three vehicles on the policy, including a 1993 Mazda MX-6, when a fourth vehicle was purchased and added to the vehicle. At that time, there was no opportunity given to the insured to reject stacked coverage. On July 23, 2001, an insured suffered serious

[2] Unfortunately for all parties, there is no documentation to support Agent Kolakowski's belief that he sent the rejection of stacking forms as printed out by the Erie Insurance system to the Abbeys. Proof of the Abbeys' written rejection of stacking when the second vehicle was added would have rendered this litigation unnecessary.

injuries while driving the covered 1993 Mazda. At issue was whether the injured insured was entitled to stacked benefits under the UIM statute. The Superior Court held:

> Here, appellees notified their agent of the new vehicle, the 1990 Ford F-150, and requested proof of coverage before the purchase was completed. The agent then faxed a copy of the insurance card and issued amended declarations pages reflecting coverage of the new vehicle at an increased premium. As in *Bumbarger*, the after-acquired vehicle provision in the Standard Fire policy is simply inapplicable. Therefore, we need not consider whether it is continuous or finite. Pursuant to *Sackett I, Sackett II* and *Bumbarger*, appellees' addition of the 1990 Ford F-150 to the policy constituted a new "purchase" of UM/UIM coverage under Sections 1738 of the MVFRL and required the execution of a new UM/UIM stacking waiver.

Pergolese, supra, 162 A.3d at 490.

As in *Pergolese*, there is no need to analyze whether the Abbey policy was "continuous" or "finite" because the after-acquired vehicle clause is inapplicable. Pursuant to *Sackett I, Sackett III, Bumbarger* and *Pergolese*, the addition of another vehicle to an existing policy by endorsement under the general terms of the policy triggers the UIM statutory requirement that the Abbeys be given the opportunity to accept or reject stacked UIM benefits.

In fairness to Erie Insurance, consideration was given to its reliance on *Toner v. The Travelers Home and Marine Ins. Co.*, 137 A.3d 583 (2016). However, *Toner* is irrelevant because its holding applied to cases involving coverage provided through the after-acquired vehicle clause. As recognized by the Majority Opinion in *Toner*, "If an insured obtains coverage contemporaneously with the purchase of a vehicle, the after-acquired vehicle grace period is not implicated." *Id.* at 597, FN 8. The Abbeys obtained coverage contemporaneously with the purchase of the Ford F-150, and therefore, the after-acquired vehicle clause "is not implicated" in this case.

CONCLUSION

The entirety of the Erie Insurance defense is based on its interpretation of the insurance contract it drafted for the Abbeys. To accept this defense is to permit Erie Insurance to solely determine if and when its responsibilities exist under the UIM statute by virtue of its interpretation of its contractual terms without any reference or regard to what the legislature mandated in the UIM statute. However, to cite the mere existence of an after-acquired vehicle clause in the Abbey policy, without any evidence of its applicability to the insured's transaction, does not discharge Erie Insurance from its responsibilities under the UIM statute.

As a matter of law, "stipulations in a contract of insurance in conflict with, or repugnant to, statutory provisions which are applicable to, and consequently form a part of, the contract, must yield to the statute, and are invalid, since contracts cannot change existing statutory laws." *Prudential Property & Casualty Insurance Company v. Colbert*, 813 A.2d 747 (Pa. 2002), quoting *Allwein v. Donegal Mutual Insurance Company*, 671 A.2d 744, 752 (Pa. Super. 1996) (*en banc*), appeal denied, 546 Pa. 660, 685 A2d 541 (1996), quoting George J. Couch, Couch on Insurance 2d (Rev. Ed.), 13.7 at 827 (1984).

Erie Insurance cannot deploy its innocuous, untitled and unused after-acquired vehicle clause to avoid its duty to provide the Abbeys with an opportunity to waive stacked coverage

when the Abbey policy went from a single-vehicle policy to a multi-vehicle policy on September 24, 2010.

Accordingly, because there was no opportunity provided to the Abbeys to execute a rejection of stacking waiver form in September, 2010, nor did Mr. Abbey ever execute such a form after September, 2010, the UIM statute mandates the Abbey policy provides stacked UIM benefits for Braden Abbey.

ORDER

For the reasons set forth in the accompanying Opinion, the Plaintiff's Motion for Summary Judgment is **GRANTED** and the Defendant's Motion for Summary Judgment is **DENIED**. Judgment is hereby entered in favor of the Plaintiff.

BY THE COURT
/s/ **William R. Cunningham, Judge**

COMMONWEALTH OF PENNSYLVANIA, Plaintiff

v.

DAVID M. NORMAN, Defendant

CONSTITUTIONAL LAW / EX POST FACTO LAWS

In *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), the Pennsylvania Supreme Court held the Sexual Offender Registration and Notification Act's ("SORNA") registration provisions were punitive and that retroactive application SORNA's provision violated the *ex post facto* clauses of both the federal and Pennsylvania Constitutions.

POST-CONVICTION RELIEF ACT / JURISDICTION AND PROCEEDINGS

A PCRA petition must be filed within one year of the date that judgment becomes final unless the petition alleges and the petitioner proves one of the three exceptions applies under the Post-Conviction Relief Act.

POST-CONVICTION RELIEF ACT / JURISDICTION AND PROCEEDINGS

A PCRA court may review the merits of an otherwise untimely PCRA petition if the petition alleges and the petitioner proves the right asserted is a constitutional right that was recognized by the United States Supreme Court or the Pennsylvania Supreme Court after the time for filing a PCRA petition expired and the right asserted has been held by that court to apply retroactively. 42 Pa.C.S. § 9545(b)(1)(iii).

POST-CONVICTION RELIEF ACT / JURISDICTION AND PROCEEDINGS

Where a defendant files an untimely PCRA petition and is unable to invoke one of the three exceptions to the timeliness requirement, Pennsylvania law makes clear no court has jurisdiction to hear the untimely PCRA petition.

POST-CONVICTION RELIEF ACT / JURISDICTION AND PROCEEDINGS

The Pennsylvania Supreme Court's decision in *Muniz* cannot satisfy the "after-recognized constitutional right" timeliness exception under Section 9545(b)(1)(iii) since the Pennsylvania Supreme Court has not yet held that *Muniz* applies retroactively in order to satisfy Section 9545(b)(1)(iii). *Commonwealth v. Murphy*, 180 A.3d 402 (Pa. Super. 2018).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. CR 2085 of 2015
360 WDA 2018

Appearances: William J. Hathaway, Esq., on behalf of David M. Norman (Appellant)
John H. Daneri, Erie County District Attorney, on behalf of the Commonwealth of Pennsylvania (Appellee)

OPINION

Domitrovich, J. April 24, 2018

The instant matter is currently before the Pennsylvania Superior Court on the Appeal of David M. Norman ("Appellant") from this Trial Court's Order dated February 7, 2018, wherein this Trial Court dismissed Appellant's Petition for Post Conviction Collateral Relief ("PCRA Petition") as patently untimely and since Appellant failed to satisfy any of the timeliness exceptions under 42 Pa.C.S. § 9545(b)(1). As such, this Trial Court has

no jurisdiction to reach the merits of Appellant's PCRA Petition. *See Commonwealth v. Taylor*, 933 A.2d 1035, 1038 (Pa. Super. 2007) ("Pennsylvania law makes clear no court has jurisdiction to hear an untimely PCRA petition."). Moreover, said PCRA Petition stated no grounds for relief to be granted under the Post-Conviction Relief Act.

On appeal, Appellant raises two issues: (1) whether the Pennsylvania Supreme Court's decision in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017) may serve as a basis for invoking the statutory "after-recognized constitutional right" exception to the timeliness requirement under 42 Pa.C.S § 9545(b)(1)(iii) so as to confer jurisdiction upon this Trial Court and the Pennsylvania Superior Court; and (2) whether this Trial Court erred in "failing to afford relief in the nature of reconsideration and modification of [Appellant's] sentence" in accordance with the holding set forth in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017). This Trial Court provides the following analysis:

On September 25, 2015, the District Attorney's Office filed a Criminal Information, charging Appellant with Aggravated Indecent Assault of a Child, in violation of 18 Pa.C.S. § 3125(b); three counts of Endangering Welfare of Children, in violation of 18 Pa.C.S. § 4304(a)(1); three counts of Corruption of Minors, in violation of 18 Pa.C.S. § 6301(a)(1)(ii); and three counts of Indecent Assault of a Person less than 13 Years of Age, in violation of 18 Pa.C.S. § 3126(a)(7). On March 14, 2016, Appellant, with the assistance of his then-counsel, John H. Moore, Esq., entered a No Contest plea to Count Two (Endangering Welfare of Children), Count Five (Corruption of Minors) and Counts Eight through Ten (Indecent Assault of a Person less than 13 Years of Age), with all other counts *nolle prossed* by the Commonwealth. On June 27, 2016, this Trial Court sentenced Appellant as follows:

- Count Eight (Indecent Assault of a Person less than 13 Years of Age): nine (9) months to twenty-four (24) months of incarceration, with three hundred seventy-one (371) days of credit for time served;
- Count Nine (Indecent Assault of a Person less than 13 Years of Age): nine (9) months to twenty-four (24) months of incarceration, consecutive to Count Eight;
- Count Ten (Indecent Assault of a Person less than 13 Years of Age): nine (9) months to twenty-four (24) months of incarceration, consecutive to Count Nine.
- Count Two (Endangering Welfare of Children): five (5) years of probation, consecutive to Count Ten; and
- Count Five (Corruption of Minors): five (5) years of probation, consecutive to Count Two.

On June 27, 2016, this Trial Court also directed Appellant to register as a Sexual Offender for his lifetime. (*See* Notice to Appellant of Duty to Register Pursuant to 42 Pa.C.S.A Chapter 97, Subchapter H "Registration of Sexual Offenders", filed June 27, 2017).

On September 15, 2017, Appellant, *pro se*, filed his Motion for Reconsideration of sentence, which this Trial Court treated as Appellant's first PCRA Petition. By Order dated September 21, 2017, this Trial Court appointed William J. Hathaway, Esq., as PCRA counsel and directed Attorney Hathaway to supplement or amend Appellant's first PCRA Petition within thirty days. Attorney Hathaway filed a Supplement to Motion for Post-Conviction Collateral Relief on October 18, 2017. By Order dated October 20, 2017, this Trial Court directed the Commonwealth to respond to the Supplement to Motion for Post-Conviction Collateral Relief within thirty days. The Commonwealth, by and through Assistant District

Attorney Matthew D. Cullen, filed the Commonwealth's Response to Supplement to Motion for Post-Conviction Collateral Relief on November 16, 2017.

On December 12, 2017, this Trial Court notified Appellant of its intention to dismiss Appellant's first PCRA Petition as patently untimely and directed Appellant to submit his Objections within twenty days. By Order dated December 22, 2017, this Trial Court dismissed in error Appellant's PCRA Petition before twenty days had expired. Thus, in order to afford Appellant adequate time to file his Objections, this Trial Court vacated said Order and issued a New Notice dated January 10, 2018. Said New Notice informed Appellant that he had the option of filing his Objections within twenty days of the date of said New Notice. Appellant did not file Objections to the New Notice. Thus, on February 7, 2018, this Trial Court issued an Order dismissing Appellant's PCRA Petition as being patently untimely and stating no grounds for relief under the Post-Conviction Relief Act.

Appellant filed his Notice of Appeal on March 9, 2018, appealing this Trial Court's Order dated February 7, 2018 dismissing Appellant's first PCRA Petition. By Order dated March 9, 2018, this Trial Court directed Appellant to file a concise statement of the matters complained of on appeal within twenty-one days of the date of said Order. Appellant, by and through his counsel, William J. Hathaway, Esq., filed his Concise Statement of Matters Complained of on Appeal on March 28, 2018.

A PCRA petition must be filed within one year of the date that 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 days of the date the claim could have been presented. 42 Pa.C.S § 9545(b)(2). The Pennsylvania Supreme Court has clearly stated that where a PCRA Petition is untimely, the petitioner, by statute, has the burden to plead in the petition and prove that one of the three exceptions set forth in 42 Pa.C.S § 9545(b)(1)(i)-(iii) applies. *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.* Thus, the petitioner must allege in his petition and prove that said petition satisfies one of the three exceptions under Section 9545(b)(1)(i)-(iii). *Id.* As the PCRA's timeliness requirements are mandatory

and jurisdictional in nature, no court may properly disregard or alter these requirements in order to reach the merits of the claims raised in an untimely PCRA Petition. *Commonwealth v. Taylor*, 933 A.2d 1035, 1042-43 (Pa. Super. 2007).

In the instant PCRA Petition, pursuant to Section 9545(b)(3), Appellant's judgment of sentence became final on July 27, 2016, when the time period to file a Notice of Appeal to the Pennsylvania Superior Court expired. *See* Pa.R.A.P. 903(a). Therefore, Appellant could have filed a timely PCRA Petition on or before July 27, 2017. As Appellant filed his first PCRA Petition on September 15, 2017, Appellant failed to file timely his first PCRA Petition. However, Appellant alleges his first PCRA Petition falls within the "after-recognized constitutional right" timeliness exception under Section 9545(b)(1)(iii). (*See* Supplement to Motion for Post Conviction Collateral Relief, filed Oct. 18, 2018). Specifically, Appellant argues the Pennsylvania Supreme Court's decision in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017)[1] serves as a basis for invoking the statutory exception to the timeliness requirement "in that the right and claim herein asserted was a constitutional right recognized by the Pennsylvania Supreme Court after the time period provided and has been found to apply retroactively . . . ." (*See id.*).

In order for Appellant to allege and prove his otherwise untimely petition satisfies the "after-recognized constitutional right" timeliness exception under Section 9545(b)(1)(iii), Appellant must satisfy two requirements. In particular, the Pennsylvania Supreme Court held in *Commonwealth v. Abdul-Salaam*, 812 A.2d 497, 501 (Pa. 2002):

> First, [Section 9545(b)(1)(iii)] provides that the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or [the Pennsylvania Supreme Court] after the time provided in this section. Second, [Section 9545(b)(1)(iii)] provides that the right "has been held" by "that court" to apply retroactively. Thus, a petitioner must prove that there is a "new" constitutional right and that the right "has been held" by that court to apply retroactively. The language "has been held" is in the past tense. These words mean that the action has already occurred, i.e., "that court" has already held the new constitutional right to be retroactive to cases on collateral review. By employing the past tense in writing this provision, the legislature clearly intended that the right was already recognized at the time the petition was filed.

Abdul-Salaam 812 A.2d at 501.

Recently, in *Commonwealth v. Murphy*, 2018 PA Super 35, 2018 WL 947156, —A.3d— (Pa. Super. Feb. 20, 2018), the Superior Court of Pennsylvania expressly held that PCRA petitioners cannot rely on *Muniz* to satisfy the after-recognized constitutional right timeliness exception under Section 9545(b)(1)(iii). *Murphy* at *3. In *Murphy*, the defendant was convicted and later sentenced on November 8, 2007 for involuntary deviate sexual intercourse, sexual assault, and indecent assault. *Id.* at *1. The defendant's judgment of sentence was affirmed on direct appeal and became final on July 28, 2009. *Id.* The defendant

[1] In *Muniz*, the Pennsylvania Supreme Court held that the Sexual Offender Registration and Notification Act's ("SORNA") registration provisions were punitive and that retroactive application SORNA's provision violated the *ex post facto* clause of the both the federal and Pennsylvania Constitutions. *Commonwealth v. Muniz*, 164 A.3d 1189, 1223 (Pa. 2017).

filed his PCRA petition on August 4, 2016, and after the trial court denied his PCRA petition, defendant timely appealed. *Id.* On appeal, the Superior Court emphasized that before the Superior Court could address the merits of defendant's PCRA petition, the Superior Court had to examine the timeliness of the defendant's PCRA petition since "the PCRA time limitations implicate [the Superior Court's] jurisdiction and may not be altered or disregarded in order to address the merits of a petition." *Id* (citing *Commonwealth v. Bennett*, 930 A.2d 1264, 1267 (Pa. 2007)).

The Superior Court in *Murphy* addressed the defendant's attempt to satisfy the after-recognized constitutional right timeliness exception under Section 9545(b)(1)(iii) by invoking the Pennsylvania Supreme Court's decision in *Muniz. Id.* at *2. First, the Superior Court acknowledged that the Pennsylvania Superior Court in *Commonwealth v. Rivera-Figueroa*, 174 A.3d 674, 678 (Pa. Super. 2017) previously held that *Muniz* "created a substantive rule that retroactively applies in the collateral context." *Id.* Significantly, however, the Superior Court indicated since the Pennsylvania Supreme Court has not yet held that *Muniz* applies retroactively, *Muniz* cannot satisfy the requirements set forth in *Abdul-Salaam. Id.* at *3; *see also Abdul-Salaam* 812 A.2d at 501 (noting the right asserted must have been a constitutional right that was recognized by either the U.S. Supreme Court or the Pennsylvania Supreme Court). Thus, the Pennsylvania Superior Court expressly held *Muniz* may not be relied upon to meet the after-recognized constitutional right timeliness exception under Section 9545(b)(1)(iii). *Murphy* at *3.

In the instant case, before this Trial Court can address the merits of the substantive issue Appellant raised in his Concise Statement, this Trial Court must examine the timeliness of Appellant's PCRA Petition. Similar to the defendant who filed an untimely PCRA petition in *Murphy*, Appellant here failed to file timely the instant PCRA Petition since Appellant's judgment of sentence became final on July 27, 2016, and Appellant filed his PCRA Petition more than a year later on September 15, 2017. Moreover, as in *Murphy*, here Appellant cited to *Muniz* in an attempt to satisfy the timeliness exception under Section 9545(b)(1)(iii). However, since Appellant's PCRA Petition is patently untimely, Appellant must show the Pennsylvania Supreme Court has held that *Muniz* applies retroactively to meet the timeliness exception under Section 9545(b)(1)(iii). Since the Pennsylvania Supreme Court has yet to issue such a holding, "Appellant cannot rely on *Muniz* to meet that timeliness exception." *See Murphy* at *3.

Nevertheless, assuming *arguendo* this Trial Court has jurisdiction to review the merits of Appellant's PCRA Petition, Appellant has failed to show he is entitled to the relief sought therein. Specifically, Appellant contends the holding set forth in *Commonwealth v. Muniz*, 164 A.3d 1189, 1193 (Pa. 2017) "serves as a legal predicate to challenge the legality of the judgment of sentence in terms of requirements imposed under SORNA." (*See* Supplement to Motion for Post Conviction Collateral Relief, filed Oct. 18, 2018). The Pennsylvania Legislature enacted the Sexual Offender Registration and Notification Act ("SORNA"), effective December 20, 2012, which enhanced the registration/reporting requirements for persons, such as the Appellant, who have been convicted of Indecent Assault of persons less than thirteen years of age. *See* 42 Pa.C.S.A. § 9799.15(a)(3); 42 Pa.C.S.A. § 9799.14(d)(8); 18 Pa.C.S. § 3126(a)(7). The effect of SORNA's reporting requirements subjected Appellant, as a Tier III sexual offender, to a lifetime reporting requirement. *See id.* As noted above,

the Pennsylvania Supreme Court held in *Muniz* that retroactive application of SORNA's registration provisions to persons convicted of Tier III offenses before SORNA's enactment violates the *ex post facto* clause of both the United States Constitution and Pennsylvania Constitution. *See Muniz* 164 A.3d at 1218.

In the instant case, however, since Appellant entered a No Contest plea on March 14, 2016, and was subsequently sentenced on June 27, 2016, almost four years after SORNA's effective date on December 20, 2012, *Muniz* does not apply to alter Appellant's registration requirements pursuant to SORNA. By virtue of Appellant's conviction of three counts of Indecent Assault of persons less than thirteen years of age in violation of 18 Pa.C.S. § 3126(a)(7), a Tier III offense, Appellant is subject to the applicable provisions under SORNA and is required to register as a sexual offender with the Pennsylvania State Police for his lifetime.[2] *See* 42 Pa.C.S.A. § 9799.15(a)(3); 42 Pa.C.S.A. § 9799.14(d)(8); *see also* Notice to Appellant of Duty to Register Pursuant to 42 Pa.C.S.A Chapter 97, Subchapter H "Registration of Sexual Offenders", filed June 27, 2017. Accordingly, Appellant is not entitled to the relief he seeks regarding "the striking of any and all elements of the sentence in regard to requirements imposed under SORNA." (*See* Supplement to Motion for Post Conviction Collateral Relief, filed Oct. 18, 2018).

Thus, for all of the foregoing reasons, this Trial Court respectfully requests the Pennsylvania Superior Court affirm this Trial Court's Order dated February 7, 2018.

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

THERESA KOECH RASH, a/k/a THERESA SUE RASH, Administratrix of the Estate of JOSEPH M. KOECH, Deceased, Plaintiff

v.

AMERICAN TALC COMPANY, AVON PRODUCTS, INC., COLGATE-PALMOLIVE COMPANY, CYCTEC INDUSTRIES, INC., on behalf of Wyeth Holdings, LLC, f/k/a Wyeth Holdings Corporation, f/k/a American Cyanamid Company, successor-by-merger to Shulton, Inc., GIANT EAGLE, INC., IMERYS TALC AMERICA, INC., JOHNSON & JOHNSON CONSUMER, INC., RITE-AID CORPORATION, SHULTON, INC., THE PROCTOR & GAMBLE COMPANY, WHITTAKER CLARK & DANIELS, INC., Defendants

APPEALS / PETITION FOR PERMISSION TO APPEAL

Where the lower court declines to amend its interlocutory order to include the language set forth in 42 Pa.C.S. § 702(b), upon the filing of a petition for review, the appellate court must determine whether the case is so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal.

APPEALS / PETITION FOR PERMISSION TO APPEAL INTERLOCUTORY ORDER

Pennsylvania Superior Court denied defendant's petition for review challenging lower court's refusal to amend interlocutory order, which sustained personal jurisdiction over defendant, to include language contained in 42 Pa.C.S. § 702(b) and Pa.R.A.P. 311(b)(2).

PLEADINGS / PRELIMINARY OBJECTIONS / BURDEN OF PROOF AS TO JURISDICTION

In evaluating a moving party's challenge to personal jurisdiction, the moving party initially bears the burden of supporting its objection to jurisdiction, but once the moving party supports its objections to personal jurisdiction, the burden of proving personal jurisdiction is upon the party asserting it.

JURISDICTION / PERSONAL JURISDICTION / MINIMUM CONTACTS

To determine whether Pennsylvania has personal jurisdiction over a defendant, the trial court must determine whether, under the Due Process Clause of the U.S. Constitution, the defendant has certain minimum contacts with Pennsylvania such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

JURISDICTION / PERSONAL JURISDICTION / MINIMUM CONTACTS

Pennsylvania courts may exercise either specific or general personal jurisdiction over a defendant, where a finding of general jurisdiction requires that a defendant be present in the state either because the defendant is a resident, has consented to be sued here, or regularly does business here.

JURISDICTION / PERSONAL JURISDICTION / MINIMUM CONTACTS

Where a foreign corporation registers to do business in Pennsylvania, said foreign corporation is said to purposefully avail itself to the privilege of conducting activities within Pennsylvania, thus invoking the benefits and protections of Pennsylvania law. Therefore, in Pennsylvania, courts may assert general personal jurisdiction over a foreign corporation if the foreign corporation is authorized to do business in Pennsylvania pursuant to 42 Pa.C.S. § 5301(a). *See Bors v. Johnson & Johnson*, 208 F.Supp.3d 648 (E.D. Pa. 2016).

CONSTITUTIONAL LAW / DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

Under the unconstitutional conditions doctrine, the government may not coerce individuals

into giving up their constitutionally enumerated rights in exchange for the government granting a benefit.

CONSTITUTIONAL LAW / COMMERCE / DORMANT COMMERCE CLAUSE

The dormant Commerce Clause under the U.S. Constitution prohibits states from engaging in economic protectionism and prevents states from enacting regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 12340 – 2017

Appearances: Jason T. Shipp, Esq. on behalf of Theresa Koech Rash a/k/a Theresa Sue Rash, Administratrix of the Estate of Joseph M. Koech, Deceased, Plaintiff
Angela M. Heim, Esq., on behalf of Imerys Talc America, Inc., Defendant

OPINION

Domitrovich, J. March 14, 2018

This matter is before this Trial Court on Defendant Imerys Talc America, Inc.'s "Motion for Reconsideration of the December 20, 2017 Order or, in the Alternative, Motion to Amend the December 20, 2017 Order to Permit an Interlocutory Appeal as of Right Pursuant to Pa.R.A.P. 311(b) or, in the Alternative, Motion to Amend to Certify the December 20, 2017 Order to (sic) For Interlocutory Appeal by Permission Pursuant to Pa.R.A.P. 312, Pa.R.A.P. 1311(b), and 42 Pa.C.S. § 702(b)." Defendant Imerys Talc America, Inc.'s (hereinafter "Defendant Imerys") Motion for Reconsideration re-raises the issue of whether the courts of Pennsylvania may exercise personal jurisdiction over Defendant Imerys by virtue of Defendant Imerys' status as a corporation registered to do business in Pennsylvania pursuant to 42 Pa.C.S. § 5301(a). Defendant Imerys alternatively requests this Trial Court consider whether this Trial Court's Order dated December 19, 2017, raises a substantial issue of jurisdiction or, alternatively, whether said Order involves a controlling question of law as to which Defendant Imerys alleges is a substantial ground for difference of opinion for an immediate appeal from said Order which may materially advance the ultimate termination of the matter. This Trial Court provides the following analysis:

Theresa Koech Rash a/k/a Theresa Sue Rash, Administratrix of the Estate of Joseph M. Koech (hereinafter "Plaintiff") filed her Complaint on August 18, 2017 against Defendant Imerys and numerous Defendants for claims arising from Plaintiff's injurious exposure to asbestos-containing products. According to Plaintiff's Complaint, Plaintiff's decedent, Joseph M. Koech, was exposed to asbestos from the 1990s through 2004. (Complaint at ¶ 13-14). Ultimately, Plaintiff was diagnosed with mesothelioma on August 26, 2015, which caused Plaintiff's death on September 25, 2015. (Complaint at ¶ 15). Defendant Imerys filed Preliminary Objections to Plaintiff's Complaint and a Brief in Support on September 18, 2017. Therein, Defendant Imerys indicated Imerys Talc America, Inc. is incorporated in Delaware and has its principal place of business in California. (*See* Defendant Imerys' Preliminary Objections at ¶ 10).

Plaintiff filed a Brief in Opposition to Defendant Imerys' Preliminary Objections on

October 4, 2017. Defendant Imerys filed a Reply to Plaintiff's Brief in Opposition on October 16, 2017 and a Supplemental Reply to Plaintiff's Brief in Opposition on December 4, 2017. Argument was heard on Defendant Imerys' Preliminary Objections on December 6, 2017. By Order and Opinion dated December 19, 2017, this Trial Court overruled Defendant Imerys' Preliminary Objections since this Trial Court found and concluded Pennsylvania courts have general personal jurisdiction over Defendant Imerys.

On January 19, 2018, Defendant Imerys filed its Motion for Reconsideration and accompanying Motions alternatively requesting this Trial Court amend its Order dated December 19, 2017, to permit Defendant Imerys to appeal said Order. In response, on February 9, 2018, Plaintiff filed its Brief in Opposition to Defendant Imerys' various Motions. Defendant Imerys thereafter filed its Reply to Plaintiff's Brief in Opposition on February 14, 2018. An Argument on Defendant Imerys' Motion for Reconsideration and Motions requesting leave to appeal was held on February 28, 2018. At said Argument, Jason T. Shipp, Esq., appeared on behalf of Plaintiff, and Angela M. Heim, Esq., appeared on behalf of Defendant Imerys.

A trial court has the authority to reconsider its own judgments, and the question of whether to exercise that authority is for the sound discretion of the trial court. *Moore v. Moore*, 634 A.2d 163, 167 (Pa. 1993). For example, "a court has inherent power 'to amend its records, to correct mistakes of the clerk or other officer of the court, inadvertencies of counsel, or supply defects or omissions in the record' at any time." *Manufacturers & Traders Tr. Co. v. Greenville Gastroenterology, SC*, 108 A.3d 913, 921 (Pa. Super. 2015) (quoting *Manack v. Sandlin*, 812 A.2d 676, 680 (Pa. Super. 2002)).

Moreover, in evaluating a moving party's challenge to personal jurisdiction, the moving party initially bears the "burden of supporting its objection to jurisdiction." *King v. Detroit Tool Co.*, 682 A.2d 313, 314, 339 (Pa. Super. 1996) (the moving party must meet its burden of showing jurisdiction infirmities that are "clear and free from doubt"). However, once the moving party supports its objections to personal jurisdiction, the burden of proving personal jurisdiction is upon the party asserting it. *Barr v. Barr*, 749 A.2d 992, 994 (Pa. Super. 2000).

To determine whether Pennsylvania has personal jurisdiction over Defendant Imerys, this Trial Court must determine whether, under the Due Process Clause of the U.S. Constitution, Defendant Imerys has "certain minimum contacts with [Pennsylvania] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *D'Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 102 (3d Cir. 2009) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158 (1945). Pennsylvania courts may exercise either specific or general personal jurisdiction over a defendant, where a "finding of general jurisdiction requires that a defendant be present in the state either because he is a resident, has consented to be sued here, or regularly does business here," while "specific jurisdiction requires minimum contacts specifically related to the actions giving rise to the case." *Am. Fin. Capital Corp. v. Princeton Elecs. Products*, CIV. A. 95-4568, 1996 WL 131145, at *3 (E.D. Pa. Mar. 20, 1996); *Library Publications, Inc. v. Heartland Samplers, Inc.*, 825 F.Supp. 701, 703 (E.D. Pa. 1993).

General personal jurisdiction may be established through a party's expressed or implied consent. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703, 102 S.Ct. 2099, 2105 (1982). In particular, a party may consent to jurisdiction through "state procedures which find constructive consent to the personal jurisdiction of the state

court in the voluntary use of certain state procedures." *Id.* In Pennsylvania, courts may assert general personal jurisdiction over a foreign corporation if the foreign corporation is authorized to do business in Pennsylvania pursuant to 42 Pa.C.S. § 5301(a). *Bors v. Johnson & Johnson*, 208 F.Supp.3d 648, 652 (E.D. Pa. 2016) (citing *Bane v. Netlink, Inc.*, 925 F.2d 637, 641 (3d Cir. 1991)). Specifically, 42 Pa.C.S. § 5301 states, in pertinent part:

> (a) General rule. – The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:
>
> . . .
>
> (2) Corporations –
>
> (i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.
>
> (ii) Consent, to the extent authorized by the consent.
>
> (iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

42 Pa.C.S. § 5301(a)(2). Where a foreign corporation registers to do business in Pennsylvania, said foreign corporation "purposefully avail[s] itself to the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Bane* 925 F.2d at 640. Therefore, by registering to do business in Pennsylvania, the foreign corporation consents to be sued in Pennsylvania courts. *Bors* at 655.

In *Bors*, Imerys Talc America, Inc. sought dismissal for lack of personal jurisdiction, arguing its registration as a foreign corporation does not constitute consent sufficient to permit the exercise of personal jurisdiction in view of the U.S. Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).[1] *Id* at 651. The Eastern District of Pennsylvania rejected Imerys Talc America, Inc.'s argument, concluding that, by registering to do business in Pennsylvania, Imerys Talc America, Inc. constructively consented to personal jurisdiction in Pennsylvania. *Id* at 658. In particular, the Eastern District of Pennsylvania stated:

> Pennsylvania's statute specifically advises the registrant of the jurisdictional effect of registering to do business. In 2007, long after Pennsylvania enacted its specific notice statute and after our Court of Appeals confirmed personal jurisdiction based on registration, Imerys elected to register to do business in Pennsylvania as a foreign corporation. Imerys' compliance with Pennsylvania's registration statute amounted to consent to personal jurisdiction.

[1] In *Daimler*, the United States Supreme Court held a non-U.S. corporation cannot be sued in the United States when the conduct that caused the alleged injuries took place entirely outside of the United States. *See id.*, 134 S. Ct. at 748.

Id at 653. Moreover, the Eastern District of Pennsylvania expressly determined the "ruling in Daimler does not eliminate consent to general personal jurisdiction over a corporation registered to do business in Pennsylvania." *Id* at 653, 655.

In the instant case, Defendant Imerys has conceded that Defendant Imerys is registered to do business in Pennsylvania. (*See* Pennsylvania Department of State Corporation Bureau Certification for Entity No. 3700348; Defendant Imerys' Motion for Reconsideration at pg. 16). Thus, Defendant Imerys has consented to general personal jurisdiction in Pennsylvania by virtue of its registration to do business in Pennsylvania. 42 Pa.C.S. §5301(a)(2); *see also Bors* at 658. Nevertheless, Defendant Imerys additionally contends Pennsylvania courts cannot assert personal jurisdiction over Defendant Imerys based on the Dormant Commerce Clause and the unconstitutional conditions doctrine. Defendant Imerys alternatively contends a temporal limitation applies to deprive Pennsylvania courts of personal jurisdiction over Defendant Imerys notwithstanding Defendant Imerys' status as a corporation registered to do business in Pennsylvania.

Under the unconstitutional conditions doctrine, the government may not coerce individuals into giving up their constitutionally enumerated rights in exchange for granting a benefit. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606, 133 S.Ct. 2586, 2595 (2013) ("[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."). However, other courts have rejected the notion that the unconstitutional conditions doctrine prevents a state from asserting personal jurisdiction over a foreign corporation by virtue of a registration provision set forth in a state's long-arm statute. *See McDonald AG Inc. v. Syngenta AG*, No. 14-md-2591-JWL, 2016 WL 1047996 (D.Kan. March 11, 2016); *McDonald AG Inc. v. Syngenta AG*, No. 14-md-2591-JWL, 2016 WL 2866166 (D.Kan. May 17, 2016) (denying motion for reconsideration and finding that jurisdiction based on consent given as a condition to do business does not violate the unconstitutional conditions doctrine); *see also Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, 817 F.3d 755, 770, n.1 (Fed. Cir. 2016) (noting that "the Supreme Court has upheld the validity of consent-by-registration statutes numerous times since the development of the unconstitutional conditions doctrine."). In this case, similar to the Kansas District Court in *McDonald AG Inc.*, this Trial Court remains unpersuaded that personal jurisdiction over Defendant Imerys violates the unconstitutional conditions doctrine. In particular, Defendant Imerys has not cited any authority supporting its position that consent by registration violates the unconstitutional conditions doctrine. Thus, since the U.S. Supreme Court has continued to uphold consent by registration as a basis for personal jurisdiction, this Trial Court concludes the unconstitutional conditions doctrine does not prevent Pennsylvania courts from exercising personal jurisdiction over Defendant Imerys.

Next, the Dormant Commerce Clause of the U.S. Constitution prohibits states from engaging in economic protectionism and prevents states from enacting regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *Office Of Disciplinary Counsel v. Marcone*, 855 A.2d 654, 666 (Pa. 2004) (citing *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273, 108 S.Ct. 1803, 1807 (1988)). In this case, personal jurisdiction based on consent by registration results in foreign corporations being subjected to the jurisdiction of Pennsylvania courts in the same manner that resident corporations are subjected to the jurisdiction of Pennsylvania courts. See *McDonald AG Inc. v. Syngenta AG*,

No. 14-md-2591-JWL, 2016 WL 1047996 (D.Kan. March 11, 2016) (concluding that *Bendix Autolite Corp. v. Midwesco Enterp., Inc.*, 486 U.S. 888, 108 S.Ct. 2218 (1988) did not apply to invalidate a statute conferring personal jurisdiction through consent by registration). Thus, since foreign corporations are not treated different than resident corporations in this context, the consent provision of Pennsylvania's long arm statute does not violate the Dormant Commerce Clause.

Moreover, Defendant Imerys' reliance on *Davis v. Farmers' Co-op. Equity Co.*, 262 U.S. 312, 43 S.Ct. 556 (1923) and *McDonald AG Inc. v. Syngenta AG*, No. 14-md-2591-JWL, 2016 WL 2866166 (D.Kan. May 17, 2016) is misplaced. In *Davis*, a non-resident plaintiff sued a non-resident interstate carrier corporation in Minnesota state court for claims which did not arise in Minnesota. *Davis* at 314. Although the non-resident interstate carrier corporation was registered to do business in Minnesota, the U.S. Supreme Court held that a Minnesota registration statute, **as construed and applied**, violated the Commerce Clause since the statute "unreasonably obstruct[ed], and unduly burden[ed], interstate commerce." *Davis* at 318. In particular, the U.S. Supreme Court concluded that "orderly effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a state in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside." *Davis* at 317. Following this reasoning, the Kansas District Court in *McDonald AG Inc.* similarly concluded, **as applied to non-resident plaintiffs**, the Kansas registration statute was invalid under the Commerce Clause. *McDonald AG Inc. v. Syngenta AG*, No. 14-md-2591-JWL, 2016 WL 2866166 (D.Kan. May 17, 2016).

In the instant case, unlike the plaintiffs in both *Davis* and *McDonald AG Inc.*, Plaintiff is a resident of Lake City, Pennsylvania, which is the state asserting personal jurisdiction over Defendant Imerys. Moreover, unlike the plaintiff in *Davis*, whose claims did not relate in any way to activities in the state in which the plaintiff brought suit, here Plaintiff alleges Plaintiff's claims arose from conduct which occurred in Pennsylvania. In particular, Plaintiff alleges "[d]uring the period [from 1990s through 2004], plaintiff-decedent was exposed to and did inhale asbestos dust contained in various talcum powder products, which caused the conditions as hereinafter set forth, resulting in plaintiff-decedent's impairment and death." (Complaint at ¶ 13-14). Plaintiff further alleges said exposure and inhalation caused Mr. Koech to develop mesothelioma, ultimately leading to Mr. Koech's death. (*Id.* at ¶ 14-15). Since Plaintiff is a resident of Pennsylvania and Plaintiff's claims against Defendant Imerys arose in Pennsylvania, both *Davis* and *McDonald AG Inc.* are distinguishable and therefore inapplicable to this instant case, and Pennsylvania's exercise of personal jurisdiction over Defendant Imerys does not violate the Commerce Clause.

Further, Defendant Imerys argues a temporal limitation should apply to prevent Pennsylvania from asserting personal jurisdiction over Defendant Imerys notwithstanding Defendant Imerys' status as a corporation registered to do business in Pennsylvania. In *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litig.*, 735 F.Supp.2d 277 (W.D. Pa. 2010), the plaintiff commenced an action against a foreign corporation in 2007 and asserted Pennsylvania had personal jurisdiction over the foreign corporation by virtue of the consent by registration provision in Pennsylvania's long-arm statute. *Id.* at 310. However, the foreign corporation did not register to do business with Pennsylvania until 2008 and

subsequently withdrew registration in 2009. *Id.* The Western District of Pennsylvania noted that "[t]he commencement of the action predates the time period in which defendant . . . was registered in Pennsylvania" and concluded that the actions underlying the suit must have taken place before the foreign corporation was authorized to do business in Pennsylvania. *Id.* Thus, the Western District held that consent by registration could not serve as a basis for personal jurisdiction. *Id.*

In the instant case, Defendant Imerys' predecessor-in-interest, Luzenac America, Inc., registered to conduct business in Pennsylvania on January 11, 2007, and Defendant Imerys registered on March 9, 2016. (*See* Pennsylvania Department of State Corporation Bureau Certification for Entity No. 3700348). Unlike the plaintiff in *In re Enterprise*, however, here Plaintiff commenced his action on August 18, 2017, which is after Defendant Imerys registered to conduct business in Pennsylvania. Although the acts underlying this lawsuit (Plaintiff's exposure to asbestos from 1990s through 2004) occurred before Defendant Imerys' registered to conduct business in Pennsylvania (beginning in January 11, 2007), the commencement of Plaintiff's action on August 18, 2017 does not predate the time period in which defendant was registered in Pennsylvania. Thus, this Trial Court concludes consent by registration in the instant case provides a basis for Pennsylvania to exercise personal jurisdiction over Defendant Imerys.

Further, Defendant Imerys requests this Trial Court to amend this Trial Court's Order dated December 19, 2017, pursuant to Pa.R.A.P. 1311(b) and 42 Pa.C.S. § 702(b). Pennsylvania Rule of Appellate Procedure 1311(b) states, in pertinent part:

> Unless the trial court or other government unit acts on the application within 30 days after it is filed, the trial court or other government unit shall no longer consider the application and it shall be deemed denied.

Pa.R.A.P. 1311(b); *see also Osborne v. Lewis*, 59 A.3d 1109, 1110 (Pa.Super.2012) (noting where the trial court did not rule on the motion for permission to file an interlocutory appeal pursuant to 42 Pa.C.S. § 702 within 30 days after the motion if filed, the motion was denied by operation of law). In this instant case, on January 19, 2018, Defendant Imerys filed its Motion to Amend to Certify the December 20, 2017 Order For Interlocutory Appeal by Permission Pursuant to Pa.R.A.P. 312, Pa.R.A.P. 1311(b), and 42 Pa.C.S. § 702(b). This Trial Court's policy for scheduling hearing dates is for the Trial Judge's assistant to contact counsel for all parties, as was done in this case, to schedule a mutually agreeable date for the subject motions to be argued. In the instant case, both counsel's offices for Plaintiff and Defendant Imerys consented to the date of February 28, 2018 at 3:00 p.m. No attempt was made by Defendant Imerys to expedite the date of Argument. Thus, on February 28, 2018, this Trial Court heard argument on Defendant Imerys' Motions. At Argument, counsel for Plaintiff contended Defendant Imerys' Motion to Amend to Certify the December 20, 2017 Order For Interlocutory Appeal by Permission Pursuant to Pa.R.A.P. 312, Pa.R.A.P. 1311(b), and 42 Pa.C.S. § 702(b) was denied by operation of law on February 20, 2017. As such, pursuant to Pa.R.A.P. 1311(b), this Trial Court is unable to further entertain said Motion.

Nevertheless, assuming *arguendo* Defendant Imerys' Motion was not denied by operation of law, "a trial court may issue an order stating that its interlocutory order involves a

controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate determination of the matter." *Stone v. York Haven Power Co.*, 749 A.2d 452, 455, n.2 (Pa. 2000); 42 Pa.C.S. § 702(b). The standard for review on a petition for review from an order denying a request for amendment to include the 42 Pa.C.S. § 702(b) language is whether the case is "so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal." *See Hoover v. Welsh*, 615 A.2d 45, 46, n.2 (Pa.Super. 1992) (quoting Official Note to Pa.R.A.P. 1311).

In the instant case, a controlling question of law does not exist since Pennsylvania courts may assert personal jurisdiction over Defendant Imerys based on *Bors v. Johnson & Johnson*, 208 F.Supp.3d 648, 652 (E.D. Pa. 2016), which determined that *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014) did not eliminate consent to general personal jurisdiction over a corporation registered to do business in Pennsylvania. *See Bors* at 653. Moreover, no substantial ground for difference of opinion exists since, as noted above, the Eastern District of Pennsylvania in *Bors* squarely addressed the issue. Lastly, an immediate appeal from this Trial Court's Order dated December 19, 2017 will not materially advance the ultimate termination in this matter. To grant Defendant's Motion would needlessly delay the ultimate termination of this matter and would be unfair to the other numerous Defendants in this case. Thus, under these circumstances, this Trial Court declines to certify for appeal this Trial Court's Order dated December 19, 2017.

Finally, Defendant Imerys argues this Trial Court's Order dated December 19, 2017 should be amended or certified so that Defendant Imerys can immediately appeal said Order since said Order presents a "substantial issue of jurisdiction." Pennsylvania Rule of Appellate Procedure 311(b) states:

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

Pa.R.A.P. 311(b). Thus, an interlocutory appeal of right only exists where the trial court order sustains personal jurisdiction if the trial court's order states a substantial issue of jurisdiction is presented. *MacNeal v. I.C.O.A., Inc.*, 555 A.2d 916, 918 (Pa.Super. 1989). In the instant case, as noted above, Pennsylvania's exercise of personal jurisdiction over Defendant Imerys by virtue of Defendant Imerys' status as a corporation registered to do business in Pennsylvania squarely falls under the Eastern District of Pennsylvania's holding in *Bors v. Johnson & Johnson*, 208 F.Supp.3d 648, 652 (E.D. Pa. 2016) ("Imerys' compliance with Pennsylvania's registration statute amounted to consent to personal jurisdiction"). Given this, personal jurisdiction over Defendant Imerys does not conflict with *Daimler* in such a

way as to raise a "substantial issue of jurisdiction." *See id.* at 653, 655 ("Consent remains a valid form of establishing personal jurisdiction under the Pennsylvania registration statute after *Daimler*."). Accordingly, this Trial Court finds and concludes that a substantial question of jurisdiction does not exist and enters the following Order:

ORDER

AND NOW, to-wit, this 14th day of March, 2018, upon consideration of oral arguments on February 28, 2018 regarding Defendant Imerys Talc America, Inc.'s Motion for Reconsideration and accompanying Brief in Support, as well as the Motion to Amend the December 20, 2017 Order to Permit an Interlocutory Appeal as of Right Pursuant to Pa.R.A.P. 311(b) and Motion to Amend to Certify the December 20, 2017 Order For Interlocutory Appeal by Permission Pursuant to Pa.R.A.P. 312, Pa.R.A.P. 1311(b), and 42 Pa.C.S. § 702(b), filed on January 19, 2018 by and through counsel, John C. McMeekin II, Esq.; and after review of said Motions as well as Plaintiff's Brief in Opposition and Defendant Imerys' Reply to Plaintiff's Brief in Opposition; and after thorough review of relevant statutory and case law, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendant Imerys' Motion for Reconsideration of the December 20, 2017 Order or, in the Alternative, Motion to Amend the December 20, 2017 Order to Permit an Interlocutory Appeal as of Right Pursuant to Pa.R.A.P. 311(b) or, in the Alternative, Motion to Amend to Certify the December 20, 2017 Order to (sic) For Interlocutory Appeal by Permission Pursuant to Pa.R.A.P. 312, Pa.R.A.P. 1311(b), and 42 Pa.C.S. § 702(b) are **DENIED**.

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

COMMONWEALTH OF PENNSYLVANIA

v.

ROBERT BENJAMIN WILEY, III, Defendant

CRIMINAL PROCEDURE / PRE-TRIAL MOTIONS / SUPPRESSION MOTIONS

At a hearing on a motion to suppress evidence, the Commonwealth has the burden of moving forward with the evidence and establishing the challenged evidence was not obtained in violation of the defendant's rights. Pa.R.Crim.P. 581(H).

CRIMINAL PROCEDURE / PRE-TRIAL MOTIONS / SUPPRESSION MOTIONS

At a hearing on a motion to suppress evidence, the suppression court's role as factfinder is to pass on the credibility of witnesses and the weight given to their testimony.

CRIMINAL PROCEDURE / PRE-TRIAL MOTIONS / SUPPRESSION MOTIONS

In order for a defendant accused of a possessory crime to prevail in a challenge to the search and seizure which provided the evidence used against him, he must, as a threshold matter, establish he has a legally cognizable expectation of privacy in the premises which were searched.

CRIMINAL PROCEDURE / WARRANTLESS SEARCHES / EXCLUSIONARY RULE

Under the exclusionary rule, evidence obtained pursuant to an unconstitutional search or seizure is inadmissible against a defendant. However, exclusion of evidence is not automatic for every violation of the defendant's rights concerning searches and seizures since exclusion of seized evidence may be appropriate only where the violation also touches upon fundamental, constitutional concerns, is conducted in bad faith, or has substantially prejudiced the defendant.

CRIMINAL PROCEDURE / WARRANTLESS SEARCHES / EXCLUSIONARY RULE / INDEPENDENT SOURCE DOCTRINE

The independent source doctrine serves as an exception to the exclusionary rule, which states that where evidence is discovered without any reliance on information gleaned from a constitutional violation, such evidence may be admissible against the defendant.

CRIMINAL PROCEDURE / WARRANTLESS SEARCHES / EXCLUSIONARY RULE / INDEPENDENT SOURCE DOCTRINE

Under the independent source rule, the Pennsylvania Superior Court has held that any taint applicable to evidence seized from a defendant's vehicle due to police removing said vehicle from the defendant's private property will be purged if police secure a constitutional canine sniff and warrant not premised on facts gathered during removal but rather on facts learned prior to removal of the vehicle.

CRIMINAL PROCEDURE / AUTOMOBILE SEARCHES / WARRANTLESS / CONTROLLED SUBSTANCES

Under the Pennsylvania Constitution, a narcotics detection dog may be used to test for the presence of narcotics where the police (1) are able to articulate reasonable grounds for believing drugs may be present in the place they seek to test and (2) are lawfully present in the place where the canine sniff is conducted.

CRIMINAL PROCEDURE / PRE-TRIAL MOTIONS / HABEAS CORPUS

A defendant may challenge the sufficiency of the Commonwealth's evidence presented at a preliminary hearing by filing a petition for writ of *habeas corpus*.

CRIMINAL PROCEDURE / PRE-TRIAL MOTIONS / HABEAS CORPUS

When reviewing a petition for writ of *habeas corpus* and deciding whether a *prima facie*

case has been established, a trial court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth.

CRIMINAL PROCEDURE / PRE-TRIAL MOTIONS / HABEAS CORPUS

The Commonwealth must demonstrate sufficient probable cause that the defendant committed the offense, and the evidence should be such that, if presented at trial and accepted as true, the trial judge would be warranted in allowing the case to go to the jury.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. CR 2729 of 2017

Appearances: Gene P. Placidi, Esquire, on behalf of Defendant
Jessica L. Lasley, Esquire, on behalf of the Commonwealth

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Domitrovich, J. May 7, 2018

After thorough consideration of the entire record regarding Defendant Robert Benjamin Wiley, III's Omnibus Pre-Trial Motion, including, but not limited to, the testimony and evidence presented during the Suppression Hearing held on April 11, 2018 and the Preliminary Hearing held on August 31, 2017, as well as the Memoranda of Law submitted by both counsel for the Commonwealth and Defendant Robert Benjamin Wiley, III; and after an independent review of the relevant statutory and case law, and pursuant to Pa.R.Crim.P. 581(I), this Trial Court hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Within approximately two months prior to July 25, 2017, Detective Jason Triana ("Detective Triana"), as well as other members of the Drug and Vice Unit of the City of Erie Police Department, began to conduct surveillance of the residence located at 245 West 16th, Street, Erie, Pennsylvania ("Residence").
2. Detective Triana engaged a confidential informant, who stated to Detective Triana that Defendant was supplying the confidential informant with crack cocaine. Said confidential informant made three controlled narcotics purchases from Defendant in exchange for dollar bills marked by Erie Police.
3. Based on said surveillance as well as the several controlled narcotics purchases, on July 25, 2017, Detective Triana applied for a search warrant for the Residence as well as Defendant. Said Search Warrant ("House Search Warrant") was authorized and issued by Magisterial District Judge Suzanne C. Mack on the same day of July 25, 2017.
4. At the time the House Search Warrant was issued, Defendant was required to wear an ankle monitor as a result of Defendant's conviction and sentence for driving under suspension.
5. Detective Triana learned Defendant was leaving his Residence to meet with his probation officer at the Erie County Courthouse on July 26, 2017 around 10:00 a.m., and waited until Defendant departed from his Residence to meet with his probation officer to serve the House Search Warrant.

6. On July 26, 2017, Detective Triana, as well as other members of the Drug and Vice Unit and members of the SWAT team, conducted surveillance at Defendant's Residence. Defendant was observed exiting his Residence at approximately 10:05 a.m. with a light-colored bag and entering the passenger side of a Buick Regal Sedan ("Buick") parked facing westbound on West 16th Street.
7. Detective Triana observed the Buick proceed westbound on West 16th Street, turn south on Myrtle Street, and turn east onto West 17th Street. The Buick then parked on the south side of West 17th Street before reaching Sassafras Street, and Defendant was observed exiting the passenger side of the Buick.
8. Detective Triana observed Defendant walking between two houses on West 17th Street where a Silver Ford Fusion was parked. Detective Michael Chodubski, another member of the Drug and Vice Unit, observed Defendant at the trunk of the Ford Fusion with the trunk door ajar. Three of the Ford Fusion's tires were observed as being flat.
9. Defendant then returned from the Ford Fusion and reentered the Buick but was no longer carrying the light-colored bag. Defendant was not actually observed placing said bag inside the Ford Fusion. However, based on Detective Triana's experience and a sweep of the area, Detective Triana concluded there was nowhere else Defendant could have concealed the bag.
10. Erie Police effectuated a stop of the Buick near the Erie County Court of Common Pleas. Defendant and Alyssa Wiley were found inside the vehicle, and Defendant was taken into investigative custody pursuant to the House Search Warrant. After Defendant was Mirandized, Defendant claimed the Ford Fusion "belonged" to him. However, Erie Police learned the vehicle is registered in the name of Desmond Martin. Defendant alleges Desmond Martin is Defendant's uncle. Moreover, Defendant made a statement to Erie Police to the effect of: "There's no drugs in the house so take me to county."
11. The House Search Warrant was served and Defendant's Residence was searched, whereupon cash in the amount of $6,480.00 was recovered, including dollar bills marked by Erie Police from the confidential informant's controlled narcotics purchases from Defendant, as well as five white pills, which tested positive as MDMA (also commonly known as ecstasy). The MDMA as well as the cash were both found in the same coat pocket.
12. However, no crack cocaine, packaging, digital scales, or any other like items were recovered from the search of Defendant's Residence.
13. Subsequent to the search of Defendant's Residence, the Ford Fusion was seized by Erie Police and towed from private property to a City of Erie garage in order to place the Ford Fusion in a secure location for Erie Police to conduct a canine sniff and ensure the safety of Erie police officers until the certified canine arrived to perform the canine sniff. No evidence was gleaned from this removal procedure as Erie Police did not view any incriminating evidence from their observation of the outside of the Ford Fusion.
14. Detective Triana stated he had reasonable suspicion to conduct a canine sniff of the Ford Fusion based on facts obtained prior to the removal of the vehicle. First, Detective Triana knew Defendant was engaged in controlled narcotic purchases with a confidential informant. Also, Detective Triana knew Defendant was arrested as a result of a previous search warrant executed at another residence in 2011 resulting in the seizure of a large quantity of narcotics. Moreover, Detective Triana knew Defendant's mother and brother

had previously been arrested with seventy-eight grams of cocaine and stolen firearms inside the subject Residence. Lastly, Detective Triana, based on his experience with individuals involved in the drug trade, believed Defendant likely removed the narcotics from his Residence before meeting with his probation officer to protect his mother and other members of his Residence.

15. Trooper J. Casey from the Pennsylvania State Police, as well as his certified dog, arrived to perform a canine sniff of the Ford Fusion. When Trooper J. Casey and his canine performed a sniff for narcotics on the Ford Fusion, the certified canine made a positive indication to the vehicle's trunk as well as both the driver and passenger sides of the vehicle.
16. On July 26, 2017, Detective Triana applied for a second search warrant to search the Ford Fusion based on the aforementioned ("Car Search Warrant"). Magisterial District Judge Suzanne C. Mack authorized and issued the Car Search Warrant on the same day of July 26, 2017.
17. Detective Triana served said Car Search Warrant and searched the Ford Fusion, whereupon Detective Triana recovered the light-colored bag resembling the bag Defendant previously wore on his person on July 25, 2017 before visiting the Ford Fusion. Detective Triana also recovered thirty-two grams of crack cocaine, twelve one-ounce bags of marijuana, three bags containing approximately eighteen grams of marijuana, a bag containing approximately six grams of powder cocaine, and a digital scale.
18. On January 16, 2018, Defendant, by and through his counsel, Gene P. Placidi, Esq., filed his Omnibus Pre-Trial Motion wherein Defendant moved to suppress the evidence seized from the Ford Fusion. Attorney Placidi also filed Defendant's Motion for Writ of Habeas Corpus requesting this Court to dismiss the charges of Possession With Intent to Deliver the eighteen grams of marijuana and Possession With Intent to Deliver the five MDMA pills.
19. A hearing on Defendant's Omnibus Pre-Trial Motion was held on April 11, 2018, at which Defendant appeared and was represented by his counsel, Attorney Gene P. Placidi. Assistant District Attorney Jessica L. Lasley appeared on behalf of the Commonwealth. During the hearing, this Trial Court heard credible testimony from Detective Triana. Defendant also chose to testify at said hearing. Defendant testified the Ford Fusion was parked on a driveway of a house belonging to Defendant's grandmother and the Ford Fusion "belonged" to him despite his admission the Ford Fusion is titled in the name of Desmond Martin.
20. Also at said hearing, both Attorneys Placidi and Lasley agreed to submit Memoranda of Law regarding the issues presented in Defendant's Omnibus Pre-Trial Motion. On April 20, 2018, Attorney Placidi submitted his Memorandum in Support of Defendant's Omnibus Pre-Trial Motion, and on May 2, 2018, Attorney Lasley filed the Commonwealth's Response to Defendant's Brief of Omnibus Pre-Trial Motion.

CONCLUSIONS OF LAW

Under Pennsylvania Rule of Criminal Procedure 581, the Commonwealth has the burden of moving forward with the evidence and establishing the challenged evidence was not obtained in violation of the defendant's rights. 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). Moreover, "[i]t 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."

Commonwealth v. Dutrieville, 932 A.2d 240, 242 (Pa. Super. 2007). In order for a defendant accused of a possessory crime to prevail in a challenge to the search and seizure which provided the evidence used against him, he must, as a threshold matter, establish he has a legally cognizable expectation of privacy in the premises which were searched. *Commonwealth v. Carlton*, 701 A.2d 143, 145–46 (Pa. 1997).

Under the Fourth Amendment of the United States Constitution as well as Article I, Section 8 of the Pennsylvania Constitution, individuals are protected from unreasonable searches and seizures by police in places where individuals have a reasonable expectation of privacy. *Commonwealth v. Enimpah*, 106 A.3d 695, 699 (Pa. 2014). "An expectation of privacy exists if a person has a subjective expectation of privacy that society is willing to recognize as legitimate and reasonable." *Commonwealth v. Loughnane*, 173 A.3d 733, 741 (Pa. 2017) (citing *Commonwealth v. Gordon*, 683 A.2d 253, 256 (Pa. 1996)). The registered owner of a vehicle has a reasonable expectation of privacy supporting a challenge to a police search of the owner's vehicle. See *Commonwealth v. Randolph*, 151 A.3d 170, 179 (Pa. Super. 2016); *see also United States v. Ryan*, 128 F.Supp.2d 232, 235 (E.D. Pa. 2000) (internal quotations omitted) ("While outright ownership is not required for a defendant to assert a reasonable and actual expectation of privacy in a motor vehicle, there must be clear evidence of continuing possession and control, as well as no evidence that the driver obtained the car illegitimately."). Regarding the seizure of an automobile, the Pennsylvania Supreme Court has stated:

> It is reasonable . . . for constitutional purposes, for police to seize and hold a car until a search warrant can be obtained, where the seizure occurs after the user or owner has been placed into custody, where the vehicle is located on public property, and where there exists probable cause to believe that evidence of the commission of a crime will be obtained from the vehicle.

Commonwealth v. Holzer, 389 A.2d 101, 106 (Pa. 1978) (citing *Cardwell v. Lewis*, 417 U.S. 583, 593-94, 94 S.Ct. 2464, (1974). Nevertheless, "[w]here the vehicle is located on the defendant's private property (garage or driveway), it becomes more difficult, although not impossible, to find the police conduct reasonable, since there has been a greater infringement upon defendant's expectations of privacy." *Id.* at n.7.

Under the exclusionary rule, evidence obtained pursuant to an unconstitutional search or seizure is inadmissible against a defendant. *Commonwealth v. Whitaker*, 336 A.2d 603, 606 (Pa. 1975). However, exclusion of evidence is not automatic for every violation of the Pennsylvania Rules of Criminal Procedure concerning searches and seizures since "exclusion of seized evidence *may* be appropriate only where the violation also touches upon fundamental, constitutional concerns, is conducted in bad-faith or has substantially prejudiced the defendant." *Commonwealth v. Balliet*, 542 A.2d 1000, 1003 (1988) (emphasis in original); *see e.g., Commonwealth v. Mason*, 490 A.2d 421, 426 (Pa. 1985) (quoting *United States v. Johnson*, 660 F.2d 749, 753 (9th Cir.1981)) (noting that for a defendant to establish prejudice arising from a rule violation, the defendant must show "(1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision of the Rule").

Moreover, the independent source doctrine serves as an exception to the exclusionary rule, which states that where evidence is discovered without any reliance on information gleaned from a constitutional violation, then such evidence may be admissible against the defendant. *Commonwealth v. Berkheimer*, 57 A.3d 171, 183 (Pa. Super. 2012) (quoting *Nix v. Williams*, 467 U.S. 431, 443-44, 104 S.Ct. 2501 (1984)). Under the independent source rule, the Pennsylvania Superior Court has held that any taint applicable to evidence seized from a defendant's vehicle due to police removing said vehicle from the defendant's private property will be purged if police secure a constitutional canine sniff and warrant not premised on facts gathered during removal but rather on facts learned prior to removal of the vehicle. *See Commonwealth v. Williams*, 2 A.3d 611 (Pa. Super. 2010).

