ERIE COUNTY LEGAL JOURNAL

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Reports of Cases Decided in the Several Courts of Erie County for the Year 2020

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ERIE, PA

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

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REAL PROPERTY / STATUTE OF FRAUDS

The Statute of Frauds requires any agreement to convey an interest in real property to be in writing and signed by the party against whom enforcement is sought. *33 P.S. Section 1, et.seq.* A limited exception to the Statute of Frauds exists in equity permitting a constructive trust to compel the enforcement of an oral agreement.

The Pennsylvania Supreme Court established the elements necessary for a constructive trust as follows:

"It is well-settled that where property is conveyed to one in a confidential relationship to the transferor, subject to a promise to reconvey which is subsequently breached, equity will intervene by imposing a constructive trust to prevent the unjust enrichment of one so abusing a confidential relationship. (citations omitted). It is necessary that both a confidential relationship and reliance upon a promise to reconvey induced by that relationship be shown." *Silver v. Silver*, 219 A.2d 659, 661-662 (Pa. 1966).

A confidential relationship exists "whenever one occupies toward another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other's interest." *Id*.

The Plaintiff's uncorroborated testimony was insufficient to establish the existence of a confidential relationship with the Defendant. There was a lifetime of deceptive and distrustful behavior within the family dynamics, particularly among the siblings, which is why the Plaintiff did not want to hold property jointly with his siblings. In the short time between the mother's request to the Plaintiff to convey her interest to the Defendant, and the Plaintiff's execution of the deed, a confidential relationship was not formed with the Defendant.

As a matter of equity, given the mother's expressed intent to transfer her interest in the property to the Defendant, who provided daily care to her and was entrusted as the Executrix of the mother's estate but did not receive any testamentary distribution, the Defendant was not unduly enriched.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW/EQUITY
No. 11674 of 2018

Appearances: Peter N. Georgiades, Esq. on behalf of Plaintiff
Matthew J. Parini, Esq. on behalf of Defendant

OPINION

Cunningham, S.J. December 23, 2019

The presenting matter is a non-jury trial held on December 17, 2019 wherein the Plaintiff sought to impose a constructive trust on the Defendant compelling her to convey her interest in real property to him. Upon consideration of the entire record, the Plaintiff's request is denied for the following reasons.

The subject property is located at 2816 Carter Avenue, Erie, Pennsylvania (hereafter the "property"). The parties are brother and sister who grew up on a neighboring parcel to the property, which was owned at that time by a childless couple, Donald and Joanne Brown. While growing up, the Plaintiff spent considerable time at the Browns' home and helped them with various chores, particularly as the Browns aged. According to the Plaintiff, the Browns promised to convey the property to him as they had no heirs.

After Joanne Brown's death on March 8, 2000, Donald Brown executed a deed dated June 27, 2000 conveying the property to the Plaintiff and the parties' mother, Elsie M. Andrzejzak (hereafter "mother"), as joint tenants with the right of survivorship. By that time, the Plaintiff was in the midst of a successfult 26-year career with the City of Pittsburgh Police Department and living in Pittsburgh, where he lives to this day.

In February, 2017, their mother was diagnosed with breast cancer. As her health declined, she needed a greater level of care. The Defendant lived across the street from her mother and for years watched over her. When her mother was diagnosed with breast cancer, the Defendant essentially moved in, taking care of her mother's daily needs. The Defendant often took her mother to her medical appointments, got groceries, etc. The Defendant ran her family business using a computer she brought to her mother's home.

In May, 2017, the mother telephoned the Plaintiff with the assistance of the Defendant. The mother informed the Plaintiff that she desired to transfer her interest in the property to the Defendant resulting in each child owning a one-half interest. According to the Plaintiff, her reason was "to keep the property in the family in case something was to happen." *Defendant's Exhibit A, para.19.*

By letter dated June 7, 2017, Attorney James R. Steadman informed the Plaintiff that he had met with their mother, who advised that she wanted "to put half of the property into Kathy's name." *Plaintiff's Exhibit C*. Kathy is the Defendant herein. Attorney Steadman informed the Plaintiff the property would go from being joint tenants with the right of survivorship to being tenants in common with the Plaintiff and Defendant each owning an "undivided one-half interest in the property." *Id*. Attorney Steadman enclosed a deed for the proposed transfer of the property into the parties as tenants in common. The enclosed deed was already executed by the mother on June 6, 2017.

On June 9, 2017, the Plaintiff executed this deed before a witness named "Ernt R. Kline" and notarized by Notary Public Suzan Ann Bogden on June 9, 2017. The deed was recorded with the Erie County Recorder of Deeds on June 20, 2017. *Plaintiff's Exhibit B*.

The mother, Elsie M. Adrzejzak, died on July 30, 2017.

According to the Plaintiff, prior to signing the deed conveying the mother's interest to the Defendant, he had a conversation with the Defendant in which he informed her that he did not want to jointly own this property with anyone. Thus he was reluctant to sign the deed unless the Defendant was willing to transfer her interest back to him after their mother passed. The Plaintiff contends the Defendant agreed to do so. As a result, the Plaintiff signed the deed on June 9, 2017.

Subsequent to their mother's demise, the parties met. When the Plaintiff broached the topic of conveying the property to him, the Defendant denied that any agreement existed to do so. This lawsuit ensued.

There are no witnesses to the alleged conversation between the parties regarding the

Defendant's agreement to convey her interest in the property to the Plaintiff after their mother's passing. The agreement, if any, was never reduced to writing or confirmed in writing.

It has long been the law in Pennsylvania that the Statute of Frauds requires any agreement to convey an interest in real estate be in writing and signed by the party against whom enforcement is sought. 33 P .S. Section 1 *et seq*. The general purpose of the Statute of Frauds is to avoid the controversies surrounding oral promises to convey real estate and thereby reduce the opportunities for fraudulent claims to real estate.

The Statute of Frauds is not a complete bar to oral agreements to sell real property as there is a limited exception wherein a constructive trust can be imposed upon a party provided certain elements are proven.

The Pennsylvania Supreme Court spelled out the requirements for a constructive trust long ago:

> "It is well-settled that where property is conveyed to one in a confidential relationship to the transferor, subject to a promise to reconvey which is subsequently breached, equity will intervene by imposing a constructive trust to prevent the unjust enrichment of one so abusing a confidential relationship. (citations omitted). It is necessary that both a confidential relationship and reliance upon a promise to reconvey induced by that relationship be shown."

Silver v. Silver, 219 A.2d 659, 661-662(Pa.1966).

Plaintiff's request for a constructive trust upon the Defendant requires him to prove the existence of confidential relationship and a promise to reconvey that was induced by that relationship.

According to the *Silver* Court, "(a)lthough no precise formula has been devised to ascertain the existence of a confidential relationship, it has been said that such a relationship is not confined to a particular association of parties, but exists **whenever one occupies toward another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other's interest."** *Id. Emphasis added.* Subsequent appellate courts have recognized the criteria that the charged party must be in a position of advisor or counselor. *See, e.g., Makozy v. Makozy*, 874 A.2d 1160 (PaSuper 2005).

In determining whether a confidential relationship exists, that the parties are siblings is a factor to be considered but is not determinative. The Plaintiff is required to show the Defendant was in a position of being an advisor or counselor to him sufficient to reasonably believe she would reconvey the property. The Plaintiff has failed to adduce enough credible evidence to establish that his sister was his advisor or counselor who could be trusted to act in his interest.

The only direct evidence of a confidential relationship comes from the Plaintiff's testimony. To his credit, the Plaintiff had an impressive career as a police officer in Pittsburgh. For his heroism on the job, he received two well-deserved awards for extraordinary bravery in the face of grave danger to himself. He has this Court's utmost respect for his professional work.

Nonetheless, the Plaintiff's testimony, standing alone as it does, is not enough to establish

a confidential relationship with the Defendant. Distilled, this case is a "he said, she said" scenario. It is the type of situation the Statute of Frauds was enacted to prevent, to-wit, disputes where one party claims another party orally agreed to reconvey real estate in a conversation with no one else present and lacking any other form of corroboration.

The parties agree the dynamics within their nuclear family were unusually vile. There were violent arguments between siblings and it was common for fisticuffs to occur during family gatherings. According to the Plaintiff, "members of my own family had lied to me and stolen from me." *Defendant's Exhibit A, para. 27*. Often family members would go for long periods of time without speaking to each other. The Plaintiff describes his childhood as though he received better care from the Browns than his parents. The Plaintiff admits he once went six years without speaking to or seeing his mother. Indeed, the family dynamics was the core reason the Plaintiff did not want to own the property with another family member.

While it is true the Plaintiff had a better relationship with the Defendant than his other siblings, that fact alone does not establish the Defendant was a trusted advisor or counselor to the Plaintiff. In the time leading up to the purported oral conversation between the parties, there is no credible evidence of any conduct by the Defendant that would place her in the position of being a trusted advisor to the Plaintiff. Notably, there was a short window of time between the Plaintiff's telephone conversation with his mother in May, 2017 and the Plaintiff's June 9, 2017 signature on the deed. It is also inherently contradictory for the Plaintiff to posit that he does not trust the Defendant enough to be co-owners of the property with her but he does trust her enough to give him the property for free. Common sense does not support the Plaintiff's contradictions.

There was no effort by the Plaintiff to have the Defendant confirm in writing the existence of their purported oral agreement. Today's technology provided the Plaintiff with ample tools for such confirmation, including emails, text messages and all forms of social media. To the Plaintiff's knowledge, the Defendant was actively sending/receiving text messages. Even an old-fashioned exchange of postal letters could have corroborated the existence of an oral agreement. In a family filled with decades of distrust, the fact readily available forms of written confirmation were not used casts considerable doubt on the existence of an alleged oral agreement to reconvey the property.

As a separate legal matter, the Plaintiff has not proven the existence of an enforceable agreement because there was no consideration conveyed to the Defendant. The Plaintiff did not offer to pay the Defendant any money or otherwise compensate her for a property interest she rightfully received from her mother.

To the extent the Plaintiff contends that he would not have signed the June, 2017, deed without the Defendant's promise to reconvey to him, it is a meaningless point. During her lifetime, their mother was free to convey her interest in the property at any time to any person. Their mother could have simply executed a quitclaim deed conveying her interest in the property to the Defendant. Hence, the Plaintiff cannot establish that he detrimentally relied on the Defendant's promise to reconvey the property prior to his execution of the June, 2017 deed as his mother was free to convey her interest without the consent or Signature of the Plaintiff.

The Defendant's denial of an oral agreement is plausible for a variety of reasons. First, there is no evidence the Defendant ever attempted to secure an interest in the property for

herself. There is no evidence the Defendant exerted any undue influence on her mother compelling her to transfer her interest to the Defendant. The Plaintiff appears to infer some impropriety by the Defendant because she is the one who placed the May, 2017 phone call to him in which their mother told him of her desire to transfer her interest to the Defendant. However, the Plaintiff talked directly to the mother during that call and she unequivocally expressed her desire to convey her interest to the Defendant. This same desire was stated to the Defendant in at least one subsequent conversation with his mother. Lastly, the June 7, 2017 letter to the Defendant from Attorney Steadman confirms the mother's intent to convey her interest to the Defendant as a tenant in common. Such a conveyance was a form of gratitude for the Defendant's assistance when her mother needed it most. Hence there is no evidence of a devious scheme by the Defendant to secure her mother's interest in the property.

The Plaintiff agreed to abide by his mother's wishes. He testified he did so with mixed emotions because privately he did not want to be a co-owner with another family member yet he did not want to upset his dying mother (which is a laudable motive). However, the fact remains the Plaintiff told his mother he would go along with her wishes and he signed the deed. His mother later died believing the Defendant would remain the owner of the mother's interest in the property after her death.

If the Plaintiff is to be believed, it means he double-crossed his mother. The Plaintiff never informed his mother of his purported agreement with the Defendant to convey her interest in the property to him after their mother passed. Yet behind his mother's back, he made arrangements to secure his mother's interest for himself thereby defeating her explicit intent.

In addition, their mother's Will appointed the Defendant as an Executrix (or possibly CoExecutrix), which is an expression of the mother's trust in the Defendant. Yet the mother's Will did not leave any property to the Defendant. The mother died believing the Defendant was the co-owner of the property, which likely explains why the Defendant did not receive anything under the Will. Under these circumstances, there is no basis to find the Defendant was unjustly enriched by receiving her mother's interest in the property.

It was the Plaintiff's decision not to seek the advice of legal counsel before signing the deed. In fairness to the Plaintiff, like most lay people, he was probably unaware of the requirements of the Statute of Frauds. However, he knew from the contents of Attorney Steadman's June 7, 2017, letter that his interest in the property would change such that there was no longer a right of survivorship contingent upon his mother passing before him.

One advantage the Plaintiff received by signing the June, 2017 deed was that his family was no longer at risk of receiving nothing in the event of his passing before his mother. Although that possibility was slim given his mother's health, there was still no guarantee he would live longer than his mother.

CONCLUSION

The Plaintiff has not presented enough credible evidence to meet his burden of proof that a confidential relationship existed with the Defendant. In particular, there is not enough evidence that the Defendant was a trusted advisor and confidential advisor to the Plaintiff in the short time span leading up to the Defendant's execution of the June, 2017 deed. This

time period is in contrast to a lifetime of chaos and distrustful behavior within the family's dynamics.

There is also no written form of any corroboration of any oral agreement between the parties despite a host of available technological options. There are no witnesses who were present during any oral agreement or who have firsthand knowledge of such an agreement.

The Plaintiff's testimony, which stands alone, is not credible enough to satisfy his burden of proof or to warrant the equitable relief he seeks.

There was no consideration given to the Defendant in exchange for her purported promise to reconvey. Hence there is no agreement enforceable against the Defendant.

As a matter of equity, given the mother's expressed intent to transfer her interest in the property to the Defendant, who provided daily care to her and was entrusted as a representative of her estate, the Defendant was not unduly enriched.

ORDER

For the reasons set forth in the accompanying Opinion, judgment is entered in favor of the Defendant and against the Plaintiff.

Consistent with the terms of the Escrow Agreement entered into by the parties on August 2, 2019, identified as Plaintiff's Exhibit E, the escrow agent shall from the escrow funds reimburse the Plaintiff Thomas J. Andrzejzak, the sum of $696.86 for expenses incurred by him in maintaining the property as set forth in Plaintiff's Exhibits F, G and H.

The escrow agent shall then pay to the Plaintiff Thomas J. Andrzejcak one-half of the remaining balance of the escrow funds.

The other half of the remaining escrow funds belong to the Defendant Kathleen Chaffee. It shall be the duty of the Defendant to provide to the escrow agent on or before March 3, 2020 a final figure owed to the Internal Revenue Service for all principal, fines, penalties and costs associated with unpaid income taxes owed by the Defendant. The escrow agent shall then pay the IRS directly from the Defendant's share of the escrow funds all monies necessary to relieve the subject property from any lien imposed or that could be imposed by the IRS. If there are any escrow funds left after the IRS is fully satisfied, then the escrow agent shall pay the Defendant any remaining funds.

In the event the Defendant's obligation to the IRS exceeds her share of the escrow funds, then the escrow agent shall pay all of the Defendant's share directly to the IRS. It then becomes the Defendant's responsibility to provide any additional amounts needed to avoid or remove an IRS lien on the subject property. Under no circumstances shall the Plaintiff's share of the escrow funds be exposed to or used to pay any tax liens incurred as a result of the Defendant's failure to pay federal, state or local income taxes.

SO ORDERED.

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

GINGER CUNNINGHAM
v.
CARLA PICARDO, M.D.

APPEAL AND ERROR / MOTIONS IN LIMINE

Case law is well-established that when an appellate court is reviewing a trial court's determination of a motion in limine, the appellate court applies an abuse of discretion standard.

APPEAL AND ERROR / ABUSE OF DISCRETION

An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support as to be clearly erroneous.

APPEAL AND ERROR / WAIVER OF ISSUES

This trial court notes case law is clear "the failure to raise an issue, objection, or argument in a timely manner during trial forecloses further review of an alleged error in post-trial motions or at the appellate level."

APPEAL AND ERROR / INSTRUCTIONS

Case law indicates in reviewing an appellant's challenges to the trial court's jury instructions, Pennsylvania Superior Court will examine trial court's rulings on jury instructions "to determine whether the trial court abused its discretion or offered an inaccurate statement of law controlling the outcome of the case."

APPEAL AND ERROR / INSTRUCTIONS

Jury instructions are considered as a whole, rather than "isolated fragments".

APPEAL AND ERROR / INSTRUCTIONS

A charge will be found adequate unless "the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to fundamental error."

APPEAL AND ERROR / INSTRUCTIONS

A court's charge to the jury will be upheld if it adequately and accurately reflects the law and was sufficient to guide the jury properly in its deliberations.

APPEAL AND ERROR / INSTRUCTIONS

Case law is also clear that "[t]he trial court is not required to give every charge that is requested by the parties and its refusal to give a requested charge does not require reversal unless the Appellant was prejudiced by that refusal."

APPEAL AND ERROR / INSTRUCTIONS

Moreover, "a trial judge may properly refuse a litigant's requested instructions when the substance thereof had been adequately covered in the general charge."

APPEAL AND ERROR / INSTRUCTIONS

The instructions to the jury are not intended to supplement the arguments of the opposing parties.