Specifically, in *Commonwealth v. Williams*, a police officer received a tip from a confidential informant, who had assisted the officer obtain convictions in the past, that the defendant was selling crack cocaine from an Expedition vehicle. *Id.* at 614. The police officer knew the defendant from prior contact, knew defendant drove a black Expedition vehicle, and had observed the defendant engage in drug-related activity in the area. *Id.* The police officer responded to the confidential informant's tip and followed the defendant to defendant's driveway, arrested defendant, and another police officer drove the Expedition vehicle back to the police department garage so a canine drug dog could perform a canine sniff of the vehicle. *Id.* at 614-15. While driving the Expedition vehicle, the police officer neither searched the vehicle nor recovered any evidence from the vehicle. *Id.* at 615. After the canine made a positive indication on the Expedition vehicle, police obtained a search warrant, executed said search warrant, and recovered crack cocaine from the vehicle. *Id.* After the defendant was charged with possession of crack cocaine, the defendant moved to suppress the evidence seized from the vehicle based on the police officer's seizure the vehicle from the defendant's driveway, and the suppression court denied the defendant's motion. *Id.*

The Superior Court of Pennsylvania in *Williams* affirmed the suppression court and specifically held the independent source rule applied as a basis to admit the evidence obtained from the vehicle. In particular, the Pennsylvania Superior Court concluded the defendant could not "obtain relief based upon the improper seizure of his vehicle because no evidence resulted from that seizure. Rather, [the defendant's] conviction [was] premised entirely upon evidence completely untainted by the police misconduct at issue herein." *Id.* at 621. The Superior Court of Pennsylvania further noted the "information supporting the canine sniff and the warrant was not derived to any extent from the singular act of taking the Expedition from the driveway to the police station to secure it. Rather, those two searches were based upon facts learned prior to the act of transporting the vehicle." *Id.* at 620. Thus, the Superior Court of Pennsylvania concluded the suppression court properly refused to suppress the evidence found in the Expedition vehicle. *Id.* at 621.

In this instant case, even assuming *arguendo* Defendant had a legally cognizable expectation of privacy in the Ford Fusion despite the vehicle not being titled in Defendant's name, the independent source rule applies. Similar to the police in *Williams*, here the Erie Police towed the Ford Fusion from private property in a very busy and visible area to a city garage in order to place the Ford Fusion in a secure location and ensure the safety of Erie police officers until the certified canine arrived. Moreover, Erie Police recovered no

evidence in the process of removing the Ford Fusion to the city garage as Erie Police did not observe any incriminating evidence from their view of the outside of the Ford Fusion, and no information gleaned from the removal procedure was utilized to support the issuance of the Car Search Warrant. Thus, although the Ford Fusion was seized without Erie Police procuring a warrant, the removal of the Ford Fusion from private property "did not result in the discovery of a scintilla of evidence used by the government in any aspect of this prosecution." *See Williams*, A.3d at 620.

Furthermore, assuming *arguendo* the Ford Fusion was illegally seized and removed from the property, Defendant "cannot obtain relief . . . because no evidence resulted from that seizure" and the evidence obtained from the Ford Fusion is untainted by any misconduct of the Erie Police pursuant to the independent source rule. *See id.* at 621. Specifically, after Erie Police removed the Ford Fusion from private property, Erie Police conducted a canine sniff of the Ford Fusion in order to obtain probable cause to secure the Car Search Warrant to search the interior of the vehicle. Under Pennsylvania law, "a narcotics detection dog may be deployed to test for the presence of narcotics, on the facts of this case where: 1. the police are able to articulate reasonable grounds for believing that drugs may be present in the place they seek to test; and 2. the police are lawfully present in the place where the canine sniff is conducted." *Commonwealth v. Johnston*, 530 A.2d 74, 79 (Pa.1987). In *Williams*, for example, the Superior Court of Pennsylvania held the canine sniff of the defendant's Expedition vehicle was permissible since the Expedition vehicle was transported from private property to the police station where police were unquestionably permitted to be present and the canine sniff was conducted. *Williams*, 2 A.3d at 622. Additionally, facts supporting reasonable suspicion to perform the canine sniff existed in *Williams*. Particularly, the police officer had supportive information obtained prior to removing the vehicle from the driveway from the confidential informant regarding the defendant's drug-related activities and the police officer had previously observed the defendant engage in said activities. *Id.*

In this instant case, as in *Williams*, Erie Police were permitted to be present at the city garage where the Ford Fusion was towed to perform a canine sniff of the Ford Fusion. Moreover, Detective Triana articulated reasonable grounds for believing crack cocaine was present in the Ford Fusion based on facts learned before removing the Ford Fusion from private property. In particular, and as noted above, Detective Triana stated he knew Defendant was engaged in controlled crack cocaine purchases with a confidential informant, and Defendant's mother and brother had previously been arrested with seventy-eight grams of cocaine and stolen firearms inside Defendant's Residence. Significantly, Detective Triana also stated, based on his experience with individuals involved in the drug trade, Defendant more than likely removed the drugs from his Residence before meeting with his probation officer to protect his mother and other members in and of his Residence. As no crack cocaine was recovered from Defendant's Residence pursuant to the House Search Warrant, even though Defendant had engaged in controlled crack cocaine purchases with the confidential informant, and since Defendant made only one stop before proceeding to meet with his probation officer, Detective Triana reasonably concluded Defendant more than likely stashed crack cocaine in the otherwise immobile Ford Fusion. Thus, this Trial Court finds and concludes the canine sniff of the Ford Fusion was proper and the evidence recovered pursuant to the Car Search Warrant is not subject to suppression.

Defendant on the other hand argues *Commonwealth v. Loughnane* applies to invalidate any evidence recovered from the Ford Fusion since Erie Police illegally seized the Ford Fusion from private property in the first place. In *Loughnane*, the Supreme Court of Pennsylvania recently held the automobile exception to the warrant requirement cannot serve as a basis for police to seize a defendant's vehicle parked in the driveway of the defendant's property. *Loughnane*, 173 A.3d at 745. In this instant case, however, as stated above, the search of the interior of the Ford Fusion is valid under the independent source rule pursuant to the holding in *Commonwealth v. Williams* notwithstanding whether Erie Police officers were permitted to remove the Ford Fusion without a search warrant. Moreover, *Loughnane* is distinguishable from *Williams* in other respects. Specifically, unlike *Williams* and the case *sub judice*, in *Loughnane*, the evidence suppressed was not evidence recovered from the vehicle but rather the evidence was the vehicle itself, and no additional search warrant was obtained by police to remove the taint from the previous, illegal seizure of the vehicle. Thus, in this instant case, like *Williams*, but unlike *Loughnane*, Defendant used the otherwise immobile Ford Fusion merely as a container to store illegal narcotics, which was seized for the purpose of preservation to later perform a canine sniff rather than seized as evidence itself.

In sum, and as articulated in *Commonwealth v. Williams*, the independent source rule applies to this instant case. Specifically, Erie Police gleaned no evidence from the removal of the Ford Fusion from private property. Rather, Erie Police obtained the Car Search Warrant based on probable cause pursuant to the properly executed canine sniff, which was based on facts learned prior to removal of the vehicle. Accordingly, the evidence obtained from the Ford Fusion, including thirty-two grams of crack cocaine, twelve one-ounce bags of marijuana, three bags containing approximately eighteen grams of marijuana, the bag containing approximately six grams of powder cocaine, and the digital scale, are not subject to suppression.

Lastly, Defendant's Motion for Writ of Habeas Corpus requests this Trial Court dismiss the charges of Possession With Intent to Deliver the eighteen grams of marijuana and Possession With Intent to Deliver the five MDMA pills. Specifically, Defendant contends the Commonwealth presented no evidence that possession of five MDMA pills or the eighteen grams of marijuana will serve as a basis to charge Defendant with two counts of Possession With Intent to Deliver rather than mere possessory charges. Under Pennsylvania law, a defendant may challenge the sufficiency of the Commonwealth's evidence presented at a preliminary hearing by filing a petition for writ of *habeas corpus*. *Commonwealth v. Landis*, 48 A.3d 432, 222 (Pa. Super. 2012). When reviewing a petition for writ of *habeas corpus* and deciding whether a *prima facie* case has been established, a trial court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth. *Commonwealth v. Santos*, 876 A.2d 360, 363 (Pa. 2005). The Commonwealth must "show sufficient probable cause that the defendant committed the offense, and the evidence should be such that, if presented at trial and accepted as true, the trial judge would be warranted in allowing the case to go to the jury." *Commonwealth v. James*, 863 A.2d 1179, 1182 (Pa. Super. 2004).

In this instant case, Detective Triana stated at the Preliminary Hearing on this matter that the marijuana found in the Ford Fusion was separately packaged into approximately twelve

one-ounce baggies in addition to three baggies separately weighing eighteen and a half grams. (*See* Notes of Testimony, Preliminary Hearing, Aug. 31, 2017, at pg. 11:4-7; 11:16-12:9). Detective Triana indicated, based on his training and experience, the marijuana was intended to be sold based on the large quantity and since the marijuana was separated for ease of sale. (*Id.*). Regarding the MDMA, Detective Triana stated the MDMA was for delivery since the MDMA "was also in one baggie with five different pills in it, which it was also contained in the same pocket with a large amount of money that also contained [controlled] buy money." (*Id.* at 13:12-19). Detective Triana also stated that "[u]sually an MDMA or ecstasy user wouldn't have several pills on them. Usually one dose will last hours upon hours for use when they're on it." (*Id.* at 16:7-9). Moreover, Detective Triana indicated, in his experience, MDMA users do not have five ecstasy pills "just for personal possession." (*Id.* at 16:8-9). Accordingly, this Trial Court finds and concludes the Commonwealth has established a *prima facie* case against Defendant for Possession With Intent to Deliver the eighteen grams of marijuana and the five MDMA pills.

Consistent with the foregoing analysis, this Trial Court issues the following Order of Court:

ORDER

AND NOW, to wit, this 7th day of May, 2018, after thorough consideration of the entire record regarding Defendant's Omnibus Pre-Trial Motion, including, but not limited to, the testimony and evidence presented during the April 11, 2018 Suppression Hearing and the August 31, 2017 Preliminary Hearing, the Memoranda of Law submitted by both counsel for the Commonwealth and Defendant, as well as an independent review of the relevant statutory and case law, and this Trial Court's accompanying Findings of Fact and Conclusions of Law, incorporated herein pursuant to Pennsylvania Rule of Criminal Procedure 581, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendant's Omnibus Pre-Trial Motion is **DENIED**.

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

DENISE KATZ, Individually and as Administratrix of the Estate of AMANDA GRAZIOLI, Plaintiffs

v.

JOHN GRAZIOLI, Defendant

EVIDENCE / PRIVILEGES / SELF-INCRIMINATION

The Fifth Amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution protects an individual against self-incrimination. In particular, the privilege protects an individual from testifying against himself in both criminal and civil proceedings where responses to questions could incriminate the individual in future criminal proceedings.

EVIDENCE / PRIVILEGES / SELF-INCRIMINATION

The privilege against self-incrimination may only be asserted where the witness is being asked to testify to self-incriminating facts or when a witness is asked a question which requires an incriminating answer.

CIVIL PROCEDURE / STAY OF PROCEEDINGS

The federal Constitution does not require a stay of a civil proceeding pending the outcome of a related criminal case.

CIVIL PROCEDURE / STAY OF PROCEEDINGS

A trial court has broad discretion to stay a proceeding or place a matter in abeyance where the interests of justice require such an action as trial courts possess the inherent power to stay a case during the pendency of another matter.

CIVIL PROCEDURE / STAY OF PROCEEDINGS

In determining whether a stay of proceedings pending the resolution of a related criminal case is appropriate, trial courts apply six factors, including: (1) the extent to which the issues in the civil and criminal cases overlap; (2) the status of the criminal proceedings, including whether any defendants have been indicted; (3) the plaintiff's interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay; (4) the burden on the defendants; (5) the interests of the court; and (6) the public interest.

CIVIL PROCEDURE / STAY OF PROCEEDINGS

Simultaneous criminal and civil cases involving the same or closely related facts may give rise to Fifth Amendment concerns sufficient to warrant a stay of the civil proceedings.

CIVIL PROCEDURE / STAY OF PROCEEDINGS

A court is most likely to grant a stay of civil proceedings where formal criminal charges have been levied against the defendant since the potential for self-incrimination is the greatest at this stage. On the other hand, because the risk of self-incrimination is reduced before formal charges are brought against a defendant, and because of the uncertainty surrounding when, if ever, criminal charges will be issued, as well as the effect of the delay on the civil trial, requests for a stay before criminal charges are levied are typically denied.

CIVIL PROCEDURE / STAY OF PROCEEDINGS

While placing a defendant in a position where he must choose between waiving his Fifth Amendment right during the civil proceeding or asserting his Fifth Amendment privilege and risking an adverse judgment against him is not unconstitutional, a trial court may consider such a conflict in deciding whether to stay a civil case.

CIVIL PROCEDURE / STAY OF PROCEEDINGS

Resolution of a parallel criminal case can encourage settlement in the civil proceeding or at least eliminate the necessity of litigating certain issues, thereby promoting judicial economy.

CIVIL PROCEDURE / STAY OF PROCEEDINGS

While a civil litigant with a private dispute has an interest in the prompt disposition of his civil claims, the public has a greater interest in the enforcement of the criminal law.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 10717 – 2018

Appearances: Paul D. Svirbel, Esq., Thomas A. McDonnell, Esq., Patrick W. Kelley, Esq., & Brian D. Arrowsmith, Esq., for Defendant John Grazioli
Christopher J. Sinnott, Esq., & Adam S. Barrist, Esq., for Plaintiffs

OPINION

Domitrovich, J. June 7, 2018

The matter before this Trial Court is the Motion for Stay of Civil Proceedings filed by Defendant John Grazioli ("Defendant"), wherein Defendant requests this Trial Court stay this civil proceeding until Defendant's parallel criminal case has concluded. Thus, the issue is whether this Trial Court should exercise its discretion in staying the instant civil proceeding until the Defendant's criminal trial has concluded. This Trial Court provides the following analysis:

On March 8, 2018, Defendant allegedly shot and killed his wife Amanda Grazioli at their home located at 5843 Forest Crossing in Millcreek Township. On the same day, March 8, 2018, the Millcreek Police Department filed a Police Criminal Complaint against Defendant. On May 29, 2018, the District Attorney's office filed a Criminal Information at Docket No. 1341 of 2018, charging Defendant with Criminal Homicide/Murder, Aggravated Assault, Recklessly Endangering Another Person, Possessing Instruments of a Crime, and Firearms Not to be Carried Without a License. As of the date of this Opinion, Defendant has been formally arraigned before the Honorable Daniel J. Brabender, Jr. Also, pursuant to Judge Brabender's Order dated May 30, 2018, jury selection and the trial for *Commonwealth v. John P. Grazioli* at Docket No. 1341 of 2018 are scheduled to commence on October 15, 2018.

On March 19, 2018, Plaintiff Denise Kaz, individually and as Administratrix of the Estate of Amanda Grazioli (collectively "Plaintiff"), through her counsel, filed a Civil Complaint against Defendant wherein Plaintiff asserted multiple claims, including two counts of negligence, wrongful death, one cause of action under the Survival Act, 42 Pa.C.S. § 8302, and battery. Before filing an Answer to Plaintiff's Civil Complaint, Defendant's counsel filed the instant Motion for Stay of Civil Proceedings. By Order dated April 25, 2018, this Trial Court issued a Rule to Show Cause, and on June 5, 2018, Argument was held before the undersigned judge. At said proceeding, Christopher J. Sinnott, Esq., appeared on behalf of Plaintiff. In addition, Paul D. Svirbel, Esq., and Patrick W. Kelley, Esq., appeared as

Defendant's counsel for the instant civil proceeding, and Brian D. Arrowsmith, Esq., appeared to represent Defendant's interests regarding Defendant's criminal case at Docket No. 1341 of 2018. Defendant's counsel contend this instant civil proceeding should be stayed until the conclusion of Defendant's criminal case since Defendant's participation in discovery in this civil proceeding entails admissions or denials that can irreparably impact Defendant's ongoing criminal case and violate his Fifth Amendment right against self-incrimination.

The Fifth Amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution protects an individual against self-incrimination. In particular, "[t]he privilege against self-incrimination protects an individual from being called as a witness against himself or herself in both criminal and civil proceedings, formal or informal, where the answers to questions might incriminate the individual in future criminal proceedings." *McDonough v. Commonwealth, Bureau of Driver Licensing*, 618 A.2d 1258, 1260–61 (Pa. Cmwlth. 1992) (citing *Caloric Corporation v. Unemployment Compensation Board of Review*, 452 A.2d 907 (Pa. Cmwlth. 1982)). However, the privilege against self-incrimination may only be asserted where the witness is being asked to testify to self-incriminating facts or when a witness is asked a question which requires an incriminating answer. *Commonwealth, Dep't of Transp., Bureau of Driver Licensing v. Vogt*, 535 A.2d 750, 753 (Pa. Cmwlth. 1988). Furthermore, the witness has the burden of demonstrating that he has a reasonable ground for asserting the privilege. *Id.*

Importantly, the United States Constitution does not require a stay of civil proceedings pending the outcome of related criminal proceedings. *Arden Way Associates v. Boesky*, 660 F.Supp. 1494 (S.D.N.Y.1987); *see also Paine, Webber, Jackson & Curtis Incorporated v. Malon S. Andrus*, 486 F.Supp. 1118 (S.D.N.Y.1980). Nevertheless, a trial court has broad discretion to stay a proceeding or place a matter in abeyance where the interests of justice require such an action as trial courts possess the inherent power to stay a case during the pendency of another matter. *In re Estate of Hartman*, 582 A.2d 648, 653 (Pa. Super. 1990); *In re Penn-Delco Sch. Dist.*, 903 A.2d 600, 606 (Pa.Cmwlth. 2006).

Although not binding upon this Trial Court, other Pennsylvania state courts have applied the factors adopted by the federal district courts of Pennsylvania in determining whether a stay of proceedings pending the resolution of a related criminal case is appropriate. In particular, trial courts apply six factors, including: "(1) the extent to which the issues in the civil and criminal cases overlap; (2) the status of the criminal proceedings, including whether any defendants have been indicted; (3) the plaintiff's interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay; (4) the burden on the defendants; (5) the interests of the court; and (6) the public interest." *In re Adelphia Commc'ns Securities Litig.*, 02-1781, 2003 WL 22358819, at *3 (E.D. Pa. May 13, 2003); *see also Spanier v. Freeh*, 95 A.3d 342, 345 (Pa. Super. 2014) (noting the trial court applied the above six factors adopted by the Eastern District of Pennsylvania); *Anderson v. Scott*, 2011 WL 10795429 (Lawrence C.P.P., Sept. 15, 2011) (applying the same six factors). When applying these factors, "[a] trial court must carefully balance the interests of the party claiming protection against self-incrimination and the adversary's entitlement to equitable treatment." *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 192 (3d Cir. 1994); *see also Spanier v. Freeh*, 2014 WL 6389500 (Centre C.P.P, Feb. 25, 2014). "Because the privilege is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent

unfair and unnecessary prejudice to the other side." *Id.*

First, this Trial Court must consider the extent to which the issues in the instant civil and criminal cases overlap. "[S]imultaneous criminal and civil cases involving the same or closely related facts may give rise to Fifth Amendment concerns sufficient to warrant a stay of the civil proceedings." *Coley v. Lucas Cty., Ohio*, 3:09 CV 0008, 2011 WL 5838190, at *2 (N.D. Ohio Nov. 18, 2011). In the instant civil proceeding, Plaintiff's claims for negligence, wrongful death, survivorship, and battery asserted in Plaintiff's Civil Complaint are based on facts identical to those facts upon which the criminal charges against Defendant in the Criminal Information are based. Indeed, both this civil proceeding and Defendant's criminal case arise from the same alleged event. Specifically, Plaintiff's Civil Complaint alleges that "[o]n or about March 8, 2018, Defendant murdered Ms. Grazioli via a gunshot to the head." (*See* Complaint at ¶ 5). Similarly, the Criminal Information alleges that "on or about March 8, 2018 . . . did cause the death of Amanda Grazioli by inflicting a single gun shot wound to the head of the victim." (*See* Criminal Information). The language of Plaintiff's Civil Complaint is almost verbatim the same language from the Criminal Information, and as such, any evidence offered against Defendant in this civil proceeding would undoubtedly be relevant in the criminal case against Defendant. Thus, this factor weighs in favor of granting a stay of this civil proceeding.

Second, this Trial Court must consider the current status of the criminal case against Defendant, including whether Defendant has been indicted. The Eastern District of Pennsylvania has stated that "[a] court is most likely to grant a stay of civil proceedings where an indictment has been returned [since the] potential for self-incrimination is the greatest at this stage. . . . Conversely, because the risk of self-incrimination is reduced at the pre-indictment stage, and because of the uncertainty surrounding when, if ever, indictments will be issued, as well as the effect of the delay on the civil trial, pre-indictment requests for a stay are typically denied." *State Farm Mut. Auto. Ins. Co. v. Beckham-Easley*, CIV.A. 01-5530, 2002 WL 31111766, at *2 (E.D. Pa. Sept. 18, 2002). In Defendant's criminal case, Defendant has already been arraigned before the Honorable Daniel J. Brabender, Jr., and by Judge Brabender's Order dated May 30, 2018, jury selection and the trial for Defendant's criminal case are scheduled to begin on the firm date of October 15, 2018. However, counsel for Defendant notes the District Attorney's Office of Erie County has yet to provide discovery to-date. Thus, Defendant's criminal case has passed the "pre-indictment stage" since formal criminal charges have been levied against Defendant by the District Attorney's Office of Erie County by the filing of a Criminal Information. Moreover, as counsel for Defendant has indicated, Defendant's criminal case will likely be resolved sometime in late-October or early-November of 2018, approximately five months from the date of this Opinion. A stay of this civil proceeding pending resolution of Defendant's criminal case therefore imposes minimal delay of the instant civil proceeding to-date. Thus, this factor also weighs in favor of granting a stay of this civil proceeding.

Third, this Trial Court must weigh Plaintiff's desires to proceed forward with this civil matter as expeditiously as possible against the prejudice to the plaintiff caused by a stay of this civil proceeding. In this case, as noted above, Defendant's criminal trial is imminent as the trial is scheduled to commence on October 15, 2018. Pennsylvania Rule of Criminal Procedure 600 places limitations on the timing of criminal trials. As such, resolution of Defendant's criminal case likely obviates Plaintiff's need to expend significant resources

in litigating this instant civil proceeding. For example, Plaintiffs will benefit in this civil proceeding from the admissions and/or denials of Defendant in his criminal case, which will dispose of Plaintiff's need for extensive/duplicative oral and written discovery. Similarly, resolution of Defendant's criminal case will clarify the issues for which Plaintiff is claiming relief in this civil proceeding. Moreover, the likelihood that evidence will become unavailable is lessened since considerable evidence is likely to be adduced at Defendant's criminal trial, and the testimony presented therein will be preserved for use by Plaintiff in this civil proceeding. Thus, this factor weighs in favor of granting a stay of this civil proceeding.

Fourth, this Trial Court must consider the burden on Defendant. If this civil proceeding were to move forward, Defendant would presumably be required to choose between waiving his Fifth Amendment right during the civil proceeding or asserting his Fifth Amendment privilege and risking an adverse judgment against him. "While it is not unconstitutional to place a defendant in [such a] position . . . courts may consider these conflicts when deciding whether to stay a civil case." *In re Adelphia Commc'ns Securities Litig.*, 02-1781, 2003 WL 22358819, at *3 (E.D. Pa. May 13, 2003). Here, requiring Defendant to proceed forward with discovery in this civil proceeding will impose a significant burden on Defendant since, as defense counsel suggest, even filing an Answer with admissions and/or denials potentially irreparably impacts Defendant's criminal case. Further, if the instant civil proceeding moves forward, the papers and various filings by the parties will potentially "taint" the jury pool in Defendant's criminal case due to the prejudicial assertions alleged therein. Moreover, counsel for Defendant argues that while Defendant is entitled to assert his Fifth Amendment rights during the instant civil proceeding, an adverse inference potentially can be drawn following such an assertion. *See e.g. Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 1558 (1976). Finally, "delaying a . . . civil matter is appropriate when the criminal trial is imminent." *See Anderson v. Scott*, 2011 WL 10795429, at *2 (Lawrence C.P.P., Sept. 15, 2011) (citing *Sterling National Bank v. A-1 Hotels International, Inc.*, 175 F. Supp 2d. 573, 577 (2nd Cir. 2001)). As Defendant's criminal trial is scheduled to commence October 15, 2018, this Court finds this factor also weighs in favor of granting a stay of this civil proceeding.

Fifth, this Trial Court must consider the management of this Trial Court's cases and the efficient use of its judicial resources. As noted by defense counsel, if this Trial Court grants a stay of proceedings in this instant civil case, questions of law in this civil proceeding will be answered by the findings of a judge or jury in Defendant's criminal trial. Additionally, as noted above, the instant civil proceeding will benefit from the admissions and/or denials of Defendant in his criminal case, which will dispose of the need for extensive/duplicative oral and written discovery in this civil proceeding. With all of these considerations in mind, resolution of the criminal action can encourage settlement or at least eliminate the necessity of litigating certain issues in this civil proceeding, thereby promoting judicial economy. *See Ivy v. Craig*, CV 17-42, 2017 WL 3951932, at *4 (W.D. Pa. July 27, 2017) (quoting *Estes-El v. Long Island Jewish Med. Ctr.*, 916 F.Supp. 268 (S.D.N.Y. 1995)). As such, this factor also weighs in favor of staying this civil proceeding.

Finally, this Court must consider the public's interest in either granting or denying Defendant's Motion for Stay of Civil Proceedings. The Eastern District of Pennsylvania has noted that "[w]hile a civil litigant with a private dispute has an interest in the prompt disposition of his or her claims, the public has a greater interest in enforcement of the criminal

law." *Kaiser v. Stewart*, CIV. A. 96-6643, 1997 WL 66186, at *4 (E.D. Pa. Feb. 6, 1997). "This interest alone may be enough to stay the entire civil proceeding, or at least to narrow the range of civil discovery." *Id.* In contrast to a situation where a civil defendant is also defending against a lesser crime, such as driving under the influence of alcohol, in this case the criminal charges levied against Defendant are particularly egregious, including two-first degree felonies of Criminal Homicide/Murder and Aggravated Assault. As the public has a compelling interest in enforcement of the criminal law for such serious charges, including first-degree Murder, this sixth factor also weighs in favor of granting a stay of this civil proceeding.

Accordingly, this Trial Court finds and concludes all of the above six factors weigh in favor of granting a stay of this civil proceeding. As such, consistent with the foregoing analysis, this Trial Court hereby enters the following Order of Court:

TEMPORARY ORDER

AND NOW, to-wit, this 7th day of June, 2018, after oral argument on the Motion for Stay of Civil Proceedings filed by Defendant John Grazioli, by and through his counsel, Thomas A. McDonnell; at which Paul D. Svirbel, Esq., and Patrick W. Kelley, Esq., appeared as Defendant's counsel for the instant civil proceeding, and Brian D. Arrowsmith, Esq., appeared to represent Defendant's interests regarding Defendant's criminal case at Docket No. 1341 of 2018; and Christopher J. Sinnott, Esq., appeared on behalf of Plaintiff Denise Katz, individually and as Administratrix of the Estate of Amanda Grazioli (collectively "Plaintiff"); and upon consideration of Defendant's Brief in Support as well as Plaintiff's Response to Defendant's Motion for Stay of Civil Proceedings and accompanying Brief in Opposition; and in view of the relevant constitutional law, statutory law, and case law; and after oral argument from civil and criminal counsel for Defendant as well as counsel for Plaintiff; and as this Trial Court has found and concluded all of the six factors set forth in the foregoing analysis weigh in favor of granting a stay of the instant civil proceeding, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendant's Motion for Stay of Civil Proceedings is **GRANTED** to the extent that this instant civil proceeding is hereby **TEMPORARILY STAYED** until Monday, November 19, 2018, at which time a Status Conference will be held to review the status of Defendant's criminal case at Docket No. 1341 of 2018. Therefore, a Status Conference is hereby scheduled for **Monday, November 19, 2018 at 1:30 p.m. in Courtroom G, Room 222, Erie County Courthouse before the undersigned judge.**

BY THE COURT

/s/ **Stephanie Domitrovich, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

ANNE JOINT-SHAPIRO, Defendant

CRIMINAL PROCEDURE / PRE-TRIAL MOTIONS / SUPPRESSION MOTIONS

At a hearing on a motion to suppress evidence, the Commonwealth has the burden of moving forward with the evidence and establishing the challenged evidence was not obtained in violation of the defendant's rights. Pa.R.Crim.P. 581(H).

CRIMINAL PROCEDURE / PRE-TRIAL MOTIONS / SUPPRESSION MOTIONS

At a hearing on a motion to suppress evidence, the suppression court's role as factfinder is to pass on the credibility of witnesses and the weight given to their testimony.

CRIMINAL PROCEDURE / WARRANTLESS SEARCHES OF PERSON

The administration of a blood test constitutes a search under both the United States and Pennsylvania Constitutions if performed by an agent of or at the direction of the government.

CRIMINAL PROCEDURE / WARRANTLESS SEARCHES OF PERSON

The United States Supreme Court held in *Birchfield* that the Fourth Amendment of the federal Constitution does not permit warrantless blood tests incident to arrests for drunk driving. *Birchfield v. North Dakota*, —— U.S. ——, 136 S.Ct. 2160 (2016).

CRIMINAL PROCEDURE / WARRANTLESS SEARCHES OF PERSON / CONSENT

Without valid, implied consent, trial courts are required to evaluate a defendant's actual consent based on the totality of the circumstances. Whether consent has been voluntarily given is a question of fact which must be determined from the totality of the circumstances. A trial court must also consider the coercive nature of an officer's advisory of the potential for enhanced criminal penalties.

CRIMINAL PROCEDURE / WARRANTLESS SEARCHES OF PERSON / CONSENT

Implied consent to a blood test cannot lawfully be based on the threat of enhanced criminal penalties.

CRIMINAL PROCEDURE / WARRANTLESS SEARCHES OF PERSON

The Pennsylvania Superior Court has held where consent to a blood test was obtained after a police officer read the DL-26 form, which contains warnings about the potential for enhanced criminal penalties, the trial court did not err in suppressing the results of the blood test.

CRIMINAL PROCEDURE / AMENDMENT OF CRIMINAL INFORMATION

Under Pa.R.Crim.P. 564, a court may allow an information to be amended, provided the information as amended does not charge offenses arising from a different set of events and that the amended charges are not so materially different from the original charge that the defendant would be unfairly prejudiced.

CRIMINAL LAW / DRIVING UNDER THE INFLUENCE / GENERAL IMPAIRMENT

The offense of driving under the influence (DUI) of alcohol, general impairment, requires the Commonwealth prove the following elements: the accused was driving, operating, or in actual physical control of the movement of a vehicle during the time when he or she was rendered incapable of safely doing so due to the consumption of alcohol.

CRIMINAL LAW / DRIVING UNDER THE INFLUENCE / GENERAL IMPAIRMENT

Blood alcohol content is not an element of the offense of driving under the influence (DUI) of alcohol, general impairment; therefore, DUI, general impairment does not require evidence of blood alcohol content. *See Commonwealth v. Mobley*, 14 A.3d 887 (Pa. Super. 2011).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
NO. CR 3105 of 2017

Appearances: Anthony B. Andrezeski, Esq., for Defendant Anne Joint-Shapiro
Grant T. Miller, Assistant District Attorney, for the Commonwealth

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Domitrovich, J. June 28, 2018

After thorough consideration of the testimony and argument regarding Defendant's Motion to Suppress Evidence, as well as the evidence presented during the Suppression Hearing held on June 18, 2018, and after review of the relevant statutory and case law, and pursuant to Pa.R.Crim.P. 581(I), this Trial Court hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On May 15, 2017, City of Erie Police Officer Anthony Quinn ("Officer Quinn") was working second shift when he was dispatched at approximately 10:11 p.m. to a motor vehicle accident involving a vehicle which had struck another unoccupied parked vehicle.
2. Upon Officer Quinn's arrival at the scene of the collision, the vehicle, situated in the lane of traffic, was still in contact with the parked vehicle.
3. Officer Quinn spoke with the driver of the vehicle, who was identified as Anne Joint-Shapiro ("Defendant").
4. Officer Quinn observed that Defendant's speech was slurred, Defendant's breath smelled of alcohol, and when asked to step out of the vehicle, Defendant had an unsteady gait.
5. Additionally, Defendant admitted at least one time to Officer Quinn that Defendant had been drinking.
6. In response, Officer Quinn instructed Defendant to perform three separate field sobriety tests on Defendant, including (1) the nine step walk-and-turn, (2) one leg stand, (3) and finger dexterity.
7. At first, Defendant was uncooperative with performing the field sobriety tests but did agree to perform the tests. After Officer Quinn explained to Defendant how to perform said tests, Defendant stated she understood how to perform the tests.
8. Defendant failed the nine step walk-and-turn since she only walked eight steps. Defendant did not perform a heel-to-toe-walk. Defendant then turned around and again walked eight steps without performing a heel-to-toe-walk.
9. Defendant also failed the one leg stand. First, Defendant attempted to stand on her left leg and raise her right leg six inches from the ground; however, she stated to Officer Quinn that her left ankle had once been broken in the past. Officer Quinn allowed her instead to stand on her right leg and raise her left leg; Defendant was only able to do these for three seconds. Officer Quinn determined Defendant failed since Defendant could not raise her left leg for the requisite thirty seconds at six inches above the ground.
10. Defendant also failed the finger dexterity test since, when asked to perform this test, she began doing a different test by touching her finger to her nose three times.

11. Officer Quinn has handled fifty to one hundred cases involving individuals driving under the influence of alcohol.
12. Based on Officer Quinn's training and experience as a police officer for six years, Officer Quinn determined Defendant was impaired and could not safely operate a motor vehicle.
13. Officer Quinn then requested two Erie Police officers to transport Defendant to the Hospital for a blood test.
14. City of Erie Police Officer William Goozdich arrived with another officer to transport Defendant to Saint Vincent Hospital.
15. Upon arrival at the Saint Vincent Hospital, Officer Goozdich read the Section 1547 Blood Test Warnings from one of the versions of the Pennsylvania Department of Transportation's DL-26 form.
16. Furthermore, Officer Goozdich cannot recall whether he read the improper enhanced criminal penalty warnings contained in original form DL-26 or whether he read the proper form without the enhanced criminal penalty warnings from the DL-26B.
17. The medical staff at Saint Vincent Hospital drew Defendant's blood, and Officer Goozdich was present when Defendant's blood was drawn.
18. On November 20, 2018, the District Attorney's Office of Erie County filed a Criminal Information charging Defendant with both: (1) Driving Under the Influence, Highest Rate of Alcohol, BAC 0.16% or greater, First Offense, in violation of 75 Pa.C.S. § 3802(c); and (2) Careless Driving, in violation of 75 Pa.C.S. § 3714(a).
19. A hearing on Defendant's Suppression Motion was held on June 18, 2018, at which Defendant appeared and was represented by her counsel, Anthony B. Andrezeski, Esquire. Assistant District Attorney Grant Miller appeared on behalf of the Commonwealth. During the hearing, this Trial Court heard credible testimony from City of Erie Police Officers Anthony Quinn and William Goozdich. Defendant also chose to testify at said hearing. Defendant testified she could not remember anything regarding the incident that occurred on the night of May 15, 2017, and the last memory Defendant recalls is waking up in a jail cell the following day when the officer told her she previously refused to leave her jail cell two hours earlier upon being told she was free to leave.
20. At the conclusion of said hearing, the Commonwealth orally requested to amend the charge of Driving Under the Influence, Highest Rate of Alcohol, BAC 0.16% or greater, First Offense to a charge of Driving Under the Influence, General Impairment, Accident. Counsel for Defendant objected to this amendment.
21. On June 21, 2018, Defendant's counsel filed Defendant's Motion for Reconsideration wherein Defendant requested this Trial Court to "reconvene the Suppression Hearing for closing arguments or in the alternative suppress the blood alcohol evidence." However, by Order dated June 22, 2018, this Trial Court dismissed Defendant's Motion for Reconsideration without prejudice as being prematurely filed since this Trial Court had not yet issued these written Findings of Facts and Conclusions of Law pursuant to Pa.R.Crim.P. 581(I).
22. On June 25, 2018, the Commonwealth filed its Motion to Amend Information requesting this Trial Court permit the Commonwealth to amend the charge of Driving Under the Influence, Highest Rate of Alcohol, First Offense in violation of 75 Pa.C.S. § 3802(c) to

a charge of Driving Under the Influence, General Impairment, Second Offense, Accident in violation of 75 Pa.C.S. § 3802(a)(1).

23. Said Motion indicates that "[s]ince no DL-26 form was filed with the police incident report for this case, it is uncertain whether or not any warnings relating to enhanced criminal penalties for refusing to submit to chemical testing were read to Defendant." (*See* Motion to Amend Information at ¶ 5).
24. By Order dated June 27, 2018, this Trial Court granted the Commonwealth's Motion to Amend Information and authorized the Commonwealth to amend the Information in this case as set forth above. Defense counsel objected to said amendment.

CONCLUSIONS OF LAW

Under Pennsylvania Rule of Criminal Procedure 581, the Commonwealth has the burden of moving forward with the evidence and establishing the challenged evidence was not obtained in violation of the defendant's rights. 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). Moreover, "[i]t 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." *Commonwealth v. Dutrieville*, 932 A.2d 240, 242 (Pa. Super. 2007).

Under the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution, citizens are protected from unreasonable searches and seizures. *Commonwealth v. Evans*, 153 A.3d 323, 327 (Pa. Super. 2016). A search will be deemed unreasonable and therefore constitutionally impermissible unless an established exception applies. *Commonwealth v. Strickler*, 757 A.2d 884, 888 (Pa. 2000). The administration of a blood test constitutes a search under both the United States and Pennsylvania Constitutions if performed by an agent of or at the direction of the government. *Commonwealth v. Kurtz*, 172 A.3d 1153, 1159 (Pa. Super. 2017); *see also Birchfield v. North Dakota*, —— U.S. ——, 136 S.Ct. 2160, 2185 (2016) ("[W]e conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving"). The United States Supreme Court held in *Birchfield* that the Fourth Amendment of the federal Constitution does not permit warrantless blood tests incident to arrests for drunk driving. *Birchfield*, 136 S.Ct. at 2185.

Without valid, implied consent, trial courts are required to evaluate a defendant's actual consent based on the totality of the circumstances. *Id.* (citing *Commonwealth v. Danforth*, 395 Pa.Super. 1, 576 A.2d 1013, 1022 (1990) (en banc) ("[w]hether consent has been voluntarily given is a question of fact [to be] determined in each case from the totality of the circumstances."). The Supreme Court of Pennsylvania has held:

> In determining the validity of a given consent, the Commonwealth bears the burden of establishing that a consent is the product of an essentially free and unconstrained choice—not the result of duress or coercion, express or implied, or a will overborne—under the totality of the circumstances. The standard for measuring the scope of a person's consent is based on an objective evaluation of what a reasonable person would have understood by the exchange between the officer and the person who gave the consent. Such evaluation includes an objective examination of the maturity, sophistication and mental or emotional state of the defendant. Gauging the scope of a

> defendant's consent is an inherent and necessary part of the process of determining, on the totality of the circumstances presented, whether the consent is objectively valid, or instead the product of coercion, deceit, or misrepresentation.

Commonwealth v. Smith, 77 A.3d 562, 573 (Pa. 2013). A trial court must also consider the coercive nature of an officer's "advisory of the potential for enhanced criminal penalties." *Kurtz*, 172 A.3d at 1160. The Pennsylvania Superior Court has held where consent to a blood test was obtained after an officer read the DL-26 form, which contains warnings about the potential for enhanced criminal penalties, the trial court did not err in suppressing the results of the blood test. *Id.* (citing *Commonwealth v. Ennels*, 167 A.3d 716, 724 (Pa. Super. 2017) ("[I]mplied consent to a blood test cannot lawfully be based on the threat of such enhanced penalties.")).

In the instant case, the blood test in question undoubtedly constituted a search under both the United States and Pennsylvania Constitutions as the test was administered at the direction of Officer Goozdich, a government agent. Furthermore, Officer Goozdich cannot recall whether he read the warnings contained in form DL-26, which warns defendants that they may potentially face enhanced criminal penalties if defendants refuse blood tests, or whether Officer Goozdich read the proper warnings contained in DL-26B, which does not contain such a warning regarding criminal penalties as stated by Assistant District Attorney Miller in his Motion to Amend Information. As Officer Goozdich cannot recall warning Defendant that she could potentially face enhanced criminal penalties and cannot say so with certainty, a possibility exists Officer Goozdich could have read to Defendant the warnings contained in the original form DL-26. Furthermore, the actual form read to Defendant, whether DL-26 or DL-26B, was not made part of the record. Therefore, Defendant did not provide voluntary consent for the blood draw. *See Ennels*, 167 A.3d at 724; *see also Kurtz*, 172 A.3d at 1160. As such, pursuant to *Birchfield*, this Trial Court finds and concludes the blood test in this case is suppressible as the test was obtained without a warrant and Defendant did not voluntarily consent to the blood draw.

Moreover, the Commonwealth amended Count One of the Criminal Information from Driving Under the Influence, Highest Rate of Alcohol, BAC 0.16% or greater, First Offense to a charge of Driving Under the Influence, General Impairment, Second Offense, Accident in violation of 75 Pa.C.S. § 3802(a)(1). See reasons stated by Assistant District Attorney Grant Miller in his Motion to Amend Criminal Information. Under the General Impairment provision of Driving Under the Influence statute:

> An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.

75 Pa.C.S. § 3802(a)(1). Notably, this charge under the Driving Under the Influence statute does not require evidence of a defendant's blood alcohol content. Although the blood test results in this case are suppressible, the Motion to Suppress the blood test results, despite being involuntary, does not apply to the amended General Impairment Charge, Second

Offense. Therefore, said Motion to Suppress Evidence is dismissed as being rendered moot.

Accordingly, consistent with the forgoing, this Trial Court issues the following Order of Court:

ORDER

AND NOW, to-wit, this 28th day of June, 2018, upon thorough consideration of Defendant's Motion to Suppress Evidence wherein Defendant requests this Trial Court to suppress the blood test results obtained from Defendant, and after review of the testimony and evidence presented during the June 18, 2018 Suppression Hearing, as well as a review of relevant statutory and case law, and this Trial Court's accompanying Findings of Fact and Conclusions of Law, incorporated herein pursuant to Pa.R.Crim.P. 581; and also in view that the Commonwealth amended Count One of the Criminal Information from Driving Under the Influence, Highest Rate of Alcohol, BAC 0.16% or greater, First Offense to the charge of Driving Under the Influence, General Impairment, Second Offense, Accident in violation of 75 Pa.C.S. § 3802(a)(1), which does not require evidence of Defendant's blood alcohol content, it is hereby **ORDERED, ADJUDGED AND DECREED** that the Commonwealth's Motion to Suppress Evidence is **DISMISSED** as being rendered moot.

BY THE COURT

/s/ **Stephanie Domitrovich, Judge**

RICHARD E. GRIFFITH and NOREEN F. GRIFFITH, husband and wife, Plaintiffs-Condemnees

v.

MILLCREEK TOWNSHIP, a Second Class Pennsylvania Township, Defendant-Condemnor

CIVIL PROCEDURE / EMINENT DOMAIN / DE FACTO TAKING

The Pennsylvania Supreme Court has generally stated that a *de facto* taking happens when a government entity "clothed" with the power of eminent domain substantially deprives an owner of the beneficial use and enjoyment of the property.

CIVIL PROCEDURE / EMINENT DOMAIN / DE FACTO TAKING

The Pennsylvania Appellate Courts have established three elements which the landowner must prove to establish a *de facto* taking:

1. the condemnor has the power of eminent domain, i.e., to file an action for a *de jure* taking;

2. the existence of "exceptional circumstances" which substantially deprive the landowner of the use and enjoyment of the property; and

3. the damages to the property interest were the immediate, necessary and unavoidable consequence of the exercise of the power to condemn.

CIVIL PROCEDURE / EMINENT DOMAIN / DE FACTO TAKING

The Township does not have to actually exercise its power to condemn for a *de facto* taking to occur. What is required is that the government entity is clothed with the power to condemn property.

MUNICIPAL ACTION / CAUSATION

Over the course of twenty-one years, from 1966 through 1987, the Township was intentionally engaged in bringing the Griswold Subdivision into legal fruition, including the dedication of the storm water system to the public.

MUNICIPAL ACTION / CAUSATION

The Township was inextricably involved in the diversion of storm water from its natural course and drainage area to another area where it would not naturally flow. The Township embraced a central role in the process that altered the original storm water plans from two discharge points to one discharge point into a ravine adjoining the Griffiths' home. The overwhelming weight of the engineering evidence is that the Township's storm water system dramatically increased the erosion of the west bank of the ravine, causing a massive landslide that rendered the Griffith home uninhabitable. In its aftermath condition as well as its proximity to an unstable ravine bank along the entire east boundary where storm water from the entire Subdivision continues to flow, the future residential use of the Griffith property has been substantially, if not entirely, taken as a matter of common sense and safety.

MUNICIPAL ACTION / CAUSATION

The Griffiths were in a position of servitude to the Township by virtue of two drainage easements. However, the Griffiths' servitude does not entitle or empower the Township to approve, own and maintain a storm water system that resulted in the landslide on the Griffiths' property. The Griffiths' receipt of an increased, diverted and concentrated flow of storm water caused by the Township's drainage system, the bulk of which would have naturally flowed elsewhere, establishes their claim of a *de facto* taking.

STATUTE OF LIMITATIONS

The installation of the storm water systems prior to the Griffiths ownership of the property does not preclude them from asserting a *de facto* taking claim. The activities of the Township did not deprive the Griffiths of the residential use of their property until September 9, 2013. Therefore, the Griffiths had no claim for a *de facto* taking until that date.

STATUTE OF LIMITATIONS

The applicable statute of limitations herein is six years. 42 Pa.C.S.A. 5527(a)(2). It commenced on September 9, 2013 and had not expired when the Griffiths filed this lawsuit.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
IN REM EMINENT DOMAIN
No. 12377 - 2015

Appearances: Eric J. Purchase, Esq., for Richard E. Griffith and Noreen F. Griffith
Patrick Carey, Esq., for Millcreek Township

OPINION

Cunningham, J. July 2, 2018

The presenting matter is the Petition for Appointment of a Board of Viewers filed by Plaintiffs-Condemnees, Richard and Noreen Griffith, husband and wife, (the "Griffiths") against Defendant-Condemnor, Millcreek Township, a Second Class Township (the "Township"). In response, the Township filed Preliminary Objections to the Petition for the Appointment of a Board of Viewers. The parties agree the material facts are not in dispute. Upon consideration of the evidence, arguments and law, the Preliminary Objections of the Township are **OVERRULED**.

FACTUAL HISTORY

The parties submitted a detailed Joint Stipulation of Facts, which is incorporated by reference as if fully set forth herein. For purposes of this Opinion, the following is a brief summary of the salient facts.

The Griffiths own an irregular-shaped lot situated in the Garnesdiyo Subdivision (the "Subdivision") at 5020 Saybrook Place in Millcreek Township, Erie County, Pennsylvania. The Subdivision was developed and constructed pursuant to recorded plot plans numbered Sections 1-6. The Griffiths' property is located in Section 3 of the Subdivision.

The development of the Subdivision began on or about March 11, 1966, when its owners, Tracy and Marianna Griswold (the "Griswolds"), applied for Township approval of the plot plan for Section 1, which consists of Lots 1-11 of the Subdivision. As proposed, the storm water for Section 1 is collected and diverted into a 36-inch pipe which eventually discharges into the ravine adjacent to what is now the Griffiths' property in an area designated as Easement 1. The Township's Engineer was involved in the oversight of the storm water system for Section 1. After all of the conditions set forth by the Township were met, the Township Engineer certified the storm water system for Section 1. The plans for Section 1 dedicated the streets and Easement No. 1 to the Township. On May 2, 1966, the Township Supervisors accepted the dedication by official action.

Section 2 of the Subdivision Plot created Lot 12, which is located between Easement No. 1 and the Griffiths' property. This plot was approved by the Township in June, 1975.

Section 3 of the Subdivision consists of Lots 13-36; Lot 13 being the Griffiths' original property. The storm water system for Section 3 includes a storm water drainage easement, designated as Easement 2, which runs from Saybrook Place along the boundary line between Lots 12 and 13.

The storm water system for Sections 2 and 3 collected all of the storm water into a 42-inch pipe and diverted it through Easement No. 2 to Easement 1. There the collected storm water is discharged into the same ravine as the 36-inch pipe from Easement 1, with the 42-inch pipe situated above the 36-inch pipe from Section 1. The plans for Section 3 dedicated the streets and Easement No. 2 to the Township. Again the Township's Engineer was involved in the oversight of this storm water plan. On December 18, 1978, the Township Engineer certified the Griswolds had satisfied the conditions set by the Township, including the storm water system, for Section 3. On March 16, 1979, the Township Supervisors accepted the dedication by official action.

The same process ensued for the certification and approval by the Township of Sections 4 through 6. By September, 1987, the Subdivision *en toto* was dedicated to the Township, with the Township thereafter owning and maintaining the entire storm water system that emptied into the Easement 1 ravine adjoining the Griffiths' property.

On July 13, 1979, the Griswolds conveyed Lot 13, subsequently known as 5020 Saybrook Place, by deed to Thomas and Betty Ann Venable. On November 12, 1992, Thomas and Betty Ann Venable conveyed 5020 Saybrook Place to Richard E. Griffith. On August 3, 2006, Richard E. Griffith and Noreen F. Griffith conveyed 5020 Saybrook Place to themselves by Quit Claim Deed. On December 18, 2012, Lot 12 was separated into Lot 12 and Lot 12A. On December 21, 2012, John P. Mraz and Josephine K. Mraz conveyed Lot 12A to the Griffiths, which encompasses both sides of Easement No. 2. On January 2, 2013, the Griffiths executed a Consolidation Deed for the purpose of merging Lots 12A and Lot 13 into a single parcel.

On or about September 9, 2013, a massive landslide of trees and soil fell along the entire eastern boundary of the Griffiths' property. The subsidence was so severe it removed the soil supporting the concrete footers for the eastern half of the Griffiths' residence. This loss in fundamental support impacted the entire structural integrity of the Griffiths' home, rendering it uninhabitable. An open fault line was created on the level area of the Griffiths' property presenting an ominous and dangerous condition. The Griffiths were forced to abandon their home.

PROCEDURAL HISTORY

On August 18, 2015, the Griffiths filed a Petition for the Appointment of a Board of Viewers. On September 24, 2015, the Township filed Preliminary Objections to the Petition. On December 29, 2015, the Griffiths filed an Answer to the Township's Preliminary Objections. Thereafter the parties engaged in the discovery process.

On March 21, 2018, the parties filed a Joint Stipulation of Facts. On March 28, 2018, both parties filed Briefs in support of their requested relief. On April 4, 2018, an evidentiary hearing was held before this Court. Plaintiff Richard E. Griffith and his expert witness testified. The Township did not present any witnesses, instead relied on the Joint Stipulation of Facts.

LEGAL STANDARD

This case does not involve a *de jure* taking initiated by a Declaration of Taking filed by the Township. Instead, this case was filed by the Griffiths, asserting the Township has engaged in a *de facto* taking of their property, which is synonymously described in legal terms as an inverse condemnation.

The Griffiths contend the Township's course of conduct significantly increased the volume and intensity of storm water beyond natural conditions entering the ravine in Easement 1. This diversion of storm water and its discharge into the ravine at the increased velocity, volume and intensity then caused severe erosion to the base and lateral support areas of the west bank of the ravine, which in turn resulted in the landslide. The Griffiths allege the Township has therefore effectuated a *de facto* taking by substantially depriving them of the residential use and enjoyment of their property

The Township denies a *de facto* taking occurred. The Township argues it did nothing to cause the September 9, 2013 landslide. Moreover, there was no intentional or purposeful action by the Township which caused the ravine to collapse. The Township points out the Griffiths have been on notice since their date of purchase in 1992 of the existence of the two drainage easements and the two discharge pipes. Because the Griffiths were not the owners when the storm water system was installed, the Township contends they cannot assert a claim for a *de facto* taking. Lastly, the Township argues this case was filed after the statute of limitations.

The Pennsylvania Supreme Court has generally stated that a *de facto* taking happens when a government entity "clothed" with the power of eminent domain substantially deprives an owner of the beneficial use and enjoyment of the property. *Conroy-Prugh Glass Company v. Commonwealth*, 321 A.2d 598, 599 (Pa. 1974).

What needs to be determined is whether a condemnation occurred, and if so, the "extent and nature of the property interest condemned" must be identified along with the date of condemnation. 26 Pa.C.S.A. §502(c)(2)(3).

The test for whether an inverse condemnation occurred is not set forth within the Eminent Domain Code. It has fallen upon the courts to make that determination on a case by case basis, driven by the circumstances of each case. The Pennsylvania appellate courts have established three elements which the landowner must prove to establish a *de facto* taking:

1) the condemnor has the power of eminent domain, i.e., to file an action for a *de jure* taking;

2) the existence of "exceptional circumstances" which substantially deprive the landowner of the use and enjoyment of the property; and

3) the damages to the property interest were the immediate, necessary and unavoidable consequence of the exercise of the power to condemn.

In this case, the first element is not in dispute. Under the Second Class Township Code, the Township has the power of eminent domain to condemn the Griffiths' property to protect and/or improve the storm water system on Easement 1.

The remaining two elements will be discussed seriatim followed by an analysis of the statute of limitations.

I) Exceptional Circumstances Rendered the Griffiths' Property Uninhabitable

The existence of exceptional circumstances is easily found in this case. A landslide of this magnitude is not an ordinary occurrence.

On September 9, 2013, while the Griffiths were asleep in their second floor bedroom, a devastating landslide occurred along the entire eastern border of their property.
As described in dry engineering terms:

a. On or about September 9, 2013, a 300 foot section of the bank of the Ravine, including the remaining trees and soil along the west bank of the Ravine nearest to the Plaintiffs-Condemnees' House collapsed, causing a large portion of the Plaintiffs-Condemnees' Property to subside and slope away from the residence. (the "September 9th Collapse").

b. The September 9th Collapse caused a large portion of Plaintiffs-Condemnees' Property which was previously level to subside and slope towards the Ravine. A fault line now exists at the edge of the level area of Plaintiffs-Condemnees' Property and the large mass of ground that has subsided.

c. The area of ground that subsided during the September 9th Collapse included the ground adjacent to and under the foundation of the eastern corner of Plaintiffs-Condemnees' House causing the concrete wall footer at said corner of Plaintiffs-Condemnees' House to subside, which resulted in structural and cosmetic damage to Plaintiffs-Condemnees' House, including the collapse of a brick wall and adjacent wooden deck.

d. In addition to the subsidence, the September 9th Collapse also caused several of the aforementioned large trees located along the Ravine to fall onto Plaintiff's-Condemnees' House, causing further structural and cosmetic damage to Plaintiff-Condemnees' House and Plaintiffs-Condemnees' Property, rendering it inhabitable, and forcing the Plaintiffs-Condemnees to abandon their home.

Joint Stipulation of Facts, Para. 28, March 21, 2018 (hereafter "Joint Stipulation").

The various engineers engaged in this case concur that the landslide rendered the Griffith home uninhabitable.

The photographs introduced in this case support the engineering conclusions. Even to the untrained eye, the damage to the Griffith home was extensive. Of particular note was the exposure of the concrete footers for the eastern part of the Griffith home and the concomitant rupturing of the structural supports in other parts of the house due to its shifting. An entire brick wall on the east side of the home was compromised beyond repair. An ominous fault line exists along the length of the property as a reminder of the continual instability on the Griffiths property.

Unquestionably, the landslide destroyed the Griffith home. In its aftermath condition as well as its proximity to an unstable ravine bank along the entire east boundary where storm water from the entire Subdivision continues to flow, the future residential use of the Griffith property has been substantially, if not entirely, taken as a matter of common sense and safety.

Accordingly, as a factual matter, there are exceptional circumstances which substantially deprive the Griffiths of the residential use of their property.

II) Griffiths' damages resulted from the Township's Actions.

The Township asserts as a matter of law there was not a *de facto* taking because there was not an actual, intentional exercise of its eminent domain power. Separately, the Township maintains there is no evidence the Township took any action that deprived the Griffiths of the residential use of their home or property. The Township characterizes its role as merely ministerial.

In support of its contentions, the Township primarily relies on *Moore v. Department of Environmental Resources*, 660 A.2d 677 (Pa. Cmwlth. 1995), a case factually distinct from the instant case. As the *Moore* Court described it, "(t)he only issue before us, which we decide adversely to Moore, is whether DER, for a closed period of time, took the oil and gas estate of Moore. We neither decide nor express any opinion herein as to whether Moore has an action, or the nature thereof, against DER and/or its lessee for its asserted ownership of the subject property." *Id.*, 660 A.2d at 686. Moore's claim for a *de facto* taking was based on an erroneous assertion by the Pa. D.E.R. that it owned the oil and gas estate under Moore's property from October 3, 1979 to October 30, 1984, when the D.E.R. conceded that it did not own this estate. The Commonwealth Court found that Moore's claim did not relate to any statutory or regulatory authority of the D.E.R. This holding has no bearing on the facts of this case.

However, the above holding is consistent with the provisions of Pennsylvania's Eminent Domain Code, wherein a "Condemnor" is defined as the acquiring agency "that takes, injures or destroys property by authority of law for a public purpose." 26 Pa. C.S.A. 103. (Emphasis added.). While the D.E.R. had no legal authority for its unilateral declaration of ownership of Moore's oil and gas rights, the Township herein was acting under the "authority of law" granted to it by its various ordinances and/or by several state laws. The Township had the authority to review, place conditions on, demand changes to, refuse the approval and/or ownership of the storm water system within the Subdivision.

The Township correctly points out that it did not exercise its eminent domain power in this case. This is a meaningless point because the Township did not have to exercise its eminent domain power; the developer was willing to grant ownership of the storm water system to the Township once all of the Township's conditions were met. The time and expense of formal eminent domain litigation was avoided. Yet the end result is the same because the Township has ownership of the Subdivision's storm water system for a public purpose.

What matters is that the Township is "clothed" with the power of eminent domain. *Griggs v. Allegheny County*, 402 Pa. 411, 168 A.2d 123 (1961), *reversed on other grounds*, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962); *Conroy-Prugh Glass Company, supra.* The Township does not have to actually exercise its power to condemn for a *de facto* taking to

occur. The Eminent Domain Code recognizes that a *de facto* taking claim does not require the actual exercise of eminent domain power. Specifically, the statute prescribes the contents for a Petition for Appointment of Viewers when no declaration of taking was filed. 26 P.S.A. 502(c)(sub-titled **"Condemnation where no declaration of taking has been filed.").**

The *Moore* case, relied upon by the Township, stated: "(w)hile it is true that the actual exercise of eminent domain is not a requisite to a *de facto* taking, where *de facto* takings have been found, either physical intrusion or the imminence or inevitability of condemnation, as that term is statutorily defined, has been an essential element." *Id., 660 A.2d at 681.*

As the *Moore* Court observed, a physical intrusion onto the condemnees' property has been a basis for finding a *de facto* taking occurred. There is no factual dispute that the September 9, 2013 landslide was a physical intrusion onto the Griffiths' property with direct and immediate consequences to them.

The question becomes what role the Township played in the physical intrusion onto the Griffiths' property. The Township tries to distance itself from the landslide by painting its role as that of a rubber stamp.

Contrary to the Township's portrayal, it was not acting in a ministerial manner during the lengthy process of bringing the Subdivision to legal fruition. This is not a case of a government entity doing a mandatory act without any discretion. Over the course of twenty-one years, from 1966 through 1987, the Township was intentionally and actively engaged in the planning and approval of the storm water systems for the entire Subdivision.

The Township's involvement began on March 11, 1966 when the Griswolds applied for approval of the preliminary plot plan for Section 1 of the Subdivision. On April 28, 1966, the Township conditionally approved the Section 1 plans and entered into an Articles of Agreement with the Griswolds. The terms of this Agreement clearly define the central role played by the Township in the development of the Subdivision.

Among the provisions of the Articles of Agreement were the following:

1. "…the Board of Supervisors of Millcreek Township have required as a condition of their approval that certain construction work be done by Owner as herein set forth…"

2. "Owner will construct all roads shown on said Plan and provide adequate drainage therefor ….in compliance with standard specifications heretofore adopted by the Board of Supervisors of the Township."

3. "All work in connection with the construction of said improvements shall be subject to inspection from time to time by the Township Engineer …and all of said work shall be completed to the satisfaction of said Engineer…".