APPEAL AND ERROR / INSTRUCTIONS

Trial judges have wide latitude in their choice of language when charging a jury, provided trial judges fully and adequately convey the applicable law.

APPEAL AND ERROR / INSTRUCTIONS

Where a requested point for charge is covered sufficiently and adequately in the trial court's

jury instructions, it is not error to deny the requested point even though it may contain a correct statement of law.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL ACTION
NO. 10274-2013
569 WDA 2019

Appearances: Eric J. Purchase, Esq., for Ginger Cunningham, Appellant
Marian J. Cullen, Esq. and R. Kent Hornbrook, Esq., for Carla Picardo, M.D., Appellee

1925(a) OPINION

Domitrovich, J. June 12, 2019

This case is an appeal of a jury trial verdict regarding a claim by a patient, Ginger Cunningham (hereinafter "Appellant"), against her surgeon, Carla Picardo, M.D. (hereinafter "Appellee"), for medical battery. Eleven (11) of twelve (12) jurors found in favor of Appellee, in that Appellee "proceeded with the surgical procedure" upon Appellant with proper informed consent. (Verdict Slip). On appeal, Appellant's issues are: (1) Whether this trial court abused its discretion and erred by recognizing the instant case is distinguishable from the factual basis in *Montgomery v. Baraz-Sehgal*, 798 A.2d 742 (Pa. 2002); (2) Whether this trial court properly denied Appellant's Motion in Limine excluding negligence where this trial court sustained Appellee's objections and denied said Motion in Limine in order to prevent counsel from trying "to 'back door' negligence concepts into this case" and where no negligence evidence was admitted in this case thereby rendering this issue moot; (3) Whether this trial court abused its discretion and committed error where Appellant did not raise any objections as to Appellee's opening and closing arguments regarding alleged references to this surgery being performed "non-negligently," and thereby Appellant failed to preserve properly this issue; and (4) whether this trial court properly denied Appellant's proposed jury instructions, specifically numbers four (4), five (5), eight (8), twelve (12), thirteen (13), sixteen (16), and eighteen (18).

Procedurally, the Honorable John Garhart denied Appellee's Partial Motion for Summary Judgment on December 11, 2018, and shortly thereafter retired. On February 26, 2019, the Erie County Court Administrator forwarded this case to the undersigned judge to conduct this jury trial. Any rulings by Judge Garhart were not disturbed by this trial judge by virtue of the coordinate jurisdiction rule. This jury trial was conducted over three days, including jury selection, and concluded on March 14, 2019.

Factually, the parties agree the surgery itself was consented to. However, the dispute arises from Appellant's allegation Appellee failed to advise Appellant she would be the "lead surgeon." In fact, all three surgeons — Dr. Picardo, Dr. Stull and Dr. Tseng — were listed as surgeons on the Informed Consent form when Appellant signed this form. Appellant contested whether Appellee personally explained the material facts to Appellant before signing the Informed Consent form.

The first issue presented is based on the Pennsylvania Supreme Court case of *Montgomery*

v. Baraz-Sehgal, 798 A.2d 742 (Pa. 2002), which is factually distinguishable from the instant case. In the instant case, Appellant admitted she consented to have the surgery performed as to the excision of her Bartholin's gland. In *Montgomery v. Baraz-Sehgal*, however, the patient had not consented to an extra procedure, an implantation, prior to surgery. Moreover, in the instant case, the facts are sufficient for the jury to find Appellee thoroughly explained the informed consent form with risks and possible alternatives which Appellant signed with the names of Dr. Picardo and two other surgeons to perform the procedure. Clearly, *Montgomery v. Baraz-Sehgal* is factually different from this instant case. To the extent Appellant argues the *Montgomery* case stands for "negligence concepts are irrelevant in a consent or informed consent case," this trial court notes no negligence evidence was admitted in the instant case and Appellant's argument is moot and meritless.

As to the second issue regarding Appellant's Motion in Limine to exclude negligence, this trial court sustained Appellee's objection and denied said Motion in Limine to avoid counsel claims of "back dooring" negligence concepts into this case. In the instant case, this trial court favored a "wait and see" attitude to ensure no counsel admitted negligence evidence in this alleged medical battery case. Case law is well-established that when an appellate court is reviewing a trial court's determination of a motion in limine, the appellate court applies an abuse of discretion standard. *See, Turner v. Vallery Housing Development Corp.*, 972 A.2d 531, 535 (Pa. Super. Ct. 2009). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support as to be clearly erroneous." *Davis v. Borough of Montrose*, 194 A.3d 597, 606-07 (Pa. Super. Ct. 2018) (citing *Crespo v. Hughes*, 167 A.3d 168, 177 (Pa. Super. Ct. 2017)).

When Appellant's counsel argued said Motion in Limine regarding negligence concepts, Appellant's counsel did not argue negligence was not an issue based upon the facts presented. Appellant's counsel argued, based upon an alleged lack of consent, a battery had occurred, and Appellee caused Appellant's alleged disfigurement in an area which was not being operated upon. As such, Appellee's counsel objected to this Motion in Limine due to his concern Appellant's counsel was "going to back door a standard of care case, because their whole case is around this allegedly improperly removed piece of [Appellant's] labia." (Notes of Testimony, Status Conference, March 6, 2019, 52:2-4). In fact, as a precaution, Appellee's counsel had an expert available during the trial to testify to standard of care if Appellant raised this issue at the trial. Similarly, as a precaution, this trial court chose a "wait and see" attitude to ensure no counsel admitted negligence evidence in this alleged medical battery case. During the trial, no negligence evidence was presented or admitted. Since no negligence evidence was introduced into this case, this issue as to Appellant's Motion in Limine is rendered moot and, therefore, lacks merit.

Appellant's third issue refers to Appellee's opening and closing arguments as to alleged references to this surgery being performed "non-negligently." This Trial Court cannot locate the use of such language of "non-negligently" by Appellee's counsel in either her opening or closing statements to the jury. To the extent Appellee's counsel used the term "standard of care," Appellant made no objections as to this language, thereby not preserving this issue for appeal. This trial court notes case law is clear "the failure to raise an issue, objection, or argument in a timely manner during trial forecloses further review of an alleged error in

post-trial motions or at the appellate level." *Com. v. Johnson*, 534 A.2d 511, 515 (Pa. Super. Ct. 1987); *See*, Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

The following is a portion of Appellee counsel's opening statement using the term "standard of care" and revealing no objections raised by Appellant's counsel:

Formerly known as MS. PATCHEN (now MS. CULLEN):

> I'm going to talk with you a little bit about what the evidence will show, but before talking about what the evidence will show I'm going to tell you what it will not show. And Mr. Purchase touched on this a little bit, and that was his indication, you know, that this isn't — you don't have to make any determination about the surgery being done wrong or anything like that in order to prove the case. ***Well, the reality is there will be no criticism whatsoever of Dr. Picardo's skill, of her judgement, of her recommendations. There will be no criticism of her surgical technique. There will be no criticism of any decisions she made in treating Ginger. And that's important, because you can assume that her treatment was therefore within the standard of care and appropriate.*** The only question in this case is whether she treated Ginger without her consent.

(N.T.1 at 32:2-] 8) (emphasis added).

Furthermore, the following is a portion of Appellee counsel's closing statement in context with her use of "standard of care" and also revealing no objections by Appellants' counsel:

Formerly known as MS. PATCHEN (now MS. CULLEN):

> You heard from Dr. Picardo, Ginger was her patient. She was always my patient. You heard from Dr. Stull, she wasn't my patient, she wasn't my patient. I think it's interesting, too, that Mr. Purchase has suggested throughout this case that Dr. Picardo lacked the experience performing this procedure. Again, with respect to the gland, Dr. Picardo was forthright about that. And she explained that operating in the area of the vulva, it's all the same anatomy, okay, and that she had removed cysts in that area and that is why this notion that she was not qualified to remove a Bartholin's cyst or that she had never removed a Bartholin's cyst is quite a disingenuous. It's also problematic for a couple of reasons.
>
> ***Mr. Purchase stood up here and told you at the beginning of the case he wasn't going to criticize Ms. Picardo's competency, that this isn't an allegation that she didn't use the standard of care, those are not issues in this case. Well, if those aren't the issues in this case, why are we talking about qualifications again? Why are we talking about her experience with that when she disclosed her experience as it related to the gland? To suggest***

that she wasn't experienced enough — and he said that in his opening, she was a young doctor, she wasn't all that experienced with surgery. That's standard of care. If you're going to pursue a case like that, we're not having the same kind of discussion that we're having in front of you.

My only reason for bringing that up, I told you at the beginning, you are to assume this surgery was performed perfectly. It was performed within the standard of care. There is no question as to her skill, her judgment, her surgical technique, known of that I at issue. Because if it was, you would have heard from an expert witness who would have offered opinions that she didn't do those things properly and that caused injury. The only question in front of you is whether Dr. Picardo obtained her consent for this surgery.

Now, one of the other issues that has come up during this testimony is whether Ginger had an understanding as to what the role of these doctors would be during this procedure. The only witness that you heard from in this case regarding what is required of a physician as it relates to obtaining a patient's consent was Dr. Picardo. The plaintiff has the ability to call any witness they want; any witness they want. And they chose to call the person they are suing and put her on the stand and have her explain to you what is required of her and whether she did it. No one contested that testimony, ladies and gentlemen, that's very important. The uncontested testimony in front of you here's what I as a physician am required to do as part of my informed consent process; here's what I did. And you didn't hear anyone say, she failed to tell Ginger what she needed to know. And that is important, okay?

(Notes of Testimony, Jury Trial — Day 2, March 14, 2019, 102:20-105:4 ("N.T.2") (emphasis added). As evidenced above, Appellant failed to object during trial, thereby waving this issue.

Assuming *arguendo*, Appellant did not waive this issue by not objecting, no negligence evidence was admitted. To the extent Appellee's counsel mentioned "standard of care" in her opening and closing arguments, this trial court's reading to this jury the following standard jury instructions adequately conveyed to the jury the understanding that argument by either counsel was not evidence. Immediately before the opening statements of counsel, this trial court stated:

THE COURT: ***The trial will proceed in the following manner: First, the plaintiff's lawyer will make an opening statement to you. Next, the defendant's lawyer will make an opening statement. An opening statement is not evidence but is simply a summary of what the lawyer expects the evidence will show. The opening***

> ***statements are designed to highlight for you the disagreements and factual differences between the parties in order to help you judge the significance of the evidence when it is presented.***
>
> Once the lawyers have made their opening statements, then each party is given an opportunity to present its evidence. Plaintiff goes first, because they have the burden of proof which I will discuss in greater detail later. The plaintiff will present witnesses whom the lawyer for the defendant may cross-examine. Following the plaintiff's case the defendant may present its evidence and plaintiffs lawyer may cross-examine their witnesses.
>
> ***After all the evidence has been presented, the lawyers will present to you closing arguments to summarize and interpret the evidence in an attempt to highlight the significant evidence that is helpful to their client's positions. As with opening statements, closing arguments are not evidence.***

(N.T.1 at 6:15-7:14) (emphasis added). Since Appellant waived the issue and this court instructed the jury that argument by counsel is not evidence, Appellant's third issue lacks merit.

As to Appellant's fourth issue, Appellant alleges this trial court erred in not giving the jury Appellant's proposed jury instructions of numbers four (4), five (5), eight (8), twelve (12), thirteen (13), sixteen (16), and eighteen (18). Most of said proposed instructions by Appellant were not Suggested Standard Civil Jury Instructions but instead referred to case law not relevant to this case, and, if granted, would have caused confusion to the jurors as to the law. Said proposed instructions were also denied when the substance had been adequately covered in other instructions. Only one proposed instruction on appeal, number eighteen (18), was standardized but was denied due to not being relevant to the instant case.

Case law indicates in reviewing an appellant's challenges to the trial court's jury instructions, Pennsylvania Superior Court will examine trial court's rulings on jury instructions "to determine whether the trial court abused its discretion or offered an inaccurate statement of law controlling the outcome of the case." *Amato v. Bell & Gossett,* 116 A.3d 607, 620 (Pa. Super. Ct. 2015) (citing *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 351 (2014)). Jury instructions are considered as a whole, rather than "isolated fragments". *Com. v. Simpson,* 66 A.3d 253, 274 (Pa. 2013). "A charge will be found adequate unless 'the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to fundamental error.'" *Stewart v. Motts,* 654 A.2d 535, 540 (Pa. 1995) (quoting *Voitasefski v. Pittsburgh Rys. Co.*, 69 A.2d 370, 373 (Pa. 1949)). "A court's charge to the jury will be upheld if it adequately and accurately reflects the law and was sufficient to guide the jury properly in its deliberations." *Com. v. Pers.*, 498 A.2d 432, 434 (Pa. Super. Ct. 1985). Case law is also clear that "[t]he trial court is not required to give every charge that is requested by the parties and its refusal to give a requested charge does not require reversal unless the Appellant was prejudiced by that refusal." *Amato v. Bell & Gossett*, 116 A.3d 607, 621 (Pa. Super. Ct. 2015) (quoting *Com. v. Sandusky*, 77 A.3d 663

(Pa. Super. Ct. 2013)). Moreover, "a trial judge may properly refuse a litigant's requested instructions when the substance thereof had been adequately covered in the general charge." *Perigo v. Deegan*, 431 A.2d 303, 306 (Super. Ct. 1981). "The instructions to the jury are not intended to supplement the arguments of the opposing parties." *Ferrer v. Trustees of Univ. of Pennsylvania*, 825 A.2d 591, 612-13 (Pa. 2002) "A 'trial judge has wide latitude in his or her choice of language when charging a jury, provided always that the court fully and adequately conveys the applicable law.'" *Ettinger v. Triangle-Pac. Corp.*, 799 A.2d 95, 106-07 (Pa. Super. Ct. 2002) (citing *Wagner v. Anzon*, 684 A.2d 570 (Pa. Super. Ct. 1996)). "[I]f a requested point for charge is sufficiently and adequately covered in the trial court's jury instructions, it is not an error to deny the requested point even though it may contain a correct statement of the law." *Thomas by Thomas v. Duquesne Light Co.*, 545 A.2d 289, 290 (Pa. Super. Ct. 1988), aff'd and remanded, 595 A.2d 56 (Pa. 1991).

This trial court will address each jury instruction ruling that Appellant challenges by providing the specific instruction language addressing each of Appellant's issues; however, all of this trial court's jury instructions should be read together as a whole.

Appellant's proposed jury instruction number four (4) indicated:

> #4. A patient may specifically limit his or her consent to an invasive medical procedure to a **particular surgeon**. *Taylor v. Albert Einstein Medical Center*, 723 A.3d 1027, 1034 (Pa. Super. 1998)[1]; *Grabowski v. Quigley*, 684 A.2d 610, 617 (Pa. Super. 1996) ("If the patient is not informed to the identity of the operating surgeon, the situation is a "ghost surgery").

Both the *Taylor* and *Grabowski* cases involved factually different situations from the instant case. In *Taylor*, the patient's mother alleged she had given consent to perform invasive surgery to Dr. Wertheimer, not to Dr. Trinkaus. In fact, when Dr. Trinkaus was specifically asked by the patient's father who would perform surgery, Dr. Trinkaus unequivocally stated Dr. Wertheimer would perform the catheterization. However, Dr. Trinkaus performed the catheterization with Dr. Wertheimer's assistance. In *Grabowski*, patient sued three physicians for battery, medical malpractice, breach of oral contract, and vicarious liability. Patient alleged first physician agreed to perform herniated disc surgery; second physician actually performed majority of surgery due to first physician's unavailability; and a third physician instructed second physician to perform surgery. The consent form which Appellant signed stated surgery would be "performed under the direction of Dr. Quigley, el al". Appellant testified "et al", which was handwritten, looked to him like "ETOL", and that the patient did not know what those words meant until his counsel explained them to him at a deposition. Moreover, the records in *Grabowski* reflected the first physician who obtained the informed consent was unavailable for the procedure so he delegated to a second physician, unknown to the patient, who performed the bulk of the surgery. The first surgeon was not even on the premises but was in another county at the time the patient was placed under anesthesia. In the instant case, clearly all three surgeons' names are listed on the Informed Consent Form that Appellant signed after discussing this form with Appellee. Appellee did not delegate to another surgeon to perform this surgery. Therefore, this trial court read to this jury Pennsylvania Suggested Standard Civil Jury Instruction 14.90,

[1] This case was reversed on other grounds. *See, Taylor v. Albert Einstein Med. Ctr.*,754 A.2d 650 (Pa. 2000).

Informed Consent — Nondisclosure and instructed the jury as follows:

> **THE COURT:** The physician who is responsible for the performance of the surgery cannot delegate to others her duty to provide sufficient information to obtain the patient's informed consent. The physician must personally satisfy this obligation through direct communication with the patient.

(N.T.2 at 146:23-147:3). *See also, generally* (N.T.2 at 138:20-160:17).

With this trial court's reading of all of the given jury instructions, and specifically Pennsylvania Suggested Standard Civil Jury Instruction 14.90, Informed Consent — Nondisclosure, the jury in the instant case was properly and adequately informed that the physician who is responsible for the procedure must be the physician who obtained the patient's informed consent. Moreover, as noted above, after Appellee discussed the Informed Consent form with Appellant, Appellant signed the Informed Consent form with all three surgeons — Dr. Picardo, Dr. Stull, and Dr. Tseng — listed near the top of the form. Dr. Picardo and Dr. Stull together then performed the surgery on Appellant. The jury in the instant case found Dr. Picardo obtained informed consent from Appellant to perform this surgery; therefore, this trial court did not "circumscribe the jury's duty by limiting any material or relevant facts" with this jury instruction which provides the law, not facts. Appellant's issue as to proposed jury instruction number four (4) was properly denied and lacks merit.