4. "When all of the work set forth in this Agreement to be done by the Owner shall be fully performed by him, and the Township Engineer, or other duly authorized person, shall issue his final certificate that said work has been completed in accordance with the Ordinance of this Township, the Township will accept dedication of such roads, drainage facilities and other improvements as shown on said Plan…"
Joint Stipulation of Facts, Paragraph 11.

On April 18, 1966, the Griswolds executed the No. 1 Plot Plan, declaring in part that they "hereby dedicate forever for public use for highway purposes all the streets, roads, drives, lanes and other public highways and drainage easements shown on this plan with the same force and effect as if the same had been opened or taken through legal proceedings...". As a result, the drainage easements and storm water system for Section 1 were dedicated for the public's use without the necessity of the Township exercising its eminent domain power. The Township accepted this dedication on May 2, 1966.

The storm water system, as dedicated by the Griswolds and accepted by the Township, collected storm water from Elizabeth Lane and parts of Tramarlac Lane and transported it via the 36-inch pipe into the ravine in Easement 1, adjacent to what later became the Griffiths' property. On May 4, 1966, the Township by letter informed the Griswolds to install additional storm water inlets at the northerly end of Elizabeth Lane.

The Griswolds next proceeded with the plans for Section 2. On April 30, 1975, the Griswolds applied to the Township for final approval of Lot 12. Unconditional approval for Lot 12 was granted by the Township on June 23, 1975. The storm water plan for Lot 12 was to transport storm water collected from it to the ravine in Easement 1.

Shortly thereafter, the plans unfolded for the approval of Sections 3-6. On February 25, 1976, the Griswolds applied for approval of what became known as the "1976 No. 3 Plans" for the development of Section 3. These plans created Lots 13-36 and identified three drainage easements. The first drainage easement is Easement 1, which was then servicing only Section 1.

The second drainage easement depicted in the 1976 No. 3 Plans begins on Saybrook Place and continues along the boundary between Lots 12 and 13 to the mouth of the ravine containing Easement 1. The plans called for the collected storm water to be transported in a 21-inch pipe through an area designated as Easement 2, which then connected to the 36-inch discharge pipe in Easement 1 servicing Section 1, which discharges into the ravine adjacent to the Griffiths' property.

The third drainage easement starts on Tramarlac Lane, goes through Lot 20, proceeds along the western boundary lines of the Sedimentation Basin Lots 16 and 17, until it ends at Lake Erie. This area is depicted as Easement 3.

These three drainage easements were intended to utilize two discharge points. The first discharge point was the existing one in the ravine known as Easement 1. Collected storm water from Sections 1 and 2 would be directed to discharge from the 36 inch pipe in the Easement 1 ravine.

The second part of the plan created a new discharge point. It started with inlets connected to a 12 to 30 inch pipe extending along Tramarlac Lane to the intersection with Wolf Road, north between Lots 20 and 29 to the Lyme Court. The plans called for the diversion of storm water from Lots 20-29 north along Tramarlac Lane into a 30 inch pipe located within Easement 3, with a discharge point at the south end of an identified sedimentation basin close to the bluff above Lake Erie. This discharge point would have been west of the Easement 1 discharge point and consistent with the natural flow of storm water from these properties.

On April 28, 1976, the Township Supervisors approved the 1976 No. 3 Plans. Among the conditions of this approval was the requirement the Griswolds provide a copy of the Soil Erosion and Sedimentation Plan as mandated by the Pennsylvania Department of

Environmental Resources. In late June, 1976, the Griswolds provided a copy of the Soil Erosion and Sedimentation Plan which called for the storm water to be discharged into the two different discharge areas identified in the 1976 No. 3 Plans.

Meanwhile, on December 11, 1977, the Township issued a building permit to Thomas Venable to construct a residence at 5020 Saybrook Place. This residence was subsequently purchased by Richard E. Griffith and is now the subject of this lawsuit. The building permit issued to the Venables noted: "Owner assumes total responsibility for locating dwelling in close proximity to top of ravine." At the time this building permit was issued, the only storm water being discharged into the ravine came from Section 1. There is no evidence the building permit was recorded at the Erie County Recorder's Office. Nor is there evidence the Griffiths were aware of this language in the building permit.

What occurred thereafter was a series of significant changes to the 1976 No. 3 Plans. There were a host of reconfigurations of plots, lots, streets, easements, drainage areas and a discharge point. What became known as the "1978 No. 3 Plans" materially changed the storm water system and had a direct impact on the reasons why the September 9, 2013 landslide occurred on the Griffith property.

The most drastic change was the elimination of Easement No. 3 and the discharge point for storm water into the sedimentation basin. All of the storm water that was intended to be discharged within Easement No. 3 instead got diverted into larger pipes that ultimately got discharged through the 42-inch pipe in Easement 1. All of the storm water collected from Lyme Court and part of Tramarlac Lane from Wolf Road north to Lot 20 is carried from a 36-inch pipe to the east, then north through a 42-inch pipe connecting to what was originally a 21-inch pipe but now doubled to a 42-inch pipe in Easement No. 2, which then connects to the 42-inch pipe that empties above the 36-inch pipe at the mouth of the ravine in Easement 1.

Following a series of communications between the Griswolds and the Township involving the approval of 1978 No. 3 Plans and the creation and reduction of bond requirements, on March 15, 1979, the Griswolds and the Township entered into another Articles of Agreement based on the 1978 No. 3 Plans.

Like their April 28, 1966 Articles of Agreement, the parties agreed to the same language conditioning the Township's final approval of the 1978 No. 3 Plans upon the Griswolds satisfaction of the construction work required by the Township; that the Township Engineer shall inspect the construction work periodically to ensure that all work was completed to his satisfaction; and the Township Engineer was to certify the Griswold's work was completed in accordance with the Township's Ordinance before the Township would accept the dedication of the improvements.

On December 6, 1978, the Griswolds dedicated the 1978 No. 3 Plans to the public, including the storm water system with just one discharge point in the Easement 1 ravine. On March 16, 1979, the Township Supervisors officially accepted this dedication.

In subsequent years, the Township went through the same process to review, inspect and approve the creation and implementation of Sections 4-6 of the Subdivision. All of these plans included a storm water system that collected storm water from the west and south of Easement 1 and instead of discharging it at a northern point consistent with its natural flow toward Lake Erie, diverted it through bigger pipes to ultimately discharge through the 42-inch pipe in the ravine in Easement 1.

Notably, there is no record of the Township requiring a second, updated Soil Erosion and Sedimentation Plan reflecting the impact on Easement No. 1 from the increased volume of storm water diverted from the entire Subdivision.

There were at least two occasions when the Township had to act on a drainage problem. In the first instance, the Township advised the Griswolds in June, 1982, that all sump pump lines must discharge directly into the storm pipes or inlets and not onto the surface of the streets.

The Township had to take action the next year on another storm water issue. By letter dated November 4, 1983, the Township informed the Griswolds, *inter alia*, that the energy dissipater at the discharge end of the storm sewer within Easement No. 2 needed to be installed. This dissipater should have been located below the 42-inch pipe in Easement 2. There is no record of whether it was ever installed, although the bond securing such work was subsequently released.

On September 14, 1987, the Township accepted the last of the dedications of the storm water system for the Subdivision. The transition process begun on May 2, 1966 when the Township accepted ownership of the storm water system for Section 1 ended on September 14, 1987 with the acceptance of ownership of the storm water system for Section 6. Since then, the Township has owned and had the responsibility to maintain all of the storm water system for the entire Subdivision knowing that it discharges into the ravine in Easement 1 adjacent to the Griffiths' property.

As this history reflects, at all times the Township possessed the discretionary power to prescribe what conditions the Griswolds needed to complete to secure the Township's approval of the Subdivision's storm water system. The Township continually exercised its discretion whether to grant preliminary approval of submitted plans and whether to impose conditions the Griswolds must meet. In fact, the Township imposed a variety of conditions over the years and required the Griswolds to purchase a bond to secure their performance of those conditions. The Township Engineer had the authority to inspect the developer's work. The Township Engineer had discretion when and whether to certify the work of the developer as compliant with the Township's conditions. Without the Township's exercise of its discretionary approval power, the Griswolds could not have implemented the storm water system that was the primary cause of the September 9, 2013 landslide.

The Township was not a passive observer when a developer of prime residential land within its borders planned and implemented a series of residential developments over three decades. As required by state law and/or its own ordinances, the Township was actively engaged in the planning, implementation, maintenance and ownership of the storm water system for the Griswold residential developments.

Thus, the Township's attempt to portray its actions as ministerial is simply inaccurate. To the contrary, the Township was acting within its discretionary "authority of law" and thus satisfies the statutory definition of a Condemnor.

III) The Landslide Was A Direct, Immediate And Unavoidable Consequence Of The Township's Actions

The Township denies that it did any act that caused harm to the Griffiths. Instead, the Township fingers the Griswolds as the culprits; after all, it was the Griswolds who did all of the planning and construction work for the Subdivision and profited therefrom. The

Township argues there is no evidence of its intent to harm the Griswolds. The Township denies any negligence; even if negligence existed, it cannot be the basis for a claim of a *de facto* taking.

These arguments require blinders for the Township's role in the massive diversion of storm water in this case. The culprit in this case is not the Griswolds, it is the Township's proactive role in the diversion of storm water that dramatically changed the normal flow and manner of storm water coming into the ravine in Easement 1.

The powerful impact of storm water flow has been a frequent subject of condemnation litigation. Noteworthy is this observation by the Commonwealth Court:

> The law of surface waters basically states, water must flow as it is wont to flow. Thus, it is clear that only where water is diverted from its natural channel or where it is unreasonably and unnecessarily changed in quantity or quality has the lower owner received an injury.

Snap-Tite, Inc. v. Millcreek Township, 811 A.2d 1101, 1106 (Pa. Cmwlth. 2002).

The *Snap-Tite* Court concluded by quoting from *Torrey v. City of Scranton*, 19 A. 351 (Pa. 1890): "There is no liability on the part of a municipal corporation for the flooding of private property from the inadequacy of gutters, drains, culverts, or sewers *as long as the municipality has not diverted water from its natural flow." Snap-Tite, Inc. at p. 1106. (Emphasis in original).*

The Subdivision is situated within a watershed where all storm water naturally flows toward Lake Erie. Prior to the development of the Subdivision, the storm water would flow in a diffuse path of least resistance toward Lake Erie.

The Subdivision consists of roughly 90 total acres of drainage area. The storm water from only the eastern part of the 90 acres naturally flowed toward the ravine in what became Easement No. 1. Importantly, the drainage capacity for the ravine in Easement No. 1 was analyzed by Steven R. Halmi, a professional engineer. He concluded there was "a significant increase in the total drainage area to the ravine from a historic, pre-development drainage area of about 39.5 acres to an actual, post-development drainage area of about 89.9 acres." *Joint Stipulation, Paragraph 109(c).* He also concluded "that the peak rate of run-off to the ravine is more than double that which existed prior to the development of the streets and supporting storm sewer infrastructure." *Id.*

The engineering report by R. A. Smith offered this concurrence: "The drainage area and total peak rates of run off have doubled as result of development with the total flow directed to the ravine due to the residential development." What is catchy about this last comment is the inference that the developer may have increased the area for development by eliminating land for drainage, which may explain the elimination of Easement 3 and a second discharge point from the 1976 No. 3 Plans.

When Section 1 was developed and approved, its storm water system led to the discharge of water in a direction it likely flowed before, into the ravine within Easement No. 1. However, this storm water moved now in a different form. Instead of travelling in a diffuse pattern through the 39.5 acres, the storm water came in a concentrated force as it discharged through the 36-inch pipe from an elevated position. As a matter of common sense, the increased

volume and concentrated flow of storm water created a more powerful force for the erosion of the ravine bank than otherwise would have occurred.

What happened after the development of Section 1 is equally troubling. In 1975, as part of the storm water plan for Section 2, Easement No. 2 was created to receive storm water from Lot 12. Easement No. 2 started at a "Future Street" which later became Saybrook Place. This easement starts at Saybrook Place and runs along the north border of Lot 12 until it connects with Easement No. 1 at the mouth of the ravine. Originally, there was going to be a 21-inch pipe running through Easement 2 into the 36-inch pipe which discharges into Easement 1. With the subsequent development of the remaining Sections, the 21-inch pipe was replaced by a 42 inch pipe, thereby doubling the pipe capacity of the concentrated flow of storm water flowing from Sections 3 to 6 into the Easement 1 ravine.

The next developments were likely the tipping point for storm water flow into the ravine in Easement 1. The year after Section 2 was approved, the Griswolds presented the 1976 No. 3 Plans for the development of Lots 13-36, located to the west and north of Section 1. Astutely, the 1976 No. 3 Plans created Easement 3, which was a new drainage area along the bank of Lake Erie to the west of Easement 1. The discharge point was at the southern end of a sedimentation basin. The location of this discharge point is in the direction the storm water from Lots 13-36 would naturally flow.

By 1978 the 1976 No. 3 Plans were significantly changed. As presented to the Township for approval, the 1978 No. 3 Plans eliminated Easement 3. Unlike the 1976 No. 3 Plans, the storm water system for Section 3 was changed to direct all of the storm water collected from Lots 13-36 eastwardly, connecting to a 42-inch pipe in Easement 2 which discharges above the 36-inch pipe in the ravine in Easement 1. This would not have been the direction the storm water would have naturally flowed from Lots 13-36.

The problem was compounded when the development of the lots for Sections 4 to 6 had approved storm water systems that did the same thing. The result is that since the mid- 1980s, the storm water systems for all six Sections of the Subdivision diverts storm water to the ravine in Easement 1. At a minimum, the storm water from roughly fifty of the Subdivision's ninety acres is getting diverted from its natural direction of flow. The result, as calculated by the engineers, is that the natural drainage area within the ravine receives double its normal amount of natural flow. This flow was also in a concentrated, forceful form discharged from two elevated positions.

The Township was inextricably involved in the diversion of storm water from its natural course and drainage area to another area where it would not naturally flow. The Township embraced a central role in the process that altered the original storm water plans from two discharge points to one discharge point in the Easement 1 ravine.

The Township's actions were intentional, purposeful and deliberate. The Township set the conditions the Griswolds had to meet for the Township's final approval. The Township Supervisors oversaw and approved all phases of the Griswold developments, ending with Township ownership of the storm water system. These events were not a single instance of benign action by the Township, nor an aberration from an otherwise sensible drainage plan. The Township's conduct cannot be described as accidental or unintentional. Instead, there was a public purpose driving the Township's decisions at all times.

The Township's attempt to cast the burden on the Griffiths to prove that it intended to

harm them is an inaccurate statement of the law. The Township does not cite any authority for the proposition the landowner must establish that government officials intended to cause harm to the landowner by the taking of their property without filing a declaration of taking.

This is also not a case of a mere negligence claim against the Township. Instead, the facts herein show a government entity, clothed with the power of eminent domain and acting within its legal authority, engaged in a course of conduct that substantially deprived a landowner of the residential use of their property. In re: *Crosstown Expressway Appeal*, 281 A.2d 909 (Pa. Cmwlth. 1971).

The case *sub judice* has several similarities to the facts of *Greger v. Canton Twp.*, 399 A.2d 138 (Pa. Cmwlth. 1979). The Gregers claimed a *de facto* taking of their property because of an overflow of sewage effluent from undersized septic tanks approved by Canton Township. The Gregers also faulted the municipality for failure to take proper measures to prevent the flow of sewage on adjoining properties and public streets. The Greger Court held: "where the evidence shows that the flooding of land and buildings is the direct and necessary consequence of the Township's drainage plan, even though the subject property may have been under a servitude of receiving natural drainage, there is a *de facto* taking by the Township." *Id., p. 140 citing Hereda v. Lower Burrell Twp.*, 48 A.2d 83 (Pa. Super. 1946).

In *Hereda, supra*, the Superior Court affirmed a *de facto* taking when the drainage system installed by Lower Burrell Township caused excessive water and sewer to flow onto the Hereda property. In an often-cited holding, the *Hereda* Court reasoned: "By appellant's act the water and sewage were accumulated and diverted in bulk into an artificial conduit and a channel and then discharged in volume on plaintiff's land where it would not otherwise have been discharged. Appellant was liable for the resulting injury, although the plaintiffs were under servitude of receiving the natural drainage." *Hereda*, at p. 84.

Another relevant situation occurred in *Central Bucks Joint School Building Authority v. Rawls*, 303 A.2d. 863 (Pa. Cmwlth. 1973). The Central Bucks Building Authority constructed a sewer line which emptied into a stream that flowed across the Rawls property. Among the problems this caused was an increase in the volume of effluent discharged onto the Rawls property and the erosion of the stream banks. In finding a *de facto* taking occurred, the dispositive facts were that a government entity had by a course of conduct caused water and sewage to be accumulated and diverted in bulk where it otherwise would not have flowed.

Like the Gregers, Heredas and the Rawls, the Griffiths were in a position of servitude to the Township by virtue of Easements 1 and 2. However, the Griffiths' servitude does not entitle or empower the Township to approve, own and maintain a storm water system that resulted in the landslide on the Griffiths' property. The Griffiths' receipt of an increased, diverted and concentrated flow of storm water caused by the Township's drainage system, the bulk of which would have naturally flowed elsewhere, supports their claim of a *de facto* taking.

The problems created by the intentional diversion of the Subdivision's storm water were exacerbated by the failure of the Township to reduce the man-made, exponential increase in the erosion factors affecting the ravine in Easement 1.

The pictures introduced into evidence of the placement of these two storm water pipes explain why the Griffiths' bank collapsed. The 36 inch pipe, which draws from the properties within Sections 1 and 2, sits one or two feet above the bottom of the ravine. The 42-inch

pipe, which services the remainder of the Subdivision, is situated directly above the 36-inch pipe at a distance of some four feet above the bottom of the ravine. Both pipes have an open flow of water descending from these elevated positions directly onto the ground.

According to the observations of Steven R. Halmi, a professional engineer, "(t)here are no headwalls, wingwalls or outlet protection at the end of the pipes. Water from these two pipes cascades directly onto the hard clay bottom of the ravine." *Report of Steven R. Halmi, P.E., November 13, 2014 as reported in Joint Stipulation, Para. 104.* According to the R.A. Smith Report, "Water continually discharges into the Ravine from the Storm Water System, even when a significant rainfall event has not occurred for some time." *Joint Stipulation, Para. 107(e).*

Because the storm water discharged from these two pipes does not permeate the hard clay bottom of the ravine, it moves across the land surface with the flow of gravity. Unfortunately, both pipes are aimed directly at the west bank of the ravine at a point where the collapse of the eastern part of the Griffiths' property occurred. It is unclear from the record why the pipes were not run farther down the ravine to discharge at point closer to Lake Erie thereby avoiding the impact on the Griffith bank.

Separately, it is unclear from the record why the storm water plans as approved by the Township did not include any measures to dissipate the energy of this increased flow of water dropping continually on the ground. Simple measures such as the placement of rip rap rock and/or erosion landscaping should have been implemented.

There is nothing in the record evidencing any attempt by the Township to study the impact of the diversion of so much storm water into the Easement 1 ravine from all parts of the Subdivision. In 1976, the Township required a Soil Erosion and Sedimentation Plan studying the impact of discharging storm water into two different discharge areas. Yet when the Township approved a plan eliminating the second discharge area and diverting all of the Subdivision's storm water into Easement 1, there is no evidence that a study was done to determine the impact on the soils of the ravine bordering the Griffiths property.

In sum, the Township assumed ownership and maintenance responsibilities of Easement 1 in 1966. The Township has a responsibility to maintain the storm water system in a manner that would not deprive neighboring owners of the beneficial use of their properties. Not only was the Township instrumental in doubling the amount of storm water discharging through the two pipes in Easement 1, there was nothing done to reduce its impact on the surrounding property.

The overwhelming weight of the engineering evidence is that the Township's storm water system within the Subdivision was the primary cause of accelerated erosion of the west ravine bank along the eastern border of the Griffiths' property.

According to the R.A. Smith Report: "the lack of maintenance within the ravine and lack of energy dissipation (placement of rip rap/rock) is a direct correlation to the erosion of the ravine slopes and the significant contributor to the September 2013 landslide that caused severe damage to the Griffith residence at 5020 Saybrook Place." *Joint Stipulation, Para. 108.*

Separately, the September 30, 2013 engineering report of Jerome D. Paulick, P.E., agreed: "I concur with this opinion and believe that this water discharging from the culverts accelerated the erosive condition (in the Ravine) that lead to the collapse of soil in the ravine, causing severe damage to the Griffith residence." *Joint Stipulation, Para. 109(a).*

The August 22, 2014 report from Patrick E. Gallagher, P.E., says he does not agree yet his conclusions are consistent with the R.A. Smith and Paulick reports: "I do not concur with this opinion and add that pipe flow concentrates total flow with increased flow rates and produces higher flow velocities causing accelerated erosion at the pipe outfalls. This location within the ravine contains two separate storm or culvert systems that carry greater volumes of flow at higher flow velocities from the developed watersheds." *Joint Stipulation, Para. 109(b).* To the extent that Gallagher attempts to limit the accelerated erosion to the area of the pipe outfalls, his conclusion is not credible.

What is credible is the final analysis within the R.A. Smith report:

> Based on my review of information as documented herein, observations of site conditions at the time of my visit of the property on October 17, 2017 and hydraulic calculations performed it is my professional opinion that the storm water discharges associated with the 36-inch and 42-inch diameter storm pipes caused accelerated erosion with the ravine as flow has been directed toward the west bank. The drainage area and total peak rates of run off have doubled as a result of development with the total flow directed to the ravine due to the residential development. The varied quantity of flows, duration of flows, and velocity of flows from these storm pipes has caused erosion and the removal of supporting soils that undercut the top of the slope along the western ravine and was the main cause of the landslide.
>
> As noted, this prolonged exposure to the ravine and supporting soils by this discharge, was further impacted with the lack of energy dissipation such as the placement of adequately sized rip rap rock, and maintenance of these two outfalls.
>
> Ownership and maintenance responsibilities of the storm water infrastructure belong to Millcreek Township, Erie County, PA.

Plaintiffs-Comdemnees' Joint Stipulation of Facts, p. 30, March 21, 2018.

The diversion of storm water within the Subdivision was the result of the purposeful, intentional and deliberative actions taken by the Township over the course of twenty-one years. The damages suffered by the Griffiths were the direct, immediate, necessary and unavoidable consequence of the exercise of the Township's authority in law.

The problems created by the diversion of storm water were compounded by the repeated approval by the Township of storm water plans that allowed the two storm pipes to empty prematurely, fall precipitously, proceed without dissipation and unnecessarily accelerate the erosion of the west bank of the ravine in Easement 1.

The Griffiths have established exceptional circumstances that rendered their home uninhabitable. The Township has substantially deprived the Griffiths of the beneficial use of their property as a residence by creating circumstances that preclude the future use of the property as a residence.

IV) The Griffiths' Petition was within the Statute of Limitations.

The Township relies on *Florek v. Commonwealth, Dep't of Transp.*, 493 A.2d 133 (Pa.

Cmwlth. 1984) for two propositions. First, the Township contends any claim for a *de facto* taking belongs to the Griffiths' predecessor in title, the Venables, who were the owners at the time the alleged taking occurred. As the Griffiths were a subsequent owner, the Township contends they were on notice of the drainage easements in favor of the Township and cannot assert a claim for a *de facto* taking.

Assuming arguendo the Griffiths are not barred as a subsequent owner from asserting a claim, the Township argues the Griffiths' Petition was not filed within any applicable statute of limitations.

The Township's arguments and reliance on *Florek, supra,* are unpersuasive. *Florek* has been disregarded more often than followed by other appellate panels.

The Township's two arguments are resolved by a determination of when the taking occurred. The Pennsylvania Supreme Court has held that a "limitation upon an owner's right to claim damages in condemnation cannot begin to run until he has had notice, actual or constructive, that his property has been condemned." *Strong Appeal,* 400 Pa. 51, 161 A.2d 380, 384 (1960). This holding makes constitutional sense, as otherwise a government entity could covertly take private property without due process notice to the injured landowner.

In *Lando v. Urban Redevelopment Authority of Pittsburgh,* 411 A.2d 1274 (Pa. Cmwlth. 1980), the Commonwealth Court adopted the trial court's reasoning "that the date of the injury and the date of the de facto taking are co-incident, otherwise a de facto taking would have no legal significance." 411 A.2d at 1276.

Citing these two precedents, the Commonwealth Court in *Appeal of Krauss,* 618 A.2d 1070 (Pa. Cmwlth. 1992), recognized the right of a landowner to receive condemnation damages caused by a water pipeline that was installed prior to the condemnee's ownership of the property. "Thus, we are of the opinion that the Krausses have stated a claim for condemnation damages and the fact that they did not hold title to the land when the pipeline was installed is not a defense to this action." *Id., pp. 1073-1074.*

In *Greger v. Canton Twp., supra,* the landowners were permitted to make a *de facto* taking claim despite the fact the Pennsylvania Department of Transportation installed the catch basin and culverts in question prior to the landowners taking title.

The same logic applies to the Griffiths. When the Griffiths took title to the property, they were on notice that the Township had two drainage easements on their property. It is also true that the two drainage pipes were in place. However, there is no evidence the Griffiths were aware that the storm water system approved and owned by the Township was going to cause a massive landslide on September 9, 2013 severely damaging their home such that it is uninhabitable.

The Township imputes upon the Griffiths' knowledge that the landslide was a foreseeable event. The Township argues the Griffiths cannot assert a claim after the landslide occurs. The problem with this reasoning is that if the landslide was a foreseeable event for the Griffiths, it was surely a foreseeable event for the Township. Any knowledge the Griffiths possessed about the problems posed by the storm water system was equally possessed by the Township. It was the responsibility of the Township, not the Griffiths, to take measures to ensure the landslide did not occur.[1]

[1] To extend the Township's argument means the Griffiths needed to file a pre-emptive *de facto* taking claim prior to the landslide. However, the Griffiths could not do so because there were no damages known to them at that time and thus no taking.

The Township had the legal authority under its eminent domain powers to take any action necessary to maintain or repair the storm water system, including the power to take property from the Griffiths by a *de jure* filing. The Township's failure to do so left the Griffiths with little recourse but to file a claim for a *de facto* taking.

In *Erie Municipal Airport Authority v. Agostini,* 561 A.2d 1281 (Pa. Cmwlth. 1989), *petitions for allowance of appeal denied,* 575 A.2d 116 (Pa. 1990), the Commonwealth Court held that a *de facto* taking occurs "when the activities of the condemner substantially deprive property owners of the beneficial use and enjoyment of their property." *Id.,* 561 A.2d at 1284. *See also Allegheny County Appeal,* 437 A.2d 795 (Pa. Cmwlth. 1981).

Herein, it is uncontroverted the activities of the Township did not deprive the Griffiths of the residential use of their property until September 9, 2013. Therefore, the Griffiths had no claim for a *de facto* taking until that date.

A similar result was reached in *Faleski v. Com., Dept. of Transp.,* 633 A.2d 1308 (Pa. Cmwlth. 1993). In constructing Pennsylvania Route 378 in 1964 through 1967, the Pennsylvania Department of Transportation and the City of Bethlehem raised the grade of the road surfaces and installed a storm water drainage system at the intersection of two streets in the City of Bethlehem. In August of 1982, water and debris caused flooding, damaging the Faleski's neighboring property. Flooding occurred at least three times thereafter. On July 29, 1988, the Faleski's filed a Petition for a *de facto* taking. Among the Defendants' Preliminary Objections was the Faleskis' claim was barred by the statute of limitations. The Commonwealth Court disagreed: "the Faleskis' Petition is not precluded by the six year statute of limitations and that the statute of limitations commenced when the first flooding occurred, in August of 1982…". *Id.,* 633 A.2d. at 1311.

Inherent within this result is that the Faleskis were not on notice of their possible claim despite their knowledge of the road grading and drainage system installation done in the late 1960s. The Faleskis understandably assumed the Commonwealth and the City properly designed and maintained the storm water system at the intersection of two streets. It was not until the first flooding occurred that the Faleskis could claim they were deprived of the beneficial use of their property.

Like the floods that swamped the Faleskis, the Griffiths were not on notice of the September 9, 2013 landslide prior to its occurrence. The Griffiths reasonably believed the Township had approved an appropriate storm water system and after taking ownership of the system, would properly maintain it to prevent damage to neighboring properties at all times.

In sum, the statute of limitations did not begin to run in 1966 when the Township became actively involved in the oversight and approval of the Subdivision storm water system. The statute of limitations did not begin to run in 1987 when the Township completed its ownership of the storm water system for the entire Subdivision. Nor did the statute of limitations begin to run in 1992 when Richard Griffith took ownership or on August 3, 2006 when Noreen Griffith became an owner. The Griffiths enjoyed the residential use of their property until the landslide occurred and thus had no prior basis for a *de facto* claim.

The applicable statute of limitations herein is six years. 42 Pa.C.S.A. 5527(a)(2). It commenced on September 9, 2013 and had not expired when the Griffiths filed this lawsuit.

CONCLUSION

The Griffiths have met their burden of proving that a *de facto* taking occurred. The Township has the power of eminent domain. There are exceptional circumstances that substantially deprived the Griffiths of the residential use and enjoyment of their property. The damages to the Griffiths' property interest were the immediate, necessary and unavoidable consequence of the Township's course of conduct acting under its legal authority. The Township's conduct was also intentional, deliberative and purposeful. The Griffiths' Petition was timely filed.

BY THE COURT
/s/ **William R. Cunningham, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

JAQUEL SHAMON TIRADO, Defendant

CRIMINAL PROCEDURE / TRIAL PROCEDURE / PROSECUTORIAL MISCONDUCT

The case law in Pennsylvania regarding prosecutorial misconduct is well settled in that a prosecutor has considerable latitude during closing arguments and his arguments are fair if they are supported by the evidence or use inferences that can reasonably be derived from the evidence.

CRIMINAL PROCEDURE / TRIAL PROCEDURE / PROSECUTORIAL MISCONDUCT

Prosecutorial misconduct occurs only where the unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility toward the defendant, thus impeding their ability to weigh the evidence objectively and render a true verdict.

CRIMINAL PROCEDURE / TRIAL PROCEDURE / PROSECUTORIAL MISCONDUCT

An allegation of prosecutorial misconduct requires trial courts to evaluate whether a defendant received a fair trial, not a perfect trial.

CRIMINAL PROCEDURE / TRIAL PROCEDURE / CLOSING ARGUMENT / PROSECUTORIAL MISCONDUCT

In determining whether a prosecutor engages in impermissible conduct during closing argument, Pennsylvania follows Section 5.8 of the American Bar Association (ABA) Standards, which provides the following standards applicable to Commonwealth's closing argument to the jury:

(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

See Commonwealth v. Judy, 978 A.2d 1015, 1019-20 (Pa. Super. 2009).

EVIDENCE / DEMONSTRATIVE EVIDENCE

Visual aids may be used to assist the jury in understanding the evidence in appropriate cases, and permission to do so is within the sound discretion of the trial judge. This rule applies equally to demonstrative aids used during the actual trial phase and during the parties' opening and closing arguments.

EVIDENCE / DEMONSTRATIVE EVIDENCE

Visual aids that summarize other evidence are generally permissible pedagogic devices, especially when used to organize complex testimony or transactions for the jury.

EVIDENCE / DEMONSTRATIVE EVIDENCE

As with the admissibility of other types of evidence, the admissibility of a slow-motion videotape rests within the sound discretion of the trial court, and the Pennsylvania Supreme Court will not reverse absent an abuse of discretion.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
CR 3831 of 2016

Appearances: Nathaniel E. Strasser, Esq., for Defendant Jaquel Shamon Tirado
Assistant District Attorney Michael E. Burns and Assistant District Attorney Jeremy C. Lightner for the Commonwealth

OPINION

Domitrovich, J. July 6, 2018

The matter before this Trial Court is the Motion for Judgment of Acquittal and/or Motion for New Trial filed by Defendant Jaquel Shamon Tirado ("Defendant"), by and through his counsel, Nathaniel E. Strasser, Esquire. The issue as presented by defense counsel is whether counsel for the Commonwealth during closing argument, by "intentionally presenting an altered, edited version of [a surveillance] video in its demonstrative aid . . . misled the jury in its closing argument [which] had the unavoidable effect of impeding the jury's ability to objectively weigh the 'true' evidence."

This Trial Court provides the following analysis:

Procedural and Factual Background

On December 22, 2016, the District Attorney's Office filed a Criminal Information charging Defendant and his co-conspirators shot and killed Stephen Bishop at or near the 2000 block of Cottage Street in Erie, Pennsylvania. The District Attorney's Office filed the following counts against Defendant: Criminal Homicide/Murder, in violation of 18 Pa.C.S. § 2501(a); Aggravated Assault, in violation of 18 Pa.C.S. § 2702(a)(1); Aggravated Assault, in violation of 18 Pa.C.S. § 2702(a)(4); Recklessly Endangering Another Person, in violation of 18 Pa.C.S. § 2705; Firearms not to be carried without a License, in violation of 18 Pa.C.S. § 6106(a)(1); Possession of Firearm by a Minor, in violation of 18 Pa.C.S. §6110.1(a); Tampering with or Fabricating Physical Evidence, in violation of 18 Pa.C.S. § 4910(1); Possessing Instruments of Crime, in violation of 18 Pa.C.S. § 907(a); Criminal Conspiracy-Criminal Homicide/Murder, in violation of 18 Pa.C.S. § 903; Criminal Conspiracy-Aggravated Assault, in violation of 18 Pa.C.S. § 903; Criminal Conspiracy-Aggravated Assault, in violation of 18 Pa.C.S. § 903; and Possession of Firearms Prohibited, in violation of 18 Pa.C.S. § 6105(a)(1).

On March 21, 2017, Defendant, by and through his counsel, Nathaniel E. Strasser, Esq., filed Defendant's Petition for Writ of Habeas Corpus. On April 19, 2017, a hearing was held on Defendant's Petition for Writ of Habeas Corpus at which this Trial Court heard expert testimony from toolmark examination expert Corporal Dale Weimer. This Trial Court also considered the Preliminary Hearing testimony from Detective Michael Hertel of the City of Erie Police from November 18, 2016. By Opinion and Order dated May 1, 2017, this Trial Court concluded the Commonwealth failed to produce sufficient evidence as to the

specific barrel length of the firearm used by Defendant Jaquel Shamon Tirado to support the charges of Firearms Not to be Carried Without a License (18 Pa.C.S. § 6106(a)(1)) and Possession of Firearms by a Minor (18 Pa.C.S. § 6110.1(a)). Specifically, no testimony or evidence was presented regarding a specific barrel description of the handgun, nor was any testimony or evidence presented demonstrating an analysis of shell casings found at the scene was performed to determine the type of firearm used. Thus, this Trial Court granted Defendant's Petition for Writ of Habeas Corpus to the extent this Trial Court dismissed Counts Five and Six from the Criminal Information.

After jury selection, a jury trial was held on August 1, 2, and 3, 2017. On August 3, 2017, the jury returned verdicts of guilty against Defendant for the following charges: Criminal Homicide/Murder, Criminal Conspiracy/Murder of the First Degree, two counts of Aggravated Assault, two counts of Criminal Conspiracy/Aggravated Assault, Recklessly Endangering Another Person, Possession of Instruments of a Crime, Tampering Evidence, and Person not to Possess Firearms.

On March 29, 2018, Defendant's counsel filed the instant Motion for Judgment of Acquittal and/or Motion for New Trial. On April 11, 2018, argument was held on said Motion, and by Order dated the same day on April 11, 2018, this Trial Court directed both counsel for Defendant and Commonwealth to file Memoranda of Law on the relevant issues presented in Defendant's Motion. On May 1, 2018, Defendant's counsel filed a Motion for Extension to File Memorandum of Law wherein counsel for Defendant indicated the court reporter needed more time to transcribe the relevant portions of the jury trial in this matter. Thus, by Order dated May 2, 2018, this Trial Court granted Defendant's Motion for Extension to File Memorandum of Law. On June 4, 2018, Defendant's counsel filed Defendant's Memorandum of Law in Support of Defendant's Post-Sentence Motion, and on June 12, 2018, counsel for Commonwealth filed the Commonwealth's Memorandum of Law in Opposition to Defendant's Post-Sentence Motion. Defense counsel provided to this Trial Court a limited number of transcripts: testimony of Detective Christopher Janus from August 1 and 3, 2017 and the Commonwealth's closing argument from August 2, 2017.

Issue:

The specific issue before this Trial Court is whether Commonwealth committed prosecutorial misconduct in utilizing a previously admitted edited surveillance video in Commonwealth's closing argument where the jury watched and heard both the edited and unedited versions of the video exhibits several times during the trial.

Legal Discussion:

The case law in Pennsylvania regarding prosecutorial misconduct "is well settled [in] that a prosecutor has considerable latitude during closing arguments and his arguments are fair if they are supported by the evidence or use inferences that can reasonably be derived from the evidence." *Commonwealth v. Holley,* 945 A.2d 241, 250 (Pa. Super. 2008). Prosecutorial misconduct occurs only where the "unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility toward the defendant, thus impeding their ability to weigh the evidence objectively and render a true verdict." *Id.* Therefore, "an allegation of prosecutorial misconduct requires [trial courts] to evaluate whether a defendant received a fair trial, not a perfect trial." *Commonwealth v. Judy,* 978 A.2d 1015, 1019 (Pa. Super. 2009). In determining whether a prosecutor engages

in impermissible conduct during closing argument, Pennsylvania follows Section 5.8 of the American Bar Association (ABA) Standards, which provides the following standards applicable to Commonwealth's closing argument to the jury:

> (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

Judy, 978 A.2d at 1019-20.

Moreover, "[v]isual aids may be used to assist the jury in understanding the evidence in appropriate cases, and permission to do so is within the sound discretion of the trial judge." *Commonwealth v. Rickabaugh,* 706 A.2d 826, 837 (Pa. Super. 1997) (quoting *Commonwealth v. Pelzer,* 612 A.2d 407, 412 (Pa. 1992)). Significantly, this rule "applies equally to demonstrative aids used during the actual trial phase and during the parties' opening and closing arguments." *Id.; see also* Pa.R.E. 1006 (a proponent of evidence may use a summary to prove the content of voluminous recordings that cannot be conveniently played in court if the originals are available to opposing parties and the court); *see also United States v. Crockett,* 49 F.3d 1357, 1360–61 (8th Cir. 1995) ("Visual aids that summarize other evidence are generally permissible pedagogic devices, especially when used to organize complex testimony or transactions for the jury."); *see also Commonwealth v. Cash,* 137 A.3d 1262, 1277 (Pa. 2016) ("[A]s with the admissibility of other types of evidence, the admissibility of a slow-motion videotape rests within the sound discretion of the trial court, and [the Pennsylvania Supreme Court] will not reverse absent an abuse of discretion.").

For example, the Pennsylvania Supreme Court in *Jordan* concluded the trial court did not commit an abuse of discretion in permitting the Commonwealth to play a slow-motion surveillance videotape during closing argument where the videotapes were played to the jury several times during trial; the jury knew two versions of the video tape existed; the time that transpired was displayed on the slowed-down version which the Commonwealth repeatedly reminded to the jury; and the Commonwealth during closing argument emphasized the slowed-down portion actually encompassed only two seconds. *Commonwealth v. Jordan,* 65 A.3d 318, 329 (Pa. 2013).

Courts in other jurisdictions have concluded prosecutors are permitted to play video exhibits, including excerpts of the video exhibits, during closing argument to the jury. *See e.g. State v. Muhammad,* 359 N.J. Super. 361, 383, 820 A.2d 70, 83 (N.J. Super. 2003) (finding no abuse of discretion in permitting the playback of video excerpts during prosecutor's closing argument since the videos "were not taken out of context and did not misstate or

distort the testimony of the witnesses presented" and "were used as an aid to the prosecutor in presenting her arguments"); *see also Hodges v. State*, 194 Ga.App. 837, 392 S.E.2d 262, 263 (1990) (replay of portion of video statement during closing is not a recall of a witness but a verbatim repetition of testimony already in evidence, and trial court did not erroneously exercise discretion in permitting the video); *see also State v. Bonanno*, 373 So.2d 1284, 1292 (La.1979) ("Because the tape recorded statements were properly admitted into evidence at trial, the [trial] court did not err in allowing the state to replay the tapes during its closing argument.").

Where a defendant claimed the prosecutor presented to the jury edited tape-recorded comments during closing argument to make it appear as though the defendant was confessing to murder, the Connecticut Supreme Court held the prosecutor did not engage in prosecutorial misconduct. *State v. Skakel*, 276 Conn. 633, 888 A.2d 985 (2006). Specifically, in *Skakel*, defense counsel argued the prosecutor manipulated a tape-recorded interview of defendant with a writer for a book about defendant's life, and that by omitting certain portions of the tape, the prosecutor conveyed to the jury an unfair impression of the evidence to the jury. *Id.* at 1070. The Connecticut Supreme Court however concluded the presentation was not deceptive as "it was not improper for the [prosecutor] to play for the jury approximately two minutes of the defendant's tape-recorded interview . . . and to display trial exhibit photographs of the victim while the tape was being played." *Id.* at 1069. Specifically, the Connecticut Supreme Court explained in *Skakel*:

> After viewing the audiovisual presentation, we are not persuaded that there is any reasonable likelihood that the state's presentation confused the jury or prejudiced the defendant in any way. Contrary to the defendant's claim, the presentation itself was not deceptive. That presentation consisted of the written transcript of the interview . . . , which the jury already had seen in its entirety. . . .

Id. Thus, the Connecticut Supreme Court in *Skakel* "reject[ed] the defendant's claim that the [prosecutor's] use of audiovisual aids during closing argument violated his right to a fair trial." *Id.*

In the instant case, Commonwealth moved for the admission of a series of unedited video recordings, which this Trial Court admitted as Commonwealth's Exhibits 36(a)-(j) without objection from counsel for Defendant. Both counsel also stipulated to the authenticity of said unedited videos. (*See* Notes of Testimony, Jury Trial, Day 2 ("N.T.2."), pg. 10:21-11:6; 11:20-12:2). Said unedited video recordings are surveillance videos taken from various businesses near the scene of the murder. These unedited video recordings depict the actions of Defendant and his co-conspirators, as well as the victim, Stephen Bishop, prior to the shooting and killing of Mr. Bishop and the events occurring shortly thereafter.

During the Commonwealth's case-in-chief, the jury watched and heard the individual unedited video surveillance recordings of Exhibits 36(a)-(j) from different angles and different surveillance cameras while Detective Janus simultaneously testified to their contents. (N.T.2. at 12:14-29:11). The individual video recordings of Exhibits 36(a)-(j) were unedited, so no footage was excised from the any of these videos. Particularly relevant to this analysis, the jury watched and heard the contents of Video Exhibit 36(h) ("Unedited Video Exhibit 36(h)"), one

of the unedited video surveillance recordings from Exhibits 36(a)-(j). Specifically, Unedited Video Exhibit 36(h) is a surveillance recording with audio obtained from the CBK Variety Store displaying, at a southwestern direction, the entrance to a parking lot of the Polish National Alliance Club ("PNA Club") and part of East 21st Street. (*See id.* at 29:12-19). According to the timestamp, Unedited Video Exhibit 36(h) shows Defendant and his co-conspirators leaving the camera's periphery at approximately 13:41:45. A period of seventy-three seconds (from 13:41:45 to 13:42:58) is a lull in activity. A series of eight gunshots are then heard starting at 13:42:58. The eighth and final gunshot is heard at 13:43:04.

At issue in this case is the Commonwealth's combined video recordings in Exhibits 36(a)-(j), which consist of independent, unedited surveillance video recordings from various properties, into an edited compilation video ("Compilation Video Exhibit 38"). The Commonwealth explained this Compilation Video Exhibit 38 provided an overview to the jury of the events prior to and after the shooting of Mr. Bishop. As explained by Detective Janus, Compilation Video Exhibit 38 is composed of the following:

> BY ADA LIGHTNER:
>
> Q: So before we view this, explain what this is.
>
> A: Basically, we have taken all of the videos that we have collected, and we have put it in order, and you'll see it through as we have seen it. Some of the areas have been edited to make it quicker, more of a time lapse, but it would b[e] an overview from where we first started off with this original video where you'll see the victim, defendant, second individual and the individual on the bicycle when they come walking this way and running this way, to the last individual coming back. You'll see all of the angles simultaneously, like at the same time, to give an overview of the incident.

(*Id.* at 38:22-39:9). Regarding the "time lapse" as described by Detective Janus above, Detective Janus indicated to the jury:

> Q: Going to see time jump in the bottom indicating we're moving ahead?
> A: Yes.
> Q: Another jump now?
> A: Another jump. . . .

(*Id.* at 39:10-14). Detective Janus confirmed in the following that the Compilation Video Exhibit 38 was played in the presence of the jury during Commonwealth's case-in-chief:

> Q: Okay. That's an entire compilation of the video of those individuals?
> A: Yes, it is.

(*Id.* at 40:24-41:1). The Commonwealth then moved to admit Compilation Video Exhibit 38, which this Trial Court admitted with no objection from defense counsel, who indicated he had previously seen the video:

ADA LIGHTNER: Couple more things, Your Honor. Now, I want to authenticate this next video with the witness. And Attorney Strasser knows this is coming, and he's viewed it. So I would ask to play that now and enter it into [] evidence as Commonwealth's 38.

THE COURT: No objection?

ATTORNEY STRASSER: No objection. I have seen that.

THE COURT: Okay

(*Id.* at 38:11-20; *see also id.* at 41:2-8). Later, Detective Janus further indicated to the jury that in the Unedited Video Exhibit 36(h), the seventy-three seconds of footage of lull time before the gunshots were fired were included. Detective Janus expressly noted to the jury however that in Compilation Video Exhibit 38 the Commonwealth had excised the seventy-three second lull:

Q: How long do we have from them disappearing on screen until the shots that killed the victim are fired?
A: Can I come over here? It would be approximately 73 seconds – or I'm sorry – 47 seconds.
Q: Well, it's 41[:]45 to 42[:]58?
A: I'm sorry. Yeah. I'm going in the wrong – a minute and 13 seconds.
Q: Which would be the 73 seconds that you said a moment ago?
A: Yes
Q: And in that time, how many shots were fired?
A: Eight
Q: And where did you discover ballistics evidence at?
A: On cottage in the 2000 block.
Q: How many individuals – or how many firearms were you able to uncover evidence of?
A: Two.
Q: And were you able to locate any firearms on scene?
A: No, I was not.
Q: And were you able to locate any groups of individuals fleeing the scene?
A: Yes.
Q: and how many individuals were in that group?
A: Two.
Q: And were those individuals – well, what are they doing with their hands as they're leaving?
A: They were bent. The right arms are bent, placed in what appears to be in the front are of their pants' pockets on certain cameras, and their left hands are moving freely or swinging as they're running.
Q: Okay. You said 73 seconds. Is it fair to say the video is not going to show 73 seconds?
A: Correct.
Q: Because it's an edited version?
A. It's edited. That portion, maybe 65 or 70 seconds are cut out.

(*See* Notes of Testimony, Day 3, ("N.T.3") Aug. 2, 2017, at pg. 157:13-159:1).

The jury again viewed and heard Unedited Video Exhibit 36(h) in the Commonwealth's case-in-chief when Counsel for Defendant cross-examined Detective Janus regarding the events which occurred shortly before gunshots were heard:

BY ATTORNEY STRASSER:

Q: This is approximately 1341 hours, again facing in a westerly direction on the corner of 21st and Ash Streets, and there is sound on this? Can you see that, Detective Janus?
A: I can see, I guess.
Q: We're going to watch this video for a few minutes to get a time frame, because I asked Officer Stevens yesterday about the time frame from when the shots occurred to EPD responding, and it would determined (sic) that the affiant would be the best person to talk about that.
A: Okay.
. . .
Q: So we'll play that. For the record, it's 13[:]41:45. So this would be the last time that we see any of those four individuals on camera until the shooting; is that correct?
A: Yes.
Q: So that time is 13[:]41:45. I'm going to play the video. I want to stop for the gunshots, okay?
A: Okay.
Q: Can you hear what those individuals are saying?
A: I cannot, word for word, the entire sentence that individual yelled; I cannot tell you that.
Q: Thank you. Was that a gunshot in the background?
A: No.
Q: Not yet?
A: There. There was a bunch of shots.
Q: And that at 13 – first one at 13[:]42:58? Sorry. Something around there. So it's one minute past since we last saw those four individuals to when the gunshots are?
A: Approximately, yes.
Q: And I'm going to play the video again.

(N.T.3 at 41:18-42:3; 42:22-43:19).

After counsel for Defendant cross-examined Detective Janus, counsel for the Commonwealth during redirect examination of Detective Janus again played the Compilation Video Exhibit 38 without objection from counsel for Defendant:

ADA LIGHTNER: Your Honor, we're going to play the video again, but I think to save time, we're going to play the compilation portion, if that's okay.

MR. STRASSER: No objection to that.

(N.T.3 at 125:21-25). Therefore, Compilation Video Exhibit 38 was again played to the jury during the Commonwealth's redirect examination of Detective Janus.

During closing argument, Commonwealth's counsel, ADA Burns, played Compilation

Video Exhibit 38 to the jury while ADA Burns simultaneously made his closing argument. (*See* Notes of Testimony, Jury Trial, Day 4 ("N.T.4"), pg. 12:20-14:16). After the jury watched and heard the Compilation Video Exhibit 38, ADA Burns repeated to the jury Commonwealth's theory as to the timeline of the murder and reminded the jury that seventy-three seconds had been excised from the Compilation Video Exhibit 38:

> ADA BURNS: From 13[:]41:45 until 13[:]42:58 or 73 seconds from the time the last individual goes off camera and until the time of the first shot, that's the time—that's the time—the time elapses before the first shot. And Detective Janus testified the distance from the PNA parking lot to Cottage Street is about 200 feet. So 73 seconds from the time we last see individuals in the video going westbound on East 21st, 73 seconds from then until the first shot. I would submit to you, that's plenty of time for them to go westbound on East 21st, commit the crime and come back, and then 73 seconds, we see the defendant, and lo and behold, there's the defendant and another individual running eastbound through the PNA parking lot.

(*Id.* at 16:14-17:3).

Defendant cites to the non-precedential case in *Commonwealth v. Jackson* as supporting authority for his claim that the Commonwealth intentionally presented an altered, edited version of the video to mislead the jury in Commonwealth's closing argument. *See Commonwealth v. Jackson*, 2016 WL 1382909, at *5 (Pa. Super. Apr. 7, 2016). In *Jackson*, the Pennsylvania Superior Court reviewed the prosecutor's closing argument in a murder trial wherein the prosecutor utilized a PowerPoint Presentation which had "dramatic allusions," including images of a manacle. *Id.* at *5. The Pennsylvania Superior Court in *Jackson* held the Commonwealth did not engage in prosecutorial misconduct by using this PowerPoint Presentation during closing argument. *Id.* at *5. Specifically, the Pennsylvania Superior Court in *Jackson* concluded "the PowerPoint slides did not convey the prosecutor's personal belief or opinion on Jackson's credibility or guilt, did not appeal to the prejudices of the jury, and did not divert the jury from deciding the case on the evidence presented at trial." *Id.* at *6 (citing *Judy*, 978 A.2d at 1020). The Pennsylvania Superior Court in *Jackson* also indicated the Commonwealth during closing argument was permitted to include "dramatic allusions" which are within the reasonable bounds of the evidence supplied at trial. *Id.*

In the instant case, similar to *Jackson*, utilizing the Compilation Video Exhibit 38 in closing argument did not convey ADA Burns' personal belief or opinion on Defendant's credibility or guilt to the jury but merely assisted ADA Burns with conveying to the jury the chronology of events. ADA Burns did not appeal to the prejudices of the jury since the purpose of playing the Compilation Video Exhibit 38 with the seventy-three seconds excised, rather than Unedited Video Exhibit 36(h), was merely "to give an overview of the incident." (N.T.2 at 39:8-9). Commonwealth's playing Compilation Video Exhibit 38 did not divert the jury from deciding the case on the evidence presented at trial since, as noted above, Compilation Video Exhibit 38 was admitted into evidence during trial with no objection from counsel for Defendant. Unlike *Jackson*, where the PowerPoint was created for the purposes of the Commonwealth's closing argument, in the instant case the Unedited Video Exhibit 38 was admitted into evidence in the Commonwealth's case-in-chief before

Commonwealth's closing argument. Thus, unlike *Jackson*, this Compilation Video Exhibit 38 was not shown to the jury for the first time during Commonwealth's closing argument. Finally, unlike *Jackson*, Compilation Video Exhibit 38 in the instant case does not contain any "dramatic allusions." In the instant case, Commonwealth merely excised seventy-three seconds of uneventful footage, a mere lull in the video.

Therefore, after review of the transcripts provided to this Trial Court which are limited to the testimony of Detective Janus and the Commonwealth's closing argument, as well as an independent review of Unedited Video Exhibit 36(h) and Compilation Video Exhibit 38, this Trial judge who presided over the entire trial finds and concludes Commonwealth's presentation of the Compilation Video Exhibit 38 during closing argument does not constitute prosecutorial misconduct. The seventy-three second timeframe that transpired was repeatedly pointed out to the jury and displayed to the jury in Unedited Video Exhibit 36(h) before Commonwealth made its closing argument. The jury was aware two versions videotapes existed: one version being the Unedited Video Exhibit 36(h) and one version being Compilation Video Exhibit 38 during the entire trial, including closing argument. The Commonwealth was transparent in both the Commonwealth's case-in-chief and closing argument by fully informing the jury the seventy-three seconds was excised and therefore the jury clearly understood these seventy-three seconds were not present in the Compilation Video Exhibit 38. Consequently, ADA Burns during closing argument did not mislead nor did he impede the jury's ability to weigh the evidence objectively in order to render true verdicts.

Consistent with foregoing analysis, this Trial Court issues the following Order of Court:

ORDER

AND NOW, to-wit, this 6th day of July, 2018, after argument on the Motion for Judgment of Acquittal and/or Motion for New Trial filed by Defendant Jaquel Shamon Tirado, by and through his attorney, Nathaniel Strasser, Esq.; at which Assistant District Attorney Jeremy C. Lightner and Assistant District Attorney Michael E. Burns appeared on behalf of the Commonwealth, and Nathaniel Strasser, Esq., appeared on behalf of Defendant; and in view the undersigned was the presiding judge in this trial; and after review of the instant Motion and accompanying Memoranda of Law submitted by counsel, as well as a thorough and independent review of the videos in evidence at issue; and after re-review of the limited number of transcripts provided to this Trial Court regarding the testimony of Detective Christopher Janus and Commonwealth's closing argument; and consistent with the analysis in the foregoing Opinion, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendant's Motion for Judgment of Acquittal and/or Motion for New Trial is hereby **DENIED**.

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

WILLIAM GALLEUR, an individual, Plaintiff

v.

A. O. SMITH CORPORATION, et al., Defendants

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS

The test on preliminary objections is whether it is clear and free of doubt from all the facts pled that the pleader will be unable to prove facts legally sufficient to establish his right to relief. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling the demurrer.

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS / SUBJECT MATTER JURISDICTION

A defendant may challenge subject matter jurisdiction by filing a preliminary objection. When a party raises preliminary objections challenging subject matter jurisdiction, the trial court must determine whether the law will preclude recovery based on the lack of such jurisdiction. The court of common pleas has subject matter jurisdiction if said court is competent to hear or determine controversies of the general nature of the matter involved sub judice.

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS / SUBJECT MATTER JURISDICTION / WORKMAN'S COMPENSATION

The Worker's Compensation Act deprives the common pleas courts of jurisdiction of common law actions in tort for negligence against employers and is not an affirmative defense which may be waived if not timely pled.

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS / SUBJECT MATTER JURISDICTION

Where a preliminary objection raising lack of subject matter jurisdiction clearly raised an issue of fact, the court must take evidence by deposition or otherwise.

LABOR AND EMPLOYMENT / WORKMAN'S COMPENSATION

Generally, the Workers Compensation Act is the exclusive means of recovery against employers for all injuries arising out of accidents occurring within the course of employment. 77 P.S. § 481(a). Thus, a common law action is barred where the "exclusivity" provision of the Workers Compensation Act limits the claimant's recovery to those administrative remedies set forth in the Workers Compensation Act.

LABOR AND EMPLOYMENT / WORKMAN'S COMPENSATION

In occupational disease claims, the employer has statutory immunity from suit for claims where claimant's diagnosis occurred within 300 weeks from her or his last exposure date. 77 P.S. § 411(2).

LABOR AND EMPLOYMENT / WORKMAN'S COMPENSATION

Where the injury complained of is not compensable under the Workers Compensation Act, a plaintiff is not barred from maintaining a common law action against an employer. *See Tooey v. AK Steel Corp.*, 81 A.3d 851, 857 (Pa. 2013).

LABOR AND EMPLOYMENT / WORKMAN'S COMPENSATION

The exclusivity provision of the Workers Compensation Act does not bar plaintiffs from seeking compensation for their injuries under a common law cause of action against employers where the disease manifests more than 300 weeks after the last occupational exposure to hazards of the disease. *See Tooey v. AK Steel Corp.*, 81 A.3d 851, 857 (Pa. 2013).

TORTS / ASBESTOS

Pennsylvania courts ordinarily apply in asbestos cases the "frequency, regularity, proximity" standard established in *Eckenrod v. GAF Corp.*, 544 A.2d 50, 52 (Pa. Super. 1988).

TORTS / ASBESTOS

Courts should make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury.

TORTS / ASBESTOS

The "frequency, regularity, proximity" criteria should be applied in an evaluative fashion as an aid in distinguishing cases in which the plaintiff can adduce evidence that there is a sufficiently significant likelihood that the defendant's product caused his harm, from those in which such likelihood is absent on account of only casual or minimal exposure to the defendant's product.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 11620 – 2017

Appearances: Michael J.R. Schalk, Esq., on behalf of Defendant Lord Corporation
Simone Dejarnett, Esq., on behalf of Defendant Lord Corporation
Jason T. Shipp, Esq., on behalf of Plaintiff William Galleur
Jennifer E. Watson, Esq., Defense counsel liaison, on behalf of all Defendants

OPINION

Domitrovich, J. February 15, 2018

This matter is before this Trial Court on Defendant Lord Corporation's (hereinafter "Defendant Lord") Preliminary Objection filed under Pa.R.C.P. 1028(1) wherein Defendant raises the issue of whether this Court of Common Pleas has subject matter jurisdiction over Plaintiff William Galleur's (hereinafter "Plaintiff") claims arising from his alleged injurious exposure to asbestos during his employment at Defendant Lord. Defendant Lord asserts the "exclusivity" provision under 77 P.S. § 481(a) of the Worker's Compensation Act precludes Plaintiff's common law cause of action. The Workers Compensation Act applies "only to disability or death resulting from [an occupational] disease and occurring within three hundred weeks after the last date of employment in an occupation or industry to which [the employee] was exposed to hazards of such disease . . . ." 77 P.S. 411(2). Plaintiff counters by contending his last exposure to asbestos at Defendant Lord's facility occurred more than 300 weeks before his mesothelioma diagnosis and, therefore, Plaintiff's common law action against Defendant Lord is not barred by 77 P.S. § 481(a).

This Trial Court hereby provides the following analysis with findings and conclusions of law:

On June 7, 2017, Plaintiff in this action, William Galleur, now deceased, filed his Complaint against Defendant Lord and numerous Defendants, alleging, *inter alia*, negligence due to injury arising from his injurious exposure to asbestos during his employment with Defendant Lord.

In particular, Plaintiff's Complaint asserts he worked for Defendant Lord in Erie, Pennsylvania "from approximately 1969 to 2012 as a Production Worker in various capacities." (Complaint at ¶ 183). This Trial Court notes Plaintiff and Defendant Lord, at the hearing on Defendant Lord's Preliminary Objection, agreed Plaintiff's last date of employment at Defendant Lord was in May of 2011. According to Plaintiff's Complaint, Plaintiff was diagnosed with mesothelioma on November 18, 2016. (Complaint at ¶ 183). Furthermore, Plaintiff's Complaint expressly alleges: "Plaintiff's last injurious exposure to asbestos occurred more than 300 weeks prior to his diagnosis of mesothelioma." (Complaint at ¶ 214).

Defendant Lord filed its Preliminary Objection on December 8, 2017. On December 21, 2017, Plaintiff filed his Response to Defendant Lord's Preliminary Objection. In support of Plaintiff's position as to subject matter jurisdiction, Plaintiff proffered evidence in the form of Plaintiff's cross-examination deposition testimony regarding Plaintiff's lack of exposure to asbestos at Defendant Lord's facility within 300 weeks of Plaintiff's mesothelioma diagnosis. Defendant Lord thereafter filed its Brief in Support of its Preliminary Objection on January 24, 2018. Defendant Lord presented evidence in the form of Plaintiff's Affidavit, Plaintiff's cross-examination deposition testimony, and a "Materials Baseline Asbestos-Containing Materials Survey" (hereinafter "Survey") authored by AMEC Environment & Infrastructure, Inc., and commissioned by Defendant Lord to identify asbestos-containing materials in Defendant Lord's facility.