Appellant next asserts Appellant's proposed jury instruction number five (5) should have been granted. Appellant's proposed jury instruction number five (5) indicated:

> #5. For consent to be effective. It must be informed and knowledgeable. In order for consent to be informed, there must be a clear understanding by both the parties of "the **nature of the undertaking** and what the possible, as well as expected, results might be." *McSorely v. Deger*, 905 A.2d 524, 528 (Pa. Super. 2006).

Here, this trial court provided the jury with Pennsylvania Suggested Standard Civil Jury Instruction 14.90, Informed Consent — Nondisclosure which adequately stated the law in this area in more detail for the jury to follow rather than a mere reference to "the nature of the undertaking." This trial court instructed the jury as follows:

> **THE COURT:** A physician must obtain a patient's consent to surgery. Patient's consent must also be informed. A patient cannot make an informed decision unless the physician explains the risks that a reasonably prudent patient would need to know to make an informed decision and the alternative choices. This is called informed consent. A patient must have been given a description of the proposed medical procedure or treatment and have been informed about the risks of the procedure or treatment. The patient must also be informed of the viable alternatives a reasonable person would consider important to know in order to make an informed decision about whether or not to undergo the procedure, treatment, or operation.

(N.T.2 at 146:9-22). *See also, generally* (N.T.2 at 138:20-160:17).

This suggested standard instruction, 14.90, adequately provided the necessary guidance as to the applicable relevant law for the jury to apply to the facts as they found the facts as to this particular issue. This trial court also properly indicated to the jury that the jurors are the finders of facts, not the trial court. Since Appellant's proposed jury instruction merely stated a conclusion regarding a "clear understanding by both the parties of 'the nature of the undertaking and what the possible, as well as expected, results might be,'" this trial court properly denied Appellant's request for number five (5). Therefore, Appellant's issue as to proposed jury instruction number five (5) lacks merit as supported above.

Appellant's next issue involves proposed jury instruction number eight (8):

> #8. The primary point of informed consent is that the patient is informed of **all the material facts** from which she can make an intelligent choice as to her course of treatment. *Shinal v. Toms*, 162 A.3d 429, 455 (Pa. 2017).

Here, this trial court provided the jury with the relevant portion of Pennsylvania Suggested Standard Civil Jury Instruction 14.90, Informed Consent — Nondisclosure:

> **THE COURT:** A physician must obtain a patient's consent to surgery. Patient's consent must also be informed. A patient cannot make an informed decision unless the physician explains the risks that a reasonably prudent patient would need to know to make an informed decision and the alternative choices. This is called informed consent. A patient must have been given a description of the proposed medical procedure or treatment and have been informed about the risks of the procedure or treatment. The patient must also be informed of the viable alternatives a reasonable person would consider important to know in order to make an informed decision about whether or not to undergo the procedure, treatment, or operation.

(N.T.2 at 146:9-22).

Additionally, this trial court also provided the jury with part of Appellant's proposed jury instruction number six (6), which Appellant's counsel drafted from *Shinal v. Toms*, 162 A.3d 429,455 (Pa. 2017):

> **THE COURT:** Informed consent requires direct communication between physician and patient and contemplates a back and forth fact-to-face exchange.

(N.T.2 at 147:12-14). *See also, generally* (N.T.2 at 138:20-160:7).

The subcommittee notes of Pennsylvania Suggested Standard Civil Jury Instruction 14.90 specifically explains the reason for disclosure as the "patient's right to know all material facts pertaining to proposed treatment cannot be dependent upon the self-imposed standards of the medical profession." 14.90 (CIV) INFORMED CONSENT — NONDISCLOSURE, Pa. SSJI (CIV), 14.90. As reflected in this subcommittee's notes, "[i]n determining whether a physician breached a duty to a patient to apprise him or her of material risks involved in a recommended medical procedure and available alternatives, the standard of care is not what a reasonable medical practitioner would have done in the situation, but whether the

physician disclosed those risks that a reasonable person would have considered material to a decision of whether or not to undergo treatment." *Id*. Said instruction was properly read to this jury to apply to the facts as the jury found them. Thus, Appellant's issue as to proposed jury instruction number eight (8) was properly denied and also lacks merit.

Appellant next asserts Appellant's proposed jury instruction number twelve (12) should have been granted. Appellant's proposed jury instruction number twelve (12) indicated:

> #12. Informed consent is the product of the physician-patient relationship. The patient is in the vulnerable position of entrusting his or her care and well-being to the physician based upon the physician's **education, training, and expertise**. It is incumbent upon the physician to cultivate a relationship with the patient and to familiarize himself or herself with the **patient's understanding and expectations** . . . Only by personally satisfying the duty of disclosure may the physician ensure that consent truly is informed." *Shinal v. Toms*, 162, A.3d at 453-454.

Here, this Trial Court provided the jury with the relevant portion of Pennsylvania Suggested Standard Civil Jury Instruction 14.90, Informed Consent — Nondisclosure:

> **THE COURT:** A physician must obtain a patient's consent to surgery. Patient's consent must also be informed. A patient cannot make an informed decision unless the physician explains the risks that a reasonably prudent patient would need to know to make an informed decision and the alternative choices. This is called informed consent. A patient must have been given a description of the proposed medical procedure or treatment and have been informed about the risks of the procedure or treatment. The patient must also be informed of the viable alternatives a reasonable person would consider important to know in order to make an informed decision about whether or not to undergo the procedure, treatment, or operation.

(N.T.2 at 146:9-22). See also, generally (N.T.2 at 138:20-160:17).

This portion of the jury instruction adequately contemplated Appellant's issue and provided the necessary guidance for the jury to apply to the facts as they found the facts. Thus, Appellant's issue as to proposed jury instruction number twelve (12) was properly denied and also lacks merit.

Appellant next asserts Appellant's proposed jury instruction number thirteen (13) should have been granted. Appellant's proposed jury instruction number thirteen (13) indicated:

> #13. Lack of informed consent is the legal equivalent of no consent. *Montgomery v. Bazaz-Sehgal*, 798 A.2d 742, 748 (Pa. 2002).

As indicated above, *Montgomery v. Bazaz-Sehgal*, 798 A.2d 742 (Pa. 2002), is factually distinguishable from the instant case. In the instant case, the jury had sufficient facts to find Appellant consented to have the surgery performed as to the excision of her Bartholin's gland. In *Montgomery v. Bazaz-Sehgal*, however, the patient had not consented to an extra

procedure, an implantation, prior to surgery. In this instant case, this trial court provided the jury with relevant portions of both Pennsylvania Suggested Standard Civil Jury Instruction 14.90, Informed Consent — Nondisclosure and Instruction 14.110, Informed Consent — Damages:

> **THE COURT:** A physician must obtain a patient's consent to surgery. Patient's consent must also be informed. A patient cannot make an informed decision unless the physician explains the risks that a reasonably prudent patient would need to know to make an informed decision and the alternative choices. This is called informed consent. A patient must have been given a description of the proposed medical procedure or treatment and have been informed about the risks of the procedure or treatment. The patient must also be informed of the viable alternatives a reasonable person would consider important to know in order to make an informed decision about whether or not to undergo the procedure, treatment, or operation.

(N.T.2 at 146:9-22).

This trial court also read this suggested standardized instruction to the jury as to damages:

> **THE COURT:** A physician who proceeds with procedure or treatment without the patient's informed consent is liable for all injuries caused by that procedure or treatment regardless of whether the procedure's performed or the treatment is administered with the proper skill and care. Damages are recoverable for this unauthorized touching, regardless of whether an actual injury occurs.

(N.T.2 at 148: 16-23). *See also, generally* (N.T.2 138:20-160:17).

As indicated above, these suggested standard civil jury instructions provided by this trial court to this jury adequately addressed these concepts and provided necessary guidance on the law to the jurors for the jurors to apply to the facts as they found them. Appellant's issue as to proposed jury instruction number thirteen (13) was properly denied and lacks merit.

Appellant also asserts Appellant's proposed jury instruction number sixteen (16) should have been granted:

> # 16. "The patient is entitled to choose his own physician and he should be permitted to [agree to] or refuse to accept [a] substitution . . . **The patient is entitled to the services of the particular surgeon with whom he or she contracts** . . . If the surgeon employed merely assists the . . . other physician in performing the operation, it is the . . . other physician who becomes the operating surgeon. If the patient is not informed to the identity of the operating surgeon, the situation is an (impermissible) 'ghost surgery'." *Taylor*, at 1036, *Grabowski*, at 617.

Here, this trial court provided this jury with the relevant portions of Pennsylvania Suggested Standard Civil Jury Instruction 14.90, Informed Consent — Nondisclosure:

> **THE COURT:** The physician who is responsible for the performance of the surgery cannot delegate to others her duty to provide sufficient

information to obtain the patient's informed consent. The physician must personally satisfy this obligation through direct communication with the patient.

(N.T.2 at 146:23-147:3). *See also, generally* (N.T.2 at 138:20-160:17).

This instruction informed the jury that the physician responsible for the procedure must be the physician who obtained the patient's informed consent. Moreover, the subcommittee notes expressly indicated this instruction focuses on who must disclose the risks: "The physician who performs an operation on a patient has a non-delegable duty to personally obtain the patient's informed consent. 14.90 (CIV) INFORMED CONSENT — NONDISCLOSURE, Pa. SSJI (CIV), 14.90 (citing *Shinal v. Toms*, 162 A.3d 429 (Pa. 2017)). Further, as indicated above, Appellant signed the Informed Consent form with all three physicians listed: Dr. Picardo, Dr. Stull, and Dr. Tseng; however, Dr. Picardo was the only surgeon who dealt with the Informed Consent form with Appellant. Dr. Picardo and Dr. Stull performed the surgery. As discussed above, both *Taylor v. Albert Einstein Medical Center* and *Grabowski v. Quigley* are distinguishable from the instant case. In the instant case, this trial court provided the jury with the proper suggested standard civil jury instructions to address adequately these concepts and provided the jury with the necessary guidance on the law for the jury to apply to the facts as they found them. Appellant's issue as to proposed jury instruction number sixteen (16) was properly denied and lacks merit.

Appellant also asserts Appellant's proposed jury instruction number eighteen (18) should have been granted:

#18. (SSJI 14.100 INFORMED CONSENT—MISREPRESENTATION OF PHYSICIAN'S PROFESSIONAL CREDENTIALS, TRAINING OR EXPERIENCE"

A physician is required to obtain the patient's informed consent to proceed with surgery. A patient's consent is not informed if the physician knowingly misrepresents her professional credentials, training, or experience.

The patient is not required to prove that she would have chosen differently, had the physician disclosed her true credentials, training, or experience. The patient must prove only that the misrepresentation was a "substantial factor" in the decision whether or not to undergo the procedure or treatment.

A physician may not argue as a defense that a reasonable person would have agreed to undergo the procedure or treatment even had the physician disclosed her true credentials, training, or experience. What a reasonable person would have chosen to do is irrelevant. The patient has the right to choose.

Pennsylvania Suggested Standard Civil Jury Instruction. Fourth Edition, No. 14.100.

In the instant case, despite evidence indicating that Dr. Picardo did not misrepresent her personal credentials as to training and experience, Appellant argued Dr. Picardo misrepresented who would be the surgeon. Additionally, no evidence was presented that Dr. Picardo misrepresented her "true" professional credentials, training, or experience. Since

no evidence of any misrepresentation occurred by the Appellee, this jury instruction was not appropriate. Appellant also argued she was "not accurately advised of the identity of the surgeon who would be performing the surgery on her." Assuming *arguendo* this statement as true, this requested suggested standardized civil jury instruction is not proper or applicable as this instruction does not contemplate the type of misrepresentation alleged by Appellant. Appellant's issue as to proposed jury instruction number eighteen (18) was properly denied and lacks merit.

For all of the above stated reasons, all of Appellant's issues on appeal lack merit. This trial court respectfully requests the Pennsylvania Superior Court affirm this trial court's rulings and uphold this jury's verdict.

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

IN RE: THE NAME CHANGE OF SAM LEROY WOOD A/K/A SANTO LEROY FARELLA

NAMES / CHANGE

The Pennsylvania Supreme Court has stated that the need "for judicial involvement centers on governmental concerns that persons not alter their identity to avoid financial obligations."

NAMES / CHANGE

A person cannot change his or her name without court approval.

NAMES / CHANGE

The Judicial Name Change Statute provides a procedure for the Trial Court to follow, which is mandated by statute.

NAMES / CHANGE

Case law is clear; the primary purpose of the Judicial Change of Name Statute is to prevent fraud. "We must keep in mind, however, that the primary purpose of the Judicial Change of Name Statute, other than with regard to minor children, is to prohibit fraud by those attempting to avoid financial obligations."

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 10938 - 2019
1072 WDA 2019

Appearance: Melissa H. Shirey, Esq., for Same Leroy Wood A/K/A Santo Leroy Farella, Appellant

1925(a) OPINION

Domitrovich, J. September 12, 2019

On July 3rd, 2019, this Trial Court entered an Order denying Appellant's Petition for Change of Name after two (2) hearings due to Appellant's failure to meet a statutory requirement. On appeal, Sam Leroy Wood a/k/a Santo Leroy Farella's (hereinafter "Appellant") raises four (4) issues which this Trial Court has consolidated into a single issue: Whether this Trial Court properly denied Appellant's Petition for Change of Name for failure to abide by the Judicial Change of Name Statute wherein the Prothonotary of Erie County, Pennsylvania's Judgment and Lien Search indicated Appellant had an outstanding judgment against him in the amount of one hundred fourteen thousand dollars ($114,000.00) at Docket Number #10657-2002, *Edward Buckner and Margaret Buckner v. Sam Farella, d/b/a Farella & Sons Builders*. Appellant also admitted during the first hearing which was held on May 16, 2019 that Farella & Sons Builders was his former business so this judgment is admittedly against Appellant under a different name Sam Farella. (Notes of Testimony, Petition For Name Change Proceedings, May 16, 2019, 4:20-21).

This Trial Court followed the statutory procedure mandated by the plain reading of the Judicial Change of Name Statute which requires petitioner to present proof he has no liens or judgments against him. As relevant here, the plain reading of the statute states: "The petitioner **must** present to the court ... [a]n official search of the proper offices of the county

where petitioner resides and of another county where petitioner has resided within five years prior to filing the petition showing that there are no judgments, decrees of record or other similar matters against the petitioner." 54 Pa.C.S. § 701(a.1) (emphasis added). This statute clearly requires a petitioner to provide the trial court with documentation demonstrating no judgments or liens exist against the petitioner in any county said petitioner has resided within in the past five years. It is undisputed Appellant has resided within Erie County, Pennsylvania for the past five (5) years. It is undisputed the Prothonotary of Erie County Pennsylvania's Court Exhibit A which is attached demonstrates Appellant has an outstanding valid judgment in Erie County which remains unsatisfied.

The Pennsylvania Supreme Court has stated the need "for judicial involvement centers on governmental concerns that persons not alter their identity to avoid financial obligations." *In Re: Change of Name of Zachary Thomas Andrew Grimes to Zachary Thomas Andrew Grimes-Palaia*, 609 A.2d 158, 160 (Pa. 1992). Therefore, the intent of the Pennsylvania Judicial Name Change Statute is to prevent a petitioner from attempting to avoid his financial obligations. In the instant case, Appellant did not provide this Trial Court with any document indicating satisfaction of the outstanding judgment against him, and thus Appellant failed to meet the necessary legislative criteria for this Trial Court to change his name. This Trial Court followed the relevant statute which has no ambiguous language and is straightforward in its requirements, despite counsel for Appellant's argument to the contrary. This Trial Court cannot use discretion to disregard legislative requirements of any statute.

Procedurally, this Trial Court will review the two case dockets that are relevant:

(1) Docket Number #10657-2002: Edward Buckner and Margaret Buckner v. Sam Farella, d/b/a Farella & Sons Builders (Appellant's outstanding valid judgment); and

(2) Docket Number #10938-2019: In Re: The Name Change Of Sam Leroy Wood a/k/a Santo Leroy Farella (as to Appellant's Change of Name Petition).

As to the first case at *Docket Number #10657-2002: Edward Buckner and Margaret Buckner v. Sam Farella, d/b/a Farella & Sons Builders*: On February 19, 2002, a Complaint was filed by Edward and Margaret Buckner against Sam Farella, d/b/a Farella & Sons Builders alleging damages in the amount of one hundred fourteen thousand dollars ($114,000.00). Appellant admitted he is Sam Farella, d/b/a Farella & Sons Builders of 5971 Teller Road, Girard, Pennsylvania 16417. On March 26, 2002, a Sheriff's Return was returned as "unable to locate" Sam Farella at said address. On October 2, 2002 Pennsylvania State Constable David Cimino stated he personally served a Notice to Defend upon Barbara Farella, Sam Farella's wife at 5971 Teller Road, Girard, Pennsylvania 16417. Proof of service was filed on November 6, 2002. On November 6, 2002, counsel for Edward Bucker and Margaret Buckner sent Sam Farella, d/b/a Farella & Sons Builders a Default Notice for Appellant's failure to respond to this Complaint. On November 21, 2002, counsel for Edward Bucker and Margaret Buckner filed a "Praecipe For Default Judgment." The Erie County Prothonotary's Office entered default judgment in the amount of one hundred fourteen thousand dollars ($114,000.00) against Sam Farella and Farella & Sons Builders. On November 22, 2002, the Erie County Prothonotary's Office entered a Docket entry indicating a Notice of Entry of Judgment was sent to Sam Farella, d/b/a Farella & Sons Builders.

As to the second case, which is the instant case on appeal, *Docket Number #10938-2019: In Re: The Name Change Of Sam Leroy Wood a/k/a Santo Leroy Farella*: On April 1, 2019,

Sam Wood a/k/a Santo Leroy Farella filed a Petition for Change of Name wherein Petitioner sought to change his name from "Sam Leroy Wood" to "Santo Leroy Farella." On May 16, 2019 a hearing was held on Appellant's Petition for Change of Name at which Appellant provided Proofs of Publication in the *Erie Times-News* and the *Erie County Legal Journal*. He also submitted his fingerprints to the Pennsylvania State Police Central Repository who indicated that he is subject to 18 Pa.C.S. Chapter 91, and noted this on his criminal history record information. At the time of the first hearing, this Trial Court discovered Appellant had an outstanding judgment against him which Appellant admitted Farella & Sons Builders was his former company. This Trial Court continued the hearing to July 1, 2019 at 9:30 a.m. "in order to provide [Appellant] additional time to satisfy this judgment and possibly obtain counsel." *See* Trial Court Order dated May 16, 2019.

Statutory Law and Relevant Case Law Analysis:

A person cannot change his name without court approval. 54 Pa.C.S. § 701(a). The Pennsylvania Judicial Name Change Statute provides a procedure for the Trial Court to follow, mandated by statute. *Id*. Case law is clear: the primary purpose of the Pennsylvania Judicial Change of Name Statute is to prevent fraud. "We must keep in mind ... the primary purpose of the Judicial Change of Name Statute, other than with regard to minor children, is to prohibit fraud by those attempting to avoid financial obligations." *Matter of McIntyre*, 715 A.2d 400, 402 (Pa. 1998) (citing *Commonwealth v. Goodman*, 676 A.2d 234 (Pa. 1996); *In re: Grimes*, 609 A.2d 158 (Pa. 1992)). Section 701 of the Pennsylvania Judicial Name Change Statute was amended to include the procedural requirements, and the updated statute became effective on January 31, 2005.

At the time of the hearing on July 1, 2019, Appellant's counsel attempted to challenge the validity of the unsatisfied judgment by stating erroneously to this Trial Court that the judgment against Appellant was only valid for five (5) years. To the contrary, in fact, creditors have twenty (20) years to execute against personal property after the entry of a judgment. 42 Pa.C.S. § 5529. The twenty (20) year statutory period for execution permits creditors from executing on personal property more than twenty years after the judgment was entered as in the instant case. Moreover, judgment liens are only required to be renewed every five (5) years in order to preserve their lien priority against real estate. See *Shearer v. Najtzinger*, 747 A.2d 859, 861 (Pa. 2000) ("Thus, a writ of revival of a judgment lien does nothing more than preserve the judgment creditor's existing rights and priorities."). Therefore, in the instant case, the judgment against Appellant in the amount of one hundred fourteen thousand dollars ($114,000.00) is valid since judgment was entered against Appellant on November 21, 2002, which is less than twenty (20) years. At both hearings, Appellant failed to demonstrate he followed the necessary procedures to challenge said judgment by either opening or striking the judgment. *See* Pa.R.C.P. No. 2959. Since, no challenge was made, a valid judgment remains recorded against Appellant. Thus Appellant did not meet all statutory requirements necessary for this Trial Court to change Appellant's name.

Moreover, in Appellant's counsel's "Memorandum of Law In Support Of The Petition For Change Of Name," Appellant cites two cases which are distinguishable to suggest this Trial Court disregard a recorded judgment. *In Re: A.S.D.*, 175 A.3d 339 (Pa. Super. Ct. 2017) involves a trial court's abuse of discretion when the trial court denied the petition and did not hold a hearing after the petitioner met the statutory prerequisites which is unlike the

instant case. Appellant also cites *In re Miller*, 824 A.2d 1207 (Pa. Super. Ct. 2003), which involves a petitioner who complied with all statutory requirements which again is unlike the instant case. Moreover, the applicable statute in the instant case is Section 701 of the Pennsylvania Judicial Name Change Statute amended in 2005 to include the procedural requirements. The *In re Miller* case was decided two years earlier under the older statute.

Therefore, this Trial Court properly denied Appellant's Petition for Change of Name since Appellant did not meet all necessary procedural requirements under the Pennsylvania Judicial Change of Name Statute, 54 Pa.C.S. §701. Thus, for all the reasons set forth above, this Trial Court respectfully requests the Pennsylvania Superior Court affirm this Trial Court.

BY THE COURT

/s/ **Stephanie Domitrovich, Judge**

COMMONWEALTH OF PENNSYLVANIA
v.
RAYMOND DALE PAYNE

HOMICIDE / MURDER / DEGREES

Under 18 Pa.C.S.A. Section 2502, effective March 26, 1974, criminal homicide constitutes murder of the first degree when it is committed by an intentional killing. 18 Pa.C.S.A. §2502(a). A criminal homicide constitutes murder of the second degree when committed while the defendant was engaged as a principal or an accomplice in the perpetration of a felony. 18 Pa.C.S.A. §2502(b). Pursuant to 18 Pa.C.S.A. Section 2502(c), "[a]ll other kinds of murder shall be murder of the third degree." 18 Pa.C.S.A. §2502(c). Under 18 Pa.C.S.A. Section 2502(d), "intentional killing" is "killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing." 18 Pa.C.S.A. §2502(d).

CRIMINAL LAW / EVIDENCE / WEIGHT AND SUFFICIENCY / CIRCUMSTANTIAL EVIDENCE

The Commonwealth may sustain its burden to prove every element of a crime beyond a reasonable doubt by wholly circumstantial evidence and the trier of fact is free to believe all, part, or none of the evidence.

HOMICIDE / MURDER / FIRST DEGREE

To obtain a conviction for first-degree murder, the Commonwealth must demonstrate that a human being was unlawfully killed, that the defendant was the killer, and that the defendant acted with malice and a specific intent to kill.

HOMICIDE / EVIDENCE / PRESUMPTIONS AND INFERENCES / INTENT OR MENS REA - MALICE

Specific intent and malice may be inferred through circumstantial evidence, such as the use of a deadly weapon on a vital part of the victim's body.

HOMICIDE / MURDER / MOTIVE

The Commonwealth is not required to prove motive to establish guilt even where the crime charged is murder of the first degree.

HOMICIDE / EVIDENCE / PRESUMPTIONS AND INFERENCES / MALICE

Actions of the accused which occur before, during, and after are admissible as evidence to prove malice.

HOMICIDE / EVIDENCE / ADMISSIBILITY IN GENERAL / SUBSEQUENT INCRIMINATING OR EXCULPATORY CIRCUMSTANCES / SUPPRESSION OR DESTRUCTION OF EVIDENCE

Evidence of acts to conceal a crime, such as disposing of the victim's body, are relevant to prove the accused's state of mind or intent.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 2562 of 1976

Appearances: Eric V. Hackwelder, Esq. and Anderson T. Bailey, Esq., on behalf of Defendant Raymond Dale Payne
John H. Daneri, Erie County District Attorney, on behalf of the Commonwealth of Pennsylvania

OPINION

Brabender, Jr., J. August 12, 2020

This matter is before the Court on remand by the Superior Court of Pennsylvania for a degree of guilt determination with respect to the August, 1975 killing of Debra Lynn Gama. *See Commonwealth v. Payne, 604 WDA 2016 (Pa. Super. Ct., April 29, 2019)*. The background leading up to this degree of guilt hearing before this Court on June 25, 2020 is summarized, as follows:

In 1977, the Defendant, Raymond Dale Payne, pled guilty to a general charge of the murder of Debra Lynn Gama, and three Erie County judges, Lindley McClelland, William Pfadt and President Judge Edward Carney, were empaneled to decide Defendant's degree of guilt. A degree of guilt hearing was held before the panel of three judges (the Degree of Guilt Panel) and on July 18, 1977 the Panel entered its decision, finding the Defendant guilty of murder in the first degree.

At the original degree of guilt hearing, the Commonwealth presented evidence to support its position that the Defendant committed first degree murder. Specifically, the Commonwealth argued the Defendant murdered Debra Lynn Gama while raping her. Her clothed body was found floating in Cussewago Creek, off Center Road, 12 miles north of Meadville, in Crawford County, Pennsylvania. As part of its case-in-chief, the Commonwealth presented the testimony of one Anthony Lee Evans, who was incarcerated with the Defendant at the Erie County Prison. Evans testified that the Defendant admitted to him that he strangled the victim in the woods after he raped her; that her death was a culmination of a sexual fantasy that he had been living with for a long time; and that he liked to tie women up and do crazy things to them. *See Commw. Ex. 2e*. The Commonwealth also called Paul R. Daube, a chemist employed with the Pennsylvania State Police, to corroborate Evans' testimony that the victim died while protesting a sexual attack upon her. *See Commw. Ex. 2c*. The Commonwealth also presented a statement made by the Defendant to Crawford County Assistant District Attorney Donald E. Lewis, wherein he confessed, with counsel present, to the murder. The Defendant basically explained that Gama died accidentally after she was asphyxiated by a clothesline rope he had tied around her neck and to two trees. *See Commw. Ex. 1*. Per the Superior Court's remand decision of April 29, 2019, the Degree of Guilt Panel determined this statement of Defendant was similar to Evans' testimony, with the exception for the manner in which the victim died.

At the conclusion of the hearing, the Defendant argued this was third degree murder. The Panel rejected that argument and convicted the Defendant of first degree murder. The Defendant was therefore sentenced by the Court *en banc* to life imprisonment, without parole, on August 5, 1977. The Defendant then, on August 18, 1977, filed the first of several appeals and Post-Conviction Hearing Act (PCRA) petitions.

The conviction and judgment of sentence were upheld on direct appeal. After several unsuccessful attempts at post-conviction relief, on January 8, 1997, the Defendant filed a PCRA petition requesting DNA testing on seminal fluid that was recovered from the victim's body. The PCRA court denied his petition. The Pennsylvania Superior Court affirmed that decision and the Pennsylvania Supreme Court denied Payne's Petition for Allowance of Appeal. On February 6, 2003, the Defendant filed another motion for DNA testing pursuant to the then-newly passed provision of the PCRA permitting DNA testing under certain

circumstances. The PCRA court again denied his motion, and he appealed to the Superior Court. The Superior Court affirmed the trial court decision and the Supreme Court later denied his Petition for Allowance of Appeal.

Undeterred, the Defendant filed a complaint in the United States District Court for the Western District of Pennsylvania against the Erie County District Attorney's Office, alleging violation of 42 U.S.C. §1983 for its refusal to permit DNA testing. While his case was being litigated in federal court, the Defendant filed another motion for DNA testing. On October 4, 2011, the PCRA court again denied relief and both the Superior and Supreme Courts also denied him relief. However, on December 16, 2014, the United States District Court signed a stipulated order permitting the post-conviction DNA testing. The DNA test results established conclusively the Defendant was excluded and not a contributor to the seminal fluid found on the victim's body.

Based on this new evidence, the Defendant filed another PCRA petition asserting that he is entitled to a new trial or degree of guilt hearing based on after-discovered DNA evidence. The PCRA court again denied him relief and the Defendant filed another appeal to the Superior Court.

On April 29, 2019, the Superior Court held the Defendant was entitled to a new degree of guilt hearing. According to the Superior Court, its only issue (with regard to the trial Court's denial of PCRA after-discovered evidence claim) was whether the Defendant had established by a preponderance of the evidence that the DNA evidence would have likely changed the outcome of the trial had it been introduced. Based upon the record before the Superior Court, it held the DNA evidence would have likely changed the outcome of the hearing because the Commonwealth's theory of the case was that the Defendant killed the victim while sexually assaulting her. In reaching its decision, the Superior Court noted that during closing argument to the Panel the prosecution repeatedly emphasized the evidence of seminal fluid and argued that the Defendant raped Gama and the presence of seminal fluid was proof of the intent required for a first degree murder conviction. The Superior Court determined that, because the DNA evidence was uncontroverted that the Defendant was not the source, the three-judge Panel erred in placing such significant weight on said evidence when making its decision. The Superior Court further found this evidence discredited the testimony of Anthony Lee Evans, a key witness against the Defendant at the time. The Superior Court noted the Degree of Guilt Panel summarized in its Opinion other evidence at the hearing, but the Panel did not place any weight on that other evidence in arriving at the conclusion of first degree murder. The Superior Court determined the Degree of Guilt Panel relied ***exclusively*** upon the testimony of Evans and Paul Daube, the chemist. *Commonwealth v. Payne, 604 WDA 2016, p. 13*. The Superior Court therefore concluded the Defendant satisfied the "after-discovered evidence" requirements, reversing the decision of the PCRA court and remanding the matter for a new degree of guilt hearing. *Commonwealth v. Payne, 604 WDA 2016, p. 15*.

The Commonwealth filed a Petition for Allocatur to the Pennsylvania Supreme Court on May 29, 2019, and same was denied on October 29, 2019. The Superior Court returned the record to the Court of Common Pleas on November 15, 2019. On December 11, 2019, the Commonwealth notified this Court, pursuant to Pa.R.Crim.P. 590(C), of its election for the Court to determine Defendant's degree of guilt, rather than a jury.

DEGREE OF GUILT HEARING HELD JUNE 25, 2020

The degree of guilt hearing was held before the undersigned on June 25, 2020. It is undisputed that the Defendant, by his own admission, is guilty of murder. The sole issue for this Court to decide is whether Defendant is guilty of murder in the first or third degree.[1] At the time of the murder, Defendant was a 38-year old teacher of the victim at Strong Vincent High School in Erie, Pennsylvania.[2] The victim, known by family and friends as Debbie Gama, was 16 years old and about to enter her senior year at the time of her strangulation death.

The parties submitted pre- and post-hearing briefs, delineating their respective positions. The Commonwealth's position is, under the totality of the circumstances, the Defendant is guilty of first degree murder. The Commonwealth asserts Gama died by ligature strangulation; the evidence surrounding the strangulation is sufficient to establish the specific intent required for first degree murder; and specific intent and malice may be inferred through circumstantial evidence. The Commonwealth asserts the record establishes copper wire ligature was around the victim's neck for no less than four to six minutes so as to cause Gama's death, and no drugs were in her system, contrary to an explanation offered by the Defendant in support of his claim of accidental death.

The Defendant's position is he should be convicted only of third degree murder, as Gama's death was accidental. The Defendant asserts the Commonwealth cannot establish an intentional killing because there were no signs of trauma, other than the embedded wire around the victim's neck. Eric Vey, M.D., a pathologist who testified at the June 25, 2020 degree of guilt hearing, opined that the neck pressure applied to the ligature was between 4.4 and 11 pounds. Defense counsel assert that the Defendant, had he intended to kill Gama, very likely would have applied 11 pounds or more of force and pressure. Defense counsel further assert neither Defendant's post-mortem actions in concealing Gama's body, nor Payne's October 8, 1976 statement to the Crawford County assistant D.A., establish an intentional killing. The defense asserts the following are more suggestive of an accidental death: 1) the absence of trauma "beyond the embedded wire" around the victim's neck; 2) the wire around Gama's neck could have become embedded after the body was submerged in a pond and creek; 3) the Defendant's belief he did not leave enough slack in a rope ligature he fastened around the neck; and 4) the victim strangled to death because she was unstable due to the presence of drugs in her system; and fell forward causing her strangulation. The defense further asserts the evidence does not support a finding of first or second degree murder, therefore, the Court must convict the Defendant of third degree murder.

Factual stipulations of the parties were submitted prior to the hearing, as follows:

1. Debbie Gama died of acute asphyxia due to ligature strangulation.

2. Debbie Gama was last seen by family members as she left her home the morning of August 8, 1975.

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[1] Under 18 Pa.C.S.A. Section 2502, effective March 26, 1974, criminal homicide constitutes murder of the first degree when it is committed by an intentional killing. 18 Pa.C.S.A. §2502(a). A criminal homicide constitutes murder of the second degree when committed while the defendant was engaged as a principal or an accomplice in the perpetration of a felony. 18 Pa.C.S.A. §2502(b). Pursuant to 18 Pa.C.S.A. Section 2502(c), "[a]ll other kinds of murder shall be murder of the third degree." 18 Pa.C.S.A. §2502(c). Under 18 Pa.C.S.A. Section 2502(d), "intentional killing" is "killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing." 18 Pa.C.S.A. §2502(d).

[2] Defendant's date of birth is July 23, 1937. *See Commonwealth Ex. No. 1, pp. 3-4; Transcript of Proceedings, Degree of Guilt Hearing, June 25, 2020 (Tr. 6/25/20), p. 13.*

3. The victim's body was found floating in Cussewago Creek on the evening of August 12, 1975.

4. Debbie Gama had copper wire wrapped around each wrist. Her ankles were bound with the wire, and the wire was embedded in the skin completely around her neck.