This Trial Court heard oral argument on Defendant Lord's Preliminary Objection from both counsel for Plaintiff and counsel for Defendant Lord on January 29, 2018. Simone Dejarnett, Esq., and Michael J.R. Schalk, Esq., appeared on behalf of Defendant Lord, and Jason T. Shipp, Esq., appeared on behalf of Plaintiff.

The law is well settled in Pennsylvania regarding Preliminary Objections. Specifically, 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 of 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 in the nature of a demurrer, a court must overrule the objections if the complaint has averred 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). Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling the demurrer. *Gabel*, 616 A.2d at 1367 (Pa. 1992).

Moreover, a defendant may challenge subject matter jurisdiction by filing a preliminary objection. Pa.R.C.P. 1028(a)(1); see also *Aronson v. Sprint Spectrum, L.P.*, 767 A.2d 564, 568 (Pa.Super.2001). When a party raises preliminary objections challenging subject matter jurisdiction, the trial court must determine whether the law will preclude recovery based on the lack of such jurisdiction. *Philadelphia Hous. Auth. v. Barbour*, 592 A.2d 47, 48 (Pa. Super.1991), *aff'd*, 615 A.2d 339 (Pa. 1992). The court of common pleas has subject matter jurisdiction if said court is competent to hear or determine controversies of the general nature of the matter involved sub judice. *Bernhard v. Bernhard*, 668 A.2d 546, 548 (Pa.Super.

1995). "Jurisdiction lies if the court had power to enter upon the inquiry, not whether it might ultimately decide that it could not give relief in the particular case." *Id.* The Worker's Compensation Act "deprives the common pleas courts of jurisdiction of common law actions in tort for negligence against employers and is not an affirmative defense which may be waived if not timely pled." *LeFlar v. Gulf Creek Indus. Park No. 2*, 515 A.2d 875, 879 (Pa. 1986). Finally, pursuant to Pa.R.C.P. 1028(c), where a "preliminary objection raising lack of subject matter jurisdiction clearly raised an issue of fact, the court must take evidence by deposition or otherwise." *Gateway Coal Co. v. Kelly*, 449 A.2d 625, 627 (Pa.Super.1982).

Generally, the Workers Compensation Act is the exclusive means of recovery against employers for all injuries arising out of accidents occurring within the course of employment. 77 P.S. § 481(a) ("[L]iability of an employer under [the Workers Compensation Act] shall be exclusive and in place of any and all other liability to such employe[e]s."); *see also Dunn v. United Ins. Co. of Am.*, 482 A.2d 1055, 1058 (Pa.Super.1984). Thus, a common law action is barred where the "exclusivity" provision of the Workers Compensation Act limits the claimant's recovery to those administrative remedies set forth in the Workers Compensation Act. *See Kline v. Arden H. Verner Co.*, 469 A.2d 158, 256-57 (Pa. 1983). In occupational disease claims, the employer has statutory immunity from suit for claims where claimant's diagnosis occurred within 300 weeks from her or his last exposure date. 77 P.S. § 411(2); see *Tooey v. AK Steel Corp.*, 81 A.3d 851, 857 (Pa. 2013); *see also Cable v. W.C.A.B. (Gulf Oil/Chevron USA, Inc.)*, 664 A.2d 1349, 1350 (Pa. 1995) (holding the three hundred week provision runs from last date of exposure to occupational hazard rather than last date of employment).

However, where the injury complained of is not compensable under the Workers Compensation Act, a plaintiff is not barred from maintaining a common law action against an employer. *Tooey at 865; see also Pollard v. Lord Corp.*, 664 A.2d 1032, 1033 (Pa.Super.1995) (permitting plaintiff to maintain an employer-related injury since plaintiff's compensability under the Workers Compensation Act could not be resolved from the pleadings). Specifically, the Pennsylvania Supreme Court held in *Tooey* that the exclusivity provision of the Workers Compensation Act does not bar plaintiffs from seeking compensation for their injuries under a common law cause of action against employers where the disease manifests more than 300 weeks after the last occupational exposure to hazards of the disease. *Tooey* at 855.

Although no standard has been developed to determine whether the evidence proffered is sufficient to establish a plaintiff's last asbestos exposure for the purposes of subject matter jurisdiction under the Workers Compensation Act, Pennsylvania courts ordinarily apply in asbestos cases the "frequency, regularity, proximity" standard established in *Eckenrod v. GAF Corp.*, 544 A.2d 50, 52 (Pa.Super. 1988). *See Sterling v. P & H Mining Equip., Inc.*, 113 A.3d 1277, 1281 (Pa.Super.2015) (applying the *Eckenrod* standard to the summary judgment stage of the litigation). In particular, courts should "make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff's/decedent's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury." *Gregg v. V-J Auto Parts, Co.*, 943 A.2d 216, 227 (Pa. 2007). However, the "frequency, regularity, proximity" criteria "do[es] not establish a rigid standard with an absolute threshold necessary to support liability." *Id.* at 225. Rather, it should "be applied in an evaluative fashion as an aid in distinguishing cases in which the plaintiff can adduce evidence that there

is a sufficiently significant likelihood that the defendant's product caused his harm, from those in which such likelihood is absent on account of only casual or minimal exposure to the defendant's product." *Id.*

In this instant case, according to Plaintiff's Complaint, Plaintiff was diagnosed with mesothelioma on November 18, 2016. (*See* Complaint at ¶ 188). For a Court of Common Pleas to exercise subject matter jurisdiction over Plaintiff's claims against Defendant Lord, Plaintiff's last actionable exposure to asbestos at Defendant Lord's facility must not have been after March of 2011, the date agreed to and cited by both Plaintiff and Defendant Lord as being 300 weeks prior to November 18, 2016. *See* 77 P.S. § 411(2). Although Plaintiff and Defendant agreed Plaintiff was last employed with Defendant Lord in May of 2011, the parties disagree as to when Plaintiff's last asbestos exposure occurred at Defendant Lord's facility. Specifically, while Plaintiff contends Plaintiff's last exposure to asbestos was before March of 2011, outside of the 300-week period, Defendant Lord asserts Plaintiff was last exposed to asbestos at Defendant Lord's facility during or after March of 2011. Since Defendant Lord's Preliminary Objection clearly raises an issue of fact as to the date of Plaintiff's last asbestos exposure, this Trial Court must consider additional evidence submitted by the parties. *See* Pa.R.C.P. 1028(c)(2).

In Plaintiff's deposition testimony under cross-examination by counsel for Defendant Lord, Plaintiff indicated he believed Defendant Lord removed asbestos-containing products and materials, including insulation, from Defendant Lord's facility in the late 1990s to early 2000s and he believed Defendant Lord took proper precautions to protect employees from asbestos exposure after that time. (Plaintiff Depo. Vol I, pg. 128-129; Vol IV, pg. 147-149). Furthermore, Plaintiff specifically indicated he did not believe he was exposed to asbestos-containing materials after Defendant Lord cleaned its facility in the late 1990s to early 2000s due to Defendant Lord's efforts to prevent employees' exposure to asbestos:

> **Q.** You were asked some questions today about an event that you witnessed when some asbestos pipe covering was removed from the LORD facility.
> **A.** Right
> **Q.** Do you recall that testimony?
> **A.** Yes.
> **Q.** And I believe you said that occurred in the late '90s or the early 2000s, correct?
> **A.** Correct.
> **Q.** Okay. Do you believe after that time period that you were exposed to any asbestos at LORD?
> **A.** No.
> **Q.** I think you said this earlier, but do you believe when – when that event occurred that LORD at that point knew of the hazards of asbestos?
> **A.** Yes
> **Q.** Do you believe from that point forward they did everything that they could to prevent exposure to asbestos by the plant employees, including yourself?
> **A.** Pretty much.

(Plaintiff Depo. Vol IV, pg. 147-148). Thus, Plaintiff's deposition testimony indicates Plaintiff did not believe he was exposed to asbestos at Defendant Lord's facility after the late 1990s to the early 2000s, which is a time period well before March of 2011.

Defendant Lord's position that Plaintiff's last exposure to asbestos occurred during and/or after March of 2011 is largely premised on a survey entitled "Baseline Asbestos-Containing Materials Survey," which Defendant Lord commissioned in 2011 and which was completed in early 2012. This Survey was prepared by a third party, AMEC Environment & Infrastructure, Inc. However, this Survey does not establish an actual predicate to support a finding Plaintiff was actionably, causally, or quantifiably exposed to asbestos at Defendant Lord's facility within 300 weeks of his mesothelioma diagnosis. To begin with, the face of the Survey cautioned this Survey should not be relied upon for purposes beyond "general planning and order-of–magnitude cost estimating." (*See* Survey at pg. 2). This is because a Baseline Asbestos-Containing Materials Survey is only the first of two main categories of asbestos surveys, the second of which being a "Project Design Survey," which is typically completed as a final step before abatement projects are commenced. (*Id.* at 2). Indeed, in this case, the "purpose of this survey was to identify asbestos-containing material in areas of the facility for general informational purposes" and was "not complete enough to be the final survey prior to a demolition project." (*Id.* at 2, 9). Also significant is this Survey plainly states "the report does not warranty, guarantee, or represent that the inspections completely define the degree or extent of [asbestos-containing materials.]" (*See* Survey at pg. 3). In other words, this Survey was not intended or commissioned to be used for the purpose of showing an employee's exposure to asbestos in the workplace.

The limited scope of the Survey further calls into question this Survey's ability to establish Plaintiff's last exposure necessarily occurred during or after March 2011. Generally, the scope of the Survey was:

> [L]imited only to those building materials suspected to be [asbestos-containing materials]. Although the survey was intended to be as inclusive as possible, operating manufacturing and building equipment (e.g., cooling towers, active boilers, laboratory hoods, ovens and associated heat vents, electric wire wrap, pipe and equipment gaskets, etc.) was unable to be safely assessed at the time of the sampling activities.

(*Id.* at 2). Notably, this Survey specifically did not include "intrusive or destructive testing of building finishing materials to view normally inaccessible areas, such as wall cavities, areas above fixed or enclosed plaster ceilings, inside mechanical systems, equipment, and/or process/manufacturing equipment, and locked/secured rooms." (*Id.* at 6). Additionally, other equipment, such as gaskets and vibration dampeners on operating equipment, as well as production equipment, were not sampled or quantified during the Survey. (*Id.* at 7). Further, since Defendant Lord's facility at the time operated 24 hours a day, suspect friable materials in areas frequently occupied were not sampled as to prevent potential airborne fibers in occupied work areas. (*Id.* at 7). In such instances, this Survey may have assumed the presence of asbestos containing materials, such as in a pipe fitting above a worker's desk. (*Id.* at 7).

In fact, in many instances, this Survey heavily relied on various assumptions to establish the presence of asbestos-containing materials in a given area. In particular, if a sample

contained "more than one percent of asbestos, the analyst would not analyze any additional representative samples from that homogenous area and would designate that homogenous area as asbestos-containing material." (*Id.* at 4) (noting that this procedure is called "stop on first positive practice"). This Survey also "presumed" certain materials to be asbestos containing that are commonly known to be asbestos containing, such as corrugated paper board insulation, compressed paper pipe insulation, and muddled joint packings in thermal system insulation systems. (*Id.* at 7). Moreover, this Survey focused mostly on "suspect" asbestos-containing materials in large quantities and friable materials, thus, small quantity non-friable intact suspect materials were only sampled on a limited basis and "assumed positive once a positive result was obtained via 'positive stop' option during laboratory testing." (*Id.* at 7-8).

Moreover, at the hearing on Defendant Lord's Preliminary Objection, Defendant Lord did not offer expert testimony as to the methodology used in preparing the Survey, the underlying reliability of the Survey's results, or quantification as to Plaintiff's exposure or likely inhalation of asbestos. Similarly, Defendant Lord did not submit an expert report on the issue to demonstrate actionable exposure by the Plaintiff after March of 2011. Nevertheless, even assuming asbestos was present in Plaintiff's workplaces at Defendant Lord's facility after March of 2011, as Defendant Lord purports this Survey demonstrates, mere proof of presence of asbestos is insufficient to demonstrate Plaintiff was *exposed* to asbestos. *See Eckenrod v. GAF Corp.*, 544 A.2d 50, 52 (Pa.Super. 1988) (noting that mere presence of asbestos is insufficient to establish exposure to asbestos).

In short, Defendants have not offered adequate evidence that Plaintiff was frequently and regularly within the proximity of asbestos to warrant a finding Plaintiff was exposed to asbestos at Defendant Lord's facility within 300 weeks of his mesothelioma diagnosis. Since insufficient evidence exists as to whether Plaintiff's last exposure to asbestos at Defendant Lord's facility occurred within 300 weeks of his mesothelioma diagnosis, doubt exists as to whether Defendant Lord's Preliminary Objection should be sustained. Therefore, this Trial Court overrules Defendant Lord's Preliminary Objection challenging the Court of Common Pleas' subject matter jurisdiction over Plaintiff's common law claims against Defendant Lord.

Accordingly, consistent with the reasons set forth above, this Trial Court enters the following Order:

ORDER

AND NOW, to wit, this 15th day of February, 2018, upon consideration of "Defendant Lord Corporation's Preliminary Objection to Plaintiff's Complaint Based on Lack of Subject Matter Jurisdiction Pursuant to Pennsylvania's Workers' Compensation Act" and accompanying Brief in Support, filed by Defendant Lord Corporation, by and through its counsel, Michael J.R. Schalk, Esq., and Benjamin J. Risacher, Esq.; and after a thorough review of the entire record, including, but not limited to, "Defendant Lord Corporation's Preliminary Objection to Plaintiff's Complaint Based on Lack of Subject Matter Jurisdiction Pursuant to Pennsylvania's Workers' Compensation Act" and the accompanying Brief in Support as well as "Plaintiff's Response to Defendant Lord Corporations' Preliminary Objection to Plaintiff's Complaint Based on Lack of Subject Matter Jurisdiction Pursuant to Pennsylvania's Workers' Compensation Act," having heard oral arguments presented by both

counsel on January 29th, 2018, and having reviewed relevant statutory and case law, and in accordance with the analysis in the foregoing Opinion, it is hereby **ORDERED, ADJUDGED AND DECREED** that "Defendant Lord Corporation's Preliminary Objection to Plaintiff's Complaint Based on Lack of Subject Matter Jurisdiction Pursuant to Pennsylvania's Workers' Compensation Act" is **OVERRULED**.

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

COMMONWEALTH OF PENNSYLVANIA

v.

RAM PARAJULI, Petitioner

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT / ELIGIBILITY FOR RELIEF

A Petitioner must meet all four requirements of 42 Pa.C.S. § 9543(a) to be eligible for relief under the Post-Conviction Relief Act.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT / INEFFECTIVE ASSISTANCE OF COUNSEL

The Pennsylvania Supreme Court has held that to obtain relief on a claim alleging ineffective assistant of counsel, the Petitioner must demonstrate the following: (1) the claim underlying the ineffectiveness claim has arguable merit; (2) counsel's actions lacked any reasonable basis; and (3) counsel's actions resulted in prejudice to petitioner.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT / INEFFECTIVE ASSISTANCE OF COUNSEL

Prejudice in the context of ineffective assistance of counsel means demonstrating that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT / INEFFECTIVE ASSISTANCE OF COUNSEL

Where a defendant alleges ineffectiveness of counsel in connection with the entry of a guilty plea, the defendant must demonstrate that said ineffectiveness caused the defendant to enter an involuntary or unknowing plea. If the defendant enters a guilty plea on the advice of his counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT / INEFFECTIVE ASSISTANCE OF COUNSEL

The Supreme Court of the United States has held that a defendant's counsel must inform a noncitizen of whether a risk exists that the defendant will be deported as a result of the defendant's plea. The United States Supreme Court noted situations will arise whereby a defendant's likelihood of deportation is unclear and uncertain. In these situations where the law is not succinct and straightforward, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. However, the United States Supreme Court further stated that when the deportation consequence is truly clear, the duty to give correct advice is equally clear. *See Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT / INEFFECTIVE ASSISTANCE OF COUNSEL

While a deportation statute may lead to the conclusion that a violation thereof will subject the defendant to deportation, counsel for a defendant is not required to inform the defendant that he will definitely be deported. All that is required of counsel is that he provide "correct advice" regarding the deportation consequences of a defendant's plea, such as advising the defendant that a substantial risk of deportation exists or that the likely consequences of entering a plea is deportation proceedings being instituted against the defendant. *See Commonwealth v. Escobar*, 70 A.3d 838, 841 (Pa. Super. 2013).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
NO. CR 1112 of 2016
494 of 2017
495 of 2017

Appearances: Anser Ahmad, Esq., on behalf of Ram Parajuli
Jessica Lasley, Esq. and Jeremy Lightner, Esq. for the Commonwealth
Matthew G. Porsch, Esq.

OPINION

Domitrovich, J. July 23, 2018

AND NOW, to-wit, this 23rd day of July, 2018, after a thorough review of the Petition for Post-Conviction Collateral Relief ("PCRA Petition"), filed by Ram Parajuli ("Petitioner"), by and through his counsel, Anser Ahmad, Esq., and the Commonwealth's Response to Petitioner's Petition for Post Conviction Collateral Relief, filed by Assistant District Attorney Jessica Lasley; as well as a thorough and independent review of the entire record; and upon consideration of the relevant statutory law and case law, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendant's PCRA Petition is hereby **DISMISSED** as his Petition states no grounds for which relief may be granted under the Post-Conviction Relief Act, 42 Pa.C.S. § 9541 *et seq*.

On May 16, 2016, the District Attorney's Office filed a Criminal Information at Docket No. 1112 of 2016, charging Petitioner with five counts of Theft from a Motor Vehicle in violation of 18 Pa.C.S. § 3934(a), five counts of Receiving Stolen Property in violation of 18 Pa.C.S. § 3925(a), and ten counts of Loitering and Prowling at Night Time in violation of 18 Pa.C.S. § 5506. The following year, on March 24, 2017, the District Attorney's Office filed a Criminal Information at Docket No. 494 of 2017, charging Petitioner with (1) Loitering and Prowling at Night Time in violation of 18 Pa.C.S. § 5506; (2) Theft from a Motor Vehicle in violation of 18 Pa.C.S. § 3934(a); and (3) Receiving Stolen Property in violation of 18 Pa.C.S. § 3925(a). On that same day, March 24, 2017, the District Attorney's Office filed a Criminal Information at Docket No. 495 of 2017, charging Petitioner with (1) Theft by Unlawful Taking in violation of 18 Pa.C.S. § 3921(a); (2) Theft from a Motor Vehicle in violation of 18 Pa.C.S. § 3934(a); (3) Access Device Fraud in violation of 18 Pa.C.S. § 4106(a)(3); and (4) Loitering and Prowling at Night Time in violation of 18 Pa.C.S. § 5506.

On December 1, 2016, Matthew G. Porsch, Esq., entered his appearance on behalf of Petitioner at Docket No. 1112 of 2016. On February 22, 2017, Petitioner filed his Application for Public Defender at Docket Nos. 494 of 2017 and 495 of 2017, which indicates that on January 17, 2017, Petitioner's financial eligibility for court appointed counsel was verified by the Erie County Public Defender's Officer and Attorney Porsch.

Petitioner entered into a counseled plea agreement with the Commonwealth pursuant to which Petitioner pled guilty: (1) at Docket No. 1112 of 2016: count five (Theft from a Motor Vehicle) and count eleven (Loitering and Prowling at Night); (2) at Docket No. 494 of 2017: count two (Theft from a Motor Vehicle); and (3) at Docket No. 495 of 2017: count

one (Theft by Unlawful Taking). The Commonwealth agreed to *nolle pros* the remaining criminal charges against Petitioner at the above-referenced docket numbers.

On June 19, 2017, a Plea and Sentencing Hearing was held, at which Assistant Attorney Jeremy Lightner informed Petitioner of the rights he was relinquishing by entering a guilty plea. Specifically, before Petitioner entered a plea, Attorney Lightner informed Petitioner:

> MR. LIGHTNER: If you are a foreign national or a naturalized citizen, your guilty plea or your conviction may result in deportation from the United States. If you think that's the case, you should speak to an immigration attorney. . . .

(*See* Notes of Testimony, Plea and Sentence ("N.T."), June 19, 2017, pg. 4:4-8). Thereafter, the following exchange occurred:

> THE COURT: And, sir, you understand English very well?
> THE DEFENDANT: Yes ma'am.
> THE COURT: Okay, he doesn't -- not need an interpreter?
> MR. PORSCH: No.

(N.T. at 6:19-24). Before Petitioner entered his plea, Attorney Lightner further inquired of Petitioner as to whether Petitioner had any questions regarding the rights Petitioner agreed to relinquish by entering a plea:

> MR. LIGHTNER: All right, Mr. Parajuli, were you in the courtroom a couple minutes ago when I went over the rights you have prior to entering a guilty plea?
> THE DEFENDANT: Yes sir.
> MR. LIGHTNER: Do you have any questions about those rights?
> THE DEFENDANT: No sir.

(N.T. at 6:19-24). Furthermore, Petitioner signed a "Defendant's Statement of Understanding of Rights Prior to Guilty Plea," which states at the bottom of the sheet just above the signature line: "I have signed this paper only after first reading and reviewing it." (*See* Defendant's Statement of Understanding of Rights Prior to Guilty Plea, filed June 19, 2017). Said written Statement of Understanding of Rights expressly sets forth the following understanding:

> I understand that if I am a foreign national or naturalized citizen that my plea of guilty or conviction of certain crimes may result in my deportation from the United States of America.

(Id.). Finally, just before Petitioner was sentenced, Petitioner acknowledged Attorney Porsch had previously advised Petitioner that entering a guilty plea could potentially have consequences related to Petitioner's immigration status, and Petitioner acknowledged he understood the potential immigration consequences in entering a guilty plea:

> MR. PORSCH: And I've also talked to you about since you're not an American citizen –

THE COURT: Oh, yeah.
MR. PORSCH: – this could affect your citizenship, your status with immigration. We've talked about that; correct?
THE DEFENDANT: Yes.
MR. PORSCH: Okay. That's all, Your Honor. Thank you.

(N.T. at 28:1-9). This Trial Court then accepted Petitioner's plea and expressly found Petitioner entered his plea knowingly, voluntarily, and intelligently. (*Id.* at 22:23-23:2).

After Petitioner entered his plea but before Petitioner was sentenced, plea counsel for Petitioner, Attorney Porsch, explained to the court the facts underlying the charges the District Attorney brought against Petitioner:

MR. PORSCH: Thank Your Honor. Your Honor, obviously this involved a number of motor vehicles over a number of cases. Essentially what Mr. Parajuli was doing was at the time he had no job; his family is from Nepal, they are all immigrants and they're having essentially financial problems. And he would essentially go from car to car to see if they were locked or unlocked. If they were unlocked, he would go in and steal spare change or anything that was loose and then walk away. And he wasn't even really good at this, because he was caught a number of times doing this by different police departments. . . .

(*Id.* at 25:11-23).

Thereafter, this Trial Court sentenced Petitioner at Docket No. 1112 of 2016: count five (Theft from a Motor Vehicle) to forty-eight (48) days to one year in the Erie County Prison and credited Petitioner forty-eight (48) days for time served and paroled Petitioner from the courtroom. (*Id.* at 31:10-18). At count eleven (Loitering and Prowling at Night) of Docket No. 1112 of 2016, this Trial Court sentenced Petitioner to one year of probation consecutive to count five. (*Id.* at 31:19-20; *see also* Sentencing Order at Docket No. 1112 of 2016, attached as Exhibit "A"). At Docket No. 494 of 2017: count two (Theft from a Motor Vehicle), this Trial Court sentenced Petitioner to one year of probation concurrent to the one year of probation at count eleven of Docket No. 1112 of 2016. (N.T. at 31:21-24; *see also* Sentencing Order at Docket No. 494 of 2017, attached as Exhibit "B"). This Trial Court also sentenced Petitioner at Docket No. 495 of 2017: count one (Theft by Unlawful Taking) to one year of probation concurrent to the one year of probation at Docket No. 494 of 2017. (N.T. at 31:21-24; *see also* Sentencing Order at Docket No. 495 of 2017, attached as Exhibit "C"). As a result, Petitioner's aggregate sentence constituted forty-eight (48) days to one year of incarceration followed by one year of probation with credit for forty-eight (48) days served, and Petitioner was paroled from the courtroom.

Moreover, this Trial Court *nolle prossed* Petitioner's remaining criminal charges as follows:

- Docket No. 1112 of 2016: counts one through four (each count being Theft from a Motor Vehicle), counts six through ten (each count being Receiving Stolen Property), and counts twelve through twenty (each count being Loitering and Prowling at Night Time).

- Docket No. 494 of 2017: count one (Loitering and Prowling at Night Time) and count three (Receiving Stolen Property); and
- Docket No. 495 of 2017: count two (Theft from a Motor Vehicle), count three (Access Device Fraud) and count four (Loitering and Prowling at Night Time).

(*See* Disposition/Commitment for Docket Nos. 1112 of 2016, 494 of 2017, and 495 of 2017, attached as Exhibit "D").

On June 19, 2017, Petitioner was paroled from his sentence at the above-referenced docket numbers.

On December 26, 2017, the U.S. Department of Homeland Security sent Petitioner a "Notice to Appear" ("Notice") ordering Petitioner to appear before an immigration judge of the U.S. Department of Justice to show why Petitioner should not be removed from the United States. (*See* Exhibit "A" of PCRA Petition). Specifically, the U.S. Department of Homeland Security alleged in said Notice that Petitioner is a native and citizen of Nepal; Petitioner's status is that of a lawful permanent resident; Petitioner was convicted of the above-referenced crimes; and the aforesaid crimes did not arise out of a single scheme of criminal misconduct. (*Id.*). Thus, the U.S. Department of Homeland Security charged that Petitioner is subject to removal from the United States pursuant to Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act in that, after Petitioner was admitted to the United States as a permanent resident, Petitioner was convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. (*Id.*). The U.S. Department of Homeland Security also charged that Petitioner is subject to removal from the United States pursuant to Section 237(a)(2)(A)(iii) in that he was convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the Immigration and Nationality Act, a law related to theft. (*Id.*).

According to Petitioner's PCRA Petition, on March 6, 2018, the U.S. Department of Homeland Security, Immigration and Customs Enforcements detained and charged Petitioner with deportability from the United States.

On April 13, 2018, Petitioner filed timely the instant PCRA Petition, wherein Petitioner alleges Petitioner's plea counsel was ineffective. In particular, Petitioner contends his plea counsel did not inform Petitioner that his plea "would result in his mandatory detention in immigration custody and possible deportation from the United States." (*See* PCRA Petition at ¶ 14). As a result, Petitioner alleges his plea was not knowingly, voluntarily, and intelligently entered. Thus, Petitioner requests this Trial Court vacate Petitioner's judgment and permit Petitioner to proceed to counseled plea negotiations or trial.

Under the Post-Conviction Collateral Relief Act, to be eligible for relief, a petitioner must plead and prove by a preponderance of the evidence all of the following:

(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:
   i. Is currently serving a sentence of imprisonment, probation or parole for the crime;
   ii. Awaiting execution of a sentence of death for the crime; or
   iii. Serving a sentence which must expire before the person may commence serving the disputed sentence;

(2) That the conviction or sentence resulted from one or more of the following:
   i. A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States, which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place;
   ii. Ineffective assistance of counsel which in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place;
   iii. A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent;
   iv. The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court;
   v. The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced;
   vi. The imposition of a sentence greater than the lawful maximum;
   vii. A proceeding in a tribunal without jurisdiction;
(3) That the allegation of error has not been previously litigated or waived; and
(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

42 Pa.C.S. § 9543(a). A Petitioner must meet all four requirements of the statute to be eligible for relief. *Commonwealth v. Rachak*, 62 A.3d 389, 394 (Pa.Super.2012). In this case, Petitioner has satisfied the first requirement because he is currently serving a sentence of probation for a period of one (1) year supervised by the County Probation Department pursuant to the sentence on his conviction of count eleven (Loitering and Prowling at Night) at Docket No. 1112 of 2016, count two (Theft from a Motor Vehicle) at Docket No. 494 of 2017, and count one (Theft by Unlawful Taking) at Docket No. 495 of 2017.

Second, Petitioner is required to plead and prove by a preponderance of the evidence that Petitioner's convictions or sentences resulted due to the ineffectiveness of his plea counsel and so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. *See* 42 Pa.C.S. § 9543(a)(2). The Pennsylvania Supreme Court has held that to obtain relief on a claim alleging ineffective assistant of counsel, the Petitioner must demonstrate the following: "(1) the claim underlying the ineffectiveness claim has arguable merit; (2) counsel's actions lacked any reasonable basis; and (3) counsel's actions resulted in prejudice to petitioner." *Commonwealth v. Cox*, 983 A.2d 666, 678 (Pa. 2009). "Prejudice in the context of ineffective assistance of counsel means demonstrating that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different." *Id.*

Moreover, where a defendant alleges ineffectiveness of counsel in connection with the

entry of a guilty plea, the defendant must demonstrate that said ineffectiveness caused the defendant to enter an involuntary or unknowing plea. *Commonwealth v. Anderson*, 995 A.2d 1184, 1192 (Pa. Super. 2010). If the defendant enters a guilty plea on the advice of his counsel, the voluntariness of the entry of the plea "depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Commonwealth v. Moser*, 921 A.2d 526, 531 (Pa. Super. 2007) (quoting *Commonwealth v. Hickman*, 799 A.2d 136, 141 (Pa. Super. 2002). However, "the law does not require that the defendant be pleased with the outcome of his decision to enter a plea of guilty: All that is required is that his decision to plead guilty be knowingly, voluntarily and intelligently made." *Anderson*, 995 A.2d at 1192.

The Supreme Court of the United States has held that a defendant's counsel must inform a noncitizen of whether a risk exists that the defendant will be deported as a result of the defendant's plea. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010). The United States Supreme Court noted situations will arise whereby a defendant's likelihood of deportation is unclear and uncertain. *Id.* at 369. In these situations where "the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* However, the United States Supreme Court further stated that "when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear." *Id.*

In the instant PCRA Petition, Petitioner claims his plea counsel was ineffective since his plea counsel engaged in a "course of conduct in which he failed to advise Petitioner that there would be any immigration consequences to the plea, where the plea was for a clearly deportable offense." (*See* PCRA Petition at ¶ 23). However, this contention is wholly without merit. Indeed, while a deportation statute may lead to the conclusion that a violation thereof will subject the defendant to deportation, counsel for a defendant is not required to inform the defendant that he will definitely be deported. *Commonwealth v. Escobar*, 70 A.3d 838, 841 (Pa. Super. 2013). All that is required of counsel is that he provide "correct advice" regarding the deportation consequences of a defendant's plea, such as advising the defendant that a substantial risk of deportation exists or that the likely consequences of entering a plea is deportation proceedings being instituted against the defendant. *See id.*

In *Escobar*, defendant was subject to deportation pursuant to the provisions under 8 U.S.C. § 1227. *Id.* at 840. That defendant filed a PCRA petition alleging ineffective assistance of counsel contending his counsel failed to advise him of possible deportation consequences as a result of his plea. *Id.* At the time the defendant entered his guilty plea, the defendant signed a written plea colloquy which indicated he understood deportation was possible, and his plea counsel informed him that he faced a risk of deportation. *Id.* In addition, the Pennsylvania Superior Court in *Escobar* noted no absolute certainty existed as to whether the U.S. Attorney General and/or other personnel would necessarily take all the steps needed to institute and carry out defendant's actual deportation. *Id.* at 841. Thus, the Pennsylvania Superior Court in *Escobar* concluded counsel was not ineffective since defendant knew deportation was possible and since counsel had advised him that a risk of deportation existed. *Id.* at 841.

In the instant case, as in *Escobar*, Petitioner is subject to deportation pursuant to the provisions under 8 U.S.C. § 1227. Also like the defendant in *Escobar* who signed a written plea colloquy, Petitioner in the instant case signed a "Defendant's Statement of Understanding

of Rights Prior to Guilty Plea" wherein Petitioner acknowledged that a plea of guilty or conviction of certain crimes may result in his deportation from the United States. In addition, similar to *Escobar*, Petitioner's plea counsel advised Petitioner that deportation consequences could result from his plea, which Petitioner expressly acknowledged on the record before the undersigned judge prior to entering his plea. Furthermore, Petitioner was also advised by Assistant District Attorney Lightner that Petitioner should seek the advice of an immigration attorney. *See Commonwealth v. Wah*, 42 A.3d 335, 340 (Pa. Super. 2012) (dismissing PCRA petition alleging counsel was ineffective for failing to advise defendant of immigration consequences of pleading guilty where defendant was advised that he should seek advice of an immigration attorney).

Petitioner's plea counsel in the instant case was well within the range of competence demanded of attorneys in criminal cases. Since Petitioner's plea counsel was not deficient, Petitioner's claim that his plea counsel, Matthew G. Porsch, Esq., should have advised him differently is entirely without merit for the record itself in the instant case speaks otherwise. Petitioner therefore has not established his plea counsel was ineffective. Similarly, Petitioner has failed to establish his plea counsel's conduct induced an unknowing, involuntary, or unintelligent plea.

Thus, for all of the foregoing reasons, Petitioner's PCRA Petition is hereby **DISMISSED**. Defendant has thirty (30) days from the date of this Order to appeal if he so desires.

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

THOMAS SEBALD and THE GLENWOOD NEIGHBORHOOD HOMEOWNERS ASSOCIATION; by THOMAS SEBALD and RONALD J. KUNCO, JR., TRUSTEES AD LITEM, Appellants

v.

THE ZONING HEARING BOARD OF THE CITY OF ERIE, Appellee and DONALD MORSE AND SUSAN MORSE, Intervenors

ZONING / SCOPE OF REVIEW

If the record below includes findings of fact made by the governing body, board or agency whose decision or action is brought up for review and the court does not take additional evidence, the findings of the governing body, board or agency shall not be disturbed by the court if supported by substantial evidence. *See* 53 P.S. § 11005-A.

ZONING / SCOPE OF REVIEW

Where a trial court does not take any additional evidence, the trial court is limited to determining whether the zoning board committed a manifest abuse of discretion or an error of law in granting the variance. An abuse of discretion is established where the findings are not supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

ZONING / ENFORCEMENT PROCEEDINGS

Where an application is contested or denied, the Zoning Hearing Boards' decision must be accompanied by findings of fact and conclusions based thereon together with the reasons therefor. Conclusions based on any provisions of this act or of any ordinance, rule or regulation shall contain a reference to the provision relied on and the reasons why the conclusion is deemed appropriate in the light of the facts found. 53 P.S. § 10908.

ZONING

A zoning board's Findings of Fact and Conclusions of Law are sufficient if it provides an adequate explanation of the zoning board's resolution of the factual questions involved, and sets forth its reasoning in such a way as to show its decision was reasoned and not arbitrary.

ZONING

Determinations as to the credibility of witnesses and the weight to be given to evidence are matters left solely to the zoning board in the performance of its fact-finding role.

ZONING

Where the record is not adequate for appellate review, the case should be remanded to the zoning board to develop the record and make proper findings of fact and conclusions of law.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 10128 - 2018

Appearances: Thomas E. Kuhn, Esq., for Appellants Thomas Sebald and the Glenwood Neighborhood Homeowners Association, by Thomas Sebald and Ronald J. Kunco, Jr., Trustees ad litem

Donald L. Wagner, III, Esq., for Appellee Zoning Hearing Board of the City of Erie

Bryan G. Baumann, Esq., for Intervenors Donald Morse and Susan Morse

OPINION

Domitrovich, J. August 13, 2018

The matter before this Trial Court is the Notice of Land Use Appeal of Appellants Thomas Sebald and the Glenwood Neighborhood Homeowners Association, by Thomas Sebald and Ronald J. Kunco, Jr., Trustees ad litem (collectively "Appellants") from the December 19, 2017, decision of Appellee Zoning Hearing Board of the City of Erie affirming the City of Erie Zoning Office's determination that Intervenors Donald and Susan Morse's residence located in the R-1 low density residential district qualifies as a "single-family dwelling" and is therefore a permitted use under the Erie Zoning Ordinance. The initial issue raised by Appellants is whether the Zoning Hearing Board's Findings of Fact and Conclusions are in accord with the requirements under the Pennsylvania Municipalities Planning Code ("MPC"). This Trial Court provides the following analysis:

This Trial Court's standard of review in a zoning hearing board appeal is specified in the MPC:

> If the record below includes findings of fact made by the governing body, board or agency whose decision or action is brought up for review and the court does not take additional evidence or appoint a referee to take additional evidence, the findings of the governing body, board or agency shall not be disturbed by the court if **supported by substantial evidence.**

53 P.S. § 11005-A (emphasis added); *see also Marshall v. City of Philadelphia*, 97 A.3d 323, 331 (Pa. 2014). Where a trial court does not take any additional evidence, the trial court is limited to determining whether the zoning board committed a manifest abuse of discretion or an error of law in granting the variance. *Marshall*, 97 A.3d at 331. An abuse of discretion is established where the findings are not supported by substantial evidence. *Collier Stone Co. v. Twp. of Collier Bd. of Comm'rs*, 735 A.2d 768, 772, n.9 (Pa.Cmwlth. 1999). "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637, 640 (Pa. 1983). Determinations as to the credibility of witnesses and the weight to be given evidence are matters solely within the authority of the zoning board in the performance of its fact-finding role. *In re: Cutler Group, Inc.*, 880 A.2d 39, 46 (Pa. Commw. 2005). The role of the trial court is to determine whether "there is some basis for the [zoning hearing board's] action, or in other words, that the action of the zoning board was not arbitrary and capricious." *In re: Appeal of Lieb*, 116 A.2d 860, 866 (Pa. Super. 1955). A trial court errs when it substitutes its judgment on the merits for that of a zoning board. *Marshall*, 97 A.3d at 331.

As to the issue of whether the Zoning Hearing Board's Findings of Fact and Conclusions are in accord with the requirements under the MPC, the Zoning Hearing Board must make each decision under Section 908(9) of the MPC, which must:

> be accompanied by findings of fact and conclusions based thereon together with the reasons therefor. Conclusions based on any provisions of this act or of any ordinance, rule or regulation shall contain a reference to the provision relied on and the reasons why the conclusion is deemed appropriate in the light of the facts found.

53 P.S. § 10908; (*See also* Supplemental Reproduced Record 110). The MPC requires a zoning board to issue a written decision so that reviewing courts, and applicants, benefit from understanding the reasons for the zoning board's decision. *Smith v. Hanover Zoning Hearing Bd.*, 78 A.3d 1212, 1223 (Pa.Cmwlth. 2013). "A zoning board's opinion is sufficient if it provides an adequate explanation of its resolution of the factual questions involved, and sets forth its reasoning in such a way as to show its decision was reasoned and not arbitrary." *Taliaferro v. Darby Twp. Zoning Hearing Bd.*, 873 A.2d 807, 816 (Pa.Cmwlth. 2005). Where a zoning board's decision is clear and substantially reflects application of the law governing variances, the decision is sufficient to enable effective review and no requirement exists that a zoning board must cite specific evidence in support of each of the zoning board's findings. *Id.* (citing *In re Avanzato*, 403 A.2d 198 (Pa.Cmwlth. 1979)).

Moreover, determinations as to the credibility of witnesses and the weight to be given to evidence are matters left solely to the zoning board in the performance of its fact-finding role. *Borough of Youngsville v. Zoning Hearing Bd. of Borough of Youngsville*, 450 A.2d 1086, 1089 (Pa.Cmwlth. 1982). Where the record is not adequate for appellate review, the case should be remanded to the board to develop the record and make proper findings of fact and conclusions of law. *See Riverfront Dev. Grp., LLC v. City of Harrisburg Zoning Hearing Bd.*, 109 A.3d 358, 370 (Pa.Cmwlth. 2015); *see e.g. Mill-Bridge Realty, Inc. v. Manchester Twp. Zoning Bd. of Adjustment*, 286 A.2d 483, 486 (Pa.Cmwlth. 1972) (remanding to the zoning board and directing the board to formulate findings of fact and conclusions together with the reasons therefor in support of its decision).

In the instant case, the Zoning Hearing Board's fifteen alleged findings of fact and seven alleged conclusions of law merely recited and identified witnesses who testified by only summarizing details concerning each witnesses' testimony. (Amended Reproduced Record 28-30). The Zoning Hearing Board failed to provide specific factual findings upon which the Zoning Hearing Board based its decision. During the process by which facts are analyzed, deduced, and stated as findings of fact, the finder of fact can make informational findings, which give only information necessary to understanding the case. *See* Judicial Opinion Handwriting Book at 227 (2007 5th ed.). On the other hand, other facts are controlling, and provide the factual fundament necessary to determine the instant case. *Id.* From these controlling findings of fact, a zoning hearing board will find ultimate facts and draw upon controlling facts by making factual conclusions to affect the outcome of the instant case. *Id.*

Although this Zoning Hearing Board's alleged findings of fact reflect hearing all of the evidence presented, the Zoning Hearing Board in these alleged findings failed to make any credibility determinations and just merely summarized the witnesses' testimony. Counsel for the Zoning Hearing Board in his Brief in Opposition to the instant Land Use Appeal admitted as much in asserting "[t]he written decision of the Board is a summary of their hearing" and "the Board's decision summarized the key testimony heard by the Board . . . ." (*See* Appellant's Brief at pg. 7). Indeed, the Zoning Hearing Board's alleged findings merely provided a narrative of the testimony offered during the hearing before the Zoning Hearing Board. Moreover, said alleged findings did not include any explanation as to the Zoning Hearing Board's rationale for resolving evidentiary conflicts and credibility issues. *See Taliaferro*, 873 A.2d at 816. Absent such an explanation, this Trial Court cannot assume the responsibility in judicial review of drawing independent inferences from the testimony presented either to support a reversal

or to affirm the decision of the Zoning Hearing Board. *See Pantry Quik, Inc. v. Zoning Bd. of Adjustment of City of Hazleton*, 274 A.2d 571, 573 (Pa.Cmwlth. 1971) ("The purpose in delineating the findings of fact is to facilitate appellate review."); *see also Zoning Hearing Bd. of Upper Darby Twp. v. Konyk*, 290 A.2d 715, 717 (Pa.Cmwlth. 1972) (noting courts "may not usurp the Board's . . . unfulfilled duty to pass upon the factual validity of the evidence presented"). In short, the Zoning Hearing Board failed to render appropriately controlling findings and make ultimate factual conclusions providing the factual fundaments necessary to support properly the Zoning Hearing Board's decision.

Moreover, the Zoning Hearing Board's alleged Conclusions did not make reference to any provisions of the MPC or of any ordinance, rule or regulation relied upon or the "reasons why the conclusion is deemed appropriate in the light of the facts found." *See* 53 P.S. § 10908. Particularly relevant to the Zoning Hearing Board's decision is Section 204.10 of the Erie Zoning Ordinance, which sets forth the "Permitted Uses" and "Special Exceptions" permitted in the R-1 low density residentially zoned district. (Supplemental Reproduced Record 9, 11). Also relevant is Article 6, which sets forth the definitions of "Dwelling," "Dwelling\ One-Family," "Family," and "Transient." (Amended Reproduced Record 121-122, 135). However, the Zoning Hearing Board made no references to these relevant provisions as required under the MPC. Moreover, contrary to the Morses' assertion, the Zoning Hearing Board's Findings of Fact and Conclusions did not "confirm[] that the Board considered caselaw from the Commonwealth regarding the application of zoning laws to short-term vacation rentals." (*See* Intervenors' Brief at pg. 22). Rather, the Zoning Hearing Board merely made a so-called "finding" Ms. Morse "provided the board with a copy of an article provided to her by her attorney that described two recent PA Commonwealth Court cases which also involved short-term rentals of residential properties." (Amended Reproduced Record 30). However, as noted above, merely reciting an event which occurred during the hearing is not sufficient to establish a proper finding. Moreover, the Zoning Hearing Board's separate section entitled "Decision" stated "Member Jeffrey Johnson also indicated that the recent court decisions influenced his vote." (Amended Reproduced Record 32). Again, merely reciting a statement by a Zoning Hearing Board member regarding unspecified "court decisions" is not a reference to the MPC nor an ordinance, rule or regulation. Reference to unspecified "court decisions" is also an insufficient basis for the "reasons why the [Zoning Hearing Board's] conclusion is deemed appropriate in the light of the facts found." *See* 53 P.S. § 10908.

A conclusion of law is a statement as to law applicable on the basis of facts found by a fact finder. *See* Black's Law Dictionary at 290 (1990 6th ed.). A conclusion of law is a finding by an adjudicatory body "as determined through application of rules of law" and embodies the "final judgment or decree required on basis of facts found." *Id.* Moreover, conclusions of law are "propositions of law which [an adjudicator] arrives at after, and as a result of, finding certain facts in [a] case . . . and as to these he must state . . . separately in writing. *Id.* In the instant case, like the Zoning Hearing Board's alleged findings, the Zoning Hearing Board's alleged Conclusions again merely recited the testimony presented at the hearing regarding the Erie Zoning Office's investigations in response to the Glenwood Association's complaints. As an example, the Zoning Hearing Board "concluded" a "Zoning Office representative said that upon receiving the complaint, zoning officials conducted an investigation of City records, and made an on-site, visual inspection of the property in question." (Amended

Reproduced Record 31). The Zoning Hearing Board also "concluded" the "Erie Zoning Office determined there was no violation of the property." (Amended Reproduced Record 31). These alleged "Conclusions" are scarcely different than the alleged "Findings of Fact" set forth by the Zoning Hearing Board, which merely summarized and provided a narrative of the testimony of Jake Welsh, the Chief Zoning Officer. The recitation of testimony heard by the Zoning Hearing Board cannot amount to Conclusions which accord with the requirements under MPC.

In a separate section entitled "Decision," the Zoning Hearing Board again recited the events which occurred on November 13th, 2018 when the Zoning Hearing Board voted to "reject[] the claim by appellants that the home owners, who are renting their properties through the AirBnB website, are in violation of the Erie City Ordinance." (Amended Reproduced Record 32). This "Decision" presumably sets forth the final disposition of this matter before the Zoning Hearing Board. However, the reason in support of the Zoning Hearing Board's decision was based on a statement made by one of five Zoning Hearing Board members. Specifically, this "Decision" recounted a statement by one Zoning Hearing Board member, Edward Dawson, who stated at the Zoning Hearing Board meeting: "the residence meets all of the qualifications for a single family dwelling under the City Code." (Amended Reproduced Record 32). Reciting a general conclusionary statement by a Zoning Hearing Board member during a meeting is not a proper finding of fact or a proper conclusion of law, and reliance thereon does not properly demonstrate "why th[is] conclusion is deemed appropriate in the light of the facts found," if any. *See* 53 P.S. § 10908.

This Zoning Hearing Board's alleged Findings of Fact and Conclusions did not satisfy the requirements of the MPC, thereby depriving this Trial Court of meaningful judicial review. Indeed, this Trial Court cannot engage in effective appellate review to determine whether substantial evidence exists to support the Zoning Hearing Board's decision since the Zoning Hearing Board issued improper Findings of Fact and Conclusions of Law without establishing the reasons therefor in accordance of the applicable provisions of the MPC and the standards set forth in the Erie Zoning Ordinance. Without legally sufficient Findings of Fact and Conclusions of Law, this Trial Court's role of determining whether "there is some basis for the [zoning hearing board's] action, or in other words, that the action of the zoning board was not arbitrary and capricious" is rendered impracticable. *See In re: Appeal of Lieb*, 116 A.2d at 866.

Since insufficient information exists regarding whether or not the Zoning Hearing Board's Findings of Fact were reasoned and not arbitrary, this Trial Court must, therefore, conclude the Zoning Hearing Board did not make the essential and proper Findings of Fact and Conclusions of Law based thereon, together with reasons therefor, in accordance with Section 908(9) of the MPC and Section 507(11) of the Erie Zoning Ordinance. This Trial Court must remand this case to this Zoning Hearing Board of the City of Erie to issue proper and sufficient Findings of Fact and Conclusions in accordance with the applicable provisions of the MPC, the standards set forth in the Erie Zoning Ordinance, and Pennsylvania statutory law and case law so that this Trial Court can properly review such work product.

Accordingly, consistent with the foregoing, this Trial Court enters the following Order of Court:

ORDER

AND NOW, to-wit, this 13th day of August, 2018, after the scheduled Argument on the Land Use Appeal filed by Thomas Sebald and the Glenwood Neighborhood Homeowners Association, by Thomas Sebald and Ronald J. Kunco, Jr., Trustees ad litem ("Appellants"), by and through their counsel, Thomas E. Kuhn, Esq.; at which Thomas E. Kuhn, Esq., appeared on behalf of Appellants; Donald L. Wagner, III, Esq., appeared on behalf of Appellee Zoning Hearing Board of the City of Erie; and Bryan G. Baumann, Esq., appeared on behalf of Intervenors Donald Morse and Susan Morse; after review of the Amended Reproduced Record filed by counsel for the Zoning Hearing Board, Brief of Appellants in Support of Appellants' Appeal, Appellee's Brief in Opposition to Appellants' Land Use Appeal, Intervenors' Brief in Opposition, oral argument from counsel on July 23, 2018, the Findings of Fact and Conclusions of Law issued by the Zoning Hearing Board, the relevant statutory law and case law, and upon consideration of all law applicable to the instant case, it is hereby **ORDERED, ADJUDGED AND DECREED** that the instant matter is hereby **VACATED** and **REMANDED** for the Zoning Hearing Board of the City of Erie to re-issue its decision, and the Zoning Hearing Board is hereby directed to formulate its decision based on legally sufficient Findings of Fact and Conclusions of Law, together with the reasons therefor, in accordance with the applicable provisions of the MPC, the standards set forth in the City of Erie Zoning Ordinance, and Pennsylvania statutory law and case law, which substantiate the City of Erie Zoning Hearing Board's decision.

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

FRENCH CREEK VALLEY CONSERVANCY, Plaintiff

v.

WILLIAM E. MITCHELL and MITCH-WELL ENERGY, INC., Defendants

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT / STANDARD

Pursuant to the Pennsylvania Rules of Civil Procedure, any party may move for summary judgment in whole or in part as a matter of law whenever no genuine issue of any material fact exists as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT / STANDARD

The nonmoving party may not rest only on the mere allegations or denials in his pleadings, but must set forth in his response by affidavits, or as otherwise provided, specific facts in dispute. A motion for summary judgment must be granted in favor of a moving party if the other party chooses to rest on its pleadings, unless a genuine issue of fact is made out in the moving party's evidence taken by itself.

REAL ESTATE / CONTRACTS / OIL AND GAS LEASES

An oil and gas lease is controlled by ordinary principles of contract law.

REAL ESTATE / CONTRACTS / OIL AND GAS LEASES / KEY PROVISIONS

Oil and gas leases generally contain several key provisions, including the granting clause, which initially conveys to the lessee the right to drill for and produce oil or gas from the property; the habendum clause, which is used to fix the ultimate duration of the lease; the royalty clause; and the terms of surrender.

REAL ESTATE / CONTRACTS / OIL AND GAS LEASES / QUALIFIED FEE

If oil or gas is produced during the agreed upon primary term of the lease, a fee simple determinable is created in the lessee, and the lessee's right to extract the oil or gas becomes vested. A fee simple determinable is an estate in fee that automatically reverts to the grantor upon the occurrence of a specific event. The interest held by the grantor after this type of conveyance is termed "a possibility of reverter." Such a fee is a fee simple, since the title vested may last forever in the grantee and his heirs and assigns, "the duration depending upon the concurrence of collateral circumstances which qualify and debase the purity of the grant."

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 13126-2016

Appearances: Brian T. Cagle, Esq., for the Plaintiff
Crandall G. Nyweide, Esq., for the Defendants

OPINION

Domitrovich, J. August 14, 2018

The matter before this Trial Court is the Motion for Partial Summary Judgment filed by Plaintiff French Creek Valley Conservancy (the "Conservancy") wherein the Conservancy requests this Trial Court to enter partial judgment in its favor alleging no issue of material fact exists and contends the following: the lease agreement entered into between Defendants William E. Mitchell and Mitch-Well Energy, Inc. ("Defendants") and Martha Ann Smith

terminated no later than January 1, 1990; the fee simple determinable oil and gas interest reverted to Martha Anne Smith by operation of law; the Conservancy is the current owner of the oil and gas interest in the Property; and Defendants must cease production and withdrawal of natural gas and plug the natural gas well ("Well") in compliance with the Pennsylvania Department of Environmental Protection regulations. This Trial Court hereby provides the following analysis:

The Conservancy is a nonprofit corporation promoting environmental integrity of the French Creek watershed, advocating for the protection of natural resources, and coordinating land protection, education, and research. (*See* Affidavit of Brenda Costa at ¶ 2). The Conservancy presently owns approximately 44 acres of real property being identified as tax parcel number (47)24-39-5 situated in Waterford Township, Erie County, Pennsylvania (the "Property"). (*See* Deed dated May 26, 2009). On May 26, 2009, the Conservancy acquired this Property by Deed from Martha Ann Smith and Henry Ralph Smith. (*Id.*). Said Deed unequivocally "grant[ed], and convey[ed], s[old] and confirm[ed] unto the said Grantee its heirs and assigns: All that certain piece or parcel of real estate situate in Waterford Township, Erie County, Pennsylvania . . . ." (*Id.*). As this Deed does not contain an exception for the reservation of oil, gas, and mineral interests, the Conservancy holds all oil, gas, and mineral rights attendant to the Property.

The following relates to the oil and gas lease agreement at issue: On March 25, 1982, Martha Ann Smith entered into an Oil and Gas Lease ("Lease Agreement") with Defendants William E. Mitchell and Mitch-Well Energy, Inc. "for the sole and only purpose of drilling and operating for oil and gas." (*See* Lease Agreement dated March 25, 1982, recorded in Erie County Recorder of Deeds, Book 1494, page 373). Shortly thereafter, Defendants drilled this Well on this Property and made several payments to Martha Ann Smith pursuant to the Lease Agreement. (*See* Martha Ann Smith Deposition at 9:3-12) (hereinafter "Smith Depo."). The duration of the Lease Agreement was as follows: "if LESSEE . . . shall commence drilling operations at any time while this lease is in force, this lease shall remain in force and its terms shall continue so long as such operations continue with due diligence and if production results therefrom, then so long as production, storage, or withdrawals continue." (*See* Lease Agreement).

Defendants ceased making payments to Martha Anne Smith sometime in 1986-1987, two or three years after production began. (Smith Depo. 9:10-12; 10:3-4). Sometime after Defendants ceased making payments, the "[W]ell quit . . . [,] ran out of gas," and Defendant William E. Mitchell stated to Martha Anne Smith that the Well "was no longer producing." (Smith Depo. 9:10-16). Martha Anne Smith personally visited this Property and discovered this Well was no longer in use and instead was producing mice. (Smith Depo. 12:2-11).

Martha Anne Smith and the Conservancy both viewed the Lease Agreement between Martha Anne Smith and the Conservancy as no longer valid when Martha Anne Smith conveyed the Property to the Conservancy in 2009. (*See* Affidavit of Brenda Costa; Smith Depo. 11:1-3; 12:2-4; 17:19-23; 18:21-25). This subject Well was non-producing. (*See id.*).

Plaintiff requested through Interrogatories and Requests for Production of Documents the dates or periods during which this Well was actively producing or extracting natural gas from this Property. In response, Defendants referred the Conservancy to Pennsylvania Department of Environmental Protection ("DEP") records attached to Defendants' Answers.

According to an Oil & Gas Well Production Report produced by the Office of Oil and Gas Management of DEP, Defendants began and ceased production on three separate occasions: (1) between January 1, 1984, ending December 31, 1984; (2) between January 1, 1989, ending December 31, 1989; and (3) between January 1, 2012, ending December 31, 2012.

DEP records further reveal at least five DEP inspections were conducted at this Well from September 17, 2009, to April 29, 2013, which revealed no production or withdrawals were being made from this Well located thereon and indicated this Well was abandoned. (*See* DEP Inspection Reports dated Sept. 17, 2009 and March 24, 2011; *see also* DEP Surface Activities Inspection Reports dated April 20, 2012; Nov. 19, 2012; and April 29, 2013; *see also* Notice of Violation letter from DEP to Defendants dated April 20, 2011). These DEP inspection reports noted this Well was "shut in," and no production equipment was connected to this Well on the Property. (*See id.*). Eventually, by Order dated January 29, 2013, the DEP determined this Well was abandoned as defined under the Oil and Gas Act and directed, *inter alia*, that Defendants plug this Well in accordance with the Oil and Gas Act. (*See* DEP Order dated Jan. 29, 2013).

Sometime on or about November 11, 2015, without permission from the Conservancy, Defendants again began producing natural gas from this Well. (*See* Affidavit of Brenda Costa at ¶ 12-13). The Conservancy notified Defendants that the Defendants did not have permission to produce natural gas from this Well located on the Property. (*Id.* at ¶ 14). Thereafter, the Conservancy filed the instant quiet title action against Defendants. (*See* Complaint filed Nov. 21, 2016).

Pursuant to the Pennsylvania Rules of Civil Procedure, any party may move for summary judgment in whole or in part as a matter of law whenever no genuine issue of any material fact exists as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report. Pa.R.Civ.P. 1035.2(1). In reviewing a Motion for Summary Judgment, a trial court must review the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *See Gerber v. Piergrossi*, 142 A.3d 854, 858 (Pa. Super. 2016). The nonmoving party "may not rest only on the mere allegations or denials in his pleadings, but must set forth in his response by affidavits, or as otherwise provided, specific facts in dispute." *Kniaz v. Benton Borough*, 642 A.2d 551, 553 (164 Pa.Cmwlth. 1994). "A motion for summary judgment must be granted in favor of a moving party if the other party chooses to rest on its pleadings, unless a genuine issue of fact is made out in the moving party's evidence taken by itself." *Curry v. Estate of Thompson*, 481 A.2d 658, 660 (Pa.Super. 1984). Summary judgment is appropriate "only in those cases where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Sellers v. Twp. of Abington*, 106 A.3d 679, 684 (Pa. 2014) (quoting *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010)).

An oil and gas lease is controlled by ordinary principles of contract law. *J.K. Willison v. Consol. Coal Co.*, 637 A.2d 979, 982 (Pa. 1994). An oil and gas lease must be construed "in accordance with the terms of the agreement as manifestly expressed" and the "accepted and plain meaning of the language used, rather than the silent intentions of the contracting parties, determines the construction to be given the agreement." *Id.* The party seeking to terminate an oil and gas lease bears the burden of proof. *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42

A.3d 261, 267 (Pa. 2012) (citing *Jefferson Cty. Gas Co. v. United Nat. Gas Co.*, 93 A. 340 (Pa. 1915)). "[O]il and gas leases generally contain several key provisions, including the granting clause, which initially conveys to the lessee the right to drill for and produce oil or gas from the property; the habendum clause, which is used to fix the ultimate duration of the lease; the royalty clause; and the terms of surrender." *T.W. Phillips Gas & Oil Co.*, 42 A.3d at 267 (citing *Jacobs*, 332 F.Supp.2d at 764).

If oil or gas is produced during the agreed upon primary term of the lease, a fee simple determinable is created in the lessee, and the lessee's right to extract the oil or gas becomes vested. *T.W. Phillips Gas & Oil Co.*, 42 A.3d at 267 (*citing* Calhoon v. Neely, 50 A. 967, 968 (Pa. 1902); *Jacobs v. CNG Transmission Corp.*, 332 F.Supp.2d 759, 772 (W.D.Pa.2004) (applying Pennsylvania law)). A fee simple determinable is an estate in fee that automatically reverts to the grantor upon the occurrence of a specific event. *Id.* (citing *Brown v. Haight*, 255 A.2d 508, 510 (Pa. 1969)). The interest held by the grantor after this type of conveyance is termed "a possibility of reverter." *Id.* (quoting *Higbee Corp. v. Kennedy*, 428 A.2d 592, 595 (Pa.Super. 1981) (durational language, such as "so long as," "during," "while" and "until," are generally used to create the fee simple determinable)). Such a fee is a fee simple, since the title vested may last forever in the grantee and his heirs and assigns, "the duration depending upon the concurrence of collateral circumstances which qualify and debase the purity of the grant." *Id.*

In *Brown v. Haight*, the grantor and lessee entered into an oil and gas lease wherein the habendum clause stated: "To have and to hold the said lands and rights unto the Grantee for the term of twenty years from the date hereof, and As much longer as . . . oil or gas is found or produced in paying quantities . . . ." *Brown v. Haight*, 255 A.2d 508, 511 (Pa. 1969). For six years, the lessee produced no oil or gas from the well. *Id.* The Pennsylvania Supreme Court concluded:

> "[W]hen oil and gas were not produced in paying quantities, the grantee's fee interest terminated automatically and the property reverted to the grantor. Since the grantee remained on the property with the implied consent of the grantor[,] although he no longer possessed any legal interest in the property, he could do so only under a Tenancy at Will. We hold, therefore, that [the grantees] remained on the property under a Tenancy at Will, which the [grantors] could [have] terminate[d] whenever they so chose."