5. Toxicology results from the victim's blood indicate blood alcohol of .06 percent and the presence of acetaminophen.

6. Vaginal and rectal swabs taken from Gama were positive for seminal acid phosphatase, which is a presumptive test of the presence of semen.

7. DNA testing performed on the swabs excludes Defendant as a contributor of the seminal material.

8. Defendant was arrested on September 23, 1976, and on October 8, 1976, he confessed to being responsible for Debbie Gama's death.

9. Debbie Gama's jewelry was found in a well or septic tank on Defendant's property; her shoes were buried on land adjacent to Defendant's property, as was a spool of copper wire.

10. None of Debbie Gama's jewelry, nor any rope, was located at the site where Defendant said she had died, Private Samuel Everett Hull Memorial Park in or near Waterford, Erie County, Pennsylvania.

11. Four (4) cement blocks, each weighing 40 pounds, were found in four and one-half feet of water approximately 15 feet from the shoreline of the pond on Defendant's property.

Commonwealth's Pre-Hearing Submission; Transcript of Proceedings, Degree of Guilt Hearing, June 25, 2020 (Tr. 6/25/20), pp. 3-6.

The parties agreed to the admission in this record of evidence and testimony introduced at the 1977 degree of guilt hearing. Also, on June 25, 2020, the Commonwealth presented the testimony of three witnesses: Eric Vey, M.D., forensic pathologist; Myshelle Will, sister of the victim; and Robin Kloss, high school classmate and close friend of the victim. The Commonwealth submitted a number of exhibits, including transcripts of testimony introduced at the 1977 degree of guilt hearing, some of which served more as background information for the case at bar, rather than evidence of the degree of guilt. *See Tr. 6/25/20, pp. 6-11.*[3]

[3] See Commw. Ex. 2b, the 1977 Degree of Guilt Hearing Testimony of Donald E. Lewis. Lewis was the assistant district attorney of Crawford County, Pennsylvania, who participated in the investigation of the murder of Gama. Lewis first came in contact with Payne on October 8, 1976, the date Payne gave a statement to Lewis at the Crawford County Court House in Meadville, Pennsylvania, in the presence of Payne's attorney, Leonard G. Ambrose, and a court reporter. *Commw. Ex. 2b, pp. 25-26.* Lewis testified concerning Payne's statement and the police investigation See also Commw. Ex. 2c, the 1977 Degree of Guilt Hearing Testimony of Paul R. Daube. Daube was the chemist

The Defendant did not testify, call witnesses or introduce additional evidence in the case at bar.[4]

EVIDENTIARY REVIEW

A. Statements of the Defendant, Raymond Payne

To bolster its position that the Defendant is guilty of first degree murder, the Commonwealth submitted into evidence, without objection, the Defendant's prior statements of the manner of death. The statements are inconsistent with the conclusions and opinions of the pathologists, Drs. Wilbur C. Thomas and Eric Vey, who were called as witnesses in this case.

1. Oral Statement of the Defendant of October 8, 1976 to Donald E. Lewis, Assistant District Attorney, Crawford County, Pennsylvania

Admitted as Commonwealth Exhibit 1 was the transcript of the 55-page oral statement of Payne of October 8, 1976 wherein he confessed to the killing of Debbie Gama. *Tr. 6/25/20, pp. 7, 11*. Payne related the following events: Payne's date of birth is July 23, 1937. *Commw. Ex. 1, pp. 3-4*. Present during his Mirandized statement were Donald E. Lewis, Assistant District Attorney, Crawford County, Pennsylvania, and Payne's attorney, Leonard G. Ambrose, Esq. *Commw. Ex. 1, pp. 4-10*. Payne first met Gama as a student at the school where Payne taught. Gama was one of his students. *Commw. Ex. 1, p. 13*. The morning of Friday, August 8, 1975, Payne decided to ride around the Peninsula with a new Polaroid camera he had in the vehicle and take pictures of his wife. While at the peninsula he smoked marijuana, then stopped for coffee at Mr. Donut on Sixth Street. He decided to drive by a flat he used to own on Raspberry Street. Between 11:00 a.m. and 11:30 a.m., he spotted Debbie Gama who was standing at Tenth and Raspberry Streets. Although to Payne something seemed to bother Gama, she denied anything was wrong. Payne asked Gama if she wanted to ride shotgun for a while and she agreed. He told her to get in the truck and Gama obliged. Payne stated that when he had coffee he had also taken some "downs," or Meprobamate pills. *Commw. Ex. 1, pp. 15-20; 40*.

Gama asked for gum, and Payne told her there was gum in the glove compartment. When Gama opened the glove compartment, she saw the bottle of Meprobamate pills. When Gama asked if she could have a couple of pills, Payne stated he told her he didn't want her to take "something that will hurt you or something." *Commw. Ex. 1, p. 20*. Payne stopped

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[3 continued] with the Pennsylvania State Police Crime Laboratory in Lawrence Park, Pennsylvania who participated in the collection and testing of smears from the victim's body. Subsequent DNA testing revealed Defendant was not the contributor of the seminal material tested. See also Commw. Ex. 2d, the 1977 Degree of Guilt Hearing Testimony of John Martin. Martin, a member of the Criminal Investigation Unit of the Pennsylvania State Police, Lawrence Park, Pennsylvania, served the warrant on Payne charging him with the murder of Gama. Martin also participated in the recovery of the victim's jewelry and sandals, and identification of evidence at the hearing. See also Commonwealth Ex. 2e, the 1977 Degree of Guilt Hearing Testimony of Anthony Lee Evans. Evans was a key witness against the Defendant at the 1977 hearing. Evans' testimony the Defendant admitted he raped Gama has been largely discredited by the DNA test results. On June 25, 2020, the Commonwealth asked the Court to disregard Evans' testimony as unreliable. Defendant concurs with the assessment Evans' testimony is unreliable. *Tr. 6/25/20, pp. 86, 75*. The Court concurs Evans' testimony is not dispositive of the issue of degree of guilt.

[4] Following the hearing, on July 6, 2020 upon Defendant's motion and without objection, the Court took judicial notice of an ABC News article of March 28, 2005. The article concerned a statement of the victim's mother about a dispute between the victim and her mother. The evidence was offered to impeach the testimony of Myshelle Will that Gamma was happy and on her way to the beach on the morning of Friday, August 8, 1975, the day she disappeared. On July 13, 2020, the Court granted the Commonwealth's request to re-open/supplement the record to clarify the date of the dispute between Gamma and her mother was Thursday, August 7, 1975, rather than Friday, August 8, 1975, the day Gamma was last seen. These exhibits were not dispositive of the issue of degree of guilt.

at the Baldwin Building and told Gama there was a girls' room there where she could get water to wash down the pills. Payne stated Gama removed the bottle of pills from the glove compartment; he let her out of the vehicle at the corner; and told her he would move the vehicle to the parking lot around the back and wait for her there. Payne parked the vehicle around the back. Gama returned to the vehicle, and replaced the bottle in the glove compartment. Later, Payne found some pills were left in the bottle. *Commw. Ex. 1, pp. 20-21*.

Payne stated he next drove up French Street and asked Gama if he could take bondage pictures of her. When she hesitated, he explained bondage pictures were pictures of people being tied up, and that it turned some people on. Payne repeatedly told Gama he wouldn't hurt her. Payne stated Gama said she believed him and agreed to the photo shoot. *Commw. Ex. 1, pp. 21-22*.

Payne detailed the route he proceeded to take after Gama consented to the photo shoot. He stated as he continued to drive, he said, "If you agree, we'll have to go somewhere where people can't see." *Commw. Ex. 1, p. 22*. Payne stated he drove to a park in Waterford [hence, the reason Erie County assumed jurisdiction] which he thought was named the Everett C. Hall Community Park [sic]. On the way, he smoked marijuana. He pulled into the woods and removed a blanket from the vehicle. He also removed a clothesline he purchased at K-Mart earlier that day on the way to the Peninsula. He proceeded about twenty yards from the truck and put the blanket down on the ground. He stated he told her he was not going to tie her if she felt tight. Payne described Gama as giggling. He stated he didn't know if she was unsteady or necessarily wobbling, but it was as though the pills were having an effect upon her. Payne described his own condition as high, but also as "down." *Commw. Ex. 1, pp. 22-25*.

Payne instructed Gama to get on her knees. Payne tied her hands together behind her back. With Gama sitting back on her haunches, back against her legs, he tied her ankles together. He related: "Then I took the rope and I put it on one tree, around her neck twice and on the ground and on the other tree, but I left a lot of slack in it." *Commw. Ex. 1, p. 25*. Payne stated he left a lot of slack in the rope, enough slack so if she had fallen, she wouldn't get hurt. *Commw. Ex. 1, p. 26*.

Payne stated he forgot the camera, so he left Gama tied up and returned the approximate twenty yards to the truck to retrieve it. Back at the truck, Payne smoked more marijuana. The camera did not have film in it. He removed the camera from the truck and tried to figure out "how to put the stuff in." Next, Payne described what he saw when he returned to Gama: "And I went back and I hadn't left enough slack. She had fallen forward. She was on the ground. Her face was all colored." *Commw. Ex. 1, pp. 26-29*.

Payne stated he panicked. He ran to the truck, retrieved a knife and returned to the body. He stated he cut the rope and unwrapped it. He found no heartbeat and repeated her face was "all colored." During the confession, Payne stated, "Nobody ever paid me to hurt anybody, yet I did." *Commw. Ex. 1, p. 29*.

Payne stated he decided to hide things. He put Gama's body in the truck and drove to his farm where he retrieved copper wire and cement blocks from a barn. He then drove to a pond on the property and dumped Gama's body in the pond with blocks and wire. Payne stated that, on Monday morning, he was fearful that Gama's body would rise to the surface so he checked the pond. He observed Gama's body "was back up" — it had somehow floated to the top. *Commw. Ex. 1, pp. 29-33*. Payne stated he walked into the pond to the body, cut the

wire "off at the roots," leaving the cement blocks behind in the pond. *Commw. Ex. 1, pp. 34-35*. Payne removed Gama's body, and drove the body to Cussewago Creek. "I put her in the creek and I got out of there as fast as I could," he stated. *Commw. Ex. 1, pp. 31-33*.

Payne specified he tied Gama with the "clothesline rope" he purchased at K-Mart. He clarified, "It wasn't the plastic. It was real rope." *Commw. Ex. 1, p. 37*. With regard to the victim's jewelry, he stated he threw some of it in the park where he killed her, and other items of jewelry he hid in the well next to his house. *Commw. Ex. 1, pp. 37-38*. He stated he removed Gama's shoes and initially discarded them near the pond. A while later he became worried and took them further back in the woods. *Commw. Ex. 1, p. 41*. Payne denied having sexual intercourse with the victim. *Commw. Ex. 1, p. 42*. Payne stated the wire he used to tie Gama could be found back in the woods. *Commw. Ex. 1, p. 43*.

In Payne's statement, he recounted one previous time he encountered Gama outside of the school setting. It was at Payne's twenty-year class reunion at the Sheraton Inn in Edinboro, Pennsylvania. Gama was with her step-father with whom Payne graduated, and Gama's mother, of whom he stated he didn't know. *Commw. Ex. 1, pp. 50-51*.

2. 1989 Clemency Application of Payne

Admitted as Commonwealth Exhibit 3 was Payne's September 26, 1989 clemency application with the Commonwealth of Pennsylvania Board of Pardons. *Tr. 6/25/20, pp. 10-11*. In the application, Defendant recounted a different version of events leading to the killing of Gama. Payne further described Gama as a "beautiful friend" with whom he struck a bargain. The bargain was, he would photograph her and send the photos to a professional photographer he knew. If the professional thought Gama photographed well, then Payne would become her modeling agent. *Commw. Ex. 3*.

In the application, Payne stated that when he met Gama he had taken Meprobamate and smoked marijuana. Payne then took "one camera load" of photos of Gama. For the next "camera load" Payne suggested a "damsel in distress" theme. Payne indicated Gama agreed to the next series of photos. He described his actions leading to her death, and in attempting to conceal the cause of death and the victim's body as follows:

> … I tied her up to take some more pictures but when I did so, I incautiously put a rope around her neck. I then went back to my truck to re-load my camera but my mind was not functioning well from the drugs and it took me longer to load than it should have.
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> When I got back to her, she had fallen forward, the rope had tightened about her neck and killed her. I went to pieces, tried to revive her but couldn't and then I panicked and the instinct for survival took over. I removed her jewelry to make it look like a robbery but then took her body to my farm and sunk her in the pond.
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> Several days later, the body arose in the water and I panicked again, took her body to a creek about eight miles from my home, and left it in the water. I then went home and waited for the police to come and get me. I did not know she had told no one she was meeting me. Thirteen nerve-racked months later, I was arrested.

Commw. Ex. 3.

3. 1991 Clemency Application of Payne

Admitted as Commonwealth Exhibit 4 was Payne's 1991 clemency application with the Commonwealth of Pennsylvania Board of Pardons. *Tr. 6/25/20, pp. 10-11*. The 1991 clemency application reveals yet another version of events. This version recounts Payne, who was desperate for funds to pay bills, as a "friend" of Gama, with whom he had spoken often. In the application, Payne stated "…I suggested to her on several occasions that she should try and become a model." Payne stated he then encountered Gama at a class reunion where they "danced a lot together and I again told her about becoming a model." At the reunion, Payne told Gama about a friend in Massachusetts who was a professional photographer. Payne stated he suggested to Gama that they take some pictures of Gama and send them to the friend to see what he thought. Payne stated he thought if Gama had potential, he could become her manager and thus supplement his income. *Commw. Ex. 4*.

Payne described his actions leading to her death, and in attempting to conceal the cause of death and the victim's body, as follows: "On the day [he] was to pick up Debbie," Payne stated he smoked marijuana and took at least three Meprobamate pills. When Gama got in the truck, she found the pills, asked what they were, and asked if she could have any. They stopped where she could get water for the pills, and he drove around to the side and waited for her, then they left. They went to a lightly wooded area of a park where Payne smoked marijuana. Payne stated the pills worked on him and they seemed to be working on Gama, though Payne acknowledged per the coroner's report, she hadn't taken any. Payne took one camera load of facial pictures, then suggested he photograph Gama as a "damsel in distress." Payne stated that when Gama agreed,

> I tied her up in such a way that she was kneeling and then very incautiously, tied a rope around her neck and, although there was a lot of slack, ran the rope to two trees.
>
> I then went back to my truck to get another load of film. The truck was about ten yards away from where she was. I had an awful lot of trouble loading the camera and when I finally got it loaded, looked over to her and saw that she had fallen forward. I ran over to her and picked her off the ground and her face was all black. I just fell apart and at first, tried mouth-to-mouth but got sick and threw up. I untied all the ropes but I did not know what to do. All I remember then was total panic and confusion.
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> Sometime later, I decided to make it look like she was robbed so I removed her rings and jewelry. Then I changed my mind and decided to hide the body on my farm so I put her in my truck. … I finally decided to put the body in the pond so I got some cement blocks and wire and dropped that poor girl in the pond. Several days later, her body rose up and I panicked all over again and took the body to a creek … and left her in the creek ….

Commw. Ex. 4.

B. Wilbur C. Thomas, M.D., Pathologist and Coroner, Crawford County — June 7, 1977 Testimony

On June 25, 2020, the Court admitted in evidence as Commonwealth Exhibit 2a the 1977 degree of guilt hearing testimony of Wilbur C. Thomas, M.D. Dr. Thomas was a pathologist

and the Coroner of Crawford County. Commw. *Ex. 2a, p. 12*. Dr. Thomas supervised the removal of Gama's body from Cussewago Creek, the transporting of Gama's body to Spencer Hospital for x-rays, and the removal of the body to the funeral home. Thomas also performed the autopsy of Gama on August 13th, shortly after midnight. *Commw. Ex. 2a, pp. 5-7*. Thomas identified photographs including photographs of Gama's body in the creek; portions of the wire which were around the body; and Gama's body on a stretcher. *Commw. Ex. 2a, pp. 7-8*.

Dr. Thomas' testimony is summarized in pertinent part as follows. The neck ligature, the wire about the neck, was not noted until the body was removed from the water because it formed a deep, firm impression in the neck. The knot of the wire was in the posterior portion of the lower neck at the level of the fifth cervical vertebrae. There were no localized lacerations, abrasions or hemorrhage noted on examination of the skin of the neck. Dr. Thomas found the wire around the neck was applied so tight that pliers could only be introduced below the wire with a lot of effort. After the wire was removed from the neck, the skin showed a slightly darker, dried track around the neck.There were no other abnormalities noted in the neck ligature. *Commw. Ex. 2a, pp. 8-9*.

He found a ligature of fine copper wire encircled each wrist. The wrist ligatures were removed with cutting pliers. A depressed, darkened linear track was left from the wire around each wrist. *Commw. Ex. 2a, p. 9*. Dr. Thomas found both ankles were bound with a single ligature of fine copper wire with twisted knot. The wire was cut away. Thomas indicated the skin showed no laceration, bruising, hemorrhage or abrasion in the area. *Commw. Ex. 2a, pp. 9-10*.

The autopsy physical findings were: Gama was five feet, five inches in height and weighed approximately 115 pounds. Based upon the dental evidence, Thomas estimated she was 16 years of age. *Commw. Ex. 2a, p. 11*.