Id. Thus, the Pennsylvania Supreme Court held since the lessee failed to produce oil for a period of six years, the lessee's oil and gas interest in the property reverted automatically to the grantor by operation of law. *Id.*

In the instant case, the habendum clause of the instant Lease Agreement grants a fee simple determinable that vests and continues as long as the "operations continue with due diligence and if production results therefrom, then so long as production . . . or withdrawals continue." (*See* Lease Agreement). Thus, the Lease Agreement continued as long as gas was produced or withdrawn from this Well. However, no dispute exists that gas was not produced or withdrawn from this Well from December 31, 1989 through January 1, 2012. This period of inactivity was in excess of twenty years, almost four times longer than the lease agreement the Supreme Court of Pennsylvania concluded terminated automatically in *Brown*. Similar to *Brown*, natural gas in the instant case was not produced or withdrawn from

this Well; therefore, Defendants' interests in the Property terminated automatically. When Defendants ceased production and withdrawal of natural gas from this Well, Defendants' interest automatically reverted to the Smiths by operation of law. Thereafter, Martha Ann Smith and Henry Ralph Smith conveyed all of their oil, gas, and mineral interest in the Property to the Conservancy. As such, the Conservancy now holds the oil, gas, and mineral interest in the Property and is entitled to enforce its rights in connection therewith.

Moreover, upon abandoning a well, "the owner or operator shall plug the well . . . to stop the vertical flow of fluids or gas within the well bore." 25 Pa. Code § 78.91. The "owner" of a well is the "person who owns, manages, leases, controls or possesses a well or coal property." 25 Pa.Code § 78.1. An "owner" does not include the owner of the surface rights to the real property if that person (1) did not participate or incur the costs of operation of the well and (2) did not have control over the operation of the well. *See id.* In the instant case, no genuine dispute of material fact exists as to this Well being abandoned. At least five DEP inspections were conducted at the Property from September 17, 2009, to April 29, 2013, which revealed no production or withdrawals were being made from this Well located thereon and the DEP considered this Well abandoned. Neither the Smiths nor the Conservancy participated or incurred the costs of Defendants' producing and withdrawing natural gas from this Well. Similarly, neither the Smiths nor the Conservancy controlled the production or withdrawal of natural gas from this Well. As such, Defendants were the sole owners and operators of this Well. Also, no genuine dispute of material fact exists the Lease Agreement is no longer valid. Thus, the Conservancy is entitled to judgment as a matter of law, and Defendants are statutorily required to plug this Well located on the Property pursuant to 25 Pa. Code § 78.91, *et seq.*

Finally, this Trial Court concludes the *Nanty-Glo* rule does not apply to the instant case and Defendants, as the nonmoving parties, concede that the *Nanty-Glo* is inapplicable to the instant matter. *See e.g., Dudley v. USX Corp.*, 606 A.2d 916, 918 (Pa.Super. 1992) (noting the *Nanty-Glo* rule states: "the party moving for summary judgment may not rely solely upon its own testimonial affidavits or depositions, or those of its witnesses, to establish the non-existence of genuine issues of material fact."). Thus, this Trial Court finds a discussion of the *Nanty-Glo* rule is unnecessary.

Accordingly, partial summary judgment is entered in favor of the Conservancy. Consistent with the foregoing, this Trial Court hereby enters the following Order of Court:

ORDER

AND NOW, to-wit, this 14th day of August, 2018, after oral argument on the Motion for Partial Summary Judgment filed by Plaintiff French Creek Valley Conservancy ("Conservancy"), by and through its counsel, Brian T. Cagle, Esq.; at which Brian T. Cagle, Esq., appeared for the Conservancy; and Crandall G. Nyweide, Esq., appeared for Defendants William E. Mitchell and Mitch-Well Energy, Inc. ("Defendants"); upon consideration of the Conservancy's Motion for Partial Summary Judgment and accompanying Brief in Support, as well as Defendants' Response; after review of the entire record; consistent with foregoing Opinion and analysis, and in view of the relevant statutory law and case law, it is hereby **ORDERED, ADJUDGED AND DECREED** that **Plaintiff's Motion for Partial Summary Judgment** is **GRANTED** to the following extent:

(1) Based on the record before this Trial Court, no genuine issue of material fact exists that the Oil and Gas Lease Agreement entered into between Martha Ann Smith and Defendants on March 25, 1982, terminated pursuant to its own terms and by Defendants' abandonment of this Well;
(2) The Oil and Gas Lease terminated as of January 1, 1990;
(3) The oil and gas interest in the Property, as described by Deed recorded at Erie County recorder of Deeds Book 1568, page 613, was a fee simple determinable and reverted to Martha Anne Smith on January 1, 1990, by operation of law;
(4) Martha Anne Smith conveyed her entire interest in the Property, including the oil and gas interest, to the Conservancy on May 26, 2009;
(5) The Conservancy is the current owner of the oil and gas interest in the Property;
(6) Defendants shall immediately cease production, storage, and withdrawal of natural gas at the Oil and Gas Well located on the Property; and
(7) Defendants, at their own expense, shall plug the Oil and Gas Well in a manner that complies with regulations promulgated by the Pennsylvania Department of Environment Protection.

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

COMMONWEALTH OF PENNSYLVANIA

v.

NATHAN J. WALLER

POST-CONVICTION RELIEF ACT /
COGNIZABLE ISSUES RESULTING FROM GUILTY PLEA

Upon entering a plea of guilty, the only cognizable issues available in a PCRA proceeding are the validity of the plea and the legality of the sentences.

POST-CONVICTION RELIEF ACT / LEGALITY OF SENTENCE

The phrase "illegal sentence" is a term of art which is applied to three narrow categories of cases: (1) claims the sentence falls outside of the legal parameters prescribed by the applicable statute; (2) claims involving merger/double jeopardy; and (3) claims implicating the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

POST-CONVICTION RELIEF ACT / LEGALITY OF SENTENCE / MERGER

Whether a defendant's convictions merge for sentencing is a question implicating the legality of defendant's sentence.

POST-CONVICTION RELIEF ACT / LEGALITY OF SENTENCE / MERGER

With specific reference to claims involving merger, Section 9765 of the Sentencing Code governing the merger of sentences prohibits merger unless two distinct facts are present: (1) the crimes arise from a single criminal act; and (2) all of the statutory elements of one of the offenses are included in the statutory elements of the other. 42 Pa.C.S. § 9765.

POST-CONVICTION RELIEF ACT / LEGALITY OF SENTENCE / MERGER

Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense. 42 Pa.C.S. § 9765.

POST-CONVICTION RELIEF ACT / LEGALITY OF SENTENCE

A claim that implicates the fundamental legal authority of the court to impose a particular sentence constitutes a challenge to the legality of the sentence. A sentence is illegal if the sentence exceeds the statutory maximum. Thus, when a court imposes a sentence outside of the legal parameters prescribed by the applicable statute, the sentence is illegal.

POST-CONVICTION RELIEF ACT

A request for relief challenging the discretionary aspects of a sentence is not a cognizable claim under the PCRA.

RECIDIVISM RISK REDUCTION INCENTIVE ("RRRI")

The Recidivism Risk Reduction Incentive Act, 61 Pa.C.S. § 4501–4512, makes certain offenders eligible for release on parole before the expiration of their minimum terms of imprisonment. Under the RRRI sentencing rules, the "minimum shall be equal to three-fourths of the minimum sentence imposed when the minimum sentence is three years or less." 61 Pa.C.S. § 4505.

RECIDIVISM RISK REDUCTION INCENTIVE ("RRRI")

The stated purpose of RRRI is to create a program that ensures appropriate punishment for persons who commit crimes, encourages inmate participation in evidence-based programs that reduce the risks of future crime, and ensures the openness and accountability of the criminal justice process while ensuring fairness to crime victims. 61 Pa.C.S. § 4502.

MOTIVATIONAL BOOT CAMP

Motivational boot camp is a program in which eligible inmates participate for a period

of six months in a humane program for motivational boot camp programs which shall provide for rigorous physical activity, intensive regimentation and discipline, work on public projects, substance abuse treatment services licensed by the Department of Health, continuing education, vocational training, prerelease counseling, and community corrections aftercare. 61 Pa.C.S. § 3903.

MOTIVATIONAL BOOT CAMP

Upon certification of the inmate's successful completion of Motivational Boot Camp, the Pennsylvania Board of Probation and Parole must release the inmate on parole, notwithstanding any minimum sentence imposed in the case. The parolee is first subject to intensive supervision for a period of time determined by the board, after which the parolee is then subject to the usual parole supervision. 61 Pa.C.S. § 3907.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. CR 1058 of 2017

Appearances: William J. Hathaway, Esq., on behalf of Nathan J. Waller
Paul S. Sellers, Esq., for the Commonwealth

OPINION

Domitrovich, J. August 17, 2018

AND NOW, to-wit, this 17th day of August, 2018, after a thorough review of the *pro se* Motion for Post-Conviction Collateral Relief, which this Trial Court notes is Nathan J. Waller's ("Petitioner") first Motion for Post-Conviction Collateral Relief ("PCRA Petition") filed on February 14, 2018; Attorney William J. Hathaway's "No Merit" Letter filed on May 29, 2018; and Commonwealth's letter submitted to this Trial Court by Assistant District Attorney Paul S. Sellers; as well as a thorough and independent review of the entire record and relevant statutory law and case law, it is hereby **ORDERED, ADJUDGED AND DECREED** that Petitioner's PCRA Petition is hereby **DISMISSED** as his Petition states no grounds for which relief may be granted under the Post-Conviction Relief Act, 42 Pa.C.S. § 9541 *et seq.*

On May 12, 2017, the District Attorney's Office filed a Criminal Information charging Petitioner with the following: (1) Driving Under the Influence, General Impairment – Incapable of Safe Driving, 3rd Offense; (2) Driving Under the Influence, Highest Rate of Alcohol, BAC 0.16% or greater, 3rd Offense; (3) Driving While Operating Privilege is Suspended or Revoked following ARD/DUI-related suspension; and (4) Driving While Operating Privilege is Suspended or Revoked, BAC 0.02% or greater, 2nd Offense, following ARD/DUI-related suspension. This is the third occasion DUI-related charges have been levied against Petitioner since Petitioner was convicted previously of DUI twice. Petitioner was assigned Kenneth A. Bickel as Petitioner's court-appointed counsel.

On August 8, 2017, Petitioner entered a counseled guilty plea to Count Two (Driving Under the Influence, Highest Rate of Alcohol, BAC 0.16% or greater, 3rd Offense) in violation of 75 Pa.C.S. § 3802(c) and Count Four (Driving While Operating Privilege is Suspended or Revoked, BAC 0.02% or greater, 2nd Offense, following ARD/DUI-related suspension) in

violation of 75 Pa.C.S. § 1543(b)(1.1)(ii). In exchange, the Commonwealth agreed to *nolle pros* Counts One and Three. On September 27, 2017, Petitioner was sentenced as follows:

- Count Two: Incarceration for a minimum period of 16 months and a maximum period of 48 months at the Pa Department of Corrections in the **standard range** consecutive to any sentence(s) Petitioner is currently serving.
- Count Four: Incarceration for a minimum period of 6 months and a maximum period of 12 months at the Pa Department of Corrections in the **standard rang**e consecutive to Count Two.

Thus, Petitioner was sentenced to an aggregate total of twenty-two (22) months to sixty (60) months of incarceration. This Trial Court also found Petitioner RRRI eligible and applied the RRRI formula to the minimum portion of his sentence to sixteen and one-half (16 ½) months; therefore, if Petitioner complies with all requirements under RRRI while incarcerated, Petitioner's total sentence will be sixteen and one-half (16 ½) months to sixty months. No direct appeal was filed from Petitioner's judgment of sentence.

On February 14, 2018, Petitioner timely filed the instant PCRA Petition, wherein Petitioner challenges the sentences imposed by this Trial Court. Specifically, "Petitioner contends that his sentences should have merged due to the similar nature of the crimes he was convicted of." (*See* PCRA Petition at pg. 4). Petitioner also argues this Trial Court misinterpreted the legislative intent of the statutes 75 Pa.C.S. § 3802(c) and 75 Pa.C.S. § 1543(b)(1.1)(ii) under which Petitioner was convicted.

By Order dated February 28, 2018, this Trial Court appointed Attorney William J. Hathaway as Petitioner's PCRA counsel. After the Plea and Sentencing Hearings, transcripts were filed with Clerk of Courts of Erie County, Attorney Hathaway filed his "No Merit" letter, wherein Attorney Hathaway details the nature and extent of his review. Attorney Hathaway also lists the issues Petitioner desires to raise, and Attorney Hathaway explains why Petitioner's issues are meritless. Specifically, Attorney Hathaway states:

> The instant sentence is patently legal in nature and the Petitioner has not presented any claims that implicate the legality of the sentence. The sentence imposed was within the standard range of the sentencing guidelines and does not exceed the statutory maximum so as to state a colorable challenge to the legality of sentence. The sentence imposed was in accord with the discretion and authority of the sentencing court and would not implicate the discretionary aspects of sentencing on direct appeal let along constitute a claim of illegal sentence.

(*See* Attorney Hathaway's "No Merit" Letter dated May 29, 2018). Thus, Attorney Hathaway states Petitioner does not have any colorable claims for relief. Attorney Hathaway filed therewith a Petition for Leave to Withdraw as Counsel, which is currently pending before this Trial Court.

On July 3, 2018, this Trial Court received a letter from ADA Paul S. Sellers on behalf of the Commonwealth. Therein, ADA Sellers "concurs with the assessment of Attorney Hathaway in his letter dated May 29, 2018 that the petitioner, Nathan J. Waller, has failed to state any

colorable claim for PCRA relief." (*See* Letter from ADA Paul S. Sellers dated July 2, 2018).

As Attorney Hathaway has filed a "No Merit" letter, this Trial Court is required to conduct an independent review as an appropriate follow-up to said "No Merit" letter. *Commonwealth v. Merritt*, 827 A.2d 485, 487 (Pa. Super. 2003).

Under the Post-Conviction Collateral Relief Act, a petitioner must plead and prove by a preponderance of the evidence all of the following to be eligible for relief:

(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:
   i. Is currently serving a sentence of imprisonment, probation or parole for the crime;
   ii. Awaiting execution of a sentence of death for the crime; or
   iii. Serving a sentence which must expire before the person may commence serving the disputed sentence;

(2) That the conviction or sentence resulted from one or more of the following:
   i. A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States, which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place;
   ii. Ineffective assistance of counsel which in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place;
   iii. A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent;
   iv. The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court;
   v. The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced;
   vi. The imposition of a sentence greater than the lawful maximum;
   vii. A proceeding in a tribunal without jurisdiction;

(3) That the allegation of error has not been previously litigated or waived; and

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

42 Pa.C.S. § 9543(a). A petitioner must meet all four requirements of the statute to be eligible for relief. *Commonwealth v. Rachak*, 62 A.3d 389, 394 (Pa.Super.2012). In the instant case, Petitioner satisfies the first requirement since he is currently serving a sentence of incarceration for a period of twenty-two (22) months to sixty (60) months of incarceration at the Pennsylvania Department of Corrections pursuant to the sentence on his convictions at the above-referenced docket.

Second, Petitioner must plead and prove by a preponderance of the evidence that imposition of Petitioner's sentence is greater than the lawful maximum. Specifically, Petitioner alleges his sentences at Counts Two and Four should have merged pursuant to the merger doctrine. Upon entering a plea of guilty, the only cognizable issues available in a PCRA proceeding are the validity of the plea of guilty and the legality of the sentences. *See Commonwealth v. Martinez*, 539 A.2d 399, 401 (1988). Whether a defendant's convictions merge for sentencing is a question implicating the legality of defendant's sentence. *Commonwealth v. Baldwin*, 985 A.2d 830, 833 (Pa. 2009). The phrase "illegal sentence" is a "term of art" in Pennsylvania Courts which is applied to three narrow categories of cases: (1) claims the sentence falls "outside of the legal parameters prescribed by the applicable statute"; (2) claims involving merger/double jeopardy; and (3) claims implicating the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Commonwealth v. Munday*, 78 A.3d 661, 664 (Pa. Super. 2013).

With specific reference to claims involving merger, Section 9765 of the Sentencing Code governs the merger of sentences:

> No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of the offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.

42 Pa.C.S. § 9765. Thus, this statute prohibits merger "unless two distinct facts are present: 1) the crimes arise from a single criminal act; and 2) all of the statutory elements of one of the offenses are included in the statutory elements of the other." *Commonwealth v. Tanner*, 61 A.3d 1043, 1046 (Pa. Super. 2013). Moreover, the Pennsylvania Supreme Court has held the proper analysis "is whether the elements of the lesser crime are all included within the elements of the greater crime, and the greater offense includes at least one additional element which is different, in which case the sentences merge, or whether both crimes require proof of at least one element which the other does not, in which case the sentences do not merge." *Commonwealth v. Anderson*, 650 A.2d 20, 24 (Pa. 1994).

In the instant case, Petitioner pled guilty to two offenses: (1) Driving Under the Influence, Highest Rate of Alcohol, in violation of 75 Pa.C.S. § 3802(c); and (2) Driving While Operating Privilege is Suspended or Revoked, BAC 0.02% or Greater, in violation of 75 Pa.C.S. § 1543(b)(1.1)(ii). Petitioner raises the issue of whether merger applies. This Trial Court's analysis is as follows:

Section 3802(c), Driving Under the Influence, Highest Rate of Alcohol is defined as:

> (c) Highest rate of alcohol.--An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is 0.16% or higher within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

75 Pa.C.S. § 3802(c).

Section 1543(b)(1.1)(i)-(ii), Driving While Operating Privilege is Suspended or Revoked,

BAC 0.02% or Greater, which includes the penalty clause, is defined as:

> (1.1)(i) A person who has an amount of alcohol by weight in his blood that is equal to or greater than .02% at the time of testing or who at the time of testing has in his blood any amount of a Schedule I or nonprescribed Schedule II or III controlled substance, as defined in the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, or its metabolite or who refuses testing of blood or breath and who drives a motor vehicle on any highway or traffic way of this Commonwealth at a time when the person's operating privilege is suspended or revoked as a condition of acceptance of Accelerated Rehabilitative Disposition for a violation of section 3802 or former section 3731 or because of a violation of section 1547(b)(1) or 3802 or former section 3731 or is suspended under section 1581 for an offense substantially similar to a violation of section 3802 or former section 3731 shall, upon a first conviction, be guilty of a summary offense and shall be sentenced to pay a fine of $1,000 and to undergo imprisonment for a period of not less than 90 days.
>
> (ii) A second violation of this paragraph shall constitute a misdemeanor of the third degree, and upon conviction thereof the person shall be sentenced to pay a fine of $2,500 and to undergo imprisonment for not less than six months.

75 Pa.C.S. § 1543(B)(1.1)(i)-(ii).

In the instant case, Section 3802(c) requires proof that Petitioner's BAC was "0.16% or higher within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle." 75 Pa.C.S. § 3802(c); *see also Commonwealth v. Thur*, 906 A.2d 552, 563 (Pa. Super. 2006) (noting the General Assembly "plainly intended to penalize driving after drinking enough alcohol that the BAC reaches 0.16% at any time within two hours after driving."). Section 3802(c)'s BAC requirement is an independent element distinct from Section 1543(b)(1.1)(i) since a higher BAC is required than Section 1543(b)(1.1)(i). Specifically, Section 1543(b)(1.1)(i) merely requires a BAC of "equal to or greater than .02%." 75 Pa.C.S. § 1543(b)(1.1)(i).

On the other hand, Section 1543(b)(1.1)(i) also contains an independent element distinct from Section 3802(c) since Section 1543(b)(1.1)(i) additionally requires Petitioner must have been driving a motor vehicle "at a time when the person's operating privilege is suspended or revoked as a condition of acceptance of Accelerated Rehabilitative Disposition." 75 Pa.C.S. § 1543(b)(1.1)(i); *Cf. Commonwealth v. Raven*, 97 A.3d 1244, 1250 (Pa. Super. 2014). Since each offense requires at least one element not included in the other, these statutes contemplate independent offenses. Therefore, Petitioner's claim of merger issue fails to merit relief.

Petitioner's next issue is whether Petitioner's sentences are legal. Under Pennsylvania law, "[a] claim that implicates the fundamental legal authority of the court to impose a particular sentence constitutes a challenge to the legality of the sentence." *Commonwealth v. Catt*, 994 A.2d 1158, 1160 (Pa. Super. 2010). A sentence is illegal if the sentence exceeds the statutory maximum. *Commonwealth v. Infante*, 63 A.3d 358, 363 (Pa. Super. 2013). Thus, "when a court imposes a sentence outside of the legal parameters prescribed by the applicable statute, the sentence is illegal." *Commonwealth v. Vasquez*, 744 A.2d 1280, 1284 (Pa. 2000). If no statutory

authorization exists for a particular sentence, such a sentence is illegal and therefore subject to correction. *Commonwealth v. Berry*, 877 A.2d 479, 483 (Pa. Super. 2005). On the other hand, a request for relief challenging the discretionary aspects of a sentence is not a cognizable claim under the PCRA. *Commonwealth v. Wrecks*, 934 A.2d 1287, 1289 (Pa. Super. 2007).

Regarding Count Two of Petitioner's sentence, Section 3804(c)(3) provides the mandatory minimum sentence as twelve months. 75 Pa.C.S.A. § 3804(c)(3). Under 18 Pa.C.S.A. § 1104(1), since Count Two is a misdemeanor of the first degree, the statutory maximum is sixty months. 18 Pa.C.S.A. § 1104(1). Under the Pennsylvania Sentencing Guidelines, the mitigated range is twelve months; standard range sentence is twelve to sixteen months; and aggravated range is nineteen months.

In order to determine Petitioner's sentences, this Trial Court considered the information in Petitioner's Presentence Investigation Report which details a number of prior charges involving drugs and driving while operating privilege is suspended. (*See* Notes of Testimony, Sentencing Hearing, Sept. 27, 2017, at pg. 15:6-17; *See also* Adult Probation Department Presentence Investigation Report). This Trial Court also noted at the time of sentencing that since Petitioner was under state supervision when he committed the present offenses at this docket, Petitioner could have been sentenced in the aggravated range; however, this Trial Court did not choose to implement an aggravated range sentence in Petitioner's case. (Notes of Testimony, Sentencing Hearing, at 15:25-16:3). This Trial Court additionally considered Pennsylvania Sentencing Guidelines, Pennsylvania Sentencing Code, Petitioner's age, seriousness of the offenses, facts and nature and circumstances of the offenses, protection of society, Petitioner's rehabilitative needs, sincerity of his remorsefulness, and a letter from an Associate Professor Academic Advisor of Edinboro University as well as Petitioner's school transcripts from Edinboro University. (*Id.* at 16:4-17:14).

After review of all of these considerations, this Trial Court sentenced Petitioner on Driving Under the Influence, Highest Rate of Alcohol, BAC 0.16% or greater, 3rd Offense in violation of Section 3802(c), in the standard range to a period of incarceration from sixteen months to forty-eight months. Petitioner's sentence does not exceed the statutory maximum nor is the sentence outside of the legal parameters prescribed by Section 3804(c)(3) or the Sentencing Code. Petitioner's sentence for his conviction under Section 3802(c) is patently legal.

Next, Regarding Count Four of Petitioner's sentence, Section 1543(b)(1.1)(ii) provides mandatory minimum sentence is six months. 75 Pa.C.S. § 1543(B)(1.1)(ii). Under 18 Pa.C.S. § 1104(3), since Count Four is a misdemeanor of the third degree, the statutory maximum is twelve months. 18 Pa.C.S.A. § 1104(3). Under the Pennsylvania Sentencing Guidelines, Petitioner's sentence is in the standard range for period of incarceration of a minimum of six months and a maximum of twelve months. Petitioner's sentence clearly does not exceed the statutory maximum nor is this sentence outside of the legal parameters prescribed by Section 1543(b)(1.1)(ii) or the Sentencing Code. Petitioner's sentence for his conviction at Section 1543(b)(1.1)(ii) is patently legal.

Notwithstanding imposing a patently legal sentence, this Trial Court also found Petitioner eligible for RRRI.[1] The Recidivism Risk Reduction Incentive Act, 61 Pa.C.S. § 4501–4512

[1] The stated purpose of RRRI is "to create a program that ensures appropriate punishment for persons who commit crimes, encourages inmate participation in evidence-based programs that reduce the risks of future crime and ensures the openness and accountability of the criminal justice process while ensuring fairness to crime victims." 61 Pa.C.S. § 4502.

makes certain offenders eligible for release on parole before the expiration of their minimum terms of imprisonment. *Commonwealth v. Hansley*, 47 A.3d 1180, 1181 (Pa. 2012). Under the RRRI sentencing rules, the "minimum shall be equal to three-fourths of the minimum sentence imposed when the minimum sentence is three years or less." 61 Pa.C.S. § 4505. According to this formula, since Petitioner was initially sentenced to an aggregate minimum total of twenty-two (22) months of incarceration, Petitioner's minimum sentence under RRRI sentencing rules is sixteen and one-half (16 ½) months. Thus, a possibility exists Petitioner may be released after only serving a total minimum of sixteen and one-half (16 ½) months so long as Petitioner complies with all requirements under RRRI while incarcerated. *See* 61 Pa.C.S. § 4501, *et seq*.

Moreover, this Trial Court recommended Petitioner for Boot Camp.[2] "Upon certification by the department of the inmate's successful completion of the program, the Pennsylvania Board of Probation and Parole shall immediately release the inmate on parole, notwithstanding any minimum sentence imposed in the case." 61 Pa.C.S. § 3907. "The parolee will be subject to intensive supervision for a period of time determined by the board, after which the parolee will be subject to the usual parole supervision." *Id.*

After review of Petitioner's sentences, and consistent with the foregoing analysis, this Trial Court finds and concludes Petitioner's challenge regarding the legality of his sentences is wholly without merit. Although Petitioner argues this Trial Court "misinterpreted the legislative intent" of these statutes under which Petitioner was sentenced, this issue is moot as Petitioner's sentence is patently legal. (*See* PCRA Petition at pg. 4).

For all of the foregoing reasons, Defendant's PCRA Petition is hereby **DISMISSED**. Furthermore, the Petition for Leave to Withdraw as Counsel, filed by William J. Hathaway, Esq., on May 29, 2017, is hereby **GRANTED.** Defendant is hereby informed of his right to appeal from this Order within thirty (30) days of the date of this Order, and can proceed *pro se* or by retaining private counsel.

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

[2] Motivational boot camp is "a program in which eligible inmates participate for a period of six months in a humane program for motivational boot camp programs which shall provide for rigorous physical activity, intensive regimentation and discipline, work on public projects, substance abuse treatment services licensed by the Department of Health, continuing education, vocational training, prerelease counseling and community corrections aftercare." 61 Pa.C.S. § 3903

COMMONWEALTH OF PENNSYLVANIA

v.

TOMAS ROBERTO LUGO

CRIMINAL PROCEDURE / SEARCH AND SEIZURE / DISPOSITION OF PROPERTY SEIZED

Pennsylvania Rule of Criminal Procedure 588 addresses motions for the return of property and provides, in relevant part, as follows:

> (A) A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for the return of the property on the ground that he or she is entitled to lawful possession thereof. Such motion shall be filed in the court of common pleas for the judicial district in which the property was seized.
>
> (B) The judge hearing such motion shall receive evidence on any issue of fact necessary to the decision thereon. If the motion is granted, the property shall be restored unless the court determines that such property is contraband, in which case the court may order the property to be forfeited.

CRIMINAL PROCEDURE / SEARCH AND SEIZURE / DISPOSITION OF PROPERTY SEIZED

The petitioner moving for the return of property must first satisfy his initial burden of demonstrating entitlement to lawful possession of the property. The petitioner must allege under oath he is entitled to lawful possession of the property at issue. Where the property at issue is currency and the Commonwealth does not dispute that it was taken from the petitioner's possession, the petitioner need only allege the money belongs to him.

CRIMINAL PROCEDURE / SEARCH AND SEIZURE / DISPOSITION OF PROPERTY SEIZED

Once the petitioner establishes entitlement to lawful possession of the property, Commonwealth must then show by a preponderance of the evidence that the property is contraband or derivative contraband. Commonwealth must make out more than simply demonstrating the property was in the possession of someone who has engaged in criminal conduct. Rather, Commonwealth must establish a specific nexus between the property and known criminal activity.

CRIMINAL PROCEDURE / SEARCH AND SEIZURE / DISPOSITION OF PROPERTY SEIZED

When the Commonwealth sustains its burden of showing the property is contraband or derivative contraband, the burden of proof shifts to the property owner to disprove the Commonwealth's evidence or establish statutory defenses to avoid forfeiture.

CRIMINAL PROCEDURE / SEARCH AND SEIZURE / DISPOSITION OF PROPERTY SEIZED

Derivative contraband is property which is innocent in itself but which has been used in the perpetration of an unlawful act.

CRIMINAL PROCEDURE / SEARCH AND SEIZURE / DISPOSITION OF PROPERTY SEIZED

Although not dispositive, whether a petitioner is charged with a crime in relation to money seized is probative of whether said money is indeed contraband.

CRIMINAL PROCEDURE / SEARCH AND SEIZURE / DISPOSITION OF PROPERTY SEIZED

The law generally disfavors forfeitures.

CRIMINAL PROCEDURE / SEARCH AND SEIZURE / DISPOSITION OF PROPERTY SEIZED

A motion for return of property is timely when said motion is filed by an accused in the trial court while that court retains jurisdiction.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. CR 3292 of 2016

Appearances: Michael Harmon, Esq., for Petitioner Tomas Roberto Lugo
Assistant District Attorney Grant Miller and Assistant District Attorney Douglas H. Sullivan for the Commonwealth

OPINION

Domitrovich, J. September 5, 2018

The matter before this Trial Court is the Motion for Return of Property filed by Petitioner Tomas Roberto Lugo ("Petitioner"), by and through his counsel, Michael Harmon, Esquire. The issue is whether or not the $600.00 seized by PSP from Petitioner should be returned to Petitioner. This Trial Court provides the following analysis:

On August 8, 2016, Pennsylvania State Police Trooper Kyle Sweeney effectuated a traffic stop of a Chrysler 200 ("vehicle") operated by Shawn Berube since said vehicle was traveling approximately ten miles per hour over the posted speed limit on Interstate I-90. Petitioner was a passenger in this vehicle. During this traffic stop, Trooper Sweeney learned the occupants were traveling from Colorado to Syracuse, New York. Trooper Sweeney discovered the vehicle was not registered or authorized to be operated by either Mr. Berube or Petitioner. Trooper Sweeney also smelled an odor of marijuana. Thus, Trooper Sweeney performed a search of the vehicle's interior as well as the trunk of this vehicle. In the trunk, Trooper Sweeney discovered marijuana seeds and approximately 2-3 ounces of vacuum-sealed marijuana in packaging labeled for commercial sale in the State of Colorado. Trooper Sweeney also found a vacuum sealer and vacuum sealable bags. Following a pat-down of Petitioner's person, Trooper Sweeney recovered $600.00 and a cell phone, both of which Trooper Sweeney seized from Petitioner.

On October 4, 2016, Commonwealth charged both Mr. Berube and Petitioner with Possession with Intent to Deliver marijuana. However, at the preliminary hearing at the above-referenced docket with respect to Petitioner, the Possession with Intent to Deliver was withdrawn and reduced to a Possession of marijuana charge in violation of 35 P.S. § 780-113(a)(16). On April 30, 2018, Petitioner pled guilty to Possession of marijuana and was sentenced on the same day to 6 months of probation to be supervised by Erie County Adult Probation.

On June 4, 2018, defense counsel filed the instant Motion for Return of Property wherein Petitioner requested the return of his $600.00 and cell phone that Trooper Sweeney had seized

from Petitioner. On August 8, 2018, after several continuances, a hearing was held before this Trial Court, at which Petitioner was present and represented by his counsel, Attorney Harmon; and Assistant District Attorney Grant Miller appeared for the Commonwealth. At said hearing, this Trial Court heard testimony from Trooper Sweeney as well as testimony from Petitioner. Also at said hearing, counsel for the Commonwealth agreed to return Petitioner's cell phone. By Order dated August 8, 2018, this Trial Court directed counsel to submit Memoranda of Law on the relevant issues presented in Petitioner's Motion for Return of Property.

Pennsylvania Rule of Criminal Procedure 588 addresses motions for the return of property and provides as follows:

> (A) A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for the return of the property on the ground that he or she is entitled to lawful possession thereof. Such motion shall be filed in the court of common pleas for the judicial district in which the property was seized.
>
> (B) The judge hearing such motion shall receive evidence on any issue of fact necessary to the decision thereon. If the motion is granted, the property shall be restored unless the court determines that such property is contraband, in which case the court may order the property to be forfeited.

Pa.R.Crim.P. 588. The petitioner moving for the return of property must first satisfy his initial burden of demonstrating entitlement to lawful possession of the property. *Commonwealth v. Howard*, 931 A.2d 129, 131 (Pa.Cmwlth. 2007). The petitioner must allege under oath he is entitled to lawful possession of the property at issue. *Id.* (citing *Commonwealth v. Johnson*, 931 A.2d 781 (Pa.Cmwlth. 2007)). "Where the property at issue is currency and the Commonwealth does not dispute that it was taken from the petitioner's possession, the petitioner need only allege that the money belongs to him." *Commonwealth v. Fontanez*, 739 A.2d 152, 154 (Pa.1999).

Once the petitioner establishes entitlement to lawful possession of the property, Commonwealth must then show by a preponderance of the evidence that the property is contraband or derivative contraband. *Howard*, 931 A.2d at 131. "Commonwealth must make out more than simply demonstrating that the property was in the possession of someone who has engaged in criminal conduct." *Singleton v. Johnson*, 929 A.2d 1224, 1227 (Pa.Cmwlth. 2007). Rather, Commonwealth "must establish a specific nexus between the property and the criminal activity." *Id.* (Commonwealth may only seize property if "some nexus to *known* criminal activity" exists). "Derivative contraband is property which is innocent in itself but which has been used in the perpetration of an unlawful act." *Beaston v. Ebersole*, 986 A.2d 876, 882 (Pa. Super. 2009). Whether a petitioner is charged with a crime in relation to money seized is probative of whether said money is indeed contraband. *Fontanez*, 739 A.2d at 154. The law generally disfavors forfeitures. *Commonwealth v. $34,440.00 U.S. Currency*, 174 A.3d 1031, 1038 (Pa. 2017). "When the Commonwealth sustains that burden, the burden of proof shifts to the property owner to disprove the Commonwealth's evidence or establish statutory defenses to avoid forfeiture." *Singleton*, 929 A.2d at 1227.

In *Fontanez*, after petitioner was stopped for a traffic violation, the detaining officer observed an open bag of cash in the petitioner's vehicle. *Fontanez*, 739 A.2d at 153. The

officer did not witness activity which tied the petitioner's possession of the money to any illegal activity. *Id.* The officer nevertheless seized the money but did not charge the petitioner with a crime in relation to the seized money. *Id.* at 153-54. The petitioner then filed a motion for return of the money. *Id.* at 154. To demonstrate the money was derivative contraband, Commonwealth offered evidence of "the circumstances surrounding the seizure of the money," including: the traffic stop occurred at 8:30 p.m.; the detaining officer knew the petitioner's past involvement with drug activity; and the petitioner refused to answer questions with respect to the money. *Id.* The trial court denied his petition for return of the money, and the Commonwealth Court of Pennsylvania affirmed the trial court. *Id.*

However, the Pennsylvania Supreme Court in *Fontanez* reversed, holding the petitioner had satisfied his burden of lawful possession through his claim of ownership merely by establishing the cash was in his possession and concluding Commonwealth's evidence was not sufficient to sustain its burden of establishing the money was contraband. *Id.* at 155. The Pennsylvania Supreme Court in *Fontanez* indicated Commonwealth's evidence established only "suspicions" of criminal activity, which was not competent evidence to justify a forfeiture of property or shift the burden back to the petitioner to explain the source of the money. The Pennsylvania Supreme Court in *Fontanez* reasoned:

> We do not believe that 8:30 p.m. is a notably late hour, and the stop took place in Appellant's own neighborhood. Although the presence of a large amount of cash might have given rise to suspicions in light of the officer's general "knowledge" regarding Appellant and his family, at most these suspicions merited further investigation or surveillance. Finally, a person stopped for a traffic violation has no obligation to respond to questions asked by an officer apart from statutory obligations to produce a driver's license, registration, and proof of insurance. Again, although it might arouse suspicions, failure to give an explanation where none is required cannot be construed as evidence of wrongful conduct. Accordingly, these factors taken individually or in combination, do not establish that the money was contraband.

Id. at 154-55. Thus, the Pennsylvania Supreme Court ordered the return of the money to the petitioner. *Id.* at 155.

In the instant case, Petitioner has made out his prima facie case establishing he had a possessory interest in this property at issue since, at the hearing on his motion, Petitioner under oath indicated this $600.00 lawfully belonged to him. Additionally, Commonwealth did not dispute this $600.00 was taken from Petitioner's possession. As such, Commonwealth must show by a preponderance of the evidence that this money is contraband or derivative contraband by establishing a specific nexus between this $600.00 and known criminal activity.

Commonwealth contends the circumstances surrounding this traffic stop and seizure of this money establishes a nexus exists between this $600.00 and Commonwealth's allegation that Petitioner intended to sell marijuana to college students in Syracuse, New York. Specifically, Commonwealth argues a nexus exists since: Petitioner denied the presence of marijuana in the vehicle and offered stories to mitigate any potential for criminal liability; Petitioner was not authorized to use the vehicle in which Petitioner was a passenger; vacuum sealed bags are often used to suppress the odor of marijuana; this $600.00 consisted of large bills, which Commonwealth alleges is consistent with large scale drug operations; and a negative inference

exists that Petitioner did not intend to use personally this marijuana since no use paraphernalia was present in the vehicle. Thus, Commonwealth argues this $600.00 is contraband.

However, Commonwealth's failure to charge Petitioner with a criminal offense related to the intent to deliver marijuana is probative that this $600.00 is not contraband. *See Fontanez*, 739 A.2d at 152 ("[Petitioner] was never charged with a crime in relation to the seized money. Although not dispositive, this fact is probative of whether the money was indeed contraband."). Specifically, Commonwealth reduced Petitioner's Possession with Intent to Deliver charge to a Simple Possession charge. Notwithstanding, Commonwealth contends Petitioner "intended to transport marijuana back to Syracuse to sell to college students." (See Commonwealth's Memorandum of Law at 7). However, like *Fontanez*, the above enumerated "circumstances" are merely indicative of Commonwealth's "suspicions" that Petitioner was engaged in the criminal activity of delivering marijuana to college students. Mere "suspicion" that Petitioner is engaged in the sale of marijuana is insufficient to demonstrate this $600.00 constitutes contraband since "there has to be some nexus to ***known*** criminal activity." *See Singleton*, 929 A.2d at 1230 (emphasis added). Given this, this Trial Court finds and concludes Commonwealth has failed to establish this $600.00 is contraband. As such, Petitioner is entitled to the return of his $600.00.

Commonwealth also argues Petitioner's request for return of property is waived. In *Commonwealth v. Allen*, 107 A.3d 709 (Pa. 2014), the Pennsylvania Supreme Court held: "a return motion is timely when it is filed by an accused in the trial court while that court retains jurisdiction, which is up to thirty days after disposition." *Id.* at 717. In *Allen*, the petitioner filed a motion for return of property nearly eight years after criminal charges against him were dismissed. *Id.* at 710-711. The Pennsylvania Supreme Court in *Allen* concluded since petitioner did not file his motion within thirty days of the dismissal of the criminal charges, petitioner's motion was waived. *Id.* at 717. However, the instant case is entirely distinguishable from *Allen*. *See id.* at n.10 ("We emphasize that our holding today is limited to the factual circumstances presented."). Specifically, unlike *Allen*, this Court of Common Pleas retains jurisdiction over Petitioner's case since Petitioner is still under supervision pursuant to Petitioner's sentence of probation at the above-referenced docket. Thus, Petitioner's request for return of property is not waived.

Lastly, Commonwealth argues this $600.00 is subject to forfeiture under the Forfeiture Act codified at 42 Pa.C.S. §§ 5801–5808. However, as explained in *Boniella v. Commonwealth*, 958 A.2d 1069, 1072 (Pa.Cmwlth. 2008):

> [A] claim for return of property is distinct from a forfeiture action . . . . This [Pennsylvania Commonwealth] Court has explained that a proceeding for return of property under Pennsylvania Rule of Criminal Procedure 588 "is simply a 'mirror image' of a forfeiture action under the Forfeiture Act." Like a civil forfeiture proceeding, a motion for the return of property is an in rem action in which a claimant "is not in danger of a loss of personal liberty should he be unsuccessful at trial." In fact, a claimant seeking the return of property has a less compelling interest in appointed counsel than a claimant in a forfeiture action because "even if the court denies the motion to return the property to a person claiming ownership, **it is not automatically forfeited to the Commonwealth until the Commonwealth files a petition to forfeit.**

Boniella, at 1073 (citations omitted) (emphasis added). In the instant case, the Commonwealth has failed to file properly a petition to forfeit under the Forfeiture Act. *See* 42 Pa.C.S. § 5805 ("The proceedings for the forfeiture or condemnation of property . . . shall be in rem, in which the Commonwealth shall be the plaintiff and the property the defendant."); *see also Fontanez*, 739 A.2d at 154, n.3 (noting Commonwealth failed to follow proper procedure for filing a forfeiture action where Commonwealth made an "impromptu" motion at the hearing on the petitioner's motion for return of property). As such, Commonwealth's argument with respect to the Forfeiture Act is without merit.

Accordingly, consistent with the foregoing, this Trial Court hereby enters the following Order of Court:

ORDER

AND NOW, to wit, this 5th day of September, 2018, after a scheduled hearing on the Motion for Return of Property, filed by Petitioner Tomas Roberto Lugo, by and through his counsel, Michael Harmon, Esq.; at which Petitioner Tomas Roberto Lugo was present and represented by his counsel, Michael Harmon, Esq.; and Assistant District Attorney Grant Miller appeared on behalf of the Commonwealth; and after hearing testimony from Petitioner Tomas Roberto Lugo and from Trooper Kyle Sweeny of the Pennsylvania State Police; and upon consideration of "Commonwealth's Memorandum or Law in Support of Dismissal of Defendant's (sic) Right to Return of Property Motion and Request for Forfeiture of Property" as well as Petitioner's Brief in Support of Motion for Return of Property; and in view of the relevant statutory law and case law; and consistent with the analysis in the foregoing Opinion, it is hereby **ORDERED, ADJUDGED AND DECREED** that Petitioner's Motion for Return of Property is **GRANTED** to the extent Commonwealth is directed to return this $600.00, seized from Petitioner on August 8, 2016, to Petitioner.

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

DIANE L. MUELLER, Personal Representative of the Estate of Ronald Buchanan, Deceased, and DONNA BUCHANAN, in her own right, Plaintiffs

v.

20th CENTURY GLOVE CORPORATION OF TEXAS, also known as GUARD LINE, INC., et al., Defendants

CIVIL PROCEDURE / DEPOSITIONS / ADMISSIBILITY AT TRIAL

Pursuant to Pa.R.C.P. 4020(a)(3)(a):

> At the trial, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had notice thereof if required, in accordance with any one of the following provisions:
>
> The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds . . . that the witness is dead.

Pa.R.C.P. 4020(a)(3)(a).

EVIDENCE / HEARSAY / DEFINITION

Hearsay is defined as an out of court statement a party offers in evidence to prove the truth of the matter asserted in the statement. The hearsay rule provides that evidence of a declarant's out-of-court statements is generally inadmissible because such evidence lacks guarantees of trustworthiness fundamental to the Anglo-American system of jurisprudence

EVIDENCE / HEARSAY / EXCEPTIONS

In order to ensure the guarantees of trustworthiness ordinarily resulting from a declarant's presence in court, a proponent of hearsay evidence must point to a reliable hearsay exception before such testimony will be admitted.

EVIDENCE / HEARSAY / EXCEPTIONS / FORMER TESTIMONY

Under the former testimony exception to the general rule against hearsay, where a party is unavailable as a witness, former testimony may be admissible if said former testimony was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination. The principle requiring a testing of testimonial statements by cross-examination has always been understood as requiring, not necessarily an actual cross-examination but merely an opportunity to exercise the right to cross-examine if desired.

EVIDENCE / HEARSAY / EXCEPTIONS / FORMER TESTIMONY / DEPOSITIONS

A declarant is considered to be unavailable as a witness if the declarant cannot be present or testify at a trial or hearing because of death. Once a trial court is satisfied that a witness is unavailable, their deposition testimony may be admitted as substantive evidence. The admissibility of the testimony of a witness given at a prior proceeding involves the discretion of the trial judge and will not be disturbed absent an abuse of such discretion.

EVIDENCE / HEARSAY / EXCEPTIONS / FORMER TESTIMONY / DEPOSITIONS / SUBSTANTIAL COMPLETENESS

Where the death or illness prevents cross-examination under such circumstances that no

responsibility of any sort can be attributed to either the witness or his party, it seems harsh measure to strike out all that has been obtained on the direct examination. Principle requires in strictness nothing less. But the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss. Courts differ in their treatment of this difficult situation; except that, by general concession, a cross-examination begun but unfinished suffices if its purposes have been substantially accomplished. Wigmore on Evidence, 4th ed. § 1390.

EVIDENCE / HEARSAY / EXCEPTIONS / FORMER TESTIMONY / DEPOSITIONS / SUBSTANTIAL COMPLETENESS

No general rule can be laid down with respect to unfinished testimony. If substantially complete, and the witness is prevented by sickness or death from finishing his testimony, whether viva voce or by deposition, it ought not be rejected, but submitted to the jury with such observations as the particular circumstances may require. *Derewecki v. Pennsylvania R. Co.*, 353 F.2d 436 (3d Cir.1965).

EVIDENCE / HEARSAY / EXCEPTIONS / FORMER TESTIMONY / DEPOSITIONS / SUBSTANTIAL COMPLETENESS

Generally speaking testimony is deemed to be substantially complete when it is clear, even though it be from the deponent's viewpoint, that the event with which the deposition is concerned occurred, and that it occurred in a particular way, and that the evidence contained in the deposition is sufficient to establish a basis for relief on the cause of action asserted. *Derewecki v. Pennsylvania R. Co.*, 353 F.2d 436 (3d Cir.1965).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 11901 – 2016

Appearances: Leif J. Ocheltree, Esq., on behalf of Plaintiffs Diane L. Mueller and Donna Buchanan
Jennifer E. Watson, Esq., Defense counsel liaison, on behalf of all Defendants

OPINION

Domitrovich, J. January 17, 2018

The instant matter is before this Trial Court on the Joint Motion of Defendants, General Electric Company, Beazer East Inc. and Chicago Bridge & Iron Company to Exclude Ronald Buchanan's Affidavit and Deposition Testimony (hereinafter "Motion to Exclude") as well as numerous Joinders to said Motion to Exclude as set forth in the accompanying Order. Following the Trial Court hearing argument from counsel on January 3, 2018, this Court requested Plaintiffs' and Defendants' counsel to submit additional Memoranda of Law regarding the applicability of *Derewecki v. Pennsylvania R. Co.*, 353 F.2d 436 (3d Cir.1965) and *Draper v. Vetter*, 38 Pa. D. & C.3d 652 (Lycoming C.C.P., Nov. 22, 1983) to the instant action. After a thorough review of the entire record, including, but not limited to, review of Defendants' Motion to Exclude and accompanying Joinders as well as Plaintiffs' Response to Defendants' Motion to Exclude, the oral arguments presented by counsel on January 3,

2018, the Memoranda of Law submitted by counsel, and the Joinder and Supplemental Briefs filed by Defendants, this Court provides the following analysis:

The facts pertinent to the Motion to Exclude are largely undisputed by the parties. On July 20, 2016, Plaintiff filed his Complaint against over one-hundred Defendants alleging various claims including Strict Product Liability, Negligence, Loss of Consortium, Aiding and Abetting, and Negligent Misrepresentation. On August 22, 2016 the Plaintiff in this action, Ronald Buchanan, executed an Affidavit wherein he averred he was exposed to various products containing asbestos at a number of various job locations which he claimed eventually caused his mesothelioma. The parties agreed Plaintiff Ronald Buchanan's Affidavit would constitute the direct examination of Mr. Buchanan obviating the need for direct examination of Mr. Buchanan during this deposition. None of the Defendants objected to the use of Mr. Buchanan's Affidavit as the foundation for Defendants' cross-examination of Mr. Buchanan at the deposition. Thus, this Trial Court accepts said Affidavit as Mr. Buchanan's direct examination testimony in lieu of actual direct examination deposition testimony.

The parties' counsel deposed and cross-examined Mr. Buchanan based on his allegations in his Affidavit, which was to occur on August 29, 30, 31, and September 1, 2016, in Bradenton, Florida. On the days during which Mr. Buchanan was cross-examined, he was unable to dress himself or walk without assistance and was in extreme physical pain. In addition, Mr. Buchanan experienced pain and discomfort, which required the parties to take breaks at the depositions. Moreover, due to his pain and discomfort, Mr. Buchanan had a difficult time responding to counsel's cross-examination questions due to his laborious breathing. Mr. Buchanan was ultimately only deposed for two days on August 29 and 30, 2016 since his health was rapidly deteriorating and Hurricane Irene was imminently approaching the Bradenton region.

Due to this dramatic decline of Mr. Buchanan's health, as well as the tropical storm in the form of Hurricane Irene in Bradenton making transportation difficult, all counsel agreed to postpone indefinitely the third deposition originally scheduled for August 31, 2016. Three days later, on September 2, 2016, Mr. Buchanan was admitted to a hospice facility. Mr. Buchanan died on November 20, 2016.

Ultimately, as represented by the Plaintiffs' counsel, approximately twenty defendants had the opportunity to cross-examine Mr. Buchanan, including: General Electric, Beazer East, Chicago Bridge & Iron Company, Joy Global Surface Mining, Ford, CBS/Westinghouse, Air & Liquid Systems, I.U. North America, Inc., Dana Companies, Maremont, Viking Pumps, The Fairbanks Company, RCH Newco, Cameron International Corporation, Elliott Company, Goulds Pumps, Grinnell, ITT Corporation, The J.R. Clarkson Company, and Keystone Valves and Controls. For example, Counsel Liaison Jennifer Watson, Esq., as well as Bryan S. Neft, Esq., deposed Mr. Buchanan regarding his work history, medical condition, exposure to asbestos, and products he worked with at the various job locations he had worked at.

On November 13, 2017, Defendants General Electric Company, Beazer East Inc. and Chicago Bridge & Iron Company, by and through its attorney, Bryan S. Neft, Esq., filed the instant Joint Motion of Defendants, General Electric Company, Beazer East Inc. and Chicago Bridge & Iron Company to Exclude Ronald Buchanan's Affidavit and Deposition Testimony. Thereafter, multiple Defendants filed Joinders to the Motion to Exclude and an argument was held on January 3, 2018.

Pennsylvania Rule of Civil Procedure 4020(a)(3)(a) is controlling regarding the admissibility of prior deposition testimony, which states, in pertinent part:

> At the trial, any part or all of a deposition, so far as admissible ***under the rules of evidence***, may be used against any party who was present or represented at the taking of the deposition or who had notice thereof if required, in accordance with any one of the following provisions:
>
> The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds . . . that the witness is dead.

Pa.R.C.P. 4020(a)(3)(a) (emphasis added).

Under the Pennsylvania Rules of Evidence, hearsay is defined as an out of court statement "a party offers in evidence to prove the truth of the matter asserted in the statement." Pa.R.E. 801(c); *Heddings v. Steele*, 514 Pa. 569, 573, 526 A.2d 349, 351 (1987); *see also Commonwealth v. Chamberlain*, 557 Pa. 34, 39, 731 A.2d 593, 595 (1999) ("The hearsay rule provides that evidence of a declarant's out-of-court statements is generally inadmissible because such evidence lacks guarantees of trustworthiness fundamental to the Anglo-American system of jurisprudence."). Thus, to ensure that the guarantees of trustworthiness ordinarily resulting from a declarant's presence in court, a proponent of hearsay evidence must point to a reliable hearsay exception before such testimony will be admitted. *Heddings v. Steele*, 514 Pa. 569, 574, 526 A.2d 349, 352 (1987).

Under the former testimony exception to the general rule against hearsay, where a party is unavailable as a witness, former testimony may be admissible if said former testimony "was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination. Pa.R.E. 804(b)(1) (noting that Pa.R.E. 804(b)(1) is identical to F.R.E. 804(b)(1)); *see also Garner v. PUC*, 177 Pa.Super. 439, 446, 110 A.2d 907, 911 (1955) ("The principle requiring a testing of testimonial statements by cross-examination has always been understood as requiring, not necessarily an actual cross-examination but merely an opportunity to exercise the right to cross-examine if desired."); but *see Beaumont v. ETL Servs., Inc.*, 761 A.2d 166, 172 (Pa.Super.2000) (concluding that testimony nevertheless admissible when co-defendant's cross-examination amounted to "constructive representation" and assured that defendant's interests were protected even when defendant did not actually cross-examine deponent).

A declarant is considered to be unavailable as a witness if the declarant cannot be present or testify at a trial or hearing because of death. Pa.R.E. 804(a)(4). Once a trial court is satisfied that a witness is unavailable, their deposition testimony may be admitted as substantive evidence. *Beaumont* at 172. Finally, the admissibility of the testimony of a witness given at a prior proceeding involves the discretion of the trial judge and will not be disturbed absent an abuse of such discretion. *Morgo v. Borough of W. Mifflin*, 116 Pa.Cmwlth. 592, 594, 542 A.2d 627, 629 (1988).

In the instant case, counsel agrees Mr. Buchanan's Affidavit, which was accepted in lieu of Mr. Buchanan's direct examination, and deposition testimony are hearsay because these are out of court statements offered in evidence to prove the truth of the matters asserted in

these statements, particularly, that the products identified in the Affidavit contained asbestos and that the asbestos caused Mr. Buchanan's mesothelioma. In addition, Mr. Buchanan is undoubtedly unavailable due to his death on November 20, 2016.

Furthermore, despite Defendants alleging their cross-examinations were incomplete due to their alleged inability to further cross-examine Mr. Buchanan, counsel for Defendants were aware of several extenuating circumstances concerning Mr. Buchanan's cross examination. For example, all counsel for Defendants knew that due to Mr. Buchanan's condition with his mesothelioma diagnosis, Mr. Buchanan's health was tenuous and would be rapidly declining. In addition, all counsel for Defendants were aware that over one-hundred Defendants were joined in this case, many of whom also sought to cross-examine Mr. Buchanan. Counsel for Defendants, therefore, knew that they had four days allotted to develop cross-examination testimony at a deposition where the deponent's health was quickly deteriorating. Thus, Defendants had similar motives to develop and elicit cross-examination testimony of Mr. Buchanan.

Admissibility of said Affidavit and cross-examination is therefore within the Trial Court's discretion and will not be disturbed absent an abuse of said discretion. This Trial Court cites the compelling principle set forth in Wigmore on Evidence, 4th ed. § 1390, which states:

> [W]here the death or illness prevents cross-examination under such circumstances that no responsibility of any sort can be attributed to either the witness or his party, it seems harsh measure to strike out all that has been obtained on the direct examination. Principle requires in strictness nothing less. But the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss. Courts differ in their treatment of this difficult situation; except that, by general concession, a cross-examination begun but unfinished suffices if its purposes have been ***substantially accomplished***.

Wigmore on Evidence, 4th ed. § 1390 (emphasis added and emphasis in original). With this guiding principle in mind, this Court will address the applicability of the Third Circuit Case *Derewecki v. Pennsylvania R. Co*., 353 F.2d 436 (3d Cir.1965).

In *Derewecki*, the United States Court of Appeals for the Third Circuit held that where a plaintiff dies before the deposition is completed, the deposition should be admitted if the party against whom the deposition testimony was offered was the party who took the deposition and who thus had an opportunity to examine the witness. Specifically, the defendant in that case moved to exclude the deposition of the plaintiff-decedent, contending that the defendant did not have an adequate opportunity to depose the plaintiff before the plaintiff died. The defendant deposed the plaintiff two times, but the second deposition was cut short due to the plaintiff's illness, which was ostensibly related to the injuries he had sustained. Over the objections of the defendant, the trial court admitted the depositions in evidence at trial.

On appeal, the Third Circuit concluded the depositions were admissible. The Third Circuit first noted that "[n]o general rule can be laid down in respect to unfinished testimony. If *substantially complete*, and the witness is prevented by sickness or death from finishing his testimony, whether viva voce or by deposition, it ought not be rejected, but submitted to the jury with such observations as the particular circumstances may require." *Derewecki* at

443-44 (quoting *Fuller v. Rice*, 70 Mass. 343, 345 (1855)) (emphasis added). Given this, the Third Circuit set forth the following test to determine whether deposition testimony is "substantially complete" for the purpose of admitting deposition testimony despite a deponent's death before cross-examination is concluded:

> Generally speaking testimony is deemed to be substantially complete when it is clear, even though it be from the deponent's viewpoint, that the event with which the deposition is concerned occurred, and that it occurred in a particular way, and that the evidence contained in the deposition is sufficient to establish a basis for relief on the cause of action asserted.

Id. at 443. Applying this test, the Third Circuit concluded that, on balance, since further cross-examination would have elicited little to no benefit to the defendant, the trial court in *Derewecki* did not err in admitting said deposition testimony. *Id.*

In the instant case, with Defendants having opportunities to cross-examine Mr. Buchanan, this Trial Court finds said deposition testimony is "substantially complete" for the purpose of admitting the deposition despite the Mr. Buchanan's death. Specifically, it is clear from Mr. Buchanan's depositions (1) that the event with which the deposition is concerned, Mr. Buchanan's alleged exposure to asbestos, occurred; (2) that the event occurred in a particular way since Mr. Buchanan elaborates, or attempts to elaborate, how he was allegedly exposed to the asbestos; and (3) that the evidence contained in the deposition, Mr. Buchanan's account of how, when, and where he was allegedly exposed to asbestos, is sufficient to establish a basis for relief on the cause of action asserted.

Lastly, Defendants' reliance on *Ritter v. Garlock, Inc.*, No. 0467, 2010 WL 4053291 (Philadelphia C.C.P., August 10, 2010) is misplaced. As an initial matter, the *Ritter* case is a Court of Common Pleas case and is not binding upon this Trial Court or any other Courts of Common Pleas. Moreover, in *Ritter*, none of the defendants had an opportunity to cross-examine the Plaintiff before he died. Here, in contrast, at least twenty Defendants had opportunities to cross-examine Mr. Buchanan before he died over a period of two days. Thus, *Ritter* is inapplicable to the instant case since *Ritter* does not mandate the exclusion of deposition testimony where defendants have had an opportunity to cross-examine the deponent.

Based on the foregoing reasons, this Trial Court issues the following Order.