Dr. Thomas arrived at the following conclusions and opinions based upon his examination of Gama's body and toxicology testing he arranged. The cause of death was "acute asphyxiation due to ligature." *Commw. Ex. 2a, p. 10*. There was no evidence of natural disease, and there were no natural causes of death. There was insufficient evidence of any toxic or poison in Gama's body. *Commw. Ex. 2a, p. 12*.

Dr. Thomas maintained the opinions rendered during direct examination, on cross-examination and upon examination by the Court. *Commw. Ex. 2a, pp. 12-23* He testified the only evidence of trauma was one small area of abrasion near the navel apparently due to the rope which anchored Gama's body until Dr. Thomas arrived at the scene. *Commw. Ex. 2a, p. 13*. Thomas testified individuals can be overcome without leaving evidence of trauma. *Commw. Ex. 2a, p. 13*. Thomas estimated Gama had been dead for three or four days before the autopsy. *Commw. Ex. 2a, p. 17*. During extensive questioning about the possibility rope was utilized in the strangulation death of Gama, Dr. Thomas maintained the opinion there was no evidence a rope had been used around the decedent's neck. He testified, as follows:

> **Attorney Ambrose:** Now, when the body was first discovered and after you got to the scene, there was a ligature of wire, small copper wire, around the neck.
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> **Dr. Thomas:** Yes, sir.
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> **Attorney Ambrose:** There was never a rope around her neck that you know of, was there?

Dr. Thomas: I didn't see any marks of a rope.

Attorney Ambrose: Well, what would you be looking for - - rope burns, the type of burns that might be made with a rope?

Dr. Thomas: Well, the rope is an irregular object which has small pointed parts which may stick into the skin. It usually is braided, and the pattern of the braiding will stay in the skin for a long time because you usually get a little hemorrhage around the areas of minute trauma that the rope causes.

Attorney Ambrose: So you'd say there would be some hemorrhaging?

Dr. Thomas: That's correct.

…

Attorney Ambrose: Now, the fact that wire - - a wire ligature was found around the neck does not mean that the mode of death could not have been a rope; correct?

Dr. Thomas: I couldn't say a rope because I found no rope or evidence of a rope.

Attorney Ambrose: I understand that.

Dr. Thomas: I can only testify to what I found, and I found a wire around the neck.

Attorney Ambrose: But you can't say a rope wasn't around the neck before a wire, can you?

Dr. Thomas: It would have to have been a rope of certain specifications - - smooth, non-traumatic.

Attorney Ambrose: Like clothesline, sir; correct?

Dr. Thomas: Perhaps.

Commw. Ex. 2a, pp. 16-17. Dr. Thomas testified the fact the ligature was snugly around Gama's neck could have been caused by post-mortem swelling of the tissues from being in the water. *Commw. Ex. 2a, p. 19*. Dr. Thomas reiterated here was "the complete absence of hemorrhage in the neck area where the ligature was found." *Commw. Ex. 2a, p. 19*. He testified if force was applied to cause death, there would not necessarily be hemorrhaging. Hemorrhaging is not necessarily consistent from a forensic standpoint to the amount of force applied. *Commw. Ex. 2a, p. 20*.

When asked by the Court to describe the manner in which the wire ligature was applied to Gama's neck, Thomas testified, as follows:

Dr. Thomas: Well, as I said, the wire was embedded in the tissues, and the knot was in the posterior part of the neck.

Judge Carney: The knot would be at the back of the neck then; is that correct?

Dr. Thomas: That's correct.

Judge Carney: And was the wire twisted?

Dr. Thomas: Yes, sir.

Commw. Ex. 2a, p. 21. During further exchange between the Court and Dr. Thomas regarding manner of death, Dr. Thomas testified, as follows:

Judge McClelland: Wait a minute. Doctor, just to clarify it, are you saying that this girl died from strangulation caused by wire around her neck Dr. Thomas, and not by drowning?

Dr. Thomas: There was no evidence of drowning, your Honor.

Judge McClelland: I mean are you saying she died of strangulation caused by the wire around her neck? That's what I'm trying to get at.

Dr. Thomas: By strangulation, yes, sir.

Commw. Ex. 2a, pp. 22-23.

C. Eric Vey, M.D., Forensic Pathologist — June 25, 2020 Testimony

In support of its position the that Defendant committed first degree murder, the Commonwealth presented the expert testimony of Eric Vey, M.D. Dr. Vey is the forensic pathologist with the Erie County Coroner's Office. He is board certified in anatomic pathology and forensic pathology and has served as forensic pathologist for northwestern Pennsylvania for 26 years. *Tr. 6/25/20, pp. 23-25*. Dr. Vey has performed over 4,000 autopsies. Approximately 50 of those autopsies involved strangulation due to ligature. *Tr. 6/25/20, pp. 26-27*.

In preparation for this Degree of Guilt Hearing, Dr. Vey reviewed the following records:

1. Summary of Coroner's Case, Deborah Lynn Gama, August 22, 1975, by Wilbur C. Thomas, M.D., Crawford County Coroner;

2. Postmortem Protocol, Deborah Lynn Gama, by Wilbur C. Thomas, M.D.;

3. Report of Laboratory Results, Pc Laboratory, dated August 25, 1975;

4. Transcript, Preliminary Hearing Testimony of Wilbur C. Thomas, M.D., December 28, 1976;

5. Transcript, Degree of Guilt Hearing Testimony Wilbur C. Thomas, M.D., June 7, 1977; and

6. Transcript, Oral Statement of Raymond Payne, October 8, 1976.

Tr. 6/25/20, p. 27; Commw. Ex. 6. Dr. Vey prepared a narrative report setting forth his findings and conclusions. Dr. Vey's report was admitted into the record as Commonwealth Exhibit 6. Dr. Vey concurred with Dr. Thomas' conclusions the cause of Gama's death was acute asphyxiation due to ligature and the manner of death was homicide. *Tr. 6/25/20, pp. 27-28*.

Based upon Dr. Vey's education, training and experience; his review of the above-referenced records and transcripts; and his review of relevant scientific and medical literature in the field of death by asphyxia as identified in his narrative report, Dr. Vey reached the following conclusions to a reasonable degree of medical certainty, as follows:

1. The toxicology results from the laboratory analysis conducted by Pc Laboratory indicate Gama was not under the influence of drugs or alcohol at the time of her death.

2. There is no pathologic evidence to support the use of a clothesline as a ligature in this case. There is an absence of corresponding ligature furrow impressions to the skin which would indicate such, and there is the absence of any associated abrasion from a rope, to either the neck, the right wrist, the left wrist, or the ankles of Gama.

3. Payne's description of Gama's face (i.e. "her face was all colored") indicates the amount of neck pressure applied was sufficient only to cause occlusion of the jugular veins.

Commw. Ex. 6, p. 3.

Dr. Vey's testimony is herein summarized as follows:

"Strangulation occurs when sufficient pressure is applied about the neck to result in either loss of consciousness or death." Strangulation and hanging have similar pathophysiology in that they are "both types of asphyxiation that occur with compression of the neck." *Tr. 6/25/20, p. 28*. Death in the vast majority of hangings and strangulations occurs by constriction of the blood vessels providing oxygenated blood to and from the brain. *Tr. 6/25/20, p. 28*. Dr. Vey testified to the "selective anatomic vulnerability" to the structures of the neck from compression, as follows:

Dr. Vey: … For example, the larynx and trachea require 33 pounds per square inch to occlude them.

Going down a lesser degree of restriction, the carotid arteries, which supply oxygenated blood up to the brain require 11 pounds per square inch to occlude those.

…

And then lastly, the jugular vein, which brings blood from the brain back down to the heart, the veins are more pliable and less rigid structures. They only require 4.4 pounds per square inch.

…

D.A. Jack Daneri: All right. And what's the time frame in which death occurs then from the strangulation or from the occlusion?

Dr. Vey: With complete and unremitting, in other words constant, interruption of the blood flow wither to the brain or from the brain, death will occur at four to six minutes.

D.A. Jack Daneri: Okay. And with respect to, you had said, the lack of blood flow, does an individual lose consciousness before they die?

Dr. Vey: Correct.

D.A. Jack Daneri: Okay. And is there — is there a time frame on when someone could lose consciousness depending on how much blockage there is?

Dr. Vey: Right. With reduction — or, I'm sorry, with complete cessation or abrupt absence of blood flow through the carotid arteries going up to the brain, consciousness is lost between 10 to 15 seconds.

D.A. Jack Daneri: What if the carotids were not blocked?

Dr. Vey: If the jugular veins are blocked and not the carotid, the period of consciousness will be longer than with just a carotid blockage.

Tr. 6/25/20, pp. 28-30.

Dr. Vey testified the distinguishing features of trauma to the neck in cases of strangulation are different than in cases of hanging, as follows:

D.A. Jack Daneri: Okay. Now, with respect to — in your experience with respect to trauma to the neck in those cases of hanging or strangulation, what can you tell us about the trauma that you would expect to find and what is found typically?

Dr. Vey: Okay. Well, typically found externally is a characteristic of what's called a ligature furrow, F-U-R-R-O-W. Like when a farmer plows a field and creates an indentation in the soil to plant seeds, that's a furrow. The same thing happens with the application of a ligature, for example, cloth or rope or wire around the neck, it creates an impression or an indentation into the skin that remain after death and its characteristics.

Ligature furrowing in cases of strangulation typically, or if not all cases, completely encircles the neck. In cases of hanging, since the suspension of the head comes from a fixed point above, the ligature furrowing imprint does not completely encircle the neck and ascends behind the ears.

Tr. 6/25/20, pp. 30-31.

Regarding the absence of imprints and hemorrhage to Gama's neck and the significance thereof, Dr. Vey testified, as follows:

D.A. Jack Daneri: Okay. Now, with respect to the autopsy report, as well as the findings of Dr. Thomas, … why don't you just report on the findings regarding imprint and hemorrhaging on the neck.

Dr. Vey: Okay. Dr. Thomas reported in his autopsy the presence of a thin wire that appeared to be copper completely encircling the neck just wrapped once. It was very thin and twisted in the back. And then when he removed that, there was corresponding circumferential, horizontal ligature furrowing corresponding to a wire.

In the soft tissues of the neck, he found an area of localized discoloration, red discoloration through the — one of the largest strap muscles in the neck, the left sternohyoid muscle. Aside from that, there were no internal injuries of the neck.

…

The wire was not initially visible at the scene of the recovery of the body from the creek, but rather once the body was moved to the funeral home in Meadville where the autopsy was performed. And at that point once she was placed on her back and her neck was hyperextended a little bit, he was able to have a visual of the wire.

D.A. Jack Daneri: Okay. Was there a description used how the wire was affixed to the skin?

Dr. Vey: Yes. It was, again, a single loop around the neck twisted in the back just to the right of the midline.

D.A. Jack Daneri: Okay. Now, with respect to imprints on the skin, not below the skin but to the skin itself, you had indicated that there would typically be some type of imprint of whatever the ligature — or the characteristics of the ligature were.

…

Dr. Vey: That's correct.

D.A. Jack Daneri: Okay. And … what causes the imprint then?

Dr. Vey: The imprint is caused by pressure on the skin by the ligature creating the ligature furrowing to the point where under many circumstances once the ligature is removed or even if a ligature isn't present at the time of the autopsy, it creates a perfect mirror image of the outline and character of the ligature itself.

So for example, in the case of a coarsely woven rope, for example a bull rope, you're going to have the coarse imprint of the weave of the rope, the braid of the rope, it's also going to correspond to the width of the rope. And with a thin wire that's smooth, the ligature furrowing will be thin corresponding almost identical to the width of the wire, and there's not going to be any pattern braid from the wire because it doesn't have a braid.

D.A. Jack Daneri: In this case regarding Debbie Gama, what was the imprint then on the neck?

Dr. Vey: The imprint corresponds to the wire.

D.A. Jack Daneri: Okay. And did it correspond to anything else?

Dr. Vey: No.

D.A. Jack Daneri: Now, with the amount of pressure that it would take for a period of four to six minutes, if someone were applying that constant pressure with a ligature, would you have expected — would you expect to see an imprint of whatever was used?

Dr. Vey: Yes.

Tr. 6/25/30, pp. 31-35.

Regarding Payne's statement, Dr. Vey testified, as follows:

D.A. Jack Daneri: And can we agree that within [Payne's] statement, he indicated he had tied up Debbie Gama, correct?

Dr. Vey: Correct.

D.A. Jack Daneri: All right. And the material or the instrument the Defendant used to tie her up was what?

Dr. Vey: Was a, basically, to paraphrase the statement, it was essentially a garden-variety rope. It wasn't smooth plastic. It was something you could pick up from Kmart, just regular, old clothesline.

D.A. Jack Daneri: So he indicated it was a clothesline?

Dr. Vey: Correct.

D.A. Jack Daneri: All right. And that it was a real rope?

Dr. Vey: Correct.

D.A. Jack Daneri: Okay. And did he indicate how many times he had wrapped the real rope around the neck of Debbie Gama?

Dr. Vey: Yes. He did. He indicated that he wrapped with two loops.

D.A. Jack Daneri: Twice around the neck?

Dr. Vey: Correct.

D.A. Jack Daneri: Now, getting back to your expertise and your experience, if the ligature would leave an imprint with four to six minutes of pressure with the ligature wrapped around, would you expect the imprint to show that it was wrapped twice around the neck?

Dr. Vey: Sure. This would be basically a double ligature furrow imprint. In other words, there would be two separate furrows with or without an intervening portion of skin protruding between the two loops, so we should have two separate areas of indentation.

D.A. Jack Daneri: So if regular rope was wrapped twice, you would expect to see an imprint of some sort regarding a rope?

Dr. Vey: Right. And I would expect to see two imprints.

Tr. 6/25/30, pp. 35-36.

As to whether or not, beyond the statements of Payne, there was any evidence a rope was used in the strangulation death of Gama, Dr. Vey testified, as follows:

D.A. Jack Daneri: With respect to the findings of Dr. Thomas and whether or not he observed an imprint of rope around the neck of Debbie Gama, …

Dr. Vey: He testified that he did not see any such imprint related to a rope.

D.A. Jack Daneri: Okay. Any evidence — from what you either read or observed looking through the materials, including the statement of the Defendant, any evidence that indicated that a rope was the cause of Debbie Gama's death?

Dr. Vey: There's no evidence in the objective material that I reviewed, namely the

transcript of Dr. Thomas preliminary hearing testimony, his testimony at the degree of guilt hearing or the findings from the autopsy report.

Tr. 6/25/20, p. 37.

Dr. Vey testified concerning the toxicology findings in Commonwealth Exhibit 7, the August 25, 1975 report from Pc Laboratory which was admitted into the record. The positive findings were limited to a blood alcohol level of .06%. There were no drugs in Gama's system except acetaminophen, which is Tylenol. There were no other drugs or substances in the victim's blood. There was no Meprobamate or trace amount of Meprobamate, a drug used as a sedative and an anti-anxiety agent, in Gama's blood. *Tr. 6/25/20, pp. 37-38.* Acetaminophen is not a by-product of Meprobamate. *Tr. 6/25/20, p. 39.*

Dr. Vey was asked whether the time interval between Gama's death, hypothetically Friday, August 8, 1975 when Gama was last seen by family, and Tuesday, August 12, 1975, the date her body was recovered, would have an impact as to what was in Gama's system at the time of death. Dr. Vey testified, as follows:

> **Dr. Vey:** The only alteration that may have been caused by this long period of decomposition would be the production of alcohol by bacteria in the postmortem interval creating the alcohol level found in this case.
>
> With respect to any other drugs, no further breakdown will occur after death regardless of the postmortem interval because breakdown of drugs into their inactive metabolites requires enzymes, and enzymes for them to act require cellular energy and there's no cellular energy any longer because the person is dead.

Tr. 6/25/20, 39-40.

When asked by the Court what .06% alcohol would represent if someone was drinking, Dr. Vey testified that depending upon the weight of an individual, .06% alcohol content would be roughly the equivalent two beers or two standard drinks. *Tr. 6/25/20, p. 40.* However, Dr. Vey opined the .06% of alcohol found in Gama's body "may be totally accounted for by postmortem bacterial production of alcohol as far as the body's decomposition process" and stated "certainly there is a contributory component from the postmortem interval with the bacterial production of alcohol in this case." *Tr. 6/25/20, p. 40. See also, 6/25/20, p. 60.*

In the context of this testimony, Dr. Vey summarized the bases for the conclusions at page 4 of his narrative report, as follows:

The conclusion that the amount of neck pressure applied was sufficient only to cause occlusion of the jugular veins of Gama's neck was premised upon the accuracy of Payne's description of Gama's face after the strangulation. Dr. Vey testified if Payne's statement that her face was "all colored" is factually accurate, then the pathophysiology is that the pressure applied was sufficient to cause obstruction or occlusion of blockage of the internal jugular veins, but not also compression of the carotid arteries. This is because, where the return of blood back down from the head via the jugular veins is impeded or completely comes to a halt because sufficient pressure is applied to block the jugular veins but not also the carotid arteries (which pump blood out from the heart), then the head will become engorged and

filled with blood which would account for Payne's description "her face was all colored." *Tr. 6/25/20, p. 43*. Dr. Vey testified the autopsy findings of Dr. Thomas of "putrefactive change" in Gama's facial features were consistent with a "partial occlusion", that is occlusion of the jugular veins. *Tr. 6/25/20, pp. 44-45*. Dr. Vey testified that with partial occlusion a victim would retain the ability to speak or make verbal noises or scream. The reason is that there would not be nearly enough pressure to block the airway. *Tr. 6/25/20, pp. 45-46*.