ORDER

AND NOW, to-wit, this 17th day of January, 2018, in accordance with the above Trial Court analysis, and after a scheduled hearing on the Joint Motion of Defendants, Beazer East, Inc. and Chicago Bridge & Iron Company to Exclude Ronald Buchanan's Affidavit and Deposition Testimony, and the Joinders to this Motion, and appearances by Leif J. Ocheltree, Esq., on behalf of Plaintiffs Diane L. Mueller and Donna Buchanan, and numerous defense counsel as well as defense counsel liaison, Jennifer E. Watson, Esq., and after hearing argument from Attorney Ocheltree, Attorney Watson, Attorney Edward Smallwood, Attorney Michael Karaffa, Attorney Robert Leidigh, Attorney Eric Fischer, and Attorney Brian Neff, and after reviewing the Memoranda of Law submitted by counsel, including:

- Joint Motion of Defendants, General Electric Company, Beazer East Inc. and Chicago Bridge & Iron Company to Exclude Ronald Buchanan's Affidavit and Deposition Testimony, filed by Defendants General Electric Company, Beazer East Inc. and Chicago Bridge & Iron Company, by and through counsel, Bryan S. Neft, Esq.;
- Plaintiff's Response to Defendant General Electric Company, Beazer East Inc. and Chicago Bridge & Iron Company's Joint Motion to Exclude Ronald Buchanan's Affidavit and Deposition Testimony, filed by Plaintiff, by and through counsel, Leif J. Ocheltree, Esq.;
- Plaintiff's Supplemental Brief in Opposition to Various Defendants' Motions to Exclude the Affidavit and Deposition Testimony of Ronald Buchanan, filed by Plaintiff, by and through counsel, Jason T. Shipp, Esq.;
- Chicago Bridge & Iron Company's Supplemental Brief in Support of the Joint Motion of Defendants, General Electric Company, Beazer East Inc. and Chicago Bridge & Iron Company to Exclude Ronald Buchanan's Affidavit and Deposition Testimony, filed by Chicago Bridge and Iron, by and through counsel, Bryan S. Neft, Esq.;
- Dravo Corporation's Joinder in Joint Motion to Exclude Ronald Buchanan's Affidavit and Deposition Testimony Filed by Defendants General Electric Company, Beazer East Inc. and Chicago Bridge & Iron Company, filed by Dravo Corporation, by and through counsel, Hilary C. Bonenberger, Esq.;
- M.S. Jacobs & Associates, Inc.'s and Erie Industrial Supply Company's Joinder in Chicago Bridge & Iron Company's Supplemental Brief in Support of the Joint Motion of Defendants, General Electric Company, Beazer East Inc. and Chicago Bridge & Iron Company to Exclude Ronald Buchanan's Affidavit and Deposition Testimony, filed by defendants, M.S. Jacobs & Associates, Inc.'s and Erie Industrial Supply Company's, by and through counsel, Joni M. Mangino, Esq., Brian M. Lucot, Esq., and Daniel J. Cuddy, Esq.;
- Defendants Cashco INC's, Decker Reichert Steel's, Eaton Corporation, as Successor-in-interest to Cutler-Hammer, INC's, Eaton Corporation, as Successor-in-interest to Fawick Corporation's, Ingersoll-Rand Company's, MW Custom Papers LLC, as Successor in interest to MeadWestvaco Corporation's Incorrectly sued as "MeadWestvaco Corporation, successor-in-interest to The Mead Corporation", Sealing Devices, Inc's, Sunbeam Products, Inc., as successor in interest to Sunbeam Corporation's, Trane U.S., Inc's, Warren Pumps, LLC's and Yeomans Chicago Corporation's Joinder in Chicago Bridge & Iron Company's Supplemental Brief in Support of the Joint Motion of Defendants, General Electric Company, Beazer East Inc. and Chicago Bridge & Iron Company to Exclude Ronald Buchanan's Affidavit and Deposition Testimony, filed by Defendants Cashco INC's, Decker Reichert Steel's, Eaton Corporation, as Successor-in-interest to Cutler-Hammer, INC's, Eaton Corporation, as Successor-in-interest to Fawick Corporation's, Ingersoll-Rand Company's, MW Custom Papers LLC, as Successor in interest to MeadWestvaco Corporation's Incorrectly sued as "MeadWestvaco Corporation, successor-in-interest to The Mead Corporation", Sealing Devices, Inc's, Sunbeam Products, Inc., as successor in interest to Sunbeam Corporation's, Trane U.S., Inc's, Warren Pumps, LLC's and Yeomans Chicago Corporation, by and through counsel, Michael A. Karaffa, Esq.;

- Flsmidth Dorr-Oliver Eimco, Inc.'s Joinder in Defendant Chicago Bridge & Iron Company's Supplemental Brief in Support of its Joint Motion to Exclude Ronald Buchanan's Affidavit and Deposition testimony, filed by Defendant Keeler/Dorr-Oliver Boiler Company, by and through counsel, Deborah L. Iannamorelli, Esq.; and
- DeZurik's Joinder in Defendant Chicago Bridge & Iron Company's Supplemental Brief in Support of its Joint Motion to Exclude Ronald Buchanan's Affidavit and Deposition testimony, filed by Defendant DeZurik, Inc., by and through counsel, Deborah L. Iannamorelli, Esq.;

this Trial Court hereby **ORDERS, ADJUDGES and DECREES** that all of the above Motions are hereby **DENIED**.

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

MARY ANN AFFINITO, and SALVATORE AFFINITO, her husband, Plaintiffs

v.

BAKER HUGHES INC., et al., Defendants

DAMAGES / JOINT LIABILITY

Joint liability is defined as liability shared by two or more parties.

DAMAGES / JOINT AND SEVERAL LIABILITY

Joint and several liability is defined as liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. When a plaintiff seeks to impose joint and several liability on two or more defendants, he seeks to recover a judgment which he can then enforce in whole or in part against each of them. Imposition of joint and several liability enables the injured party to satisfy an entire judgment against any one of the tortfeasors, even if the wrongdoing of that tortfeasor contributed only a small part to the harm inflicted.

DAMAGES / JOINT AND SEVERAL LIABILITY / PLEADING

The Fair Share Act expressly states joint and several liability may be imposed where the defendant has been held liable for not less than 60% of the total liability apportioned to all parties. 42 Pa.C.S. § 7102(a.1)(3)(iii).

DAMAGES / JOINT AND SEVERAL LIABILITY / PLEADING

The Fair Share Act reflects the Legislature's intention to have a fact-finder allocate liability among joint tortfeasors.

DAMAGES / JOINT AND SEVERAL LIABILITY / PLEADING

The policy of permitting plaintiffs to recover jointly and severally against multiple defendants is to assure those defendants who are substantially responsible for a plaintiff's injury will have to account for the full amount of the plaintiff's harm.

VENUE / PLAINTIFF'S CHOICE OF FORUM

A plaintiff's choice of forum is afforded great weight. The plaintiff is generally given her choice of forum so long as the requirements of personal and subject matter jurisdiction are satisfied.

PRELIMINARY OBJECTIONS / VENUE

Under the Pennsylvania Rules of Civil Procedure, a party may file preliminary objections on the grounds of improper venue. The party seeking to change venue bears the burden of proving that change in venue is "necessary."

VENUE / CHANGE OR TRANSFER OF VENUE / DISCRETION OF COURT

Trial courts have "considerable discretion" when determining whether a request to change venue should be granted.

VENUE / PLEADING

Unlike the pleading practice in the federal courts, in Pennsylvania, the plaintiff is not required to plead the facts upon which venue and jurisdiction depend.

VENUE / PLACE OF ACCRUAL OF RIGHT OF ACTION

Under Pennsylvania's venue statute, a personal action may be brought against a corporation or similar entity in and only in: (1) the county where its registered office or principal place of business is located; (2) a county where it regularly conducts business; (3) the county where the cause of action arose; (4) a county where a transaction or occurrence took place out of

which the cause of action arose; or (5) a county where the property or a part of the property which is the subject matter of the action is located provided that equitable relief is sought with respect to the property. Pa.R.C.P. 2179(a).

VENUE / CORPORATE AND BUSINESS ORGANIZATIONS

Where defendants residing in separate counties jointly or jointly and severally incur an obligation or commit a tort, a single action can be brought against all defendants either in the county of the cause, or in a county in which one of the defendants may be served. For example, a plaintiff may bring her action in any county where one corporate defendant maintains its principal place of business notwithstanding that a co-defendant resides in another county.

VENUE / AFFIDAVITS AND OTHER EVIDENCE

While affidavits may be used to resolve factual issues with respect to challenges to jurisdiction and venue if the facts averred are clear and specific, Pennsylvania appellate courts note this is not a recommended procedure.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 11349 – 2018

Appearances: Joni M. Mangino, Esq., Gregory C. Scheuring, Esq., & Brian M. Lucot, Esq., for Defendants National Fuel Gas Distribution Corporation and National Fuel Gas Supply Corporation f/k/a United Natural Gas Company
Jason T. Shipp, Esq., & Joseph J. Cirilano, Esq., for Plaintiffs Mary Ann Affinito and Salvatore Affinito

OPINION

Domitrovich, J. September 28, 2018

The matter before this Trial Court are the Preliminary Objections to Plaintiffs' Complaint and accompanying Brief in Support filed by Defendants National Fuel Gas Distribution Corporation and National Fuel Gas Supply Corporation f/k/a United Natural Gas Company (collectively "National Fuel"). The issues are: (1) whether Plaintiffs' Complaint is in accord with the Fair Share Act in pleading claims for damages "jointly and severally" against the named Defendants, including National Fuel; and (2) whether venue in the instant action against National Fuel properly is in Erie County, Pennsylvania. This Trial Court provides the following analysis:

Plaintiffs are individuals residing at 27040 State Highway 27, Guys Mills, Pennsylvania 16327. (Complaint at ¶ 1). On May 24, 2018, Plaintiffs filed a Complaint against twenty-one (21) Defendants alleging seven causes of action arising from Plaintiff Mary Ann Affinito's ("Mary Ann") mesothelioma diagnosis due to her alleged exposure to asbestos. (Complaint at ¶ 24-26). Plaintiffs' Complaint alleges Defendants engaged in the activities of mining, milling, manufacturing, distributing, supplying, selling, and/or recommending, installing, and/or removing asbestos materials. (Complaint at ¶ 27).

Plaintiffs in particular allege Plaintiff Salvatore Affinito ("Salvatore") worked with and/or around asbestos at National Fuel from 1954 through 1996 in Meadville, Pennsylvania as

a laborer, utility man, pipefitter, welder, and sub-foreman. (Complaint at ¶ 23). During this time, Plaintiffs allege Salvatore then transported home via his clothing said asbestos dust and fibers to his wife Mary Ann from 1963 to the present. (Complaint at ¶ 24). Plaintiffs allege Mary Ann was exposed to these asbestos-containing dust and fibers causing Mary Ann to develop consequently mesothelioma. (Complaint at ¶ 24-25). Plaintiffs allege Mary Ann was diagnosed with mesothelioma on January 8, 2018. (Complaint at ¶ 26).

On August 1, 2018, National Fuel filed its Preliminary Objections to Plaintiffs Complaint and accompanying Brief in Support. On August 22, 2018, Plaintiffs filed an Answer to National Fuel's Preliminary Objections with the Affidavit of Salvatore Affinito attached thereto. On September 19, 2018, oral argument was held at which Brian M. Lucot, Esq., appeared for National Fuel; and Jason T. Shipp, Esq., appeared for Plaintiffs Mary Ann Affinito and Salvatore Affinito.

The law is well settled in Pennsylvania regarding Preliminary Objections. Specifically, 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 of 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 in the nature of a demurrer, a court must overrule the objections if the complaint has averred 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). Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling the demurrer. *Gabel*, 616 A.2d at 1367 (Pa. 1992).

The first issue is whether Plaintiffs' Complaint is in accord with the Fair Share Act in pleading claims for damages "jointly and severally" against the named Defendants, including National Fuel. The relevant provisions of the Fair Share Act (the "Act") state as follows:

> **(a.1) Recovery against joint defendant; contribution.—**
>
> (1) Where recovery is allowed against more than one person, including actions for strict liability, and where liability is attributed to more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned under subsection (a.2).
>
> (2) Except as set forth in paragraph (3), a defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability.
>
> (3) A defendant's liability in any of the following actions shall be joint and several, and the court shall enter a joint and several judgment in favor of the plaintiff and against the defendant for the total dollar amount awarded as damages:

(i) Intentional misrepresentation.

(ii) An intentional tort.

(iii) ***Where the defendant has been held liable for not less than 60% of the total liability apportioned to all parties.***

(iv) A release or threatened release of a hazardous substance under section 702 of the act of October 18, 1988 (P.L. 756, No. 108),1 known as the Hazardous Sites Cleanup Act.

(v) A civil action in which a defendant has violated section 497 of the act of April 12, 1951 (P.L. 90, No. 21), 2 known as the Liquor Code. 42 Pa.C.S.A. § 7102

42 Pa.C.S. § 7102(a.1) (emphasis added).

In the instant case, as noted above, Plaintiffs have pled joint and several liability against all Defendants, including National Fuel. The Pennsylvania Superior Court has stated "the main purposes of the Fair Share Act [is] to make joint and several liability inapplicable to most tort cases." *Roverano v. John Crane, Inc.*, 177 A.3d 892, 914 (Pa. Super. 2017). However, the plain language of this Act does not preclude Plaintiffs at the pleading stage of this litigation from alleging joint and several liability against all Defendants. Specifically, Section 7102(a.1)(3)(iii) clearly states that if one defendant is held liable for more than 60% of the liability in a given case, joint and several liability applies to that particular defendant. *Id*. at 909 (citing 42 Pa.C.S. § 7102(a.1)(3)(iii)) ("This exception assures that those defendants who are substantially responsible for a plaintiff's injury will have to account for the full amount of the plaintiff's harm.").

At this stage of litigation, this Trial Court cannot predict the manner in which the trier of fact, a jury, will assess the relative liability of each Defendant; the responsibility of apportioning liability among the named-Defendants is solely within the fact finder's prerogative. *See id.* at 908 (noting this Act "reflects the Legislature's intention to have a fact-finder allocate liability among joint tortfeasors"). As this Act expressly states joint and several liability may be imposed "where the defendant has been held liable for not less than 60% of the total liability apportioned to all parties," Plaintiffs are not precluded from pleading joint and several liability in their Complaint. *See* 42 Pa.C.S. § 7102(a.1)(3)(iii). Plaintiffs' Complaint is therefore in accord with Fair Share Act in pleading claims for damages "jointly and severally" against the named Defendants. Thus, Defendant's first claim is without merit.

The second issue is whether venue in the instant action against National Fuel properly lies in Erie County, Pennsylvania. A plaintiff's choice of forum is afforded great weight. *Masel v. Glassman*, 689 A.2d 314, 316 (1997). Under the Pennsylvania Rules of Civil Procedure, a party may file preliminary objections on the grounds of improper venue. Pa.R.C.P. 1028(a)(1). "[C]orporations have a constitutional right to seek a change of venue." *Purcell v. Bryn Mawr Hosp.*, 579 A.2d 1282, 1284 (Pa. 1990). Under Pa.R.C.P. 1006(d)(1), trial courts have "considerable discretion" when determining whether a request to change venue should be granted. *Id.* The plaintiff is generally given her choice of forum so long as the requirements of personal and subject matter jurisdiction are satisfied, and the party seeking to change venue bears the burden of proving that venue is "necessary." *Id*. "Unlike the pleading practice in the Federal Courts, in Pennsylvania, the plaintiff is not required to plead the facts upon

which venue and jurisdiction depend." *United Beauty Supply Co. v. John Maffei, t/a Marcus Beauty Salon*, 1979 WL 139262 (C.C.P. Butler, Oct. 11, 1979) (noting "the rules of civil procedure do not require that plaintiff shall plead the facts of venue and jurisdiction").

Under Pa.R.C.P. 2179(a), a personal action may be brought against a corporation or similar entity in and only in:

(1) the county where its registered office or principal place of business is located;

(2) a county where it regularly conducts business;

(3) the county where the cause of action arose;

(4) a county where a transaction or occurrence took place out of which the cause of action arose, or

(5) a county where the property or a part of the property which is the subject matter of the action is located provided that equitable relief is sought with respect to the property.

Pa.R.C.P. 2179(a). "The statutory scheme established by Rule 2179 enables suitors to bring a cause of action against corporations on the four different grounds noted above." *Purcell*, 579 A.2d at 1284. Further, Pa.R.C.P. 1006(c)(1) states, in relevant part:

> an action to enforce a joint or joint and several liability against two or more defendants, except actions in which the Commonwealth is a party defendant, may be brought against all defendants in any county in which the venue may be laid against any one of the defendants under the general rules of [Pa.R.C.P. 2179].

Pa.R.C.P. 1006(c)(1).[1] "[W]here defendants residing in separate counties jointly or jointly and severally incur an obligation or commit a tort, a single action can be brought against all defendants either in the county of the cause, or in a county in which one of the defendants may be served." *Tarasi v. Settino*, 298 A.2d 903, 904 (1972); *see also See Ro–Med Construction Co., Inc. v. Clyde M. Bartley Co., Inc.*, 361 A.2d 808 (1976) (concluding venue was proper in county where plaintiff alleged joint or joint and several liability and one of the defendants was subject to venue in county). Indeed, "reading Rule 1006(c) in conjunction with Rule 2179, a plaintiff may bring her action in any county where one corporate defendant maintains . . . its principal place of business . . . notwithstanding that a co-defendant resides in another county." *Zappala v. Brandolini Prop. Mgmt., Inc.*, 909 A.2d 1272, 1280 (Pa. 2006) (noting that the "stated policy for this rule allowing an action to be brought in any county in which venue is proper against any one of the defendants is to avoid multiplicity of suits").

In the instant case, Plaintiffs' Complaint alleges Defendant Zurn Industries a/k/a Erie City

[1] "Joint liability is defined as liability shared by two or more parties." *Sehl v. Neff*, 26 A.3d 1130, 1133 (Pa. Super. 2011) (quoting Black's Law Dictionary, at 933 (8th ed.2004)) (internal quotations omitted). Joint and several liability is defined as "liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion." *Id*. As the Pennsylvania Superior Court has stated: "when a plaintiff seeks to impose joint and several liability on two or more defendants, he seeks to recover a judgment which he can then enforce in whole or in part against each of them." *Hileman v. Morelli*, 605 A.2d 377, 384 (Pa. Super. 1992). The Pennsylvania Superior Court has further explained "[i]mposition of joint and several liability enables the injured party to satisfy an entire judgment against any one of the tort-feasors, even if the wrongdoing of that tortfeasor contributed only a small part to the harm inflicted." *Glomb v. Glomb*, 530 A.2d 1362, 1365 (Pa. Super. 1987). "If the defendants are held jointly and severally liable, they may have contribution rights as between them, but this does not affect the plaintiff's right to collect his judgment from either." *Morelli*, 605 A.2d at 384.

Iron Works is a corporation incorporated under the laws of Pennsylvania whose principal place of business is located in Erie, Pennsylvania. Venue in this action is therefore proper against Zurn Industries in Erie County since Plaintiffs' Complaint establishes Erie County is "the county where [Zurn Industries'] . . . principal place of business is located." *See* Pa.R.C.P. 2179(a)(1). Moreover, as noted above, since Plaintiffs' Complaint alleges joint and several liability against all twenty-one (21) Defendants in the instant matter, Plaintiffs have filed "an action to enforce a joint or joint and several liability against two or more defendants." *See* Pa.R.C.P. 1006(c)(1). Thus, since venue exists in Erie County as to Zurn Industries by virtue of its principal place of business being located in Erie County, the instant action may be brought against all defendants, including National Fuel, in Erie County. *See e.g. Gilfor ex rel. Gilfor v. Altman*, 770 A.2d 341, 344 (Pa. Super. 2001) ("We agree with the trial court that the action at issue involved a joint/joint and several liability against the defendants, and, therefore, under Pa.R.C.P. 1006(c), the action could be brought in any county in which venue lies against any one of the defendants.").

Plaintiffs also assert even without application of Pa.R.C.P. 1006(c) in the instant case, venue in Erie County is proper with respect to National Fuel pursuant to Pa.R.C.P. 2179(a). Specifically, Plaintiffs attached the Affidavit of Salvatore Affinito. Therein, Salvatore Affinito avers facts in support of Plaintiffs' argument that this action may be brought against National Fuel in Erie County since Erie County is "where a transaction or occurrence took place out of which [Plaintiffs'] cause of action arose." *See* Pa.R.C.P. 2179(a)(4). This Trial Court notes that while affidavits may be used to resolve factual issues with respect to challenges to jurisdiction and venue if the facts are clear and specific, "[t]his is not a recommended procedure." *Slota v. Moorings, Ltd.*, 494 A.2d 1, 3 (1985); *cf. Ambrose v. Cross Creek Condominiums*, 602 A.2d 864, 869 (Pa. Super. 1991) (recognizing that resolving objections to personal jurisdiction by "submission of evidence by affidavit is not a recommended procedure"). Nevertheless, regardless of Plaintiffs' Affidavit, this Trial Court finds and concludes venue is proper as to all Defendants pursuant to Pa.R.C.P. 1006(c)(1) since venue is properly in Erie County as to Zurn Industries. Thus, this Trial Court need not address Plaintiffs' additional argument with respect to venue or consider Plaintiffs' Affidavit.

Accordingly, this Trial Court finds and concludes Plaintiffs' Complaint is in accord with the Fair Share Act in pleading claims for damages "jointly and severally" against the named Defendants, and venue in the instant action against National Fuel properly lies in Erie County, Pennsylvania. Consistent with the foregoing, this Trial Court hereby enters the following Order of Court:

ORDER

AND NOW, to-wit, this 28th day of September, 2018, after oral argument on the Preliminary Objections to Plaintiffs' Complaint and accompanying Brief in Support filed by Defendants National Fuel Gas Distribution Corporation and National Fuel Gas Supply Corporation f/k/a United Natural Gas Company (collectively "National Fuel"), by and through their counsel, Brian M. Lucot, Esq.; at which Brian M. Lucot, Esq., appeared for National Fuel; and Jason T. Shipp, Esq., appeared for Plaintiffs Mary Ann Affinito and Salvatore Affinito; and upon consideration of Plaintiffs' Answer to National Fuel's Preliminary Objections to Plaintiffs' Complaint; and in view of the relevant statutory and case law; and consistent with the

analysis in the foregoing Opinion, it is hereby **ORDERED, ADJUDGED AND DECREED** that National Fuel's Preliminary Objections to Plaintiffs' Complaint are **OVERRULED**. National Fuel shall file an Answer to Plaintiffs' Complaint within twenty (20) days from the date of this Order.

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

JOSEPH P. CONTI and ANN MARIE CONTI, Appellants
v.
THE ZONING HEARING BOARD OF FAIRVIEW TOWNSHIP also referred to as, THE FAIRVIEW TOWNSHIP ZONING HEARING BOARD, Appellee and UP STATE TOWER CO., LLC, Intervener

FAIRVIEW TOWNSHIP, Appellant
v.
FAIRVIEW TOWNSHIP ZONING HEARING BOARD, Appellee and UP STATE TOWER CO., LLC, Intervener

ZONING / SCOPE OF REVIEW

Where a trial court hears additional evidence on the merits of case after a governing body, board, or agency whose decision or action is brought up for review, the trial court must determine the case *de novo* and make its own findings of fact. *See* 53 P.S. § 11005-A.

ZONING / REQUEST FOR VARIANCE / STANDARD

The five elements to determine whether a variance should be granted are: (1) there are unique physical circumstances or conditions; (2) causing unnecessary hardship in the form of an unreasonable inhibition of usefulness of the property; (3) the hardship is not self-inflicted; (4) the grant of the variance will not adversely impact public health, safety, and welfare; and (5) the variance sought is the minimum that will afford relief. *See* 53 P.S. § 10910.2.

ZONING / REQUEST FOR VARIANCE / PUBLIC WELFARE

The concept of 'public welfare' is a broad one, in which an application for a variance may include traffic effects, impact on the character of the neighborhood, impact on property values, the effect on surrounding zoning, and other variables.

ZONING / REQUEST FOR VARIANCE / MINIMIZATION REQUIREMENT

The minimization requirement of the Municipalities Planning Code clearly applies in dimensional variance requests; however, the applicability of this requirement to use variance requests is often not relevant or tenuous.

ZONING / REQUEST FOR VARIANCE / SELF-INFLICTED HARDSHIP

The law does not permit a developer to subdivide his land and then make a subsequent claim for a variance because a remnant of that land does not conform with a zoning ordinance. The opportunity for greater profit from more lots in a subdivision is not a ground for the grant of a variance. When a landowner divides a parcel into two lots, and one of the lots is undersized, any resulting hardship is self-inflicted.

ZONING / USE VARIANCE / UNNECESSARY HARDSHIP

In determining whether unnecessary hardship has been established to justify the grant of a use variance, the hardship must be shown to be unique or peculiar to the property as distinguished from a hardship arising from the impact of zoning regulations on an entire district. Personal or economic hardship does not warrant the granting of a variance. Where the asserted hardship amounts to a landowner's desire to increase profitability or maximize development potential, the unnecessary hardship criterion required to obtain a variance is not satisfied. Showing a lot can be used in a more profitable fashion is insufficient; the land must have no feasible, permitted use before a use variance is granted.

ZONING / VARIANCES / UNNECESSARY HARDSHIP

In evaluating hardship, the use of adjacent and surrounding land is unquestionably relevant. Moreover, testimony indicating a property could be used for alternative permitted uses should not be taken out of context, and if the testimony as a whole demonstrates that the uses are not feasible, the property owner should not be required to bear the burden of converting the property to those uses.

ZONING / VARIANCES / UNNECESSARY HARDSHIP

The mere fact that an applicant for a variance purchased the property with knowledge of the hardship does not alone preclude him from being granted the variance.

ZONING / DIMENSIONAL VARIANCE

A dimensional variance involves a request to adjust zoning regulations to use property in a manner consistent with regulations, as opposed to a use variance, which involves a request to use property in a manner that is wholly outside zoning regulations.

ZONING / DIMENSIONAL VARIANCE / UNNECESSARY HARDSHIP

In determining whether unnecessary hardship has been established to justify the grant of a dimensional variance, courts may consider multiple factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements, and the characteristics of the surrounding neighborhood.

ZONING / DIMENSIONAL VARIANCE / UNNECESSARY HARDSHIP / QUANTUM OF EVIDENCE

The quantum of evidence required to establish an unnecessary hardship is lesser when a dimensional variance, rather than a use variance, is sought.

TELECOMMUNICATIONS / TELECOMMUNICATIONS ACT OF 1996

The construction, operation and maintenance of wireless telecommunications towers are controlled by regulations adopted and enforced by the Federal Communications Commission. *See* 47 U.S.C. § 301, *et seq.*

TELECOMMUNICATIONS / TELECOMMUNICATIONS ACT OF 1996

Congress may preempt state and local governments from regulating the operation and construction of a national telecommunications infrastructure, including construction and operation of personal wireless communications facilities. Congress enacted the Telecommunications Act of 1996 to provide a pro-competitive, de-regulatory national policy framework designed to rapidly accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.

TELECOMMUNICATIONS / LOCAL GOVERNMENT REGULATION

Under the Telecommunications Act of 1996, state and local governments retain authority over zoning and land use issues; however, the Telecommunications Act places several procedural and substantive limitations on such authority when exercised in relation to personal wireless service facilities. The Telecommunications Act of 1996 was intended to promote competition by limiting the ability of local authorities to regulate and control the expansion of telecommunications technologies.

TELECOMMUNICATIONS / LOCAL GOVERNMENT REGULATION

The purpose of Section 332(c)(7) of the Telecommunications Act of 1996 is to reduce the

impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers. This purpose is effectuated through Section 332(c)(7)'s limitations on the general authority of state or local governments or instrumentalities thereof to make decisions regarding the placement, construction, and modification of personal wireless service facilities.

TELECOMMUNICATIONS / LOCAL GOVERNMENT REGULATION

State or local government, or instrumentalities thereof, shall not prohibit or have the effect of prohibiting the provision of personal wireless services. 47 U.S.C. § 332(c)(7)(B)(i)(II).

TELECOMMUNICATIONS / LOCAL GOVERNMENT REGULATION

To show a violation of Section 332(c)(7)(B)(i)(II) of the Telecommunications Act of 1996, an unsuccessful provider applicant must show (1) its telecommunications facility will fill an existing significant gap in the ability of remote users to access the national telephone network; and (2) the manner in which the applicant proposes to fill the significant gap in service is the least intrusive means of remedying that gap.

ADMINISTRATIVE LAW AND PROCEDURE / DEFERENCE TO AGENCY INTERPRETATION

If a court of appeals interprets an ambiguous statute one way, and the agency charged with administering that statute subsequently interprets the statute in another way, even that same court of appeals may not then ignore the agency's more recent interpretation.

TELECOMMUNICATIONS / LOCAL GOVERNMENT REGULATION

The FCC has adopted a standard that requires a provider to show a gap in its own service. See Ruling to Clarify Provisions of 332(C)(7)(b), 24 F.C.C.R. 13994 ¶ 56–61 (Nov. 18, 2009). Indeed, the U.S. District Court for the Eastern District of Pennsylvania has stated courts are required to give deference to the FCC's interpretation, which holds a provider must plead a significant gap in service in any area exists for that particular service provider. *Liberty Towers, LLC v. Zoning Hearing Bd. of Twp. Lower Makefield, Bucks Cty., Pa.*, 748 F.Supp.2d 437, 444 (E.D. Pa. 2010).

TELECOMMUNICATIONS / LOCAL GOVERNMENT REGULATION

To determine if a significant gap in coverage exists, courts consider the quality of the service in the area and the effect on remote users. Propagation maps as well as reports from radio-frequency engineers are suitable to support a claim for a substantial gap in coverage.

TELECOMMUNICATIONS / LOCAL GOVERNMENT REGULATION

The applicant of a zoning variance for the construction of a telecommunications tower need only show a good faith effort has been made in identifying and evaluating less intrusive alternatives, e.g., that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 13076 – 2017
No. 13100 – 2017 and
No. 13101 – 2017

Appearances: Joseph P. Conti, Esq., for Appellants Joseph P. Conti and Ann Marie Conti
Paul F. Burroughs, Esq., for Appellant Fairview Township
David J. Rhodes, Esq., & Bryan L. Spry, Esq., for Appellee Fairview Township Zoning Hearing Board
Thomas S. Kubinski, Esq., & T. Scott Thompson, Esq., for Intervener Up State Tower Co., LLC

OPINION

Domitrovich, J. October 11, 2018

Up State Tower Co., LLC ("Intervener Up State") had filed two zoning variance applications to construct two telecommunications towers at two separate real properties located within Fairview Township. The Zoning Hearing Board granted both of Intervener Up State's zoning variance applications. Appellants appealed the Zoning Hearing Board's decisions to this Trial Court.[1] The matters before this Trial Court are the land use appeals of Appellants Joseph P. Conti and Ann Marie Conti as well as Appellant Fairview Township challenging the decisions entered by the Fairview Township Zoning Hearing Board (the "Zoning Hearing Board"). A *de novo* hearing was held at which this Trial Court received new evidence. This Trial Court provides the following Findings of Fact and Conclusions of Law:

I. PROCEDURAL HISTORY

On May 2, 2017, Fairview Evergreen Nurseries, Inc. ("Fairview Evergreen") and Intervener Up State entered into two separate land lease agreements wherein Fairview Evergreen agreed to lease portions of two separate real properties located in Fairview Township to Intervener Up State for the purposes of Intervener Up State constructing and operating a wireless telecommunications tower upon each property. On September 12, 2017, Intervener Up State submitted two separate variance applications to the Fairview Township Zoning Hearing Board with respect to each property requesting several variances from the Fairview Township Zoning Ordinance, including use variances, height variances, and numerous dimensional variances.

On October 3, 2017, a hearing was held before the Fairview Township Zoning Hearing Board on Intervener Up State's variance applications. The Zoning Hearing Board voted to grant Intervener Up State's requests for variances with respect to both applications, and on November 14, 2017, the Zoning Hearing Board issued two sets of Findings of Fact and Conclusions for Law setting forth the reasons for its decisions. On November 1, 2017, Joseph P. Conti, Esq., on behalf of himself and his wife, Ann Marie Conti ("Conti"), filed a Land Use Notice of Appeal at Docket Number 13076-2017. On November 2, 2018, Fairview Township filed two Notices of Land Use Appeals at Docket Numbers 13100-2017 and 13101-2017, by and through its counsel, Paul F. Burroughs, Esquire. On November 2, 2018, various landowners living in close physical proximity to the Dutch Road Property ("Landowners"), by and through their counsel, Gary Eiben, Esq., filed a Notice of Land Use Appeal/Petition for Review.[2] On November 28, 29, and 30, 2017, Intervener Up State filed, by and through its counsel, Thomas S. Kubinski, Esq., its Notices of Intervention at all four dockets.

[1] This Trial Court has jurisdiction of these land use appeals pursuant to Section 1001-A, *et seq.* of the Pennsylvania Municipalities Planning Code, 53 P.S. § 11002-A, *et seq.*

[2] On May 3, 2018, the Landowners filed their Praecipe to Discontinue their action against Zoning Hearing Board of Fairview Township at Docket Number 13099-2017. Therefore, this Trial Court will not address the remaining procedural history at Docket Number 13099-2017 as this procedural history is now rendered moot.

On December 4, 2017, Fairview Township filed its Motion for Additional Evidence and Appellant Conti filed his Motion to Present Additional Evidence. On December 27, 2017, both Fairview Township and Appellant Conti also filed separate Motions to Consolidate. By Order dated January 5, 2018, this Trial Court consolidated all dockets for trial purposes only. By Order dated March 9, 2018, after a scheduled Argument on the Motions to Present Additional Evidence, this Trial Court granted said Motions in part as well as Intervener Up State's oral request to the extent that a *de novo* hearing was scheduled for the purpose of this Trial Court receiving new evidence and the parties developing a thorough and complete record by providing an opportunity for all parties to be heard fully and to admit relevant evidence and testimony. This *de novo* hearing was scheduled to begin on May 31, 2018; however, since Attorney Conti was unable to appear on behalf of himself and Ann Marie Conti due to a last-minute, unforeseen illness, this Trial Court continued said *de novo* hearing.

On July 23, and 24, 2018, said *de novo* hearing was held; at which Thomas S. Kubinski, Esq., appeared on behalf of Intervener Up State Tower; Joseph P. Conti, Esq., appeared on behalf of himself and his wife; Paul F. Burroughs, Esq., appeared on behalf of Appellant Fairview Township; and David Rhodes, Esq., as well as Bryan Spry, Esq., appeared on behalf of Appellee Fairview Township Zoning Hearing Board. Said *de novo* hearing provided all counsel with the opportunity to present evidence and examine as well as cross-examine all witnesses. At said *de novo* hearing, counsel for Intervener Up State called several witnesses in support of Intervener Up State's Zoning Permit Applications, including Hagan Hetz, the CEO and Chair of the Board of Directors for Fairview Evergreen Nurseries, Inc.; Eric Wong, radio-frequency engineer for Blue Wireless; Richard Conroy, an expert radio-frequency engineer; Brian Gelfand, General Manager of Blue Wireless; and Don Carpenter, site acquisition and site development agent. Counsel for Appellant Fairview Township called Eve Hanlon to testify.

On August 29, 2018, Attorney Kubinski on behalf of Intervener Up State filed his "Application for Admission *Pro Hac Vice* of T. Scott Thompson" to appear and participate on behalf of Intervener Up State in these consolidated land use appeals. Said Motion was granted.

On September 13, 2018, Attorney Kubinski filed "Intervenor's Motion for Leave to File Reply Conclusions of Law." On September 17, 2018, Attorney Conti filed his "Opposition to Intervenor's Motion for Leave to File Reply Conclusions of Law." By Order dated September 17, 2018, this Trial Court permitted Attorney Kubinski to submit Reply Conclusions of Law and provided counsel for both Appellants with the opportunity to submit their Responses thereto. On September 20, 2018, Attorney Kubinski filed "Intervenor's Reply Conclusions of Law." On September 24, 2018, Attorney Burroughs filed "Appellant Fairview Township's Response to Up State's Reply Conclusions of Law." On September 26, 2018, Attorney Conti filed his "Response to Intervenor's Reply Conclusions of Law."

Where a deemed approval of a zoning application is appealed and the trial court accepts new evidence, the findings of the zoning board are rendered null and the trial court must render its own findings of fact and conclusions of law. *See DeSantis v. Zoning Hearing Bd. of the City of Aliquippa*, 53 A.3d 959, 962 (Pa. Cmwlth. 2012). Accordingly, these matters are ripe for this Trial Court's *de novo* review.

II. FINDINGS OF FACT

1. Fairview Township is a Pennsylvania municipality organized and existing under the laws of the Commonwealth of Pennsylvania.
2. Appellants Joseph P. Conti and Ann Marie Conti reside at 7498 Water Street, Fairview, Pennsylvania 16415.
3. Intervener Up State Tower Co., LLC is a limited liability company with a business address of 4915 Auburn Avenue, #200, Bethesda, Maryland, 20814.
4. Intervener Up State is in the business of acquiring real estate by either purchase or license, constructing cellular towers, and providing space for cellular carriers to collocate antennas on said cellular towers. (Notes of Testimony, De Novo Hearing, July 23, 2018, at pg. 17:8-19 ("N.T.1")).
5. If a particular parcel of real estate is not zoned to allow for telecommunications facilities, Intervener Up State will apply for zoning variances. (N.T.1 at 17:8-19).
6. Blue Wireless operates a facilities-based cellular telephone network and is a federal licensee of commercial mobile radio services. Blue Wireless also operates stores at which consumers purchase cell phones for voice and data services. (N.T.1 at 15:24-16:3).
7. To operate a cell phone network and provide voice and data services, Blue Wireless requires placement of radio equipment at certain heights, based on radio-frequency engineering, typically either on dedicated cell towers or tall buildings, in order for radio equipment to communicate with each other properly. (N.T.1 at 16:6-11).
8. Fairview Township Zoning Ordinance permits the construction and operation of wireless telecommunications towers in the I-1 Light Industrial, I-2 Industrial Park, or I-3 Heavy Industrial Districts. These three industrially zoned districts comprise approximately eight percent of the township. (Notes of Testimony, De Novo Hearing, July 24, 2018, at pg. 125:25-126:4 ("N.T.2")).
9. On September 12, 2017, Intervener Up State submitted to the Fairview Township Zoning Hearing Board: (1) an Application for Zoning Permit for 7463 West Ridge Road, Fairview, PA 16415 ("Dutch Road Property"); and (2) an Application for Zoning Permit for 7475 West Ridge Road, Fairview, PA 16415 ("Water Street Property").[3]
10. In both Applications, Intervener Up State requested use, dimensional, and height variances to construct wireless telecommunications towers at the Dutch Road Property and the Water Street Property. Specifically, Intervener Up State proposed to construct 50 foot by 50 foot wireless telecommunications facilities with a height of 160 feet on both the Dutch Road Property and Water Street Property.
11. The Fairview Township Zoning Ordinance requires a telecommunications tower constructed in any of the "I" Industrially Zoned Districts with a height of 160 feet to have a minimum setback of 208 feet (160 feet by 130%). (N.T.1 at 31:7-13; 33:12-13).
12. The proposed telecommunications towers will not produce noise or light and will not increase local traffic in the area. (N.T.1 at 21:16-22:1). A technician will only visit the site "a couple times a year for regular maintenance checks." (N.T.1 at 22:2-7).
13. The 160 foot height of the proposed telecommunications towers are the minimum heights necessary to provide the radio-frequency coverage Blue Wireless desires to produce in

[3] Intervener Up State also identifies the Dutch Road Property as "ERI-664" and the Water Street Property as "ERI-675." (N.T.1 at 6:15-7:3).

order to provide sufficient wireless coverage in Fairview Township. (*See* N.T.1 at 16:6-11; 45:3-6; N.T.2 at 91:12-15; *see also* 93:11-20).

14. The proposed telecommunications towers are designed to have a breakage point 25 to 30 feet near the top of the tower; thus, if the tower were to topple, the tower would collapse upon itself. (N.T.2 128:15-24).
15. A significant gap in wireless coverage is an area where a wireless provider is not able to service customers reliably in a particular geographic area due to either (1) inadequate signal or (2) inadequate capacity. (N.T.2 at 63:25-64:2). If either of these elements is lacking, a gap in coverage will exist. (N.T.2 at 64:3-10).
16. Richard Conroy has a Bachelor's degree in electrical engineering from the New Jersey Institute of Technology and has 30 years of experience designing wireless telecommunications systems throughout the United States. (N.T.2 at 58:20-23).
17. The primary issue in Blue Wireless' lack of coverage is due to Blue Wireless' frequency of operation, or the radio-frequency by which Blue Wireless' radio signals are propagated. (N.T.2 at 64:3-6; 64:11-13).
18. Wireless carriers obtain licenses from the Federal Communications Commission ("FCC") to operate their network, and FCC licenses provide for different bands of spectrum and frequencies. (N.T.2 at 65:20-23).
19. Blue Wireless's network operates on one frequency known as the 1900 megahertz frequency band. (N.T.2 at 65:24-66:2; 67:1-2). This 1900 megahertz is a higher than average frequency band of other cellular service providers. (N.T.2 at 64:20-66:2).
20. Blue Wireless's network operates on five megahertz of bandwidth, which refers to capacity, or how many users their frequency band can support. (N.T.2 at 67:1-6; 68:18-19).
21. Higher frequency bands, such as Blue Wireless'1900 megahertz frequency, covers less distance than lower frequencies since this higher frequency signal will become attenuated as the signal travels through the air and diffracted as the signal travels through objects like trees, buildings and terrains. (N.T.2 at 66:8-13).
22. Due to the Blue Wireless' higher frequency band and Blue Wireless' lack of wireless facilities in Fairview Township, a shortage of in-building coverage exists in Fairview Township regarding the ability of remote users to access Blue Wireless' cellular network. (*See* Exhibit I-15A; N.T.2 at 76:19-24; 77:19-78:5; 83:20-21).
23. Blue Wireless' coverage gap in Fairview Township encompasses Lake Erie to the north, Manchester Road to the east, Interstate I-90 to the south and Fairplain Road to the west. (N.T.2 at 77:19-78:5).
24. Blue Wireless' gap in wireless service consists of approximately 19.46 square miles and affects approximately 8,671 people who live within this coverage gap. (N.T.2 at 77:19-78:5; 83:20-21; 98:9-18).
25. The count of population within the coverage gap area is based on U.S. Census data for the calendar year 2010. (Exhibit I-15, pg. 8; N.T.2 64:23-65:5; 105:20-106:10). U.S. Census data is an acceptable methodology for radiofrequency engineers to utilize in performing radio-frequency analyses. (N.T.2 120:4-16).
26. Telecommunications towers placed at both Water Street and Dutch Road Properties are needed to fill Blue Wireless' gap in coverage since neither tower alone will effectively provide in-building coverage. Specifically, even if one tower could support the coverage,

one tower will not be able to support the capacity since, as more users access a single tower's signal, too many users accessing that resources will exceed the tower's capacity, thereby resulting in a coverage gap. (N.T.2 at 79:8-17). Thus, one tower standing alone is insufficient to provide seamless in-building coverage. (N.T.2 at 81:25-82:6; Exhibit I-15B; Exhibit I-15C).

27. The existence of both proposed telecommunications towers at the Water Street and Dutch Road Properties operating in unison will together provide approximately 12.6 square miles of coverage and serve approximately 7,638 people within the coverage gap. (N.T.2 at 83:6-12).
28. The two proposed telecommunications towers together will substantially remedy Blue Wireless' gap in service and provide in-building LTE coverage to populated areas of Fairview Township. (N.T.2 at 83:21-84:2; 98:23-99:5; *compare* Exhibit I-15D *with* Exhibits I-15A-C, E-J).
29. "Search rings" are developed by radio-frequency engineers when a new tower site is required indicating a geographic area in which potential sites may be located in order to produce the maximum amount of coverage in an inadequately serviced area. (N.T.2 at 85:11-87:6).
30. Intervener Up State examined four existing cell towers in Fairview Township to determine whether collocation on a variation of these existing towers would adequately fill Blue Wireless' gap in coverage. (*See* N.T.2 84:3-98:1; Exhibits I-15E-J).
31. These existing towers include: (1) "Crown Tower" located at 6250 West Ridge Road; (2) "SBA Tower" located at 7230 Canal Road; (3) "Verizon Tower" located at 7985 West Ridge Road; and (4) "ATC Tower" located at 4701 Franklin Road. (See Exhibit I-15, at pg. 10).
32. These four existing towers are located too far outside of the search rings and therefore do not provide efficient coverage to both the area as well as the population present in Fairview Township. (N.T.2 at 99:10-16; 99:19-20).
33. Blue Wireless has a significant gap in service in the vicinity of each of the sites caused by a lack of reliable in-building residential coverage based on advanced computer propagation modeling. (N.T.2 at 64:17-20; Exhibit I-15, at pg. 12-13).
34. Don Carpenter provided credible testimony in that he has been working in the site development field for over 20 years and has a Bachelor of Arts in English as well as an Associate's degree in Applied Civil Engineering. (N.T.2 at 122:17-24).
35. Mr. Carpenter has been working for Intervener Up State since 2013 and has located approximately 100 sites for the construction and operation of other telecommunications facilities. (N.T.2 at 123:4-9).
36. James Cardman, the Fairview Township Planning and Zoning Administrator, has served in this role for 30 years. (N.T.2 at 204:7-12).

A. <u>Findings of Fact with Respect to the Dutch Road Property (ERI-664)</u>

37. The Dutch Road Property is zoned in the A-1 Rural District, which does not permit utility, communication, electric or gas company operations as of right. (Exhibit I-1).
38. Fairview Evergreen Nurseries, Inc. owns the real property located at Dutch Road in Fairview, Pennsylvania; Tax ID No. (21) 42-59-51. (Exhibit I-1).
39. Fairview Evergreen purchased the Dutch Road Property on March 11, 2013, by deed

for $12,000.00. (*See* Exhibit T-2).

40. When Fairview Evergreen acquired the Dutch Road Property, the Dutch Road Property's condition was roughly similar to what it is now or completely similar to what it is now. (N.T.2 at 46:7-10). Specifically, the existing conditions including the "swale" and similar features unique to the Dutch Road Property are similar to what it was when Fairview Evergreen acquired the Dutch Road Property in 2013. (N.T.2 at 47:4-10). Similarly, the condition of the portion of the property where the proposed cell tower will be placed is the same as it was in 2013. (N.T.2 at 47:11-16).
41. On May 2, 2017, Intervener Up State Tower Co., LLC entered into a "Land Lease Agreement" with Fairview Evergreen wherein Fairview Evergreen agreed to lease a portion of the Dutch Road Property to Intervener Up State for the purpose of constructing and operating a wireless telecommunications tower thereon.
42. The construction, operation and maintenance of Intervener Up State's wireless telecommunications tower at the Dutch Road Property will be controlled by regulations adopted and enforced by the Federal Communications Commission. *See* 47 U.S.C. § 301, *et seq.*
43. The industrially zoned properties within the search ring near the Dutch Road Property meeting the setback distances required to construct a 160 foot structure already have existing primary uses. (*See* N.T.2 at 133:11-22; 134:19-24).
44. Intervener Up State is requesting the following variances from the Fairview Township Zoning Ordinance as to the Dutch Road Property:
    a. A use variance to § 709 to allow for the construction of a wireless telecommunications tower in the A-1 Rural District;
    b. A variance as to the height restriction set forth in § 709(D)(6) to allow for the construction of a 160 foot wireless telecommunications tower in A-1 Rural District;
    c. A dimensional variance from § 709(D)(5) to allow for a rear yard setback of 13.5 feet; and
    d. A dimensional variance from § 709(D)(4) to allow for a side yard setback of 14.6 feet.
45. The property located immediately adjacent to the south of the Dutch Road Property is zoned in the I-1 Light Industrial District. (Exhibit T-4; N.T.2 at 137:2-5).
46. The shape of the Dutch Road Property is irregular in that the Dutch Road Property is a "pie-wedge shape" and consists of approximately ten acres. (N.T.1 at 98:11-15; Exhibit I-13; Exhibit T-2). Approximately 27 feet of the Dutch Road Property's eastern boundary borders Dutch Road. (N.T.1 at 98:2-5). The western boundary of the Dutch Road Property is approximately 300 feet. (*See* Exhibit I-13).
47. Fairview Evergreen owns property immediately north of the Dutch Road Property whereupon Fairview Evergreen operates a tree farm growing ornamental trees and other plants. (N.T.1 at 99:1-13; *see also* Exhibit I-13).
48. The Dutch Road Property has unique physical circumstances in that the Dutch Road Property is uneven and has a "swale" or a dip/valley on the southern portion. (N.T.1 at 98:21-24; 99:19-100:13). This swale slopes downward from the northern property line and slopes up to the southern border of the Dutch Road Property. (N.T.1 at 100:3-6).
49. The southern portion of the Dutch Road Property is not being utilized since the

topography does not allow for cultivation of ornamental plants or farm crops. (N.T.1 at 98:16-20; 103:18-25).

50. Dutch Road lies to the east of the Dutch Road Property. (*See* Exhibit I-13).
51. A railroad runs along the southern border of the Dutch Road Property. (N.T.1 at 100:16-24; 101:7-13; N.T.2 at 137:15-17; Exhibit I-13; Exhibit I-19).
52. Electric power lines exist overhead on the southern portion of the Dutch Road Property. (N.T.1 at 100:25-101:4; N.T.1 at 137:13-15; Exhibit I-18; Exhibit I-19).
53. Tow Road exists to the south of the railroad tracks. (N.T.1 at 101:14-18).
54. A power grid/large transformer station exists to the south of the Dutch Road Property. (N.T.1 at 101:22-24; N.T.2 at 138:5-8; 140:5-8).
55. A "chipper tree remover company" also exists to the south of the south of the Dutch Road Property. (N.T.1 at 101:19-22).
56. Chiver's Construction operates a construction business to the south of the Dutch Road Property across Tow Road. (N.T.1 at 101:17-24; N.T.2 at 140:4-5).
57. An electrical company owns land to the south of the property. (N.T.2 at 140:5-8).
58. Fairview Evergreen owns property immediately west of the Dutch Road Property extending west to Eaton Road. (N.T.1 at 101:25-102:6).
59. A residential neighborhood exists on the east side of Dutch Road and to the north of the Dutch Road Property. (N.T.1 at 102:19-103:17).
60. Fairview Evergreen purchased the Dutch Road Property to protect the southern border of property already owned by Fairview Evergreen and acquired the Dutch Road Property since its price was reasonable. (N.T.1 at 103:25-104:14).
61. The Dutch Road Property cannot be cultivated to grow ornamental plants, farm crops, or any other type of plants. (N.T.1 at 100:3-13).
62. The previous owner of the Dutch Road Property dumped non-organic materials onto said Property including expended diesel containers and used tires. (N.T.1 at 104:3-10).
63. The proposed telecommunications tower site will occupy a 50 foot by 50 foot area in the northwest portion of the Dutch Road Property. (Exhibit I-1; Exhibit I-13).
64. The proposed telecommunications tower site will be located on the Dutch Road Property with an approximate 2,380 foot front yard setback, 13.5 foot rear yard setback, and side yard setbacks of 264.9 feet and 14.6 feet. (Exhibit I-1).
65. The properties in the industrial zone near the Dutch Road Property have existing primary uses and will not meet the required setback distances under the Fairview Township Zoning Ordinance. (N.T.2 at 133:11-20; 134:25-135:12). While one vacant lot without a primary use existed, that property owner was not interested in signing a lease nor was the property large enough to comply with applicable setback requirements. (N.T.2 at 135:10-12; 136:2-7).
66. The Walnut Creek drainageway as well as a wrecking yard occupy much of the nearby area in the I-3 industrially zoned district, rendering much of the nearby real estate unsuitable. (N.T.2 at 133:22-134:2). Properties located near the Dutch Road Property will not comply with use and setback requirements of the Fairview Township Zoning Ordinance. (N.T.2 at 134:19-135:12).
67. Intervener Up State previously filed a variance application to construct a telecommunications tower at a property zoned in the industrial district which had an

existing self-storage facility operating thereon. (N.T.2 at 129: 9-21). This property was located along the railroad tracks to the east of the Dutch Road Property. (N.T.2 at 130:6-15). However, Intervener Up State's variance application was denied since the property already had an existing use, the self-storage facility. (N.T.2 at 129:22-130:5).

B. Findings of Fact with Respect to the Water Street Property (ERI-675)

68. Fairview Evergreen also owns the real property located at 7475 West Ridge Road in Fairview, Pennsylvania 16415; Tax ID No. (21) 81-26-24 ("Water Street Property"). (Exhibit I-2).
69. The Water Street Property is zoned in the R-1 Village District, which does not permit utility, communication, electric or gas company operations as of right. (Exhibit I-2).
70. On May 2, 2017, Intervener Up State entered into another "Land Lease Agreement" with Fairview Evergreen wherein Fairview Evergreen agreed to lease a portion of Water Street Property to Intervener Up State for the purpose of constructing and operating a wireless telecommunications tower thereon. (Exhibit C-5).
71. The construction, operation and maintenance of Intervener Up State's wireless telecommunications tower at the Water Street Property will be controlled by regulations adopted and enforced by the Federal Communications Commission. *See* 47 U.S.C. § 301, *et seq.*
72. Fairview Evergreen entered into a lease with Intervener Up State for the subdivision of its property and allowed for the construction of a telecommunications tower thereon in order to obtain additional revenue for Fairview Evergreen. (N.T.2 at 42:17-43:1).
73. Two residential subdivisions exist near the Water Street Property, one of which, the Pine Grove subdivision, contains 25 lots of primarily two-story dwellings. (N.T.2 at 226:19-22; 228:21-25).
74. The two-story homes in the area are approximately 26 feet tall and the ranch-style homes are approximately 18 feet in height. (N.T.2 at 237:12-21; 238:24-239:11).
75. The proposed telecommunications tower will stand approximately 8 times higher than the ranch homes and more than 5 times higher than the two-story homes in the area. (N.T.2 at 239:7-11).
76. The proposed telecommunications tower for the Water Street Property would be located less than 200 feet from the nearest home in the area. (N.T.2 at 227:15-18). A wooded area exists between the proposed telecommunications tower at the Water Street Property and the nearest home. (N.T.2 at 227:19-228:1).
77. A local Presbyterian Church is the highest structure in the immediate area with a steeple approximately 50 foot in height; all other structures in the immediate area are one or two stories in height. (N.T.2 at 229:16-230:1).
78. Under the Fairview Township Zoning Ordinance § 201(A), no use may be operated in a district unless it is specifically included as a use by right for that district, and each parcel shall be limited to one principal or permitted use per lot. (Exhibit T-3).
79. Fairview Evergreen agreed to subdivide the Water Street Property to provide a ten acre parcel around the proposed cell tower site to ensure only one use would be made on this subdivided parcel. (N.T.1 at 112:4-16; N.T.2 at 26:20-22).
80. If the Water Street Property, which is zoned in the R-1 district, is subdivided, the residual subdivided property will remain zoned in the R-1 district; therefore, Intervener Up State

will need to obtain a variance to construct a telecommunications tower on the residual, subdivided property. (N.T.2 at 220:16-23; 221:3-222:8; 236:17-237:11).

81. Intervener Up State is requesting the following variances from the Fairview Township Zoning Ordinance as to the Dutch Road Property:
    a. A use variance from § 700 to allow for the construction of a wireless telecommunications tower in the R-1 Village District;
    b. A variance as to the height restriction set forth in § 700(C)(6) to allow for the construction of a 160 foot wireless telecommunications tower in A-1 Rural District;
    c. Three dimensional variances from § 700(C) to allow for setbacks of 200 feet from the east, north, and south property lines.
82. The Water Street Property is currently being used for Fairview Evergreen's wholesale growing business operations. (N.T.1 at 113:6-8; N.T.2 at 40:24-25).
83. Fairview Evergreen has been conducting wholesale growing business operations at the Water Street Property in excess of 20 years. (N.T.2 at 41:3-18).
84. The Water Street Property contains many structures located thereon in furtherance of Fairview Evergreen's business operations, including: a parking lot for employees, a van garage containing a shop, a loading dock, a scale house used to weigh trucks, a paved driveway, a barn, offices, a woodshop, an old barracks building, a cold storage area, an integrated pest management building, storage facilities, a grain storage bin, a fenced in pen, and poly houses. (N.T.1 at 110:10-24; 119:3-9; 119:14-120:2; 121:13-17; 124:3-125:3).
85. Fairview Evergreen also stores and uses digging tractors, used to cultivate the soil, on the Water Street Property. (N.T.1 at 125:4-11).
86. Fairview Evergreen has fields on the Water Street Property growing "seedling growing material" as well as field corn, sweet corn, wheat, and oats. (N.T.1 at 110:25-111:1-12; 112:22-23; 125:12-15).
87. The ground upon which the location of the proposed telecommunications facility at the Water Street Property will be placed is currently being used to grow corn by Fairview Evergreen. (N.T.2 at 26:2-19; Exhibit C-4).
88. Fairview Evergreen's agricultural operations are permitted uses under the Fairview Township Zoning Ordinance. (N.T.2 at 182:2-13).
89. Other businesses exist in the immediate area of the Water Street Property, including a Country Fair gas station, dentist's office, and antique business. (N.T.1 at 113:11-23).
90. Other potential sites within the search ring near the Water Street Property generated by Blue Wireless are not industrially zoned. (N.T.2 at 141:25-142:1).
91. The Verizon and ATC towers are within view from the Water Street Property. (N.T.2 at 145:15-22; 153:14-17; Exhibit I-24; Exhibit I-25).
92. The Water Street Property is "quasi-industrial" in that Fairview Evergreen conducts warehousing and shipping operations thereon. (N.T.2 at 142:2-14).

III. CONCLUSIONS OF LAW

A. Standard of Review

This Trial Court's standard of review in the instant case is specified in the Pennsylvania Municipalities Planning Code ("MPC"), which states: "[I]f additional evidence is taken by the court . . . , the court shall make its own findings of fact based on the record below as supplemented by the additional evidence, if any." 53 P.S. § 11005-A. Where a trial court

hears additional evidence on the merits, the trial court must determine the case *de novo* and issue "its own findings of fact based on the record made before the board as supplemented by the additional evidence." *Mitchell v. Zoning Hearing Bd. of the Borough of Mount Penn*, 838 A.2d 819, 825 (Pa.Cmwlth. 2003); *see also Boss v. Zoning Hearing Bd. of Borough of Bethel Park*, 443 A.2d 871, 873 (Pa.Cmwlth. 1982) ("Where the court below takes additional evidence in a zoning appeal, it must decide the case on the merits.").

B. Law and Analysis

Under the Pennsylvania Municipalities Planning Code, a variance may be granted under local law if all of the following findings are made where relevant in a given case:

> (1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located;
>
> (2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;
>
> (3) That such unnecessary hardship has not been created by the appellant;
>
> (4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare; and
>
> (5) The variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

53 P.S. § 10910.2(a); *see also Southeastern Chester Cty. Refuse Auth. v. Zoning Hearing Bd. of London Grove Twp.*, 898 A.2d 680, 688 (Pa. Cmwlth. 2006).

> The Fairview Township Zoning Ordinance provides similar requirements:
>
> The Zoning Hearing Board may adapt or vary the strict application of any requirements of this Ordinance in the case of irregular, narrow, shallow or steep lots, or other physical conditions whereby such strict application would result in practical difficulty or unnecessary hardship that would deprive the owner of the reasonable use of the land or building involved but in no other case.

Fairview Township Zoning Ordinance ("FTZO") § 1103(D). Section 1103(D) of the Fairview Township Zoning Ordinance further states:

1. No such variance in the strict application of any provision of this Ordinance shall be granted by the Zoning Hearing Board unless it finds the conditions stated in Section 1103 D above are such that the strict application of this Ordinance would deprive the applicant of the reasonable use of land or buildings.

2. The granting of any variance shall be in harmony with the general purpose and intent of this Ordinance and the Comprehensive Plan, and shall not be injurious to the neighborhood or otherwise detrimental to the public welfare and shall be the minimum necessary to afford relief.

3. The board must determine that any unnecessary hardship has not been created by the appellant.

FTZO § 1103(D)(1)-(3). "The overriding standard for a variance is unnecessary hardship." *Doris Terry Revocable Living Trust v. Zoning Board of Adjustment of City of Pittsburgh*, 873 A.2d 57, 63 (Pa. Cmwlth. 2005). The party seeking a variance bears the burden of proving (1) unnecessary hardship will result if the variance is denied, and (2) the proposed use will not be contrary to the public interest. *Valley View Civic Ass'n v. Zoning Bd. of Adjustment*, 462 A.2d 637, 640 (Pa. 1983). The hardship must be shown to be unique or peculiar to the property as distinguished from a hardship arising from the impact of zoning regulations on an entire district. *Id.* at 556. In evaluating hardship, the use of adjacent and surrounding land is unquestionably relevant. *Id.*

Indeed, the hardship must be an unnecessary one and not simply a "mere" hardship. *Larsen v. Zoning Bd. of Adjustment of City of Pittsburgh*, 672 A.2d 286, 290 (Pa. 1996). Personal or economic hardship does not warrant the granting of a variance. *Rinck v. Zoning Bd. of Adjustment*, 339 A.2d 190, 192 (Pa. Cmwlth. 1975). The Pennsylvania Commonwealth Court has stated where the asserted hardship amounts to a landowner's desire to increase profitability or maximize development potential, the unnecessary hardship criterion required to obtain a variance is not satisfied. *Society Hill Civic Ass'n. v. Philadelphia Zoning Bd. of Adjustment*, 42 A.3d 1178, 1187 (Pa. Cmwlth. 2012). Furthermore, showing a lot can be used in a more profitable fashion is insufficient; the land must have no feasible, permitted use before a use variance is granted. *Township of East Caln v. Zoning Hearing Bd. of East Caln Tp.*, 915 A.2d 1249, 1253-54 (Pa. Cmwlth. 2007). However, "testimony indicating a property could be used for alternative permitted uses should not be taken out of context, and if the testimony as a whole demonstrates that the uses are not feasible, the property owner should not be required to bear the burden of converting the property to those uses." *Zoning Hearing Bd. of Sadsbury Twp. v. Bd. of Sup'rs of Sadsbury Twp.*, 804 A.2d 1274, 1279 (Pa.Cmwlth. 2002) (citing *Halberstadt v. Borough of Nazareth*, 687 A.2d 371, 373 (Pa. 1997)).

A dimensional variance involves a request to adjust zoning regulations to use property in a manner consistent with regulations, as opposed to a use variance, which involves a request to use property in a manner that is wholly outside zoning regulations. *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 721 A.2d 43, 47 (Pa. 1998). In determining whether unnecessary hardship has been established to "justify the grant of a dimensional variance,

courts may consider multiple factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood." *Id.* at 50. Significantly, the quantum of evidence required to establish an unnecessary hardship is lesser when a dimensional variance, rather than a use variance, is sought. *Id.* at 47-48.