Dr. Vey's conclusion that there was no pathologic evidence to support the use of a clothesline as a ligature in this case is based upon the absence of findings of corresponding ligature furrow impressions or imprints to the skin which would indicate the use of a clothesline, and the absence of any associated abrasion from a rope to either the neck, the right wrist, the left wrist, or the ankles of Gama. *Tr. 6/25/20, p. 46*.

Dr. Vey's conclusion that Gama was not under the influence of drugs or alcohol at the time of her death is based upon the toxicology results from Pc Laboratory. *Tr. 6/25/20, p. 46*.

Dr. Vey testified that, of the subset of approximately 50 cases in which he was involved as a pathologist, where the individual died due to ligature strangulation and another person was present, none of those cases involved an accidental death. *Tr. 6/25/20, p. 48*. On cross examination, when questioned about the possibility Gama's death was accidental, say for example, from falling forward and being unable to help herself, Dr. Vey testified:

> **Dr. Vey:** We have to then take Mr. Payne's statement in its global context. So he discusses the tying her hands behind her back with rope and looping the rope twice around her neck and then affixing it to the trunk of a tree unspecified. And with all of that, we have no ligature furrowing from a rope to the ankles the wrists or the neck.

Tr. 6/25/20, p. 56. During cross examination, defense counsel attempted to establish a clothesline could have been used. *Tr. 6/25/20, pp. 57-58*. However, on redirect examination, Dr. Vey reaffirmed the cause of strangulation or asphyxia was by wire ligature. *Tr. 6/25/20, pp. 58, 65*.

Per Dr. Vey's testimony, under the totality of the circumstances, Gama's death was not consistent with the Defendant's version of an accidental death.

D. Myshelle Marie Will, Sister of Victim — June 25, 2020 Testimony

On June 25, 2020, the Commonwealth presented the testimony of Myshelle Will, the victim's sister. *Tr. 6/25/20, pp. 12-17*. Will testified about events the morning of Friday, August 8, 1975. Will, then 10 years old, and Gama, then 16, shared a bedroom. Will woke up to the sun shining in the widow. She saw her sister trying on different outfits. *Tr. 6/25/20, pp. 12-13*. Will watched her sister until Gama told her to turn around. Gama told Will she was going to the beach. Will answered a phone call from a male who asked for Debbie. Gama took the phone call. When Gama left the house, nothing seemed abnormal. Gama did not appear to be down or depressed. She did not mention anything to Will about going with Raymond Payne on a photo shoot to do some modeling or anything. Gama did not say that morning if Payne was going to be her modeling agent for pictures taken. *Tr. 6/25/20, pp. 14-17*.

E. Robin Kloss, Best Friend of Victim — June 25, 2020 Testimony

On June 25, 2020, the Commonwealth presented the testimony of Robin Kloss, who characterized herself as the victim's best friend. *Tr. 6/25/20, pp. 17-22*. As of 1975, she had known Gama for about three years. They met in 9th grade and became close friends. Kloss

testified she and Gama were inseparable. They talked on the phone frequently with one another. *Tr. 6/25/20, pp. 18-19*.

Kloss knew Payne as her English teacher at Strong Vincent High School. She described Payne as a fun teacher with whom they got along and never had any problems. *Tr. 6/25/20, pp. 18-19*.

Kloss and Gama planned to go to the beach that day. There were no set plans; just whoever gets up first is supposed to call the other. Kloss called Gama at home around 11:30 a.m. that day. Myshelle, Gama's sister, answered the telephone. Kloss asked for Gama and Myshelle told Kloss that Gama was not there. Kloss asked for Gama's mother who came to the phone. Gama's mother told Kloss Gama went to the beach. Kloss testified she probably asked Gama's mother with whom she went to the beach with, "because she wouldn't have gone with anybody else but me." *Tr. 6/25/20, pp. 20-21*. It made no sense to Kloss that she had plans to go to the beach with Gama and when Kloss called the next morning when they were supposed to go together, Gama already left. It made no sense to Kloss because Kloss and Gama were together all the time. *Tr. 6/25/20, pp. 21*. During all their times together, Gama never talked about becoming a model or having Defendant be her modeling agent. She never talked about going with Payne or anyone on a photo shoot for modeling pictures. Kloss testified that is something Gama would have absolutely shared with her. *Tr. 6/25/20, pp. 21-22*. Gama never shared with Kloss anyone's or Payne's interest in taking bondage photos of Gama. *Tr. 6/25/20, pp. 22*. When asked if it would surprise Kloss there was a claim that Gama agreed to bondage photos, Kloss testified, "It would greatly surprise me." When asked the reason for this, Kloss testified, "She wasn't like that. She wouldn't have done that. She just wouldn't have." *Tr. 6/25/20, pp. 22*.

ANALYSIS

The Commonwealth may sustain its burden to prove every element of a crime beyond a reasonable doubt by wholly circumstantial evidence and the trier of fact is free to believe all, part, or none of the evidence. *Commonwealth v. Hicks*, 156 A.3d 1114, 1123 (Pa. 2017). "To obtain a conviction for first degree murder, the Commonwealth must demonstrate that a human being was unlawfully killed, that the defendant was the killer, and that the defendant acted with malice and a specific intent to kill." *Commonwealth v. Hicks, supra*, at 1123-1124, citing *Commonwealth v. Laird*, 988 A.2d 618, 624-25 (Pa. 2010). "Specific intent and malice may be inferred through circumstantial evidence, such as the use of a deadly weapon on a vital part of the victim's body." *Commonwealth v, Hicks, supra,* at 1124.

It is "axiomatic that the Commonwealth is not required to prove motive to establish guilt even where the crime charged is murder of the first degree." *Commonwealth v. Keaton*, 729 A.2d 529, 536 (Pa. 1999), citing *Commonwealth v. Brantner*, 406 A.2d 1011, 1013 (Pa. 1979).

Moreover, the actions of the accused which occur before, during, and after are admissible as evidence to prove malice. *Commonwealth v. Gonzalez*, 858 A.2d 1219, 1223 (Pa. Super. 2004). Evidence of acts to conceal a crime, such as disposing of the victim's body, are relevant to prove the accused's state of mind or intent. *Commonwealth v. Dollman*, 541 A.2d 319, 322 (Pa. 1988).

Unlike the 1977 Degree of Guilt Panel, this Court does not rely on the testimony of Anthony Lee Evans, a convict who sought favors, and/or PSP chemist Paul Daube. The testimony

of Evans and Daube is of little or no value or consequence in view of the results of the DNA analysis. The fact that the DNA analysis excludes the Defendant as a contributor of the semen found on the victim's body simply leaves open the question as to whether Payne had an accomplice. The parties concur the testimony of Evans is unreliable.

The parties stipulated Gama died of ligature strangulation, and the testimony of Drs. Thomas and Vey amply supports this. The parties stipulated that the copper wire ligature that was embedded in the skin completely encircled the neck. At autopsy, the wire was found embedded around the circumference of the victim's neck and twisted in the back. There is no doubt the wire was deliberately twisted by the Defendant to secure it around the neck. When the wire was cut away, an even ligature furrow was found around the circumference of the victim's neck where the wire had been. There were no other signs of external trauma to the neck. There were no marks, abrasions, bruises, scrapings, hemorrhaging from rope fibers, or other indications of external trauma to the neck. There were no indications on the neck that clothesline rope played a role in the ligature strangulation death of Gama. If rope had been looped twice around Gama's neck as Defendant once explained, there would have been two imprints of rope left behind. In this instance, not even one imprint of rope, or not even one partial imprint of rope, was left behind on Gama's neck.

There were no indications elsewhere on Gama's body that clothesline rope was used to restrain her. Gama had copper wire around each wrist and her ankles were bound with the wire. At autopsy, copper wire was found encircled around each wrist, and the victim's ankles were bound together with more wire. There were no signs of external trauma to either wrist or to Gama's ankles from clothesline rope or any other material used as a restraint, other than from the copper wire. There were no indications on either wrist or on either ankle that clothesline rope was used to bind the victim's extremities. Not even one imprint of rope was left behind on any extremity.

The Defendant's contention that the death was accidental is belied by the record. His assertions that Gama drugged herself, was unsteady from pills she had taken and accidentally fell forward, basically hanging herself, are further belied by the record. The record establishes no drug other than acetaminophen (Tylenol) was found in Gama's system. The drug the Defendant claimed as having a role in the death, Meprobamate, was not found in Gama's body. The testimony of Dr. Vey established no drugs would have disappeared or metabolized between the dates of Gama's disappearance and discovery of her body. Dr. Vey's testimony established that the level of alcohol is explained in whole or in part by the natural decomposition process of Gama's body. There is no evidence alcohol played any role in Gama's death.

The record establishes that the circumferential ligature and ligature furrow in Gama's neck are not consistent with a death by hanging. If that were the occurrence, the ligature furrow imprint would not completely encircle the neck and would ascend behind the ears. In this case, the ligature furrow evenly encircled the neck. There was no indication of trauma elsewhere on the neck or ascension behind the ears.

Considering Dr. Thomas' findings of "putrefactive change" in the facial features of the decedent, the record amply establishes Gama's death occurred from occlusion of the jugular veins. During this process, Gama would have retained the ability to speak or make verbal noises or scream. The Defendant never indicated he heard any verbalizations or noises from

Gama. According to Defendant's statements, he would have been close enough to have heard any noises from Gama.

Defendant's assertion that it seemed like something was "bothering" Gama when he encountered her, is belied by the record. Myshelle Will credibly testified that the victim did not appear to be down or depressed when she left the house on the morning of August 8, 1975. Despite Defendant's contention that he took Gama to the woods to take bondage and/or modeling photographs of her, or that he was going to be her modeling agent, both Will and best friend Robin Kloss credibly testified Gama never mentioned anything to them about modeling or posing for photographs.

Examined closely, Payne's statement is one of a remarkable series of coincidences: a chance meeting with the victim on West Tenth Street; the victim's voluntary consent to bondage photos; having the new Polaroid camera uniquely suitable for bondage photos readily available; having just the right drugs on hand; the victim's decision to voluntarily take Meprobamate, a "downer"; having available clothesline rope he just happened to buy that morning; his absence at the critical moment when the victim was being strangled to death; that he tarried to load his camera and smoke more marijuana while the victim was being strangled; and that he heard absolutely nothing coming from the victim while she was being strangled to death. This Court is not even convinced that this murder occurred at the park in question, as opposed to the murder actually happening on the Defendant's property on Kinter Hill Road.

The Court fully recognizes that the Commonwealth bears the full burden of proof in this matter. That said, the Defendant's happenstance explanations on how the death was accidental are pure fiction; not plausible; and inconsistent with the evidence presented in the case at bar. On the other hand, Payne's placement of the copper wire ligature around the neck, and tightly twisting the same, causing a four- to six-minute occlusion, proved that this killing was intentional.

Following the killing, the Defendant took deliberate steps to conceal the body of Debbie Gama and her personal effects. He hoped to sink her body with cement blocks in the pond located on his property; and when to him it surprisingly and inexplicitly surfaced, he packed the body in his truck and drove to Center Road in Crawford County and unceremoniously dumped it in Cussewago Creek. He hid the victim's shoes and the wire in a woods and hid her jewelry in the well on his property. No camera and, more tellingly, no clothesline rope that he said he purchased at K-Mart the morning of the murder were ever presented. Defendant's repeated efforts over time to dispose of Gama's body and conceal her personal effects are additional indicia of the requisite intent to kill.

CONCLUSION

Under the totality of the circumstances, and with the requisite legal principles in mind, the Commonwealth has met its burden of proving the elements of first degree murder and establishing that the death of the victim was an intentional killing, beyond a reasonable doubt. The Court's verdict is that the Defendant, Raymond Dale Payne, is guilty of the murder of Debra Lynn Gama in the first degree.

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

LOUIS ALIOTA
v.
MILLCREEK TOWNSHIP SCHOOL DISTRICT OF SCHOOL DIRECTORS, and WILLIAM HALL, Superintendent

PRETRIAL PROCEDURE / MOOTNESS

It is well-settled in Pennsylvania that if at any stage of the judicial process a case is rendered moot, said case will be dismissed.

APPEAL AND ERROR / EFFECT OF DELAY OR LAPSE OF TIME IN GENERAL

It is also well-settled that a plaintiff's loss of standing will result in a plaintiff's case becoming moot.

APPEAL AND ERROR / EFFECT OF DELAY OR LAPSE OF TIME IN GENERAL

The cases that involve mootness problems involve litigants who clearly had standing to sue at the outset of the litigation. The problems arise from events occurring after the lawsuit has gotten under way — changes in the facts or in the law that allegedly deprive the litigant of the necessary stake in the outcome.

PRETRIAL PROCEDURE / MOOTNESS

The mootness doctrine requires that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.

ACTION / PERSON ENTITLED TO SUE

To have standing, there must be some discernible adverse effect to some interest other than the abstract interest of having others comply with the law.

MANDAMUS / NATURE OF ACTS TO BE COMMANDED

The writ of mandamus exists to compel official performance of a ministerial act or mandatory duty.

MANDAMUS / NATURE AND EXISTENCE OF RIGHTS TO BE PROTECTED OR ENFORCED

Mandamus cannot issue to compel performance of a discretionary act or to govern the manner of performing the required act.

MANDAMUS / NATURE AND SCOPE OF REMEDY IN GENERAL

A court may issue a writ of mandamus where the petitioners have a clear legal right, the responding public official has a corresponding duty, and no other adequate and appropriate remedy at law exists.

MANDAMUS / NATURE AND SCOPE OF REMEDY IN GENERAL

Moreover, mandamus will be issued to compel action by an official where his refusal to act in the requested way stems from his erroneous interpretation of the law.

ACTION / MOOT, HYPOTHETICAL OR ABSTRACT QUESTIONS

Cases important to the citizenry as a whole, as when the state acts as substantial trustee for the public, have been reviewed under the great public importance exception even when a party has lost standing.

ACTION / MOOT, HYPOTHETICAL OR ABSTRACT QUESTIONS

It is only in very rare cases where exceptional circumstances exist or where matters or questions of great public importance are involved that the Supreme Court will decide moot questions or erect guideposts for future conduct or actions.

ACTION / MOOT, HYPOTHETICAL OR ABSTRACT QUESTIONS

Where courts have applied the great public importance exception, those cases often

implicate the rights or interests of broad groups of citizens with common experiences, traits, or characteristics, the breadth of which necessitate adjudication in order to resolve significant future controversy.

ACTION / MOOT, HYPOTHETICAL OR ABSTRACT QUESTIONS

Such cases often involve laws or rules that impact groups of citizens due to their common attributes, such that deciding the individual's case before the court will affect the rights or interests of those just like them in the future.

EDUCATION / POWERS AND FUNCTIONS IN GENERAL

Moreover, it is well-settled in Pennsylvania law that school district board members act in an official capacity only when lawfully convened as a body.

ACTION / MOOT, HYPOTHETICAL, OR ABSTRACT QUESTIONS

The capable of repetition yet likely to evade judicial review exception to the mootness doctrine is utilized when the issue in question has and will continue to affect many similar parties but is of such a temporary or short-term nature that those parties are not likely to maintain standing throughout the judicial process.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 2562 of 1976

Appearances: William P. Weichler, Esq. appeared on behalf of Defendants
Brian L. Pulito, Esq. appeared on behalf of Plaintiff

OPINION

Domitrovich, J. July 24, 2020

On July 7, 2020, argument was held on Defendants' Motion to Dismiss Plaintiff's Amended Complaint and Request for Permanent Injunction.

The procedural history of this case is as follows: On April 11, 2017, Plaintiff filed his Amended Complaint in Mandamus and for a Permanent Injunction. On May 12, 2017, Plaintiff filed for reinstatement of the Complaint, which was granted on May 15, 2017. The docket entries indicate Plaintiff filed his Amended Complaint in Mandamus and for a Permanent Injunction on June 29, 2017. Prior to this second filing, Defendants filed Preliminary Objections on June 7, 2017 and also on July 11, 2017. On October 31, 2017, the Honorable John Garhart of the Erie County Court of Common Pleas overruled Defendants' Preliminary Objections, and on November 29, 2017, Defendants filed an Answer and Counterclaim for both Defamation and Wrongful Use of Civil Proceedings. Plaintiff responded by filing Preliminary Objections to Defendants' Counterclaim on January 16, 2018, which Judge Garhart overruled on February 15, 2018, save for striking two paragraphs in Defendants' Counterclaim as nonspecific and sustaining Plaintiff's objection to the Wrongful Use of Civil Proceedings as premature. Plaintiff filed an Answer and New Matter to Defendants' Counterclaim on March 22, 2018, to which Defendants replied on March 23, 2018.