Moreover, the Fairview Township Zoning Ordinance addresses height restrictions for structures located in Fairview Township. Specifically, Fairview Township Zoning Ordinance § 700(C)(6) provides for a maximum building height in the R-1 Zoning District of 40 feet. (FTZO § 700(C)(6)). Similarly, Fairview Township Zoning Ordinance § 709(D)(6) provides a "Maximum building height shall be three stories or 40 feet except for agricultural wind turbines which shall not exceed 120 feet" in the A-1 Zoning District. (FTZO § 709(D)(6)). Pursuant to Fairview Township Zoning Ordinance § 706(D)(7), 707(D)(7), and 708(C)(6) structures may be constructed in excess of 100 feet, provided:

a. The structures must be in operation and not vacated for more than 6 months;

b. The applicant must supply Fairview Township with a bond or suitable form of financial surety for the removal of such structure; and

c. The minimum setback to all property boundaries shall be the height of the structure, plus 30 percent.

(FTZO § 706(D)(7), 707(D)(7), & 708(C)(6)).

1. Dutch Road Property

As noted above, for Intervener Up State to obtain relief in the form of use and dimensional variances, Intervener Up State must establish five (5) elements where relevant: "(1) there are unique physical circumstances or conditions; (2) causing unnecessary hardship in the form of an unreasonable inhibition of usefulness of the property; (3) the hardship is not self-inflicted; (4) the grant of the variance will not adversely impact public health, safety, and welfare; and (5) the variance sought is the minimum that will afford relief." *Twp. of E. Caln v. Zoning Hearing Bd. of E. Caln Twp.*, 915 A.2d 1249, 1252 (Pa.Cmwlth. 2007) (citing 53 P.S. § 10910.2).

The first element is whether unique physical circumstances or conditions attend the Dutch Road Property. In the instant case, unique physical conditions exist at the Dutch Road Property since the topography of the Dutch Road Property is uneven and has a "swale" or a dip/valley on the southern portion. Specifically, this swale slopes downward from the northern property line and slopes up toward the southern border of the Dutch Road Property. Also, the Dutch Road Property is irregularly shaped since the Dutch Road Property has a "pie-wedge shape" where the eastern boundary is approximately 27 feet and the western property is approximately 300 feet. Thus, this first requirement is met since unique physical circumstances or conditions exist at the Dutch Road Property.

The second element is whether said unique physical circumstances or conditions are causing an unnecessary hardship in the form of an unreasonable inhibition of usefulness of the Dutch Road Property. In the instant case, horticulture is a permitted accessory use within

A-1 zoned district.[4] However, as a result of the unique physical conditions attendant to the Dutch Road Property as noted above, the Dutch Road Property is rendered unusable for horticulture since the ground cannot be cultivated with farm or ornamental crops. Specifically, the Dutch Road Property cannot be cultivated to grow ornamental plants, farm crops, or any other type of plants. The only useful purpose the Dutch Road Property serves to Fairview Evergreen is to protect the southern border of Fairview Evergreen's tree farm to the north of the Dutch Road Property. Thus, this second requirement is satisfied since said unique physical conditions create unnecessary hardship in the form of an unreasonable inhibition of usefulness of the property.

The third element is whether the unnecessary hardship is self-created by the applicant. In the instant case, Fairview Evergreen acquired the Dutch Road Property on March 11, 2013. When Fairview Evergreen acquired the Dutch Road Property, the Dutch Road Property's condition was "roughly similar to what it is now or completely similar to what it is now." Specifically, the existing conditions, including "the swale and things of that nature" unique to the Dutch Road Property, is similar to the condition of the property when Fairview Evergreen acquired the Dutch Road Property in 2013. Similarly, the "end where the proposed cell tower location is . . . the condition is the same as it was in 2013." Although Fairview Evergreen was aware of the unique physical conditions of the property when Fairview Evergreen purchased the Dutch Road Property, "the mere fact that an applicant for a variance purchased the property with knowledge of the hardship does not alone preclude him from being granted the variance." *Marlowe v. Zoning Hearing Bd. of Haverford Twp.*, 415 A.2d 946, 950 (Pa.Cmwlth. 1980). Thus, the foregoing establishes the third element is met in that the hardship is not self-inflicted.

The fourth element is whether the grant of the variance will adversely impact public health, safety, and welfare. Hanging power lines exist overhead when viewing the Dutch Road Property at an eastern and southwestern direction. In addition, commercial equipment and buildings exist along the southern border of the Dutch Road Property. Indeed, the property immediately to the south of the Dutch Road Property is zoned in the I-1 Light Industrial District. To the south of the Dutch Road Property is a construction company, a "chipper tree remover company," and a large power grid. These features demonstrate the character of the neighborhood to the Dutch Road Property is industrial in nature. Thus, this variance will not alter the essential character of the neighborhood or district in which the Dutch Road Property is located.

Moreover, the variance, if granted, will not substantially or permanently impair the appropriate use or development of adjacent property. Specifically, the property existing immediately to the west and north of the Dutch Road Property is also owned by Fairview Evergreen. Moreover, the property immediately to the south of the Dutch Road Property is zoned in the I-1 Light Industrial district, which permits construction of telecommunications towers. The construction of a telecommunications tower on the Dutch Road Property will not impair the use or development of Fairview Evergreen's own property or the industrially zoned property to the south.

[4] Horticulture is defined in the Fairview Zoning Ordinance as: "Any form of growing, cultivation of or raising any fruits, vegetables, flowers and ornamental plants including nurseries, hay and grain crops." (FTZO § 401; *see also* § 709(B)(7)-(8)).

Also, the variance, if granted, will not be detrimental to the public welfare. "The concept of 'public welfare' is a broad one, which in an application for a variance may include traffic effects, impact on the character of the neighborhood, impact on property values, the effect on surrounding zoning, and other variables." *Zoning Bd. of Adjustment of Hanover Twp., Northampton Cty. v. Koehler*, 278 A.2d 375, 378 (Pa.Cmwlth. 1971). In the instant case, the proposed telecommunications tower will not produce noise or light, nor will the existence of the proposed telecommunications tower increase local traffic in the area. In light of the foregoing, the fourth element is satisfied since the grant of the variance will not adversely impact public health, safety, and welfare with regard to the Dutch Road Property.

The fifth element is whether the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue. The Pennsylvania Commonwealth Court has concluded this minimization requirement of the MPC clearly applies in dimensional variance requests; however, the applicability of this requirement to use variance requests is often not relevant or tenuous. *See South of South St. Neighborhood Ass'n v. Philadelphia Zoning Bd. of Adjustment*, 54 A.3d 115, 124 (Pa.Cmwlth. 2012), *appeal dismissed*, 97 A.3d 1200 (Pa. 2014) ("The MPC specifically provides that adjudicators and reviewing courts consider the specific variance requirements identified in Section 910.2(a) of the MPC when they are *relevant*."); *see also Appeal of Redeemed Christian Church of God, Living Spring Miracle Ctr., Inc.*, 930 C.D. 2015, 2016 WL 7449224, at *7, n.7 (Pa.Cmwlth. Dec. 28, 2016).[5]

In the instant case, other industrially zoned properties located near the Dutch Road Property have existing primary uses and do not meet the setback distances required to construct a 160 foot structure. Moreover, as noted above, the unique physical circumstances attendant to the Dutch Road Property, including the "swale" and shape of the property, serve as an obstacle with respect to placement of the proposed telecommunications facility on the Dutch Road Property. The properties immediately to the north and west, the boundaries from which Intervener Up State is requesting dimensional variances, are both owned by Fairview Evergreen. Absent these three parcels of land being legally distinct properties, Intervener Up State's need to request these two dimensional variances would be obviated. Under these circumstances, these variances sought are the minimum that will afford relief and will represent the least modification possible of the Fairview Township Zoning Ordinance. Thus, Intervener Up State has established this fifth requirement under the MPC.

Based on the foregoing reasons, this Trial Court concludes Intervener Up State has satisfied its burden of establishing undue hardship under the MPC and Fairview Township Zoning Ordinance with respect to its variance requests as to the Dutch Road Property. Accordingly, Intervener Up State is entitled to the variance relief requested as to the Dutch Road Property.

2. Water Street Property

As indicated above, for Intervener Up State to obtain relief in the form of use and dimensional variances, Intervener Up State must establish five (5) elements where relevant: "(1) there are unique physical circumstances or conditions; (2) causing unnecessary hardship in the form of an unreasonable inhibition of usefulness of the property; (3) the hardship is

[5] *See* 210 Pa. Code § 69.414 (unreported Pennsylvania Commonwealth Court decisions may be cited for persuasive value).

not self-inflicted; (4) the grant of the variance will not adversely impact public health, safety, and welfare; and (5) the variance sought is the minimum that will afford relief." *Twp. of E. Caln*, 915 A.2d at 1252.

The first element is whether unique physical circumstances or conditions attend the Water Street Property. In the instant case, the asserted hardship results from Fairview Evergreen's desire to put this piece of property to a profitable use for Fairview Evergreen and to maximize the development potential of the Water Street Property. Indeed, the purpose of entering into a lease with Intervener Up State for the subdivision of its property and allowing for the construction of a telecommunications tower thereon is for Fairview Evergreen to earn additional revenue. However, the Commonwealth Court has concluded where an asserted hardship amounts to a landowner's desire to increase profitability or maximize development potential, the unnecessary hardship criterion required in obtaining a variance is not satisfied. *Society Hill Civic Ass'n. v. Philadelphia Zoning Bd. of Adjustment*, 42 A.3d 1178, 1187 (Pa. Cmwlth. 2012). Unlike the Dutch Road Property, no evidence was presented to support a finding that unique physical circumstances or conditions attend the Water Street Property. As such, this first element is not satisfied.

The second element is whether unique physical circumstances or conditions are causing an unnecessary hardship in the form of an unreasonable inhibition of usefulness of the Water Street Property. In the instant case, as noted above, no unique physical circumstances or conditions attend the Water Street Property. Moreover, Fairview Evergreen is presently making reasonable use of the Water Street Property and has been doing so in excess of 20 years. Specifically, Fairview Evergreen has been conducting wholesale growing business operations at the Water Street Property. For example, Fairview has been annually growing corn on the location of the proposed telecommunications facility at the Water Street Property. Clearly, the "physical circumstances or conditions" of the Water Street Property have not prevented Fairview Evergreen from making reasonable use thereof. As such, authorization of a variance is therefore not necessary to enable the reasonable use of the property. Thus, this second element is not satisfied.

The third element is whether the unnecessary hardship is self-created by the applicant. The law is well established in that the "law does not permit a developer to subdivide its land and then make a subsequent claim for a variance because a remnant of that land does not conform with a zoning ordinance" and the "opportunity for greater profit from more lots in a subdivision is not a ground for the grant of a variance." *Carman v. Zoning Board of Adjustment*, 638 A.2d 365 (Pa. Cmwlth. 1994) (reversing grant of a variance to a developer who subdivided land, thereby creating a residual lot that did not conform to the applicable zoning ordinance, and who thereafter sought a variance in light of this nonconformity); *Lebeduik v. Bethlehem Twp. Zoning Hearing Bd.*, 596 A.2d 302 (Pa.Cmwlth. 1991) (concluding landowners who divided parcel into two lots, retaining one which was undersized, were properly denied variance to construct home on undersized lot on ground that nonconformity was self-created); *see also Appeal of Grace Bldg. Co., Inc.*, 392 A.2d 888, 890 (Pa.Cmwlth. 1978); *Ephross v. Solebury Twp. Zoning Hearing Bd.*, 359 A.2d 182, 184 (Pa.Cmwlth. 1976).

In the instant case, Fairview Evergreen entered into a Land Lease Agreement for the Water Street Property with Intervener Up State. Fairview Evergreen agreed to subdivide the

Water Street Property to provide a ten acre parcel around the Intervener Up State's proposed cell tower site to ensure only one use would be made on this subdivided parcel. Intervener Up State now seeks relief in the form of a use variance and three dimensional variances so Intervener Up State may construct a 160 foot tower thereon. However, "[w]hen a landowner divides a parcel into two lots, and one of the lots is undersized, any resulting hardship is self-inflicted." *Lebeduik*, 596 A.2d at 306. In the instant case, any alleged unnecessary hardship has been "self-inflicted" or created by Intervener Up State since Intervener Up State agreed to subdivide a portion of the Water Street Property to an area less than adequate to comply with the setback requirements of the Fairview Township Zoning Ordinance. As such, Intervener Up State cannot satisfy this third requirement under the MPC. *See* 53 P.S. § 10910.2(a)(3).

The fourth element is whether the grant of the variance will adversely impact public health, safety, and welfare. In the instant case, Intervener Up State is seeking a variance to construct a 160 foot telecommunications tower in this district that has a height restriction of 40 feet. (*See* FTZO § 700(C)(6)). The Verizon and ATC cellular towers are within view from the Water Street Property. While the character of the neighborhood surrounding the Water Street Property consists of residential dwellings, the neighborhood also consists of other commercial structures. Moreover, the steeple of the Presbyterian Church is another tall structure in the immediate area which is at least 50 feet in height. In addition, the Water Street Property is "quasi-industrial" in that Fairview Evergreen conducts warehousing and shipping operations thereon, which already contains many structures in furtherance of Fairview Evergreen's business operations. Moreover, as noted above, the proposed telecommunications tower will not produce noise or light, nor will the existence of the proposed telecommunications tower increase local traffic in the area. Under these circumstances, granting Intervener Up State's variance requests to construct a telecommunications tower will not alter the essential character of the neighborhood or district in which the Water Street Property is located. Thus, this fourth requirement is satisfied.

Fifth is whether the variance sought is the minimum that will afford relief. In the instant case, substantial evidence was presented the proposed height of the tower (120 feet) is the minimum that will afford relief because if the tower height were any lower, the tower would not provide sufficient coverage to fill the coverage gap in Fairview Township. *See Twp. of Derry v. Zoning Hearing Bd. of Palmyra Borough, Lebanon County*, 2016 WL 10705957, at *6 (C.C.P. Lebanon, March 29, 2016), *affirmed*, 663 C.D. 2016, 2017 WL 2791504 (Pa. Cmwlth. June 28, 2017). Thus, Intervener Up State has established this fifth requirement under the MPC.

In sum, Intervener Up State presented substantial evidence to satisfy two of the five elements under the MPC as to the Water Street Property. However, as Intervener Up State was unable to satisfy all of the elements under the MPC, Intervener Up State cannot establish entitlement to relief from the Fairview Township Zoning Ordinance under Pennsylvania and local land use law as to the Water Street Property.

3. Telecommunications Act of 1996

Notwithstanding Intervener Up State's inability to establish three of the five elements under the MPC with respect to the Water Street Property, Pennsylvania and local land use law must be interpreted in light of relevant federal standards for the construction and operation of

wireless telecommunications facilities. *See e.g. Cellular Phone Taskforce v. F.C.C.*, 205 F.3d 82, 96 (2d Cir.2000) ("Congress may preempt state and local governments from regulating the operation and construction of a national telecommunications infrastructure, including construction and operation of personal wireless communications facilities."). Indeed, courts must be mindful that Congress enacted the Telecommunications Act ("TCA") of 1996 "to provide a pro-competitive, de-regulatory national policy framework designed to rapidly accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." *APT Pittsburgh Ltd. P'ship v. Penn Twp. Butler Cty. of Pennsylvania*, 196 F.3d 469, 473 (3d Cir. 1999) (citing H.R. Conf. Rep. No. 104–458 (1996), reprinted in 1996 U.S.C.C.A.N. 10, 1124); *see also Omnipoint Commc'ns Enterprises, L.P. v. Newtown Twp.*, 219 F.3d 240, 242–43 (3d Cir. 2000) (The TCA "was intended to promote competition by limiting the ability of local authorities to regulate and control the expansion of telecommunications technologies"); *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620, 627 (1st Cir. 2002) (noting that if a local authority's decision "effectively prohibits the provision of wireless service, § 332(c)(7)(B)(i)(II), then under the Supremacy Clause of the Constitution, local law is pre-empted in order to effectuate the TCA's national policy goals").

Under Section 332(C)(7) of the TCA, the authority to regulate land use and zoning traditionally exercised by state and local government is preserved; however, the TCA places substantive limitations on a state or local government's ability to exercise this authority in relation to personal wireless service facilities:

> (7) **Preservation of local zoning authority**
>
> (A) **General authority**
>
> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
>
> (B) **Limitations**
>
> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

47 U.S.C. § 332(c)(7)(A)-(B). The purpose of Section 332(c)(7) is to reduce "the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115, (2005). This purpose is effectuated through Section 332(c)(7)'s limitations on "the general authority

of state or local governments or instrumentalities thereof to make 'decisions regarding the placement, construction, and modification of personal wireless service facilities.'" *Liberty Towers, LLC v. Zoning Hearing Bd. of Twp. Lower Makefield, Bucks Cty., Pa.*, 748 F.Supp.2d 437, 444 (E.D. Pa. 2010) (citing 47 U.S.C. § 332(c)(7)(A)).

Particularly relevant to the instant case is the substantive limitation the TCA places on state or local government, or instrumentalities thereof, which "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). "In accordance with this limitation, local officials must always ensure that neither their general policies, nor their individual opinions, prohibit or have the effect of prohibiting wireless service." *Schiazza v. Zoning Hearing Bd., Fairview Twp., York Cty., Pennsylvania*, 168 F.Supp.2d 361, 366 (M.D. Pa. 2001) (*citing Cellular Tel. v. Zoning Bd. of Adj. of Ho–Ho–Kus*, 197 F.3d 64, 70 (3d Cir.1999)) (noting that under this Section "the statutory bar against regulatory prohibition is absolute, and does not anticipate any deference to local findings"); *see also City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290 (2013).

The Third Circuit has implemented a two-pronged test to determine whether a state or local government, or instrumentality thereof, has effectively prohibited the provision of personal wireless services thereby violating Section 332(c)(7)(B)(i)(II). Effective prohibition of service is present if the provider establishes: (1) the provider's "facility will fill an existing significant gap in the ability of remote users to access the national telephone network"; and (2) the "manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." *APT Pittsburgh*, 196 F.3d at 480.

Regarding this first prong, as recently as 2003, the Third Circuit followed the "one provider" rule, which required a showing that a "significant gap" in a wireless provider's service as a gap in service that was not being serviced by any other providers. *See Omnipoint Commc'ns Enters. L.P.*, 331 F.3d at 398 (3d Cir. 2003). However, in 2009, the FCC rejected this "one provider" interpretation of the "effective prohibition" clause of Section 332(c)(7)(B)(i) and adopted a standard that requires a provider to show a gap in its own service. *See* Ruling to Clarify Provisions of 332(C)(7)(b), 24 F.C.C.R. 13994 ¶ 56–61 (Nov. 18, 2009) ("[A] State or local government that denies an application for personal wireless service facilities siting solely because 'one or more carriers serve a given geographic market' has engaged in unlawful regulation that 'prohibits or ha[s] the effect of prohibiting the provision of personal wireless services,' within the meaning of Section 332(c)(7)(B)(i)(II).").

While the FCC's 2009 Declaratory Ruling has not yet been addressed by the Third Circuit, the Eastern District of Pennsylvania has concluded this FCC's Ruling is entitled to deference. *See Liberty Towers, LLC v. Zoning Hearing Bd. of Twp. Lower Makefield, Bucks Cty., Pa.*, 748 F.Supp.2d 437, 444 (E.D. Pa. 2010) (concluding that "under well-established principles of administrative law, the FCC's Declaratory Ruling is entitled to deference from the . . . courts"); *see also Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 502 (3d Cir. 2008) ("[I]f a court of appeals interprets an ambiguous statute one way, and the agency charged with administering that statute subsequently interprets it another way, even that same court of appeals may not then ignore the agency's more-recent interpretation.").

Indeed, in *Liberty Towers*, the U.S. District Court for the Eastern District of Pennsylvania stated: "According to the rule echoed in *Levy*, this Court is required to give deference to the FCC's interpretation. According to the FCC's interpretation, a provider must plead

that there is a significant gap in service in any area ***for that particular service provider."*** *Liberty Towers*, 748 F.Supp.2d at 444 (emphasis added). As the FCC's Declaratory Ruling is entitled to deference, this Trial Court hereby adopts the rule as set forth in *Liberty Towers* that a significant gap in service must exist in an area only for that particular service provider.

The first issue is whether Intervener Up State presented substantial evidence showing Intervener Up State's proposed telecommunications towers at the Dutch Road and Water Street Properties will fill an existing significant gap in the ability of remote users to access Blue Wireless' cellular network. *See id.* To determine if a significant gap in coverage exists, courts consider the quality of the service in the area and the effect on remote users. *Am. Cellular Network Co. v. Upper Dublin Twp.*, 203 F.Supp.2d 383, 389 (E.D. Pa. 2002). Propagation maps as well as reports from radio-frequency engineers "are suitable to support a claim for a substantial gap in coverage." *T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794, 807 (6th Cir. 2012).

In the instant case, Blue Wireless has a significant gap in service in the vicinity of each of the Sites caused by a lack of reliable in-building residential coverage based on a review of advanced computer propagation modeling. The primary issue in Blue Wireless' lack of coverage is due to Blue Wireless' frequency of operation, or the frequency by which Blue Wireless' radio signals are propagated. Specifically, Blue Wireless' network operates at a higher than average frequency band of 1900 megahertz, which is higher than other cellular service providers. Higher frequency bands, such as Blue Wireless' frequency, propagates over less distance since the signal becomes attenuated as the signal travels through the air and diffracted as the signal travels through objects such as trees, buildings and terrains. Due to the Blue Wireless' higher frequency band and Blue Wireless' shortage of wireless facilities in Fairview Township, a lack of in-building coverage exists in Fairview Township regarding the ability of remote users to access Blue Wireless' cellular network. Propagation maps illustrate Blue Wireless' coverage gap in Fairview Township, which encompasses Lake Erie to the north, Manchester Road to the east, Interstate I-90 to the south and Fairplain Road to the west. Thus, Blue Wireless has a significant gap in wireless service and the coverage gap consists of approximately 19.46 square miles and affects approximately 8,671 people that live within the coverage gap.

To fill this wireless gap, telecommunications towers placed at both Water Street and Dutch Road Properties are required to fill Blue Wireless' gap in coverage since neither tower alone will effectively provide in-building coverage in Fairview Township. Specifically, even if one tower could support the coverage, said tower could not support the capacity since, as more users access a single tower's signal, too many users accessing that resources will exceed the tower's capacity, thereby resulting in a coverage gap. As illustrated by propagation maps, one tower standing alone is insufficient to provide seamless in-building coverage. The existence of both proposed telecommunications towers at the Water Street and Dutch Road Properties working in unison will together provide approximately 12.6 square miles of coverage and serve approximately 7,638 people within the coverage gap. Given this, the two proposed telecommunication towers together will substantially remedy Blue Wireless' gap in service and will be successful in meeting Blue Wireless' intention to provide in-building LTE coverage to populated areas of Fairview Township. Thus, Intervener Up State presented substantial evidence the two proposed telecommunications towers at both the Dutch Road

and Water Street Properties will fill an existing significant gap in the ability of remote users to access Blue Wireless' network.

The second issue is whether Intervener Up State has provided substantial evidence showing the manner in which Blue Wireless proposed to fill this significant gap in service is the least intrusive means of remedying that gap. Regarding this second prong, the applicant must show "a good faith effort has been made to identify and evaluate less intrusive alternatives, e.g., that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc." *APT Pittsburgh*, 196 F.3d at 480. However, the applicant does "not bear the burden of proving that every potential alternative, no matter how speculative, is unavailable. The proper inquiry for an effective prohibition claim is whether '***a good faith effort*** has been made to identify and evaluate less intrusive alternatives.'" *Sprint Spectrum, L.P. v. Zoning Bd. of Adjustment of the Borough of Paramus New Jersey*, 606 Fed.Appx. 669 (3d Cir. 2015) (quoting *APT Pittsburgh*, 196 F.3d at 480) (emphasis in original).

In the instant case, Intervener Up State examined four existing cell towers in Fairview Township to determine whether collocation on a variation of these existing towers would adequately fill Blue Wireless' gap in coverage. Specifically, six propagation maps illustrate potential wireless coverage utilizing a variation of these four existing cell towers in combination with Blue Wireless' existing and approved neighboring towers.[6] However, these existing towers are located too far outside of the search rings and therefore cannot provide efficient coverage to either the area or the population present in Fairview Township. Thus, Intervener Up State presented substantial evidence Intervener Up State made a good faith effort to place radio equipment on existing structures.

Moreover, Blue Wireless generated two search rings wherein Blue Wireless' propagation equipment could be placed to fill adequately Blue Wireless' coverage gap in wireless service. Site acquisition personnel properly and adequately investigated potential properties within the search rings but could not find acceptable locations. Specifically, Donald Carpenter, a site acquisition and site development agent, investigated other potential sites in the search ring near the Dutch Road Property. Mr. Carpenter thoroughly investigated the industrial zone near the Dutch Road Property. No properties existed without existing primary uses and no properties existed which would meet the setback distances under the Fairview Township Zoning Ordinance. While one vacant lot without a primary use existed, that property owner was not interested in signing a lease. Regardless, that property was not large enough to comply with applicable setback requirements.

Also, the Walnut Creek drainageway as well as a wrecking yard occupy much of the nearby area in the I-3 industrially zoned district, rendering much of this nearby real estate unsuitable. Further, Intervener Up State previously filed a variance application to construct a telecommunications tower at a property zoned in the industrial district which had an existing self-storage facility operating thereon. However, Intervener Up State's variance application

[6] *See* N.T.2 84:3-98:1; *see also* Exhibit I-15E (propagation map illustrating potential coverage from existing Crown tower); Exhibit I-15F (propagation map illustrating potential coverage from existing Crown and SBA towers); Exhibit I-15G (propagation map illustrating potential coverage from existing Crown, SBA, and ATC towers); Exhibit I-15H (propagation map illustrating potential coverage from existing Crown, SBA, ATC, and Verizon towers); Exhibit I-15I (propagation map illustrating potential coverage from proposed tower at Dutch Road Property and existing Verizon tower); Exhibit I-15J (propagation map illustrating potential coverage from proposed tower at Dutch Road Property and existing ATC tower).

was denied since the property already contained that self-storage facility as an existing use. Thus, no properties existed near the Dutch Road Property which would comply with the use and setback requirements of the Fairview Township Zoning Ordinance.

Other properties located near the Water Street Property are not industrially zoned. The existing use on the Water Street Property is "quasi-industrial" in that Fairview Evergreen conducts warehousing and shipping operations thereon. Moreover, the Verizon and ATC towers are within view from the Water Street Property. Less intrusive sites do not exist near the Water Street Property.

Based on the foregoing substantial evidence presented, this Trial Court finds and concludes Intervener Up State made good faith efforts to identify and evaluate less intrusive alternatives for both the Dutch Road and Water Street Properties.

IV. CONCLUSION

Accordingly, in accordance with the TCA, this Trial Court finds and concludes Intervener Up State has established placing these two proposed telecommunications towers at both the Dutch Road and Water Street Properties will fill an existing significant gap in the ability of remote users in Fairview Township to access Blue Wireless' cellular network. Moreover, the manner in which Blue Wireless proposes to fill this significant gap in service is the least intrusive means of remedying Blue Wireless' gap in coverage in Fairview Township. As such, a denial of Intervener Up State's variance requests will effectively prohibit Blue Wireless from providing seamless wireless service in Fairview Township in violation of Section 332(c)(7)(B)(i)(II) of the TCA. Therefore, consistent with the foregoing Findings of Fact and Conclusions of Law, this Trial Court hereby enters the following Order of Court:

ORDER

AND NOW, to-wit, this 11th day of October, 2018, after thorough review of the entire record, including, but not limited to, the testimony and evidence presented at the *de novo* hearing on July 23, 2018, and July 24, 2018; the proposed Findings of Fact and Conclusions of Law submitted by Attorney Conti, Attorney Burroughs, and Attorney Kubinski; as well as "Intervenor's Reply Conclusions of Law" submitted by Attorney Kubinski; "Appellant Fairview Township's Response to Up State's Reply Conclusions of Law" submitted by Attorney Burroughs; and the "Response to Intervenor's Reply Conclusions of Law" submitted by Attorney Conti; and after an independent review of relevant statutory law and case law; and consistent with the analysis in the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED, ADJUDGED AND DECREED** that Intervener Up State's requests for variances from the Fairview Township Zoning Ordinance are **GRANTED** to the following extent:

(1) Intervener Up State is entitled to the following variances with respect to the Dutch Road Property:
   (a) A use variance to § 709 to allow for the construction of a wireless telecommunications tower in the A-1 Rural District;
   (b) A variance as to the height restriction set forth in § 709(D)(6) to allow for the construction of a 160 foot wireless telecommunications tower in A-1 Rural District;
   (c) A dimensional variance from § 709(D)(5) to allow for a rear yard setback of 13.5 feet; and

(d) A dimensional variance from § 709(D)(4) to allow for a side yard setback of 14.6 feet.

(2) Intervener Up State is entitled to the following variances with respect to the Water Street Property:

(a) A use variance from § 700 to allow for the construction of a wireless telecommunications tower in the R-1 Village District;

(b) A variance as to the height restriction set forth in § 700(C)(6) to allow for the construction of a 160 foot wireless telecommunications tower in R-1 Village District; and

(c) Three dimensional variances from § 700(C) to allow for setbacks of 200 feet from the east, north, and south property lines.

BY THE COURT

/s/ **Stephanie Domitrovich, Judge**

COMMONWEALTH OF PENNSYLVANIA, ex. rel. JACK DANERI, DISTRICT ATTORNEY OF ERIE COUNTY, PENNSYLVANIA, Plaintiff

v.

LASHARLES FOSTER D/B/A LASHARLES LLC D/B/A ERIE VIEW HOTEL & ULTRA VIEW LOUNGE AND VALINTON FOSTER AND JOHN JAMES D/B/A ERIE VIEW INN, LLC D/B/A ERIE VIEW HOTEL & ULTRA VIEW LOUNGE, Defendants

EQUITY / WEIGHT OF EVIDENCE

The trial court sitting in equity is the ultimate finder of fact, and, especially concerning the credibility of witnesses, trial court findings are entitled to great weight.

INTOXICATING LIQUORS / STATUTORY PROVISIONS

Courts should liberally construe the Liquor Code to effectuate its purpose of protecting the public health, welfare, peace, and morals.

EQUITY / INJUNCTIONS / NUISANCE

An action to enjoin any nuisance defined in this the Liquor Code may be brought in the name of the Commonwealth of Pennsylvania by the district attorney of the proper county and that such action shall be brought and tried as an action in equity. 47 P.S. § 6-611. Such actions may be brought against both licensees and non-licensees who violate the Liquor Code.

EQUITY / INJUNCTIONS / NUISANCE

Under the Liquor Code, a bar or tavern may be closed for one year where the court finds that the bar constitutes a common nuisance. 47 P.S. § 6-611.

EQUITY / INJUNCTIONS / NUISANCE

In deciding whether to close a bar pursuant to § 6–611, the trial court should examine whether any apparently reasonable grounds for closing the bar exist. A court may consider violations of the Crimes Code when deciding whether the closure of an establishment is proper. Also, an inquiry into the activities outside the bar is permissible so long as the conduct at issue is in the immediate vicinity of the bar and there is a causal relationship between what occurs inside and outside the premises.

EQUITY / INJUNCTIONS / NUISANCE

An injunction should issue abating a nuisance under the Liquor Code where the evidence is clear and there exists a causal relationship between the deplorable situation outside the premises and what occurred inside the bar.

EQUITY / INJUNCTIONS / NUISANCE / EVIDENCE

Moreover, testimony concerning conduct by bar patrons in the area of the bar who are attracted to the area by the manner of operation of the bar is competent evidence to support an injunction as a nuisance in law and in fact.

EQUITY / INJUNCTIONS / GROUNDS IN GENERAL

In order to establish a claim for a permanent injunction, the movant must establish: (1) his right to relief is clear; (2) an urgent necessity exists to avoid an injury which cannot be compensated for by damages; and (3) greater injury will result from refusing rather than granting the relief requested.

EQUITY / INJUNCTIONS

Courts are precluded from granting injunctive relief where an adequate remedy exists at law.

EQUITY / INJUNCTIONS

Where the essential prerequisites of an injunction are satisfied, courts must narrowly tailor the remedy to abate the injury.

EQUITY / INJUNCTIONS

A court has discretion to grant or refuse an injunction under the circumstances and the facts of the particular case.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 11961 – 2018

Appearances: Jeremy Lightner, Assistant District Attorney, for the Commonwealth
Anthony Rodriques, Esq., for Defendants John James and VaLinton Foster

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Domitrovich, J. October 17, 2018

After thorough consideration of the testimony and argument regarding the "Complaint in Equity (Permanent Injunction)" filed by Commonwealth of Pennsylvania *ex rel.* Jack Daneri, District Attorney of Erie County Pennsylvania ("Plaintiff"), including the Exhibit entered into evidence of the transcripts from the Emergency Temporary Injunction and Preliminary Injunction hearing held on August 8, 2018, as well as all other evidence and testimony presented at the Permanent Injunction hearing held October 15, 2018, including two "Orders to Correct Code Violations" issued by City of Erie Property Maintenance on both January 18, 2018, and September 25, 2018, two "Violation Notices" prepared by the Erie Fire Department, Inspection Division resulting from two inspections on both January 12, 2018, and September 13, 2018, "Pennsylvania State Police Victim/Witness Statement" dated July 13, 2018, "Affidavit of Control" signed by Richard A. Vendetti, Esq., and Statement of Receipts from the Erie County Tax Claim Bureau detailing tax payments from September 24, 2011, through March 29, 2017, for the property bearing County of Erie Index No. (17)4029-205; and after review of the relevant statutory and case law, this Trial Court hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT[1]

1. Ann M. McDermott is the legal owner of the property located at 901 West 4th Street, Erie, Pennsylvania, 16507 (bearing County of Erie Index No. (17)4029-205) (the "Property") by virtue of a Warranty Deed dated October 16, 2013.
2. John James and VaLinton Foster have an equitable interest in said Property by virtue of an "Agreement for Installment Sale of Real Estate" dated April 9, 2015, entered into between Ann M. McDermott and John James as well as VaLinton Foster.[2] Said Agreement is executory since John James and VaLinton Foster have not fully fulfilled

[1] The trial court sitting in equity is the ultimate finder of fact, and, especially concerning the credibility of witnesses, trial court findings are entitled to great weight. *Moscatiello v. Whitehall Borough*, 848 A.2d 1071 (Pa.Cmwlth.2004).
[2] This Trial Court notes Paragraph 24 of this Agreement states: "This Agreement shall not be recorded by Buyers, and any such recording shall constitute an Event of Default hereunder." Said Agreement was recorded on December 3, 2015, at Instrument No. 2015-026551.

their obligations under said Agreement.

3. Residential homes exist all along at 901 West 4th Street. The distance of these residential homes from the sidewalks on this street are approximately ten (10) to fifteen (15) feet. (Notes of Testimony, Emergency Temporary Injunction and Preliminary Injunction, August 8, 2018, at pg. 69:17-22 ("NT")). These residential homes are in the immediate vicinity to the Property at 901 West 4th Street.
4. The Pennsylvania Liquor Control Board ("LCB") granted from the previous owner a Hotel Liquor License to LaSharles, LLC on November 10, 2015 (Liquor ID # 71875).[3] (NT at 9:22-25). LCB then issued said Hotel Liquor License to LaSharles, LLC on November 16, 2015. (NT at 9:22-25).
5. LaSharles Foster is the sole corporate officer of LaSharles LLC. (NT at 10:9-12). Only corporate owners, corporate officers, or board approved managers may act pursuant to Hotel Liquor Licenses.
6. John James and VaLinton Foster are corporate owners of the Erie View Inn, LLC. Erie View Inn, LLC is a legally distinct entity from LaSharles, LLC. The LCB has never issued a liquor license to Erie View Inn, LLC. The Erie View Inn, LLC provided $22,140.00 to LaSharles, LLC to purchase and obtain a Hotel Liquor License.
7. The Hotel Liquor License held by LaSharles, LLC requires that LaSharles, LLC manage and have available a "required number of bedrooms." *See* 47 P.S. § 4-461(c).
8. John James and VaLinton Foster are not employees of LaSharles, LLC.
9. LaSharles Foster resides at 24500 Heartland Road, Euclid, Ohio 44123. (NT at 41:12-18).
10. John James and VaLinton Foster each have criminal histories precluding John James and VaLinton from legally obtaining a liquor license under their own names or as sole or corporate officers. (NT at 12:24-13:7).
11. Richard A. Vendetti, Esq., assisted LaSharles, LLC in obtaining said Hotel Liquor License from the Pennsylvania Liquor Control Board. In furtherance of obtaining this Hotel Liquor License, Attorney Vendetti submitted an "Affidavit of Control" wherein Attorney Vendetti stated and affirmed "LaSharles, LLC will be in full and complete control of all Hotel rooms situate at the Licensee's establishment situate at 901 West 4th Street, Erie, PA 16507." (*See* Permanent Injunction Plaintiff's Exhibit # 6).
12. The Hotel Liquor Licensee, LaSharles, LLC, operated a bar and hotel by virtue of the Hotel Liquor License under the name "Ultra View Lounge" and "Erie View Hotel" at the Property (**hereinafter collectively referred to as "Ultra View Lounge"**). The bar portion was operated out of the basement of the building. (NT at 62:19-22). The bar and hotel are therefore intertwined and inseparable as the same entity under this Hotel Liquor License pursuant to the Pennsylvania Liquor Code. *See* 47 P.S. § 1-101, *et seq.*
13. Only a Wholesale Liquor Purchase Permit Card permit holder or authorized agent may use the Wholesale Liquor Purchase Permit Card to purchase liquor at wholesale prices.
14. John James and VaLinton Foster are not Wholesale Liquor Purchase Permit Card permit

[3] Under 47 P.S. § 1-102 of the Liquor Code, "hotel" is defined as "any reputable place operated by responsible persons of good reputation where the public may, for a consideration, obtain sleeping accommodations and meals and which, in a city, has at least ten, and in any other place at least six, permanent bedrooms for the use of guests, a public dining room or rooms operated by the same management accommodating at least thirty persons at one time, and a kitchen, apart from the public dining room or rooms, in which food is regularly prepared for the public." 47 P.S. § 1-102.

holders or authorized agents. However, John James and VaLinton Foster have accepted and signed deliveries for wholesale liquor in violation of the Liquor Code. On May 23, 2017, LaSharles Foster pled guilty to an administrative citation regarding this Wholesale Liquor Purchase Permit Card violation before an Administrative Law Judge Richard O'Neill Earley at citation #170146.

15. The Ultra View Lounge operated Thursday through Sunday nights frequently and regularly into the early hours of the morning. (NT at 35:4-7; 88:5-15; 96:5-97:2).
16. Before the Ultra View Lounge began operating, the establishment called the "Starlight Hotel" existed at 901 West 4th Street. (NT at 46:11-17). The Starlight Hotel was a quiet neighborhood bar and did not intrude upon the surrounding neighborhood beyond a few incidents, which involved noise. (NT at 95:8-20). Once the Ultra View Lounge began operating, the noise issues emanating from the Property escalated. (NT at 95:21-24).
17. The Ultra View Lounge produced noise in excess of acceptable noise levels for a residential area Thursday through Sunday from approximately 10 a.m. to as early as 3:00 a.m. (NT at 35:4-7; 88:5-15; 96:5-97:2). Specifically, music emanated from the Ultra View Lounge so loudly that the music caused the nearby houses to vibrate. (NT at 88:5-6; 93:10-15; 96:23; 104:11-12; 105:22-106:1). This noise frequently and regularly interrupted the sleep of neighborhood residents. (NT at 95:25-96:97:2; 105:22-106:1; 106:24-107:4; 109:3-4).
18. After the Ultra View Lounge closed for the night on Thursday through Sunday nights, patrons exiting from the Ultra View Lounge frequently and regularly caused a wide variety of disturbances in the neighborhood, including, but not limited to, screaming, urinating in the yards of nearby residential properties, trespassing upon nearby residential properties and porches without permission, littering various trash such as beverage bottles and soiled undergarments onto nearby residential properties, and discharging firearms. Before the Ultra View Lounge began operating, these disturbances did not exist. (NT at 108:21-109:2).
19. Patrons of the Ultra View Lounge were often obnoxious, loud, drunk, and disorderly outside of the Ultra View Lounge in the very early hours of the mornings. (NT at 53:3-5; 54:15-17; 55:7-21).
20. Patrons of the Ultra View Lounge also frequently and regularly parked their vehicles in and in front of nearby residential driveways and in the yards of residential homes as well as handicap spots. (NT at 49:17-22; 54:25-55:1; 91:10-19; 93:10-15; 101:12-102:1; 109:5-11). Patrons also played loud music from their vehicles late at night and early in the morning. (NT at 55:16-23; 93:10-15).
21. Since the Ultra View Lounge began operating, the Erie City Police received 166 calls related to the Ultra View Lounge, twenty (20) of which were "major events." (NT at 43:25-44:19). A major event is defined as aggravated assault, shots fired, stabbing, shooting, or attempted homicide or homicide. (NT at 44:14-16).
22. At least nine (9) "shots fired" incidents resulting in at least five (5) shootings have occurred outside of the Ultra View Lounge since the Ultra View Lounge began operating. (NT at 45:12-15).
23. On October 28, 2017, at around 3:01 a.m., a shooting occurred outside of the Ultra View Lounge where a patron of the Ultra View Lounge shot and hit two other patrons of the Ultra View Lounge multiple times. (NT at 58:4; 63:4-64:2).

24. On June 9, 2018, at around 2:42 a.m., a patron of the Ultra View Lounge approached an individual from behind on the street and shot this individual in the head. (NT at 65:9; 68:12-16).
25. On May 6, 2018, two patrons exited the Ultra View Lounge and fired gunshots hitting a vehicle traveling eastbound on 4th Street. (NT at 70:7-71:3). The gunfire also hit a second vehicle containing three occupants. (NT at 70:7-71:3). The gunfire also twice hit a house on the corner of 902 West 4th Street with residents inside, one being a pregnant female and one being an infant child. (NT at 70:7-71:7).
26. On July 29, 2018, at approximately 2:18 a.m., another shooting occurred outside of the Ultra View Lounge where a female victim of the shooting was discovered by Erie Police on the porch of a residence two houses south of the Ultra View Lounge without permission of the owner. (NT at 82:4-10). Another victim had been "removed from the scene via a private vehicle" and taken to the hospital. (NT at 82:19-22).
27. The streets outside of the Ultra View Lounge frequently and regularly became "extremely congested" due to patrons parking vehicles on each side of roads "in the areas radiating from 4th and Plum going north, south, east and west" such that these roads "essentially bec[a]me[] one-way street[s]." (NT at 80:10-21). This created a difficult and almost impossible situation for emergency responders to enter the area. (NT at 80:10-14).
28. On June 3, 2017, a patron was stabbed outside of the Ultra View Lounge over a disagreement which occurred inside the Ultra View Lounge regarding payment for sexual favors from a female. (NT at 47:14-48:14).
29. Since the Ultra View Lounge began operating, residents of the neighborhood surrounding the Ultra View Lounge felt threatened and did not feel safe. (NT at 102:2-16). Indeed, the patrons of the Ultra View Lounge caused residents to "feel danger and suspicion of everyone . . . in the area." (NT at 102:2-16).
30. After this Court issued the "Emergency Temporary Injunction and Preliminary Injunction Order" dated August 18, 2018, enjoining, *inter alia*, the operation of the Ultra View Lounge and adjoining hotel, the chaos, noise, and violence ceased.
31. The Pennsylvania State Police Bureau of Liquor Control Enforcement ("LCE") conducts criminal and administrative investigations regarding liquor licenses issued by the Commonwealth. (NT at 8:24-9:1). The LCE conducted at least six investigations and an ongoing investigation is being conducted of the Hotel Liquor License attached to the Property at which LaSharles, LLC operated both the bar and hotel. (NT at 14:11-15). LCE received numerous calls regarding the bar and hotel operated by LaSharles, LLC. (NT at 14:16-21).
32. LCE commenced a "new license orientation" investigation beginning on March 7, 2016, to provide guidance with operating a licensed establishment legally. (NT at 14:24-15:2). LCE issued an administrative citation. LaSharles Foster was not present when LCE conducted this investigation. (NT at 15:3-5).
33. LCE began a "noisy and disorderly" investigation beginning on October 25, 2016, due to numerous public nuisance complaints arising from administrative violations and criminal activity occurring in and around the Ultra View Lounge. (NT at 16:16-22). A nuisance investigation was initiated thereafter to determine if the bar qualified as a nuisance. (NT at 18:3-23).

34. LCE initiated another "noisy and disorderly" investigation on January 13, 2017, based on an incident which occurred over New Year's Eve. (NT at 23:4-20). LCE closed this investigation without citation or warning. (NT at 23:4-20).
35. LCE began another "noisy and disorderly" investigation on May 1, 2017, in response to a large volume of community complaints as well as from a request by the Erie Police Department arising from a shooting occurring shortly prior to this date. (NT at 23:21-24; 24:5-8). LCE cited the Ultra View Lounge for administrative "loud-speaker" violations since "activities at the [Ultra View Lounge] were spilling out into the community." (NT at 24:14-18).
36. LCE started another "noisy and disorderly" investigation on May 14, 2018, at the request of the community for numerous administrative problems as well as recent criminal activity including recent shootings. (NT at 24:19-25:1).
37. On July 13, 2018, the "Nuisance Bar Task Force" met with John James and VaLinton Foster, as well as Rick Adams, who self-identified as the manager of the hotel portion of the Ultra View Lounge, and Sabrina Porter, the sole board approved manager for the Hotel Liquor License. (NT at 28:11-22). LaSharles Foster was not present at said meeting and informed LCE personnel that the above-named individuals could be present and speak on behalf of LaSharles Foster at said meeting. (*See* NT at 28:11-22). Sabrina Porter as the board approved manager also permitted the above-named individuals to be present at said meeting and signed a "Pennsylvania State Police Victim/Witness Statement Form." (NT at 28:8-22; Permanent Injunction Plaintiff's Exhibit # 7). At said meeting, LCE informed the above-named individuals of five corrective actions that needed to be taken. (NT at 30:1-35:25). To date, these corrective actions have not been taken or remedied. (NT at 35:25).
38. After an inspection conducted by the City of Erie Code Enforcement on January 12, 2018, of the Property in the presence of two "representatives" of the "hotel," by Order dated January 18, 2018, the City of Erie Code Enforcement cited twenty-six (26) violations of the International Property Maintenance Code and set forth the corrective actions to be taken in order to remedy these violations. This Order was sent to the Erie View Inn care of Rick Adams and was sent to the current legal owner of the Property, Ann M. McDermott.
39. Later in the year, after another inspection conducted by the City of Erie Code Enforcement on August 29, 2018, of the Property, by Order dated September 25, 2018, the City of Erie Code Enforcement declared the Property uninhabitable stating the building cannot "be occupied until the violations are cleared and the building is re-inspected by [the code enforcement] office." Said Order cited forty-six (46) violations of the International Property Maintenance Code and set forth the corrective actions to be taken by LaSharles Foster in order to remedy the violations. Said Order stated persons directly affected by this Order may appeal within twenty days. This Order was mailed to LaSharles Foster. No appeal was taken from this Order.
40. The pertinent International Property Maintenance Codes to be followed include, as set forth in the "Order to Correct Violations" issued by Erie County Property Maintenance's "Order to Correct Code Violations" dated September 25, 2018 (Permanent Injunction Plaintiff's Exhibit # 1), as well as the "to wit" violations of these International Property

Maintenance Codes, are as follows:

a. **PM-108.1.3.** A structure is unfit for human occupancy whenever the code official finds that such structure is unsafe, unlawful or, because of the degree to which the structure is in disrepair or lacks maintenance, is insanitary, vermin or rat infested, contains filth and contamination, or lacks ventilation, illumination, sanitary or heating facilities or other essential equipment required by this code, or because the location of the structure constitutes a hazard to the occupants of the structure or to the public.
    i. #1-The structure has been declared uninhabitable due to the violations found within.

b. **PM-304.10.** Every exterior stairway, deck, porch and balcony, and all appurtenances attached thereto, shall be maintained structurally sound, in good repair, with proper anchorage and capable of supporting the imposed loads.
    i. #1-Balcony off of rear upstairs apartment is in a major state of disrepair.

c. **PM-304.13.1.** All glazing materials shall be maintained free from cracks and holes.
    i. #1-Broken window(s)

d. **PM-304.18.1.** Doors providing access to a dwelling unit, rooming unit or housekeeping unit that is rented, leased or let shall be equipped with a deadbolt lock designed to be readily openable from the side from which egress is to be made without the need for keys, special knowledge or effort and shall have a minimum lock throw of 1 inch (25 mm). Such deadbolt locks shall be installed according to the manufacturer's specifications and maintained in good working order. For the purpose of this section, a sliding bolt shall not be considered an acceptable deadbolt lock.
    i. #1-Missing deadbolt locks on exterior doors.

e. **PM-304.2.** All exterior surfaces, including but not limited to, doors, door and window frames, cornices, porches, trim, balconies, decks and fences, shall be maintained in good condition. Exterior wood surfaces, other than decay-resistant woods, shall be protected from the elements and decay by painting or other protective covering or treatment. Peeling, flaking and chipped paint shall be eliminated and surfaces repainted. All siding and masonry joints, as well as those between the building envelope and the perimeter of windows, doors and skylights, shall be maintained weather resistant.
    i. #1-Soffit and fascia damaged
    ii. #2-Exterior wood surfaces such as window and door frames have peeling/chipping paint.

f. **PM-304.7.** The roof and flashing shall be sound, tight and not have defects that admit rain. Roof drainage shall be adequate to prevent dampness or deterioration in the walls or interior portion of the structure. Roof drains, gutters and downspouts shall be maintained in good repair and free from obstructions. Roof water shall not be discharged in a manner that creates a public nuisance.
    i. #1-Damaged or missing gutters and downspouts.

g. **PM-305.1.** The interior of a structure and equipment therein shall be maintained in good repair, structurally sound and in a sanitary condition. Occupants shall keep that part of the structure that they occupy or control in a clean and sanitary condition. Every owner of a structure containing a rooming house, housekeeping units, a hotel, a dormitory, two or more dwelling units or two or more nonresidential occupancies,

shall maintain, in a clean and sanitary condition, the shared or public areas of the structure and exterior property.

i. #1-The interior of the building and all of its rooms are filled with garbage and other derbis [sic] putting them into an extremely unsanitary condition.

h. **PM-305.3.** All interior surfaces, including windows and doors, shall be maintained in good, clean and sanitary condition. Peeling, chipping, flaking or abraded paint shall be repaired, removed or covered. Cracked or loose plaster, decayed wood and other defective surface conditions shall be corrected.

i. #1-Peeling/bubbling/chipping paint on walls and ceiling.
ii. #2-Unfinished drop ceiling and missing or damaged ceiling tiles.
iii. #3-Damaged interior doors.
iv. #4-Board covering hole in floor in utility room is not structurally sound.
v. #5-Holes in walls and ceilings.
vi. #6-Loose paneling behind the bar.
vii. #7-Bathtub not property caulked and sealed.

i. **PM-305.4.** Every stair, ramp, landing, balcony, porch, deck or other walking surface shall be maintained in sound condition and good repair.

i. #1-The tile stair case that leads to the basement is damaged and in need or [sic] repair.
ii. #2-Multiple flooring surfaces in the interior of the building are badly damaged or deteriorating.

j. **PM-305.6.** Every interior door shall fit reasonably well within its frame and shall be capable of being opened and closed by being properly and securely attached to jambs, headers or tracks as intended by the manufacturer of the attachment hardware.

i. #1-Many door frames serverly [sic] damaged
ii. #2-Room number 12 door is to [sic] short for the frame.
iii. #3-Multiple doors damaged or broken.

k. **PM-307.1.** Every exterior and interior flight of stairs having more than four risers shall have a handrail on one side of the stair and every open portion of a stair, landing, balcony, porch, deck, ramp or other walking surface that is more than 30 inches (762 mm) above the floor or grade below shall have guards. Handrails shall be not less than 30 inches (762 mm) in height or more than 42 inches (1067 mm) in height measured vertically above the nosing of the tread or above the finished floor of the landing or walking surfaces. Guards shall be not less than 30 inches (762 mm) in height above the floor of the landing, balcony, porch, deck, or ramp or other walking surface.

i. #1-Handrail in west side stairway is not a proper handrail.

l. **PM-308.1.** All exterior property and premises, and the interior of every structure, shall be free from any accumulation of rubbish or garbage.

i. #1-Junk and derbis [sic] and other garbage along the side of the building
ii. #2-Garbage and other junk and derbis [sic] throughout the entire interior of the building.

m. **PM-309.1.** All structures shall be kept free from insect and rodent infestation. Structures in which insects or rodents are found shall be promptly exterminated by approved processes that will not be injurious to human health. After pest elimination, proper

precautions shall be taken to prevent reinfestation.

i. #1-Infestation of various insects including bedbugs and cockroaches.

n. **PM-403.3.** Unless approved through the certificate of occupancy, cooking shall not be permitted in any rooming unit or dormitory unit, and a cooking facility or appliance shall not be permitted to be present in the rooming unit or dormitory unit. Exceptions: 1. Where specifically approved in writing by the code official; 2. Devices such as coffee pots and microwave ovens shall not [sic]

i. #1-Hot plate found in a rooming unit.

o. **PM-403.5.** Clothes dryer exhaust systems shall be independent of all other systems and shall be exhausted outside the structure in accordance with the manufacturer's instructions. Exception: Listed and labeled condensing (ductless) clothes dryers.

i. #1-Clothes dryer exhaust is not properly maintained and is damaged.

p. **PM-404.3.** Habitable spaces, hallways, corridors, laundry areas, bathrooms, toilet rooms and habitable basement areas shall have a minimum clear ceiling height of 7 feet (2134 mm). Exceptions: 1. In one- and two-family dwellings, beams or girders spaced not less than 4 feet (1219 mm) on center and projecting a maximum of 6 inches (152 mm) below the required ceiling height. 2. Basement rooms in one- and two-family dwellings occupied exclusively for laundry, study or recreation purposes [sic]

i. #1-Ceiling heights in the bathroom above lavatory are less than 7ft.

q. **PM-504.1.** All plumbing fixtures shall be properly installed and maintained in working order, and shall be kept free from obstructions, leaks and defects and be capable of performing the function for which such plumbing fixtures are designed. Plumbing fixtures shall be maintained in a safe, sanitary and functional condition.

i. #1-Sinks in kitchen do not have proper traps.

ii. #2-Multiple shower units in rooming house not properly installed or maintained.

iii. #3-Water lines in the laundry room for the washing machines are not properly installed and maintained.

r. **PM-603.1.** Mechanical appliances, fireplaces, solid fuel-burning appliances, cooking appliances and water heating appliances shall be properly installed and maintained in a safe working condition, and shall be capable of performing the intended function.

i. #1-Missing cover panel on furnace in basement untility [sic] room.

ii. #2-Water heater exhaust pipe does not have proper slope.

iii. #3-Copper gas line fueling second floor furnace.

iv. #4-Water sitting inside the furnace in the basement utility room.

v. #5-Both hot water heaters in the basement utility room are deteriorating.

s. **PM-603.3.** All required clearances to combustible materials shall be maintained.

i. #1-Combustibles leaning against furnace and waterheaters [sic] in basement utility room.

t. **PM-604.3.** Where it is found that the electrical system in a structure constitutes a hazard to the occupants or the structure by reason of inadequate service, improper fusing, insufficient receptacle and lighting outlets, improper wiring or installation, deterioration or damage, or for similar reasons, the code official shall require the defects to be corrected to eliminate the hazard.

i. #1-Extension cords used throughout the building.

u. **PM-605.1.** All electrical equipment, wiring and appliances shall be properly installed and maintained in a safe and approved manner.
   i. #1-Unknown device installed in basement kitchen window wired to an extension cord.
   ii. #2-Service panel cover not installed.
   iii. #3-Interior of service panel in unmaintained.
   iv. #4-Multiple receptacles and switches missing covers.
   v. #5-Multiple open splices in electrcial [sic] wiring throughout the building.
   vi. #6-Multiple damaged receptacles throughout the building.
   vii. #7-Multiple impropely [sic] installed or unmaintained light fixtures in the building.

v. **PM-702.3.** All means of egress doors shall be readily openable from the side from which egress is to be made without the need for keys, special knowledge or effort, except where the door hardware conforms to that permitted by the International Building Code.
   i. #1-Security bars placed over exit doors.

w. **PM-704.1.** All systems, devices and equipment to detect a fire, actuate an alarm, or suppress or control a fire or any combination thereof shall be maintained in an operable condition at all times in accordance with the International Fire Code.
   i. #1-Smoke alarms not properly installed or maintained.

41. After an inspection conducted by the Erie Fire Department, Inspection Division on January 12, 2018, of the Property, the Erie Fire Department, Inspection Division cited nine (9) violations of the International Fire Code. By "Violation Notice" dated September 19, 2018, after a separate inspection was conducted by the Erie Fire Department, Inspection Division on September 13, 2018, the Erie Fire Department, Inspection Division cited eighteen (18) other violations of the International Fire Code. This Violation Notice was emailed to Andy Zimmerman at the Office of Code Enforcement. Many of these violations appear to be incorporated into the Orders issued by the City of Erie Code Enforcement.
42. As the sole owner of LaSharles, LLC, which is the entity holding the Hotel Liquor License, LaSarles Foster has failed to perform her duties as a Hotel Liquor Licensee under the Liquor Code.

CONCLUSIONS OF LAW

The District Attorney of Erie County has filed this action in equity asking this Trial Court to find the Ultra View Lounge constitutes a common nuisance under 47 P.S. § 6-611, which provides that a bar or tavern may be closed for one year where the court finds that it constitutes a common nuisance. 47 P.S. § 6-611. The Liquor Code, which is remedial legislation, "is to be liberally construed to effectuate its purpose to protect the public health, welfare, peace, and morals." *Hyland Enterprises, Inc. v. Liquor Control Bd.*, 631 A.2d 789, 792 (Pa.Cmwlth. 1993). Specifically, 47 P.S. § 6-611 states: "An action to enjoin any nuisance defined in this act may be brought in the name of the Commonwealth of Pennsylvania by . . . the district attorney of the proper county" and that "[s]uch action shall be brought and tried as an action in equity." 47 P.S. § 6-611. A municipality may bring such actions against both licensees and non-licensees who violate the Liquor Code. 47 PS. § 4-491; *Commonwealth ex rel Ness*

v. Keystone Sign, Co., Inc., 355 Pa.Super. 562, 513 A.2d 1066 (1986). Title 47 P.S. § 6-611 permits the Court to enjoin permanently the activities of a licensee:

> Upon the decree of the court ordering such nuisance to be abated, the court may, upon proper cause shown, order that the room, house, building, structure, boat, vehicle or place shall not be occupied or used for one year thereafter . . . .

47 P.S. § 6-611; see also *Commonwealth v. The Down Low Nightclub*, 2009 WL 7127398 (Pa.Com.Pl.), *affirmed*, 993 A.2d 331 (Pa.Cmwlth. 2010) (ordering the abatement of a nuisance at a bar under 47 P.S. § 6-611(c) for a period of one year thereby enjoining all business at the bar).

In deciding whether to close a bar pursuant to § 6–611, the trial court should examine whether any "apparently reasonable grounds for [closing the bar]" exist. *Commonwealth v. Graver*, 461 Pa. 131, 334 A.2d 667, 669 (1975) (citations omitted). A court may consider violations of the Crimes Code when deciding whether the closure of an establishment is proper. *Commonwealth ex rel Ness v. Keystone Sign Co., Inc.*, 355 Pa.Super. 562, 513 A.2d 1066, 1068–69 (1986). Further, an inquiry into the activities outside the bar is permissible so long as the conduct at issue is in the immediate vicinity of the bar and there is a causal relationship between what occurs inside and outside the premises. *Id.; see also Graver*, 334 A.2d at 669.

The Pennsylvania Supreme Court has further held where "the evidence is clear and, indeed, so found by the Trial Court, that there was a causal relationship between the deplorable situation outside the premises and what went on inside the . . . bar," the trial court abuses its discretion in not granting the injunction. *Commonwealth v. Tick, Inc.*, 233 A.2d 866, 868 (Pa. 1967). Moreover, testimony concerning conduct by bar patrons in the area of the bar who are attracted to the area by the manner of operation of the bar is competent evidence to support an injunction as a nuisance in law and in fact. *Reid v. Brodsky*, 397 Pa. 463, 156 A.2d 334 (1959).

In *Commonwealth v. Sal-Mar Amusements, Inc.*, 630 A.2d 1269, 1273 (Pa.Super. 1993), the district attorney of Dauphin County brought an action in equity under § 6-611 to close the bar for one year. The trial court in *Sal-Mar Amusements* enjoined operation of the bar, and the bar owners appealed. On appeal, the Superior Court of Pennsylvania in *Sal-Mar Amusements* concluded the Commonwealth presented ample evidence supporting the closure of the bar. Specifically, the Superior Court of Pennsylvania in *Sal-Mar Amusements* noted:

> Inside the bar, repeated sales of drugs were made to an undercover officer by persons with access to private areas of the bar and in view of bar employees. Police witnesses testified to numerous calls for assistance from the bar and in the area surrounding it. Police also conducted surveillance of the area and reported on the loud and disruptive behavior of persons congregating outside the bar. A videotape of the activity was shown to the court. Finally, several residents of the neighborhood testified that the conduct of the people in and around the bar was noisy, disorderly, vulgar and rude. Traffic, litter, excessive alcohol use and drug activity were all found to be by-products of the bar's operation. It was the Commonwealth's position, and that of many area residents, that the bar brought much of this undesirable behavior into the neighborhood.

Sal-Mar Amusements, Inc., 630 A.2d at 1274. The Superior Court of Pennsylvania in *Sal-Mar Amusements* further noted:

> We find that the testimony by the residents and police, coupled with the drug violations, was more than sufficient to support the injunction. *See Graver*, 334 A.2d at 670. The fact that Vanity operated in the past without these particular difficulties does not negate the existence of present harm to the neighborhood. *Id.* (deterioration of business changed law-abiding establishment into one that was offensive to sensibilities of the community).

Id. The Superior Court of Pennsylvania in *Sal-Mar Amusements* concluded the Commonwealth established a "persistent and continuous disturbing of the peace and good order of the neighborhood," and determined the trial court properly found a nuisance existed and properly acted within its power to enjoin the bar's operation. *Id.*

Similarly, in *Commonwealth v. Graver*, 334 A.2d 667, 668 (Pa. 1975), the Commonwealth, in support of its request for injunctive relief under Section 611 of the Liquor Code, averred numerous violations of the Liquor Code occurred in the months preceding the filing of the complaint. At the hearing, the Commonwealth introduced various testimony, including the custodian of police records who read from daily police logs listing the date, time, and names of policemen dispatched to the area of the bar, their observations upon arriving, and the action taken, if any. Residents of the neighborhood credibly testified extensively to the deteriorating condition of the area immediately surrounding the bar due to the unruly behavior of patrons of the bar. Included in this testimony were incidents where patrons engaged in loud, boisterous, and violent conduct, urinated and littered on property of residents living adjacent to or near the bar, directed abusive and obscene language toward the people of the neighborhood and, in one instance, physically attacked a resident. Credible testimony also revealed many residents were undergoing severe emotional strain due to the manner of the operation of this business establishment. Based on this testimony, the Pennsylvania Supreme Court in *Graver* affirmed the trial court's order enjoining the operation of the bar, holding: "In our judgment the voluminous testimony in this case of increasing abhorrent conduct by patrons in a once peaceful neighborhood, coupled with the admitted Liquor Code violations amply support the issuance of the injunction." *Id.* at 137.

Under well-settled Pennsylvania law, to prevail on a petition for a permanent injunction, the Plaintiff must establish: (1) his right to relief is clear; (2) an urgent necessity exists to avoid an injury which cannot be compensated for by damages; and (3) greater injury will result from refusing rather than granting the relief requested. *Eleven Eleven Pennsylvania, LLC v. Commonwealth*, 169 A.3d 141, 145 (Pa.Cmwlth. 2017). Courts are precluded from granting injunctive relief where an adequate remedy exists at law. *Bronstein v. Sheppard*, 412 A.2d 672 (Pa.Commonwealth 1980). Even where the essential prerequisites of an injunction are satisfied, the court must narrowly tailor its remedy to abate the injury. *John G. Bryant Co., Inc. v. Sling Testing & Repair, Inc.*, 369 A.2d 1164, 1167 (Pa. 1977). The power to grant or refuse an injunction "rests in the sound discretion of the court under the circumstances and the facts of the particular case." *Rick v. Cramp*, 53 A.2d 84, 88 (Pa. 1949). Unlike a preliminary injunction, the moving party need not establish either irreparable harm or immediate relief, and a trial court "may issue a final injunction if such relief is necessary

to prevent a legal wrong for which there is no adequate redress at law." *Eleven Eleven Pennsylvania*, 169 A.3d at 145. A violation of a statutory scheme justifies injunctive relief. *Id.* (citing *Grine v. Centre Cnty.*, 138 A.3d 88 (Pa. Cmwlth. 2016))

The first issue is whether Plaintiff's right to relief is clear. In the instant case, before the Hotel Liquor License was issued to LaSharles, LLC, an establishment called the "Starlight Hotel" operated at 901 West 4th Street. The Starlight Hotel was a quiet neighborhood bar and did not intrude upon the surrounding neighborhood beyond a few minor incidents, which involved noise. However, since the Ultra View Lounge began operating under the Hotel Liquor License issued to LaSharles, LLC, the safety of the lives of the surrounding neighborhood residents has been placed in jeopardy. Erie City Police received 166 calls related to 901 West 4th Street, twenty (20) of which were "major events." Nine (9) "shots fired" incidents resulted in at least five (5) gunshot victims in the immediate vicinity of the Ultra View Lounge since the Ultra View Lounge began operating. A causal relationship exists between what occurs inside and outside the premises of the Ultra View Lounge. For example, a disagreement which began inside the Ultra View Lounge resulted in a stabbing outside of the Ultra View Lounge. Moreover, patrons of the Ultra View Lounge have engaged in multiple shootings. At least one shooting by a patron resulted in a residential home on the corner of 902 West 4th Street across the street from the Ultra View Lounge being hit twice by gunshots. Residents of the neighborhood surrounding the Ultra View Lounge felt their lives and safety were threatened and did not feel safe in their own homes. The streets outside of the Ultra View Lounge frequently and regularly became extremely congested making emergency responders' ability to enter the area almost impossible. Patrons of the Ultra View Lounge conducted themselves with no regard for the safety or welfare of the surrounding neighborhood and created a wide variety of disruptions, including frequently and regularly creating loud noise into the early hours of the morning, urinating and littering on private property of nearby residents, and discharging firearms with the intent to inflict serious bodily harm upon other patrons. These shootings often resulted in unintended targets being struck, such as nearby homes and passersby. Given the foregoing circumstances created by the Ultra View Lounge and patrons, Plaintiff presented substantial and voluminous evidence of increasing abhorrent and violent and deadly criminal conduct by patrons of the Ultra View Lounge in the immediate vicinity of the Ultra View Lounge in a once peaceful neighborhood.

Aside from a routine inspection, LCE has commenced five investigations into LaSharles LLC. These investigations were often initiated in response to complaints of nuisances and criminal activity in the area near the Ultra View Lounge, including shootings by patrons taking place in front of the Ultra View Lounge. LCE cited LaSharles, LLC for administrative "loud-speaker" violations since activities at the Ultra View Lounge were "spilling out into the community." Moreover, John James and VaLinton Foster were not Wholesale Liquor Purchase Permit Card permit holders or authorized agents. However, John James and VaLinton Foster accepted and signed for deliveries for wholesale liquor in violation of the Liquor Code. As a result, on May 23, 2017, LaSharles Foster pled guilty to an administrative citation regarding this Wholesale Liquor Purchase Permit Card violation before Administrative Law Judge Richard O'Neill Earley.

Also, on July 13, 2018, LCE provided six (6) corrective actions for the LaSharles LLC, the Hotel Liquor Licensee, to remedy in order for the LaSharles, LLC to continue operating

the Erie View Lounge legally. However, to date, LaSharles, LLC has not made any of these corrective actions. LaSharles, LLC's refusal to take any corrective actions demonstrates LaSharles, LLC was unwilling to engage voluntarily in remedial steps to ensure a safe environment at and around the Ultra View Lounge or that the Ultra View Lounge operating under Hotel Liquor Licensee LaSharles, LLC complied with the Liquor Code. Additionally, between the inspection conducted by the City of Erie Code Enforcement on January 12, 2018, resulting in twenty-six (26) violations of the International Property Maintenance Code and the inspection conducted on August 29, 2018, resulting in forty (46) violations, after being notified of these violations, the LaSharles, LLC has failed to make any good faith efforts to engage in corrective actions to remedy these violations, which have greatly increased in number since January 2018. Similarly, although apparently and mostly incorporated into the Orders issued by the City of Erie Code Enforcement, between the inspection conducted by the Erie Fire Department, Inspection Division in January 2018 resulting in nine (9) violations of the International Fire Code and the inspection conducted by the Erie Fire Department, Inspection Division in September 2018 resulting in eighteen (18) violations of International Fire Code, no corrective actions were taken by the Ultra View Lounge. Thus, Plaintiff presented evidence showing LaSharles, LLC has repeatedly violated the Liquor Code, International Property Maintenance Code, and International Fire Code.

Based on the foregoing, Plaintiff has established its right to relief is clear in that LaSharles, LLC doing business as the Ultra View Lounge operating a bar and hotel constitutes a common nuisance under 47 P.S. § 6-611.

The second issue is whether an urgent necessity exists to avoid an injury which cannot be compensated with damages. An injunction is necessary to prevent LaSharles, LLC and agents thereof from storing, possessing, and dispensing alcohol at the premises of the Ultra View Lounge. An injunction is also necessary to enjoin the operation of LaSharles, LLC's bar and hotel, which may only legally operate so long as the LaSharles, LLC compiles with the Liquor Code, the International Property Maintenance Code, and the International Fire Code. Indeed, the City of Erie Code Enforcement has declared the entire Property, not just the hotel portion, uninhabitable. Moreover, the Ultra View Lounge's substantial infringement upon the tranquility and safety of the residents in the neighborhood due to the frequent and regular noise and violent crime caused by patrons of the Ultra View Lounge cannot be adequately compensated by damages. Thus, damages are not adequate in addressing the problems caused by LaSharles, LLC and the Ultra View Lounge.

The third issue is whether greater injury will result from refusing rather than granting the relief requested. Plaintiff has demonstrated the extensive amount of crime associated with the Ultra View Lounge since the Ultra View Lounge began operating in 2016. Granting the injunction will prevent the Ultra View Lounge from continuing to violate the Liquor Code and suspend a business which, in light of all the foregoing circumstances, is an establishment conducive to crime. If this Trial Court refuses the injunction and abatement of LaSharles, LLC doing business as the Ultra View Lounge, which this Trial Court has concluded constitutes a common nuisance, greater injury will result since patrons of the Ultra View Lounge will continue to engage in disruptive, violent, and deadly criminal activity threatening lives of nearby residents as well as the peace and safety of the neighborhood.

Counsel for John James and VaLinton Foster concedes the "bar" portion of the Ultra View

Lounge must be abated and closed but argues the "hotel" portion of the Ultra View Lounge should be permitted to operate notwithstanding a closure of the "bar" portion. However, as noted above, both the "hotel" and "bar" portions of the Ultra View Lounge operate under a single indivisible Hotel Liquor License granted to LaSharles, LLC, not to John James and VaLinton Foster or the Erie View Inn LLC. Moreover, this Trial Court cannot permit a building to operate as a hotel which has been declared uninhabitable. Title 47 P.S. § 6-611 expressly permits courts to abate nuisances and "order that the room, house, ***building, structure***, boat, vehicle or place shall not be occupied or used for one year thereafter . . . ." 47 P.S. § 6-611 (emphasis added). This Trial Court also notes LaSharles, LLC has demonstrated no good faith efforts have been made to take the corrective action necessary in response to numerous violations of the Liquor Code, International Property Maintenance Code, and International Fire Code. *See Matter of Boelter Bar Corp.*, 372 A.2d 1253, 1254 (Pa.Cmwlth. 1977) (hotel liquor license was properly suspended where no rooms were available for guests due to uninhabitable conditions and concluding even good faith efforts to remedy condition "does not justify the continued operation of the hotel liquor license on premises which do not qualify to have one"). LaSharles Foster as sole corporate officer of LaSharles, LLC was absent and irresponsible in her duties regarding both the bar and hotel.

Accordingly, for all of the foregoing reasons, the issuance of a permanent injunction pursuant to 47 P.S. § 6-611 is necessary to abate the nuisance at 901 West 4th Street which operated under Hotel Liquor Licensee LaSharles, LLC.

ORDER

AND NOW, to-wit, this 17th day of October, 2018, after a full hearing on the "Complaint in Equity (Permanent Injunction)" filed by Commonwealth of Pennsylvania ex rel. Jack Daneri, District Attorney of Erie County Pennsylvania ("Plaintiff"); at which Assistant District Attorney Jeremy Lightner appeared for the Plaintiff; and Anthony Rodriques, Esq., appeared for Defendants John James and VaLinton Foster; and LaSharles Foster failed to appear; and after hearing credible testimony from International Property Maintenance Inspector Jake Binney of the City of Erie, Erie Fire Inspector Mark Polanski, Lieutenant William Marucci of the City of Erie Police, Limited Jurisdiction Officer Douglas Keys of the Pennsylvania State Police Bureau of Liquor Control Enforcement, as well as neighbors James Anderson and Michael Thomas; and after a thorough review of the entire record, including all Exhibits presented at this Permanent Injunction hearing as well as transcripts from the Emergency Temporary Injunction and Preliminary Injunction hearing held on August 8, 2018, entered into evidence; in view of the relevant statutory and case law; and consistent with the analysis in the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED, ADJUDGED AND DECREED** as follows:

(1) All Defendants are hereby enjoined and prohibited from conducting or permitting any further business of any kind whatsoever on the premises at 901 West 4th Street, also known as the Erie View Hotel and Ultra View Lounge, for a period of one year ending on **Tuesday, October 15, 2019**;

(2) Defendants and all other persons acting directly or indirectly in concert with Defendants are hereby enjoined and prohibited from removing or in any way interfering with the liquids, beverages or other matters used in connection with the violation of the Liquor Code constituting a nuisance; and

(3) The Office of the District Attorney of Erie County and the City of Erie Police Department shall hereby continue to secure completely the entire Hotel Liquor Licensed premises at 901 West 4th Street, also known as the Erie View Hotel and Ultra View Lounge, for a period of one year ending on **Tuesday, October 15, 2019**. The entire premises including the hotel shall remain secured for a period of one year ending on **Tuesday, October 15, 2019**, pursuant to 47 P.S. § 6-611 and relevant case law.

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

COMMONWEALTH OF PENNSYLVANIA

v.

C.K.

CRIMINAL PROCEDURE / DECERTIFICATION TO JUVENILE COURT

Juvenile decertification from adult court to juvenile court must serve the public interest. 42 Pa.C.S.A. §6322(a).

CRIMINAL PROCEDURE / DECERTIFICATION / BURDEN OF PROOF

To transfer a case from the criminal division to the juvenile division, the child is required to establish by a preponderance of the evidence the transfer will serve the public interest.

CRIMINAL PROCEDURE / DECERTIFICATION / FACTORS

The factors for decertification at 42 Pa.C.S.A. §6355(a)(4):

(a) Impact of offense on the victim/victims;
(b) Impact of offense on community;
(c) Threat to the safety of the public or any individual posed by the child;
(d) Nature and circumstances of the offense;
(e) Degree of child's culpability;
(f) Adequacy and duration of dispositional alternatives available under the juvenile justice chapter and the adult criminal justice system; and
(g) Whether the child is amenable to treatment, supervision or rehabilitation as a juvenile after consideration of additional factors.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
NO. 1930 of 2018

Appearances: Erin Connelly, Esq., Office of the District Attorney
Maria Goellner, Esq., Office of the Public Defender, Juvenile Probation

MEMORANDUM OPINION

Brabender, J. November 14, 2018

This matter is before the Court on a Motion to Decertify Defendant for Juvenile Disposition.

By Information filed on August 22, 2018, Defendant was charged as an adult with Criminal Conspiracy (to commit Robbery), Receiving Stolen Property and Theft By Unlawful Taking or Disposition.[1]

The charges arose from an incident on June 14, 2018 wherein Defendant allegedly agreed with Marquel McCutchen and/or Tanner Greer to steal various items, including cellular phones, from the Verizon Wireless Store at 5093 Peach Street, Erie, Pennsylvania. According to the Affidavit of Probable Cause, Marquel McCutchen entered the Verizon store, followed by Defendant who carried a bag. McCutchen threatened a store employee with a handgun. Defendant placed in the bag miscellaneous store merchandise worth approximately $12,000.00. McCutchen and Defendant left the area in a getaway vehicle operated by Greer.

[1] 18 Pa.C.S.A. §903(a)/18 Pa.C.S.A. §3701(a)(1)(ii), 18 Pa.C.S.A. §3925(a) and 18 Pa.C.S.A. §3921(a), respectively.

After a vehicle pursuit and foot chase shortly following the incident, Defendant and the other two individuals were arrested.

Defendant's date of birth is December 29, 2000; he was seventeen (17) years old when the offenses occurred; and he is from Cleveland, Ohio where he resided with his mother.

A hearing on the decertification motion was held on October 23, 2018. The Court considered testimony from Randolph A. Matuscak, MSW, AFSW, a social worker who conducted a forensic evaluation at Defendant's request. The expert transfer evaluation report of Mr. Matuscak was admitted in evidence as Defendant Exhibit "A." The Court also considered testimony from Defendant's maternal grandfather, M. K.

Matuscak opined Defendant is amenable to treatment through the juvenile justice system and transfer of Defendant's case to the juvenile justice system is in the Defendant's best interest and will best serve the public interest. In formulating his opinion, Matuscak reviewed records of Defendant including juvenile history records, academic and mental health records, and records concerning the instant charges and the preliminary hearing transcript. Matuscak also interviewed Defendant, Defendant's mother, and the Defendant's juvenile probation officer in Cuyahoga County and members of Defendant's extended family. Matuscak testified concerning the factors at 42 Pa.C.S.A. §6355(a)(4)(iii). M.K., the maternal grandfather, also believes Defendant is amenable to treatment. M.K. is a placement resource for Defendant in Arkansas. M.K. is actively employed and involved in a youth soccer program in Arkansas.

RELEVANT LEGAL PRINCIPLES AND ANALYSIS

Significantly, Defendant is charged with crimes that are delinquent acts and are not excluded from the definition of "delinquent act" pursuant to 42 Pa.C.S.A. §6302. Under the general rule at 42 Pa.C.S.A. §6322, if a juvenile is able to establish the public interest is served by treatment in the juvenile justice system, the trial court may "decertify" the case back to the juvenile justice system. *See 42 Pa.C.S.A. §§6322(a), 6355(e), (g).*

In evaluating whether to transfer such a case from the criminal division to the juvenile division, the child is "required to establish by a preponderance of the evidence that the transfer will serve the public interest." *42 Pa.C.S.A. §6322(a).*

The decertification court must determine there are reasonable grounds to believe the public interest is served by transfer of the case. In so doing, the Court must consider the factors at 42 Pa.C.S.A. §6355(a)(4)(iii). *42 Pa.C.S.A. §§6322(a), 6355(a)(4)(iii).* See also, *Commonwealth v. Ruffin*, 10 A.2d 336, 338 (Pa. Super. 2010).

This Court's analysis of the factors at §6355(a)(4) is summarized herein.

(A) The impact of the offense on the victim or victims – There is no indication Defendant's actions had an impact upon the store clerk aside from viewing Defendant in the store with a black bag. There is no indication Defendant verbally or physically threatened the store clerk, who fled the store after being threatened by McCutcheon and was not pursued by the Defendant.

(B) The impact of the offense on the community – The import of Matuscak's testimony is the incident had minimal impact upon the community aside from the reaction of the store clerk. Matuscak's review of the transcript from the preliminary hearing indicated that only one person, McCutcheon, had a weapon. No shots were fired. There was no indication of public or customer involvement in the brief episode. The individuals were apprehended without any

apparent threat to the public. The items removed from the store were recovered.

(C) The threat to the safety of the public or any individual posed by the child – As indicated above, the Defendant posed little threat to the safety of the public or any individual. There is no indication Defendant presented a direct threat to the store clerk or any third person. While the flight of Defendant and counterparts could have potentially created a risk of harm to third persons, no evidence was introduced that third persons were placed in harm's way during pursuit of Defendant, McCutcheon or Greer.

(D) The nature and circumstances of the offense committed by the child – This factor has been previously discussed.

(E) The degree of the child's culpability – Matuscak indicates Defendant has accepted responsibility for his actions. The offenses as described reflect Defendant was a follower, not an instigator or mastermind.

(F) The adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system – As described by Matuscak, more than three years remain for Defendant to receive appropriate remedial treatment which is available to him through the juvenile justice system upon decertification. Upon juvenile disposition the matter may be transferred to the Ohio juvenile justice system. Matuscak advises his interview with Defendant's former Ohio juvenile probation officer revealed there is a multitude of suitable and effective programs available to Defendant through the Ohio juvenile justice system. In contrast, in Pennsylvania there are limited options for youthful "adult" offenders in the criminal justice system.

(G) whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors:

(I) age – Defendant's date of birth is December 29, 2000. He was seventeen (17) years old when the alleged offenses occurred.

(II) mental capacity – Defendant has mental limitations. Defendant does not have the intellectual capacity to benefit from adult rehabilitative concepts. Matuscak opined Defendant appeared to be below average intelligence based upon his interview with Defendant and review of Defendant's academic records.

(III) maturity – Matuscak noted Defendant is immature; Defendant needs to develop life and coping skills in order to satisfactorily function as an adult; and Defendant is behind academically. However, Matuscak opined Defendant's motivation and participation in programs at the Erie County Prison demonstrate an ability to positively respond in highly structured, small group and individualized settings which are more common in the juvenile justice system.

(IV) the degree of criminal sophistication exhibited by the child – Defendant's criminal behavior does not appear particularly "sophisticated."

(V) previous records; if any –The records reviewed by Matuscak are identified in detail in the expert report.

(VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child – Juvenile records in Ohio reveal Defendant complied with the terms of his court supervision. The matter was closed in May of 2017.

(VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction – Matuscak is optimistic about the likelihood of Defendant's rehabilitation through the juvenile justice system over the next three years.

In view of relevant factors, the Court concludes the burden of proof has been met and there are reasonable grounds to believe the public interest is served by transfer of the case. The Court believes Defendant will be sufficiently rehabilitated and the public interest will best be served through Defendant's participation in the juvenile justice system.

CONCLUSION

The Defendant's Motion to Decertify must be granted. An appropriate Order will follow.

ORDER

AND NOW, to-wit, this 9th day of November, 2018, following a hearing on the Motion to Decertify Defendant for Juvenile Disposition, it is **ORDERED** the petition is **GRANTED**. The case shall be immediately transferred to the Juvenile Division of the Court of Common Pleas of Erie County for further disposition.

It is **FURTHER ORDERED** the juvenile shall be immediately transferred from the Erie County Prison to the Edmund L. Thomas Adolescent Center.

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

GARY GAUSMAN, Plaintiff

v.

KAREN GAUSMAN, Defendant

CITY OF ERIE OFFICERS' AND EMPLOYEES' RETIREMENT PLAN, Additional Defendant

FAMILY LAW / DIVORCE / EQUITABLE DISTRIBUTION / PENSION BENEFITS

A QDRO negotiated between divorcing spouses cannot alter the amount or form of pension benefits available under the terms of a pension plan. Where there is no provision in the pension plan granting former spouse right to survivor benefits, the trial court could not order the pension plan to provide survivor benefits as part of equitable distribution. To conclude otherwise would impermissibly alter the benefit structure of the pension plan.

FAMILY LAW / DIVORCE / MUNICIPAL PENSION / SURVIVOR BENEFITS

Municipal pension provision that "former spouse" of a participant shall not be treated as "spouse" or "surviving spouse" for any purpose under the plan, permissibly excluded former spouses from entitlement to survivor benefits under the pension plan.

EQUITY / PRINCIPLES OF EQUITY

The court cannot do in equity what is not permitted by law. Although the court has broad equitable powers, when rights of a party are clearly established by defined principles of law, equity should not change or unsettle those rights.

CONSTITUTIONAL LAW / EQUAL PROTECTION / MUNICIPAL PENSION SURVIVOR BENEFITS

Municipal pension ordinance's exclusion of "former spouses" from the definition of "spouses" entitled to elect survivor benefits did not violate Equal Protection. The plan's differing treatment of "spouses" and "former spouses" was reasonably related to achieving cost savings and providing for current families, therefore, it passed the applicable rational basis test.

CONSTITUTIONAL LAW / DUE PROCESS / MUNICIPAL PENSION SURVIVOR BENEFITS

Wife's entitlement to share in the marital value of participant's monthly municipal pension benefit through equitable distribution did not create a property interest in survivor benefits under the plan. Accordingly, former wife was not deprived of a property interest by exclusion from the class of spouses entitled to survivor benefits under the plan.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION – DIVORCE
NO. 10048-2014

Appearances: Melissa Pagliari, Esquire, for Plaintiff
Stacey K. Baltz, Esquire, for Defendant
John J. Estok, Esquire, for Additional Defendant

OPINION

Walsh, III, J. March 9, 2017

This matter is before the Court on Defendant-Wife, Karen Gausman's ("Wife") *Motion for Special Relief to Approve QDRO and to Direct Approval of QDRO by City of Erie Officers and Employees Retirement Plan* ("Motion"), filed September 7, 2016. After a hearing held December 1, 2016, and upon consideration of the legal arguments set forth in the pleadings and briefs of the parties, for the reasons that follow, Wife's Motion is Denied. An appropriate Order will follow.

I. BACKGROUND

Plaintiff-Husband, Gary Gausman ("Husband") filed a *Complaint Under Divorce Code* ("Complaint") at the above term and number on January 9, 2014 seeking a decree of divorce under sections 3301(c) and 3301(d) of the Pennsylvanian Divorce Code, *23 Pa.C.S.A. §§3101 et seq*. Wife filed her Petition for *Ancillary Economic Relief*, seeking, among other claims, equitable distribution of the parties' marital assets, on June 22, 2015. Husband and Wife entered into a Martial Settlement Agreement ("MSA") dated December 4, 2016.

At Article IX, Paragraph 6 of the MSA, Husband and Wife agreed to share the marital portion of Husband's City of Erie Officers and Employees Retirement Plan ("Plan") pension ("Pension") equally, by deferred distribution via qualified domestic relations order prepared by a third party ("QDRO"). *Motion Exhibit 1, MSA pg. 9*. In addition. Husband and Wife agreed that Wife was entitled to a survivor benefit for her lifetime, equal to her share of the marital portion of the Pension, and certain death benefits. Thereafter, a proposed QDRO was prepared and submitted to the Plan for approval.

The Plan, through its Administrator's legal counsel, responded by letter dated May 13, 2016, that it could not approve the QDRO without seven material revisions.[1] *Motion Exhibit 3*. After Preliminary Objections filed September 28, 2016, the Plan was joined in this action by *Complaint to Add Additional Defendant* on October 17, 2016. The Plan filed its Answers to both the joinder Complaint and Wife's Motion, on November 21, 2016. Wife's Motion seeks to compel the Plan to provide the survivor and death benefits to which Husband and Wife agreed in the MSA.

Specifically, Wife's Motion pertains to the Plan's required revisions to Paragraphs 10, 11 and 12 of Wife's proposed QDRO, relative to survivor and death benefits. Below are the proposed QDRO provisions at issue, with objectionable language from Wife's proposed QDRO struck-through, and alternative text required by the Plan underlined:

Paragraph 10:

If the Participant predeceases the Alternate Payee, ~~either~~ before ~~or after~~ the Participant's retirement, then the Alternate Payee shall ~~receive the marital portion [ ] of the Plan's 50% survivor annuity. Such survivor annuity shall be payable to the Alternate Payee for her lifetime and irrespective of her or the Participant's marital status. If there is any~~

[1] The first two were superficial. The third, to Paragraph 9, had the result of eliminating Wife's marital interest in the Pension upon her remarriage. Wife acquiesced to this revision, which seems inconsistent with her position relative to survivor benefits - that being essentially that her marital share of the Pension is her constitutionally protected property. Why a constitutionally protected property interest should survive Husband's death, but not Wife's remarriage, is not explained.

~~cost to provide such former spouse survivor annuity for the Alternate Payee, the cost shall be deducted from the Alternate Payee's share of the Participant's monthly pension, and such cost shall not reduce the Participants portion of the pension benefit. If the Plan pays a lump sum refund of employee contributions or any other pre-retirement death benefit, the Alternate Payee shall receive 50% times the marital coverture fraction of such lump sum payment or death benefit~~ not entitled to payment of any pre-retirement death benefit from the Plan. Alternate Payee shall only be entitled to receive the percent of the marital portion of Participant's undistributed contributions [ ], if any, after the death of Participant's surviving spouse, if Participant remarried and/or the death of his/her/their surviving children prior to their attaining the age eighteen (18).

Paragraph 11:[2]

~~If the Alternate Payee dies before the Participant, the Alternate Payee's share of any monthly retirement pension or lump sum payment (DROP or refund contributions) shall be paid if, as and when the Participant receives such payment, to the Alternate Payee's beneficiary as designated on a form provided by the Plan. However, of the Plan does not allow the Alternate Payee to designate a beneficiary, then the Alternate Payee's portion of the assigned benefits herein shall revert to Participant.~~ In the event Participant dies survived by Alternate Payee, the Alternate Payee's interest in Participant's retirement benefits under the Plan shall cease.

Paragraph 12:

In no event shall the Alternate Payee have greater benefits or rights other than those which are available to the Participant. The Alternate Payee is not entitled to any benefit not otherwise provided by the Plan. The Alternate payee is only entitled to specific benefits offered by the Plan as provided in this Order. All other rights, privileges and options offered by the Plan not granted to Alternate Payee are reserved to the Participant. Nothing in this Order requires the Plan to provide either the Participant of the Alternate Payee with:

a. Any type or form of benefit not otherwise provided under the Plan; or
b. Any increases in benefits to which the Participant is not otherwise entitled.

Wife argues the Plan should be directed to accept Wife's revised proposed QDRO, *Motion Exhibit 4*, which does not incorporate the above revisions. She asserts two grounds for her position. First, that the Plan's refusal to provide survivor benefits to her as a former spouse is unconstitutional; and second, that principles of equity and fairness entitle Wife to share in survivor benefits available to current spouses under the Plan.

[2] In response to the Plan's May 13, 2016 letter, Wife prepared a revised proposed QDRO, *Motion Exhibit 4*. The language found in Wife's original proposed Paragraph 11, *Motion Exhibit 2*, is missing from the revised proposed QDRO, *Motion Exhibit 4*. Given the Motion indicates Wife objects to the Plan's revision of her original Paragraph 11, the omission of that language from her second proposed QDRO may be inadvertent.

II. THE PLAN

The Plan contains the following provisions material to eligibility for survivor benefits:[3]

145.02(hh) "Surviving Spouse" if married prior to retirement means a living individual who was legally married to the Participant and is married to the Participant at the time of the Participant's death. If married post-retirement- a living individual who was legally married to the Participant and is married to the Participant at the time of the Participant's death and for the twelve months immediately preceding the participant's death.

145.02(ii): "Survivor" means the Participant's Surviving Spouse. If there is no Surviving Spouse following the death of the Participant, or at the subsequent death of the Surviving Spouse, "Survivor" shall mean the surviving children of the deceased Participant in equal shares so long as they are under the age of eighteen (18).

145.15(f)(2): ... [A] former spouse of a Participant shall not be treated as the spouse or Surviving Spouse for any purposes under the plan. (*Emphasis supplied*).

There is no dispute that Wife, in her capacity as a former spouse (by the time the QDRO is entered), has no entitlement to survivor benefits under the plain language of the Plan ordinance. Instead, her claim derives from her marital interest in Husband's retirement benefit, which benefit, she essentially argues, should not cease upon Husband's death, based on principles of equity, equal protection and due process.[4]

III. DISCUSSION

A. Equity

Wife argues that it would be unfair to deny survivor benefits to Wife, on the theory that survivor benefits are available to current spouses, and necessary to protect her interest in her marital share of Husband's pension in the event he would predecease her. In support of her argument, Wife relies primarily on a federal court Opinion and Order entered by the Honorable Maurice B. Cohill, Jr., in the case of *Sontheimer v. City of Erie / Police Pension Fund Civil Action No. 89-159E (W.D.Pa. 1991)*,[5] and the subsequent Opinion and Order entered by the Honorable John J. Trucilla, of Erie County, Pennsylvania Court of Common Pleas, in the case of *Tate v. Tate, Erie County Docket No. 945-1992*, which gave *res judicata* effect to Judge Cohill's 1991 decision.

Sontheimer and Tate involved spousal claims to City of Erie Police Pension Fund ("Police Pension") benefits. *Sontheimer* was a class action suit brought by present, past, and future spouses of then current participants in the Police Pension. The spouses in that case alleged

[3] City of Erie Codified Ordinances can be viewed online at: www.erie.pa.us/CityCouncil/CityOrdinances.aspx. The Plan provisions referenced herein are found at Part One of the 2015 Administrative Code, Title Seven, Article 145, §§145.01 et seq.

[4] It appears Wife may have a remote chance of receiving a share of the marital portion of Husband's benefit if he predeceases her prior to retirement, and if Husband's surviving spouse, if any, and children, if any, also predecease Wife, assuming there are any undistributed contributions remaining. *See Motion Exhibit 3, pg. 2, in reference to Paragraph 10 of the proposed QDRO.*

[5] This case was appended to Wife's Motion. There is no indication it was ever reported. The Court could find no instance of its having been cited in any reported case.

unconstitutional deprivation of their right to the marital portion of their participant-spouse's Police Pension benefits, by virtue of the Plan's practice of denying current and survivor pension benefits to former spouses. Judge Cohill held that, "[t]he outright denial by defendants of any interest in either survivor or current pension benefits of an ex-spouse of a city employee is in violation of 42 U.S.C. §1983." *Motion Exhibit 6. Order dated September 9, 1991*. In the same Order, Judge Cohill mandated the Police Pension to "obey all court orders regarding the equitable distribution of pension benefits."

Tate involved an Erie County divorce action filed in 1992, and settled in 1994. Within three years of Judge Cohill's decision in *Sontheimer*, the parties in *Tate* agreed that Mrs. Tate would receive half of the marital portion of Mr. Tate's Police Pension benefits, and would be designated a surviving spouse for that amount, in the event of the prior death of Mr. Tate. A QDRO was prepared and presented to the Police Pension in 1994. Presumably, in light of Judge Cohill's fairly recent Order, and the fact that Mrs. Tate was a member of the successful class of plaintiffs in *Sontheimer*, the Police Pension approved the QDRO, and the same was entered as an Order of Court in early 1995. Mr. Tate retired in 2000, and Mrs. Tate began receiving her share of his benefit under the QDRO. However, when he died in 2013, her benefits were terminated on the ground that former spouses were not eligible for survivor benefits under the Police Pension plan. Judge Trucilla determined that Judge Cohill's 1991 Order was entitled to *res judicata* effect, and ordered the Police Pension to reinstate Mrs. Tate's monthly benefit for the remainder of her life.

Judge Trucilla's reliance on *Sontheimer* was an appropriate application of *res judicata* under the particular facts of that case. However, *res judicata* does not apply here, where Wife is not a member of the *Sontheimer* class of plaintiffs, and pension involved here is an entirely different entity. Though the issues are similar, this Court must decide the case *sub judice* under the law as it exists today.

The cases decided since *Sontheimer* fail to support Wife's position. Specifically, *Palladino v. Palladino, 713 A.2d 676 (Pa. Super. 1998)*, which held that a right to survivor benefits acquired by the non-participant spouse during the marriage, is marital property for purposes of equitable distribution, underscores the Plan's argument in this case that such benefits are separate and distinct from the participant's retirement benefit. In *Palladino*, a survivor benefit was available to Mrs. Palladino under the express terms of the pension plan. The issue of whether Mrs. Palladino would have been entitled to those benefits by operation of law, in the absence of express plan terms, never arose.

Berrington v. Berrington, 633 A.2d 589 (Pa. 1993), is also contrary to Wife's position. For one, it concerns only the proper method for calculating the marital portion of a participant's pension benefit under a defined benefit plan, which method was superseded by §3501 of the Divorce Code, 23 Pa.C.S.A. §§ 3101, et seq. *See Smith v. Smith, 938 A.2d 246, 252 (2007)*. For another, it adopts the now well-known definition of a QDRO, including the requirement that to be "qualified," the order cannot alter the amount or form of plan benefits. *Id., 633 A.2d 589, 591 n.3*. Requiring a plan to provide survivor benefits to otherwise ineligible beneficiaries is the very definition of altering the amount and form of plan benefits.

Such was the conclusion in *Maloney v. Maloney, 754 A.2d 36 (Pa.Cmwlth. 2000)* and *Kenney v. City of Wilkes-Barre Police Pension Fund, 2010 Pa.Cmwlth.Unpub.Lexis 45*. In both cases, a QDRO was entered dividing the marital portion of the participant- spouse's

monthly retirement benefit. In both cases, the pension plans approved the QDROs, but refused to continue payments after the participants' deaths on the ground that the former spouses were not eligible for survivor benefits under the respective plans. As aptly explained in *Kenney*:

> Here, the Kenney DRO divided the pension benefits that Mrs. Kenney was entitled to receive under the terms of the Pension Ordinance. To the extent that Mr. Kenney received payments from the Pension Fund, the DRO attached a portion of such payments in favor of Mrs. Kenney. For three years the Pension Fund honored the DRO granting a fixed amount of benefits to Mrs. Kenney. Although the DRO in this case awarded Mrs. Kenney a specific amount and was implemented by the Pension Fund before Mr. Kenney's death, *Maloney* is nevertheless applicable. Mrs. Kenney's right to receive pension payments from the Pension Fund was completely dependent upon Mr. Kenney's right to receive such payments under the Pension Ordinance. Once Mr. Kenney died, his right to pension payments terminated under the Pension Ordinance and the DRO became a legal nullity because the pension no longer existed. While we sympathize with Mrs. Kenney's predicament, there is no provision in the Pension Ordinance that grants an ex-spouse the right to survivor pension payments. To conclude otherwise would impermissibly alter the benefit structure of the Pension Ordinance. We, therefore, conclude that the trial court erred in ordering the Pension Fund to continue to make payments to Mrs. Kenney.

Kenney v. City of Wilkes-Barre Police Pension Fund, No. 1334 C.D. 2009, 2010 WL 9512681, at *2 (Pa. Commw. Ct. Feb. 3, 2010).

Wife attempts to distinguish *Maloney* and *Kenney* on the ground that it is unclear from the facts whether the former spouses had been designated as survivors for the purposes of survivor benefits at the time the QDROs were entered. Wife's argument fails because the former spouses were not entitled to survivor benefits at any relevant time, therefore, they could not have been designated to receive them. Also, had the plans inadvertently accepted QDROs that expressly provided survivor benefits to the former spouses contrary to plan terms, it is reasonable to presume that fact would have made its way into the Courts' Opinions.

In sum, while the Court is sympathetic to the Wife's equitable arguments, it cannot do in equity what is not permitted by law: *Aequitas legem sequitur*.

B. Equal Protection

Wife argues that the Plan's actions (refusal to provide survivor benefits to her as a former spouse) violate the equal protection clause of the Fourteenth Amendment, *U.S. Const. Amend. XIV*. The Equal Protection Clause, in pertinent part, provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." *Id. § 1*. The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly. *Curtis v. Kline, 666 A.2d 265, 267 (Pa. 1995)*. However, it does not require that all persons under all circumstances enjoy identical protection under the law. *Id.* The right to equal protection under the law does not absolutely prohibit classification of individuals for the purpose of receiving different treatment, and does not require equal treatment of people having different needs. *Id.* The prohibition against treating people differently under the law does not preclude the resort to legislative classifications,

provided those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. *Id. at 268*. A classification, though discriminatory, is not arbitrary or in violation of the equal protection clause if any state of facts reasonably can be conceived to sustain that classification. *Id.* In undertaking its analysis, the reviewing court is free to hypothesize reasons the legislature might have had for the classification. *Id*.

Depending on the persons and interests affected, different standards of review apply. *Id*. The parties agree that only minimal scrutiny is applicable to the Plan's decision in the instant case. *Wife's Brief, pp. 6-9; Plan's Reply Brief, p. 5*. For purposes of Equal Protection analysis, minimal scrutiny means the action will be upheld if there is any rational basis for the classification. *Curtis, 666 A. 2d at 268-269 (citing Smith v. City of Philadelphia, 516 A.2d 306 at 311 (Pa 1986))*.

The Plan's denial of survivor benefits passes the rational basis test. It is not a reach to conclude that a primary purpose of the Plan is to provide for continuation of income to its employees and their current families, after years of loyal service. One can easily hypothesize that most workers, and, therefore, most employers, are less interested in protecting ex-spouses. Further, and probably more pertinent, there would be a substantial costs savings to the Plan by not providing survivor benefits to ex-spouses. As noted by other Courts and in popular literature, it is widely accepted that nearly one-half of U.S. marriages end in divorce, and subsequent marriages are even more likely to fail. *See e.g. Walters v. City of Allentown, 818 F. Supp. 855 n.9, (E.D. Pa.), aff'd, 9 F.3d 1541 (3d Cir. 1993),"The High Failure Rate of Second and Third Marriages", https://www.psychologytoday.com/blog/the-intelligent-divorce/201202/the-high-failure-rate-second-and-third-marriages*. Thus, Wife's argument that paying benefits to ex-spouses would cost the same as paying benefits to current spouses is unsubstantiated, and ignores the fairly reasonable conclusion that in many cases, employees will not remarry, or remain remarried until their death.

C. Due Process

Having previously determined that Wife has no property interest in the Plan's survivor benefits (see section II.A. above), it must follow that the denial of those benefits does not violate the Due Process. The Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." *U.S. Const. Amend. XIV § I*. In order for Wife to have a claim under Due Process, she must first have a property interest in the survivor benefits, which she does not.

III. Conclusion

For all of the reasons discussed above, Wife's Motion is denied. An Order will follow.

ORDER

AND NOW, this 9th day of March, 2017, upon consideration of the "Motion for Special Relief to Approve QDRO and to Direct Approval of QDRO by City of Erie Officers and Employees Retirement Plan," filed by Defendant, Karen Gausman, on September 7, 2016, for the reasons set forth in the Opinion accompanying this Order, it is hereby ORDERED that the Motion is DENIED. Further, the Preliminary Objections filed by the Additional Defendant on September 28, 2016 are dismissed as moot.

BY THE COURT
/s/ **Joseph M. Walsh, III, Judge**

COMMONWEALTH OF PENNSYLVANIA

v.

ALBERT D. MAXON, JR.

CRIMINAL PROCEDURE / SUFFICIENCY OF EVIDENCE

At a suppression hearing, the Commonwealth must demonstrate by a preponderance of the evidence that the challenged evidence was not obtained in violation of the defendant's rights.

CRIMINAL PROCEDURE / ARREST

Under current United States and Pennsylvania constitutional jurisprudence, three (3) categories of interactions between police officers and citizens exist: (1) a "mere encounter" (or request for information), which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond; (2) an "investigative detention," must be supported by reasonable suspicion; said detention subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest; and (3) an arrest or "custodial detention" must be supported by probable cause.

CRIMINAL PROCEDURE / ARREST / REASONABLE SUSPICION

To establish grounds for "reasonable suspicion," a police 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.

CRIMINAL PROCEDURE / ARREST / 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.

CRIMINAL PROCEDURE / PRE-TRIAL PROCEDURE / PRE-TRIAL MOTIONS / HABEAS CORPUS

"Petition for Writ of Habeas Corpus" is the proper means for testing whether the Commonwealth has sufficient evidence to establish a *prima facie* case.

CRIMINAL PROCEDURE / PRE-TRIAL PROCEDURE / PRE-TRIAL MOTIONS / HABEAS CORPUS

When reviewing a Petition for Writ of *Habeas Corpus*, a trial court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth.

CRIMINAL PROCEDURE / PRE-TRIAL PROCEDURE / PRE-TRIAL MOTIONS / HABEAS CORPUS

To demonstrate that a *prima facie* case exists, the Commonwealth must produce evidence of every material element of the charged offense(s) as well as the defendant's complicity therein.

CRIMINAL PROCEDURE / CONTROLLED SUBSTANCE / CONSTRUCTIVE POSSESSION

As the contraband was not found on a defendant's person, the Commonwealth must establish Defendant's constructive possession of the items.

CRIMINAL PROCEDURE / CONTROLLED SUBSTANCE / CONSTRUCTIVE POSSESSION

In order to prove a defendant had constructive possession of a prohibited item, the Commonwealth must establish that the defendant had both the ability to consciously exercise control over it as well as the intent to exercise such control.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
NO. CR 3995 of 2016

Appearances: Michael E. Burns, Assistant District Attorney, on behalf of the Commonwealth
Jason A. Checque, Esq., on behalf of Albert D. Maxon, Jr. (Defendant)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Domitrovich, J. July 12, 2017

After thorough consideration of the entire record regarding Defendant's Omnibus Pre-trial Motion, including, but not limited to, the testimony and evidence presented during the June 1, 2017 Omnibus Pre-trial Motion 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. On August 12, 2016, City of Erie Police Corporal Curtis Waite (hereafter referred to as "Corporal Waite") received a dispatch call to the four hundred (400) block of East 3rd Street in Erie, Pennsylvania for a male and female passed out in a vehicle.
2. Upon arriving in the four hundred (400) block of East 3rd Street, Corporal Waite observed the vehicle, which was parked with the driver's door wide open, and further observed a male seated in the driver's seat and a female seated in the front passenger seat.
3. The male, identified as Albert D. Maxon, Jr. (hereafter referred to as "Defendant") had a blunt in his mouth and discarded the blunt as Corporal Waite approached the vehicle.
4. When asked about the blunt by Corporal Waite, who has been involved in prior drug investigations and has experience with the packaging and sale of drugs, Defendant admitted the blunt contained marijuana and he [Defendant] had smoked the marijuana blunt earlier.
5. Defendant and the female occupant were asked to exit the vehicle, to which they complied, and were patted down for weapons and contraband, none of which were found on their persons.
6. Thereafter, Corporal Waite searched the front area of the vehicle as the back seat of the vehicle was filled with clothes and other personal belongings.
7. Corporal Waite discovered a closed black hygiene bag on the head cushion of the driver's seat of the vehicle, where Defendant had been seated.
8. When Corporal Waite opened the black hygiene bag, he discovered one hundred (100) empty clear & yellow baggies, nine (9) baggies containing a substance suspected to be heroin, four (4) baggies containing a substance suspected to be cocaine and a digital scale.

9. Defendant admitted to Corporal Waite that everything in the black hygiene bag was his.
10. The substances in the baggies were field-tested, which indicated positive for heroin and cocaine, and were thereafter sent to the Pennsylvania State Police lab.
11. On October 19, 2016, the District Attorney's Office filed a Criminal Information, charging Defendant with two (2) counts of Possession of a Controlled Substance, in violation of 35 P.S. §780-113(a)(16); two (2) counts of Possession with Intent to Deliver, in violation of 35 P.S. §780-113(a)(30); and two (2) counts of Possession of Drug Paraphernalia, in violation of 35 P.S. §780-113(a)(32).
12. On March 24, 2017, Defendant, by and through his counsel, Jason A. Checque, Esq., filed the instant Omnibus Pre-trial Motion.
13. A hearing on Defendant's Motion to Suppress was scheduled for May 5, 2017, but was continued to June 1, 2017 at the request of the Commonwealth and with no objection from defense counsel.
14. At the June 1, 2017 Omnibus Pre-trial Motion hearing, this Trial Court heard testimony from City of Erie Police Corporal Curtis Waite and Detective Ryan Victory (hereafter referred to as "Detective Victory") and received evidence. Defendant appeared and was represented by his counsel, Jason A. Checque, Esq., and Assistant District Attorney Michael E. Burns appeared on behalf of the Commonwealth.
15. Detective Victory, who was qualified as an expert in narcotics investigations stated he reviewed the Pennsylvania State Police lab report (*see Commonwealth's Exhibit 1*), which indicated the baggies found in the black hygiene bag contained 3.09 grams of heroin and 4.66 grams of cocaine, and other police incident reports.
16. Detective Victory, based upon his review of the documents provided to him, stated his conclusion, which were also contained in his Incident Report, that Defendant was engaged in the sale of narcotics, rather than possessing narcotics for personal use. *See Commonwealth's Exhibit 2*.
17. Following this hearing, counsel agreed to submit Memoranda of Law regarding the issues presented in Defendant's Omnibus Pre-trial Motion for Relief on or before July 3, 2017. The Commonwealth, by and through ADA Michael E. Burns, submitted its Memorandum of Law on June 30, 2017. Defendant, by and through his counsel, Jason A. Checque, Esq., submitted his Memorandum of Law on July 3, 2017.

CONCLUSIONS OF LAW

A. Motion for Suppression

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.").

Under current United States and Pennsylvania constitutional jurisprudence, three (3)

categories of interactions between police officers and citizens exist. The first is a "mere encounter" (or request for information), which need not be supported by any level of suspicion, but carries no official compulsion to stop or to respond. *Commonwealth v. Roberts*, 133 A.3d 759, 771 (Pa. Super 2016). The second, an "investigative detention," must be supported by reasonable suspicion; said detention subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest. *See id*. Finally, an arrest or "custodial detention" must be supported by probable cause. *Id*.

Corporal Waite's contact with Defendant originated as a "mere encounter," but was elevated to an "investigative detention," which is supported by reasonable suspicion. To establish grounds for "reasonable suspicion," a police 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. *See Commonwealth v. Fulton*, 921 A.2d 1239, 1243 (Pa. Super. 2007). In order to determine whether the police officer had reasonable suspicion, the totality of the circumstances must be considered, which does not limit a trial court's 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. *See Roberts* at 771.

Corporal Waite, who has been involved in prior drug investigations and has experience with the packaging and sale of drugs, was dispatched to the four hundred (400) block of East 3rd Street for a male and female passed out in a vehicle. Upon arriving, Corporal Waite observed the vehicle, which was parked with the driver's door wide open, and approached the vehicle. The male, identified as Defendant, had thrown away a blunt and, after questioning from Corporal Waite, admitted the blunt contained marijuana and he [Defendant] had smoked the marijuana blunt earlier. The totality of the circumstances, including Corporal Waite's experience in drug investigations, Corporal Waite's observation of the blunt discarded by Defendant and Defendant's own admission that the blunt contained marijuana supports sufficient reasonable suspicion to have detained Defendant and investigated the possibility of drug-related activity.

In the case of *Commonwealth v. Gary*, 91 A.3d 102 (Pa. 2014), the Pennsylvania Supreme Court adopted the federal automobile exception to the warrant requirement, which allows police officers to search a motor vehicle when there is probable cause to do so and does not require any exigency beyond the inherent mobility of a motor vehicle. *See id* at 104. 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. *Commonwealth v. Ibrahim*, 127 A.3d 819,824 (Pa. Super. 2015). Furthermore, if a police officer has probable cause for a warrantless search of a vehicle for contraband, he was also permitted to search any container found therein where the contraband could be concealed. *See Commonwealth v. Runyan*, 2017 Pa. Super. 114, *5 (Pa. Super. 2017). Again, in the instant case, Corporal Waite's experience in drug investigations, including experience with packaging and sale of drugs, Corporal Waite's observation of the blunt discarded by Defendant and Defendant's

own admission that the blunt contained marijuana supports probable cause that Defendant was involved in drug-related criminal activities and gave Corporal Waite the authority to search Defendant's vehicle. During the search of the vehicle, Corporal Waite had discovered a closed black hygiene bag on the head cushion of the driver's seat of the vehicle, where Defendant had been seated. Inside the black hygiene bag, Corporal Waite had discovered numerous empty baggies, baggies containing suspected heroin and cocaine, and a digital scale.

Therefore, the totality of the circumstances, Corporal Waite's experience III drug investigations, including the packaging and sale of drugs, Corporal Waite's observation of Defendant discarding a blunt and Defendant's own admission that the blunt contained marijuana, supports reasonable suspicion to initiate an investigatory detention of Defendant and also supports probable cause to search Defendant's vehicle and any containers therein for controlled substances. Defendant's Motion for Suppression is hereby denied.

B. Petition for Writ of Habeas Corpus

A pre-trial Petition for Writ of *Habeas Corpus* is the proper means for testing whether the Commonwealth has sufficient evidence to establish a *prima facie* case. *Commonwealth v. Dantzler*, 135 A.3d 1109, 1112 (Pa. Super. 2016). When reviewing a Petition for Writ of *Habeas Corpus*, a trial court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth. *See Commonwealth v. Santos*, 876 A.2d 360, 363 (Pa. 2005). To demonstrate that a *prima facie* case exists, the Commonwealth must produce evidence of every material element of the charged offense(s) as well as the defendant's complicity therein. *See Dantzler* at 1112. To meet its burden, the Commonwealth may utilize the evidence presented at the preliminary hearing and also may submit additional proof. *See id*.

In the instant case, as the contraband was not found on a defendant's person, the Commonwealth must establish Defendant's constructive possession of the items. *See Commonwealth v. Haskins*, 677 A.2d 328, 330 (Pa. Super. 1996). Regarding "constructive possession," the Pennsylvania Superior Court has held:

> Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not. We have defined constructive possession as "conscious dominion." We subsequently defined "conscious dominion" as "the power to control the contraband and the intent to exercise that control." To aid application, we have held that constructive possession may be established by the totality of the circumstances.

Commonwealth v. Cruz, 21 A.3d 1247, 1253 (Pa. Super. 2011) (*citing Parker*, 847 A.2d at 750). In order to prove a defendant had constructive possession of a prohibited item, the Commonwealth must establish that the defendant had "both the ability to consciously exercise control over it as well as the intent to exercise such control." *Commonwealth v. Gutierrez*, 969 A.2d 584, 591 (Pa. Super. 2009). Intent to maintain a conscious dominion may be inferred from the totality of the circumstances, and circumstantial evidence may be used to establish a defendant's possession of drugs or contraband. *See id*.

During Corporal Waite's search of Defendant's vehicle, Corporal Waite had found a closed

black hygiene bag on the head cushion of the driver's seat of the vehicle, where Defendant had been seated. Following a search of the hygiene bag, Corporal Waite had found numerous empty baggies, baggies containing suspected heroin and cocaine, and a digital scale. After questioning from Corporal Waite, Defendant had admitted "everything in the bag was his [Defendant's]." Based upon the location of the black hygiene bag and Defendant's own voluntary admission to ownership of the black hygiene bag and its contents, this Trial Court finds and concludes the Commonwealth had produced sufficient evidence to demonstrate Defendant constructively possessed the black hygiene bag and its contents.

Furthermore, at the time of the Omnibus Pre-trial Motion hearing, the Commonwealth introduced the testimony of City of Erie Police Detective Ryan Victory, who had previously worked with the City of Erie Police Department's Vice/Narcotics Unit, as well as having experience and training in drug investigations. Detective Victory stated he had reviewed the police reports and the Pennsylvania State Police lab report regarding the illegal drugs and paraphernalia seized from Defendant's vehicle. In his Investigative Report, Detective Victory indicated: (1) eight [8] baggies contained heroin with a total weight of 3.09 grams, which amounts to thirty [30] to sixty [60] doses, and a street value of $450-$600, which is consistent with selling drugs, rather than personal use; (2) four [4] baggies contained cocaine with a total weight of 4.66 grams and a street value of $400-$500, which is consistent with selling drugs, rather than personal use; (3) Defendant did not possess items of "use" paraphernalia, such as needles, burnt spoons, possible used bags, etc.; (4) Defendant possessed a digital scale, which is commonly used by drug dealers to weigh specific amounts of heroin and is consistent with selling drugs, rather than personal use; (5) Defendant possessed over one hundred [100] unused baggies, which is consistent with selling drugs, rather than personal use; and (6) during booking and when asked if he used drugs, Defendant responded "No." See *Commonwealth's Exhibit 2*. The weights of the controlled substances are supported by the Pennsylvania State Police lab report. *See Commonwealth's Exhibit 1*. Ultimately, Detective Victory opined, based upon his review of the evidence, that Defendant's possession of these illegal drugs and paraphernalia was consistent with the sale and delivery of controlled substances, rather than personal use. *See Commonwealth's Exhibit 2*. Therefore, based upon the testimony and evidence presented, this Trial Court finds and concludes the Commonwealth has produced sufficient evidence to support the charges of Possession with Intent to Deliver, Possession of a Controlled Substance and Possession of Drug Paraphernalia. Defendant's Petition for Writ of *Habeas Corpus* is hereby denied.

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

ORDER

AND NOW, to wit, this 12th day of July, 2017, after thorough consideration of the entire record regarding Defendant's Omnibus Pre-trial Motion, including, but not limited to, the testimony and evidence presented during the June 1, 2017 Omnibus Pre-trial Motion Hearing, as well as an independent review of the relevant statutory and case law, and the Findings of Fact and Conclusions of Law, attached hereto above pursuant to Pennsylvania Rule of Criminal Procedure 581, it is hereby **ORDERED, ADJUDGED AND DECREED** that Defendant's Omnibus Pre-trial Motion is hereby **DENIED**.

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

COMMONWEALTH OF PENNSYLVANIA
v.
ALBERT D. MAXON

CRIMINAL PROCEDURE / WEIGHT AND SUFFICIENCY OF EVIDENCE

Evidence is sufficient when viewing all evidence admitted in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact finder to find every element of the crime beyond a reasonable doubt.

CRIMINAL SENTENCING / DISCRETION

Where a sentence is within the standard range of the guidelines, the sentence is considered appropriate under Pennsylvania law.

CRIMINAL SENTENCING / CONTROLLED SUBSTANCE

Any detectable amount of a controlled substance in a compound of mixture is deemed composed of the controlled substance.

CRIMINAL SENTENCING / CONTROLLED SUBSTANCE

Purity of controlled substances is irrelevant for sentencing purposes.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
DOCKET NO. 3995-2016

Appearances: Michael E. Burns, Assistant District Attorney, on behalf of the Commonwealth
Jason A. Checque, Esq., on behalf of Albert D. Maxon, Jr. (Defendant)

MEMORANDUM ORDER

Mead, J. December 4, 2017

Appellant Albert Maxon appeals from the judgment of sentence entered on October 3, 2017, following his conviction for two counts of possession (heroin and cocaine); two counts of possession with the intent to deliver (heroin and cocaine); and two counts of possession of drug paraphernalia.

Appellant has stated three reasons for his appeal.

1. SUPPRESSION ISSUES

Appellant claims that Judge Domitrovich erred by denying his pretrial omnibus motion to suppress evidence obtained as a result of a stop and search of his vehicle. This Court relies on the well-reasoned Opinion of Judge Domitrovich as to this matter.

2. VERDICT AGAINST THE WEIGHT OF EVIDENCE

Appellant argues that the verdict is against the sufficiency of the evidence because the Commonwealth

> [C]annot conclusively prove beyond a reasonable doubt that all 4.66 grams of cocaine and/or all 3.09 grams of Heroin was 100% pure or 50% pure or even 1% pure, AND the Commonwealth cannot conclusively prove beyond a reasonable doubt that all of the Cocaine and/or Heroin was, in fact, Cocaine and/or Heroin and/or another substance that was not one of those two (2) illegal substances.

Appellant's 1925(b) Statement, p. 2.

Appellant's argument is without merit. There was sufficient evidence for the jury to reach its verdict. First, there was testimony that several bags of powder were found in Appellant's vehicle, and Appellant admitted on cross examination that the drugs found in his vehicle were his. *Trial Transcript, p. 174.* Second, the Commonwealth called David Eddinger, a forensic, scientist with the Pennsylvania State Police, as an expert witness on drug identification. *Id. at 53-55*. Mr. Eddinger testified he examined a total of fourteen (14) different bags found in Appellant's vehicle. He determined nine of the bags contained heroin (weighing a total of 3.09 grams), and four of the bags contained cocaine (weighing a total of 4.66 grams.) (One bag did not contain drugs). Mr. Eddinger did not measure the percentage of the heroin or cocaine in the bags. Third, Officer Ryan Victory testified as an expert in the field of narcotic investigation and possession with intent to deliver. He opined that both the heroin and cocaine were possessed with the intent to deliver. *Id. at 120.*

Thus, the evidence presented at trial was sufficient to prove Appellant possessed the drugs with the intent to deliver. There is no requirement that the Commonwealth must prove weight or purity for, purpose of a conviction. The evidence was uncontradicted that appellant possessed nine bags containing a measurable amount of heroin, and four bags containing a measurable amount of cocaine. Since weight or purity is not an element of the crimes for which Appellant was convicted, his argument is meritless.

3. <u>SENTENCING</u>

The Appellant argues that the Court erred by sentencing Appellant to a standard range sentence based on the 4.66 grams of cocaine and 3.09 grams of heroin, since the Commonwealth did not prove the purity of the drugs.

Appellant's argument is without merit. 204 Pa. Code §303.3(e) states: "If any mixture or compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be deemed to be composed of the controlled substance."

Here, there was no evidence that contradicted the forensic scientist's testimony that the nine (9) bags possessed by Appellant all contained heroin and totaled 3.1 grams, and the other four (4) bags in his possession all contained cocaine and totaled 4.6 grams. Purity is irrelevant for sentencing purposes. Appellant was thus properly sentenced under the applicable sentencing guidelines to a standard range sentence.

Therefore, Appellant's appeal should be denied.

BY THE COURT
/s/ **John J. Mead, Judge**