Also in March of 2018, both counsel and the parties began a very lengthy and acrimonious discovery process. In July of 2018, Defendants filed a Motion for a Protective Order to prevent Plaintiff from seeking interrogatories and requests for documents from current or former directors of the Millcreek Township School District Board [hereinafter School

District Board], who were not parties to the litigation. Defendants' Motion for Protective Order was granted by Judge Garhart on August 6, 2018. This Motion for Protective Order notwithstanding, discovery continued until April 22, 2019, when Defendants stipulated to and filed, on Plaintiff's behalf, Plaintiff's Amended Answer and New Matter to Defendants' Counterclaim. Afterwards, discovery again resumed until Plaintiff filed a Motion to Sever regarding Defendants' defamation counterclaim on August 14, 2019, which was denied by a senior judge, the Honorable William R. Cunningham, who had become the presiding judge in this case. On October 8, 2019, Plaintiff filed a Motion for Summary Judgment, which was denied by Judge Cunningham on November 5, 2019. Plaintiff then filed a Motion to Reconsider or Certify for Interlocutory Appeal, which was also denied by Judge Cunningham on November 20, 2019. On December 2, 2019, Defendants filed the instant Motion to Dismiss Plaintiff's Complaint in Mandamus and for a Permanent Injunction.

In the instant case, the factual history is as follows: Plaintiff's 2017 Complaint and Injunction requested this Trial Court direct the School District Board as well as William Hall and John DiPlacidio, Superintendent of the Millcreek Township School District and President of the School District Board, respectively, grant Plaintiff access to certain documents, all of which referenced School District Board expenditures, and enjoin Plaintiff's denial of access to School District Board documents thereafter. At the time Plaintiff's Complaint and Permanent Injunction were filed, Plaintiff was undisputedly an elected member of the School District Board. Plaintiff's term as a School District Board member ended in 2019, however, since the results of the 2019 election season were not in Plaintiff's favor. Defendants filed the instant Motion to Dismiss Plaintiff's Complaint in Mandamus and for a Permanent Injunction arguing Plaintiff no longer has standing to pursue this case since Plaintiff is no longer a member of the School District Board.

It is well-settled in Pennsylvania that if at any stage of the judicial process a case is rendered moot, said case will be dismissed. *See Magnelli v. Commonwealth, Pennsylvania State Civil Service*, 423 A.2d 802, 804 (Pa. Super. 1980); *In re Gross*, 382 A.2d 116, 119-20 (Pa. 1978); *Janet D. v. Carros*, 362 A.2d 1060 (Pa. 1976). It is also well-settled that a plaintiffs loss of standing will result in a plaintiff's case becoming moot. "The cases presenting mootness problems involve litigants who clearly had standing to sue at the outset of the litigation. The problems arise from events occurring after the lawsuit has gotten under way — changes in the facts or in the law which allegedly **deprive the litigant of the necessary stake in the outcome**. The mootness doctrine requires that 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *In re Gross*, 382 A.2d at 209 (quoting G. Gunther, Constitutional Law 11578 (9th ed. 1975)) (emphasis added).

In the instant case, Plaintiff sued for two forms of relief: 1) a writ of mandamus[1] to grant him access to School District Board documents, and 2) a permanent injunction to prevent

[1] The writ of mandamus exists to compel official performance ofa ministerial act or mandatory duty. *Fagan v. Smith,* 41 A.3d 816, 818 (Pa. 2012) (citing *Delaware River Port Auth. v. Thornburgh*, 493 A.2d 1351, 1355 (Pa. 1985). Mandamus cannot issue "to compel performance of a discretionary duty or to govern the manner of performing [the1 required act." *Fagan*, 41 A.3d at 818 (quoting *Volunteer Firemen's Relief Ass'n of City of Reading v. Minehart,* 203 A.2d 476, 479 (Pa. 1964)). **"[A courtl may issue a writ of mandamus where the petitioners have a clear legal right, the responding public official has a corresponding duty, and no other adequate and appropriate remedy at law exists."** *Fagan*, 41 A.3d (citing *Minehart*, 203 A.2d at 479) (emphasis added). Moreover, mandamus will be issued to compel action by an official where a refusal to act stems from an erroneous interpretation of the law. *Fagan*, 41 A.3d at 818 (citing *Minehart*, 203 A.2d at 479-80). Other adequate remedies at law exist to obtain school district board records such as the Pennsylvania Right to Know Law. 65 P.S. §§ 67.101, et seq.

being denied access to any School District Board documents in the future. *See* Plaintiff's Amended Complaint in Mandamus and for a Permanent Injunction. The controversy between the parties was whether Plaintiff was entitled to access these documents as a member of the School District Board in order that he fulfill his duty as a School District Board member. *See id.*, ¶¶ 18-21, 31. It is undisputed Plaintiff no longer holds this position. Therefore, Plaintiff no longer has access to the requested documents as a member of the School District Board, and no longer has a necessary stake in the outcome. Plaintiff has no greater right of access to these documents than any other citizen of Millcreek Township, and as the Pennsylvania Supreme Court has stated: "[to have standing] [t]here must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). Moreover, as Plaintiff no longer has a right of access to these documents, this Trial Court no longer has the ability to grant his requested relief.

Plaintiff argues, in the alternative, if this Trial Court finds he is without standing, the instant case should still be resolved in court as it is subject to two exceptions to the mootness doctrine: 1) the matters of great public importance exception, and 2) issues capable of repetition but likely to avoid judicial review. *See In re Gross,* 382 A.2d at 122-23; *Janet D.,* 362 A.2d; *Wortex Mills v. Textile Workers Union*, 85 A.2d 851, 857 (Pa. 1952); *Commonwealth v. Baker*, 766 A.2d 328, 330 n. 4 (Pa. 2001); *Commonwealth v. Shaw,* 744 A.2d 739, 742 n. 3 (Pa. 2000); *In re J.M.*, 726 A.2d 1041, 1045 n. 6 (Pa. 1999).

Cases "important to the citizenry as a whole, as when the state acts as substantial trustee for the public ... " have been reviewed under the great public importance exception even when a party has lost standing. *See Janet D.*, 362 A.2d at 1170. However, while this exception is well-established in Pennsylvania, its use is reserved only for the most exceptional of circumstances: "[i]t is only in very rare cases where exceptional circumstances exist or where matters or questions of great public importance are involved, that [the Supreme Court] ever decides moot questions or erects guideposts for future conduct or actions." *Wortex Mills*, 85 A.2d at 857.

Where courts have applied the great public importance exception, those cases often implicate the rights or interests of broad groups of citizens with common experiences, traits, or characteristics, the breadth of which necessitate adjudication in order to resolve significant future controversy. Such cases often involve laws or rules that impact these groups of citizens due to their common attributes, such that deciding the individual's case before the court will affect the rights or interests of those just like them in the future. For example, cases regarding matters of great public importance have involved laws for the protection, health, safety and well-being of children; the scope of state authority over immigrants; the treatment of school students; sufficiency of evidence of indirect criminal contempt of Pa.R.Civ.P. 1905 Protection From Abuse Orders; and even the fares charged for public transportation. See *D.G.A. v. Dep't of Human Services*, 2020 WL 283885 *4 (Pa. Commw. Ct. Jan. 21, 2020) (non-precedential opinion) (citing *Janet D.*, 362 A.2d at 1070; *Commonwealth v. Nava,* 966 A.2d 630, 633 (Pa. Super. 2009); *Mifflin Cty. Sch. District v. Stewart by Stewart,* 503 A.2d 1012 (Pa. Commw. 1986); *Baker*, 766 A.2d at 330 n. 4; *SEPTA v. Weiner*, 426 A.2d 191 (Pa. Commw. 1981)). It is not merely the presence of a significant interest alone that determines application of this exception. In *In re Gross*, for example, the Pennsylvania Supreme Court

found this exception was not warranted despite the case involving the rights of involuntarily committed psychiatric patients. 382 A.2d at 122-23. And in *Wortex Mills*, the Pennsylvania Supreme Court declined to apply the exception when the parties asked the Court to decide the constitutionality of peaceful picketing for organizational purposes. 85 A.2d at 857.

Plaintiff argues the relevant issue of great public importance is whether Plaintiff, as a School District Board member, can be denied access to documents necessary for his decision-making process. *See* Plaintiffs Brief in Support of Plaintiff's Response in Opposition to Defendants' Motion to Dismiss, at 8-9. However, Plaintiff does not point to any statute or rule that governs school board members' access to documents that is implicated by this case. Plaintiff does not specify how his access to these documents is likely to impact other school board members or even the public generally. Plaintiff relies only on his status as a School District Board member to establish the public importance of his access to the documents he requested. Without any indication Plaintiff's access to these documents will impact other school board members or the public at large, this Trial Court cannot erect guideposts for the School District Board's future conduct when Plaintiff no longer has standing.

Moreover, it is well-settled in Pennsylvania law that school district board members act in an official capacity only when lawfully convened as a body. *School Dist. of Philadelphia v. Framlau Corp.*, 328 A.2d 866, 870 (Pa. Commw. 1974). No single school district board member can act with the school board's authority nor compel the entire board or individual members of the board to act in an official capacity. In this instant case, this includes demanding the production of records which the majority of the School District Board members have determined are unnecessary in exercising the School District Board's duties. Plaintiff had the right to vote against such decisions and did so as a School District Board member.

After reviewing counsel's briefs, and after considering the factual history and the nature of the controversy between the parties, this Trial Court finds and concludes the issues raised by Plaintiff do not involve matters of great public importance needed to continue this case despite Plaintiff's absence of standing.

The second mootness doctrine exception Plaintiff contends is applicable to the instant case is the "capable of repetition but likely to evade judicial review exception." This exception is utilized when the issue in question has and will continue to affect many similar parties but is of such a temporary or short-term nature that those parties are not likely to maintain standing throughout the judicial process. *See D.G.A. v. Dep't of Human Services*, *3-4 (citing *Baker*, 766 A.2d at 330 n. 4; *Janet D.*, 362 A.2d at 1069; etc.). In *Janet D.*, for example, the issue was the treatment received by deprived children in shelter facilities who were authorized by law to be placed there but could only remain for three months. *Janet D.*, 362 A.2d at 1060. And in *Baker*, the issue was the sufficiency of evidence needed to convict a defendant of indirect criminal contempt of a Rule 1905 PFA Order, for which the maximum sentence was only six months. *Baker*, 766 A.2d at 328; *see* Pa.R.Civ.P. 1905. In both cases, the Pennsylvania Supreme Court found there were many more individuals likely to experience the same issues and the judicial process would far exceed the length of time any would retain standing if they brought their cases before the courts.

In the instant case, Plaintiff has not provided sufficient support for his assertion that this exception applies. Plaintiff did not cite to any law or rule that governs the issue at hand, as was the case in *Janet D.* and *Baker*, as individual school board members are not granted or

denied access to documents by express rule or statute. Plaintiff did not provide any examples of similar disputes among school board members or past cases adjudicating school board members' access to documents, either. There is no indication that if this Trial Court does not decide Plaintiff's case, many other school board members will continue to experience the same issues in the future. In fact, Plaintiff relies only on the length of a school board member's term to justify application of this exception, which this Trial Court acknowledges could be brief enough to evade judicial review. However, to apply this exception, Plaintiff's case must also be likely to repeat itself, and this Trial Court finds and concludes there is no indication this issue will repeat itself.

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

ORDER

AND NOW, to wit, on this 24th day of July, 2020, for all of the reasons as set forth in this Trial Court's Opinion, it is hereby **ORDERED, ADJUDGED, AND DECREED** Defendants' Motion to Dismiss Plaintiff's Amended Complaint and Request for Permanent Injunction is **GRANTED**.

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

JOHN JONES and TANYA JONES
v.
ERIE INSURANCE EXCHANGE

PLEADING / JUDGMENT ON PLEADINGS

Pennsylvania Rule of Civil Procedure 1034(a) states: "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings."

PLEADING / JUDGMENT ON PLEADINGS

Entry of judgment on the pleadings is appropriate when there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law.

PLEADING / JUDGMENT ON PLEADINGS

In a motion for judgment on pleadings, a trial court's scope of inquiry is limited to the averments contained in the pleadings.

PLEADING / JUDGMENT ON PLEADINGS

A court presented with a motion for judgment on the pleadings must consider the plaintiff's complaint, the defendant's answer, and any written instruments or exhibits attached to the pleadings.

PLEADING / JUDGMENT ON PLEADINGS

A motion for judgment on the pleadings must be analyzed under the same standard as a motion to dismiss in that a trial court must accept all allegations in the opposing party's pleadings against whom the motion for judgment on the pleadings is addressed as true and draw all reasonable inferences in favor of the non-moving party.

INSURANCE / EXCLUSIONS AND LIMITATIONS IN GENERAL / REGULAR OR FREQUENT USE

In Pennsylvania, the "regularly used, non-owned vehicle exclusion" has been held by the Supreme Court to be valid and enforceable under the Motor Vehicle Financial Responsibility Law (MVFRL) and Public Policy.

INSURANCE / COVERAGE – AUTOMOBILE INSURANCE

The primary public concern behind passing the Motor Vehicle Financial Responsibility Law (MVFRL) is to prevent the rising cost of automobile insurance rates in Pennsylvania.

INSURANCE / COVERAGE – RISKS AND EXCLUSIONS IN GENERAL

Invalidating the regularly used, non-owned vehicle exclusion would not serve the MVFRL's public policy concern; in fact, doing so is likely to increase automobile insurance rates.

INSURANCE / REGULAR OR FREQUENT USE

Invalidating the regularly used, non-owned vehicle exclusion would be untenable, as it would require insurers to compensate for risks they have not agreed to insure, and for which premiums have not been collected.

INSURANCE / AUTOMOBILES NOT IN POLICY IN GENERAL / "STACKING"

The MVFRL provides for stacked UIM coverage across single or multiple automobile insurance policies as a default insurance coverage and also requires the express waiver of stacked UIM coverage before a policyholder may be excluded from such coverage. Section 1738 contains a form waiver to exclude UIM coverage to facilitate meeting this requirement.

INSURANCE / AUTOMOBILES NOT IN POLICY IN GENERAL / "STACKING"

By placing the "household vehicle exclusion" within the language of the automobile insurance policy, an insurer could avoid § 1738's express waiver requirement. The "household

vehicle exclusion" operated as a *de facto* waiver of stacked UIM coverage, allowing an insurer to exclude stacked UIM coverage without having to prove the insured was aware of waiving said coverage.

INSURANCE / COVERAGE – RISKS AND EXCLUSION IN GENERAL

Requiring insurers to take on the risk of applying stacked UIM coverage to any vehicle regularly used but neither owned nor insured by a policyholder would likely increase automobile insurance rates. Increased insurance rates would defeat the public policy purpose of the MVFRL, as the Pennsylvania Supreme Court states in *Burnstein*.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
No. 11517 - 2019
PA SUPERIOR COURT
690 WDA 2020

Appearances: Craig R.F. Murphey, Esq., appeared on behalf of Appellants
Jeffrey Childs, Esq., appeared on behalf of Appellee

1925(a) OPINION

Domitrovich, J. September 10, 2020

John and Tanya Jones [hereinafter Appellants] have appealed this Trial Court's grant of judgment on the pleadings to Erie Insurance Exchange [hereinafter Appellee Insurance Co.] dated June 17, 2020. This case stems from a motor vehicle accident wherein Appellant John Jones was operating his employer's, Time Warner Cable's, bucket truck when he became involved in a motor vehicle accident with a third party driver. Appellant John Jones suffered various injuries due to this accident. The third party driver's insurer paid to Plaintiffs the $100,000.00 maximum allowed under the third party driver's policy. However, Appellants subsequently filed a supplemental claim for underinsured motorist (UIM) coverage with Appellee Insurance Co., their own personal automobile insurer. Appellee Insurance Co. denied Appellants' UIM claim pursuant to the "regularly used, non-owned vehicle exclusion" contained in Appellants' policy because Appellant John Jones was operating his employer's vehicle, for which Appellants had not purchased insurance.

The material facts of the instant case are not in dispute: It is undisputed Appellant John Jones regularly operated vehicles owned and insured by his employer, and it is undisputed Appellant John Jones was operating his employer's bucket truck at the time of the accident. Neither party contested the validity of the automobile insurance policy in question or the presence of the "regularly used, non-owned vehicle exclusion" within the language of the policy itself. Appellants instead argue the "regularly used, non-owned vehicle exclusion" is no longer enforceable following the Pennsylvania Supreme Court's decision in *Gallagher v. Geico Indemnity Co.*, 201 A.3d 131 (Pa. 2019). Appellants argue use of this exclusion violates the Motor Vehicle Financial Responsibility Law (MVFRL) as well as public policy since Plaintiffs did not expressly waive the stacked UIM coverage in their personal insurance policy. Appellee Insurance Co. argues the "regularly used, non-owned vehicle exclusion" remains valid and enforceable under Pennsylvania law and is not impacted by the *Gallagher* decision. Appellant John Jones operated his employer's bucket truck vehicle, which his employer regularly granted him access and for which Appellants did not purchase insurance

coverage, making the "regularly used, non-owned vehicle exclusion" directly applicable to the facts at hand.

After reviewing the pleadings filed by counsel for both parties in light of the standards for a motion for judgment on the pleadings, taking the factual allegations in Appellants' pleadings as true and drawing all reasonable inferences therefrom in Appellants' favor; after considering oral arguments raised by counsel during the hearing on the record; and after reviewing the *Gallagher* decision itself, this Trial Court granted judgment on the pleadings in favor of Appellee Insurance Co. This Trial Court issued an Opinion and Order on June 17, 2020 finding there are no disputes as to any material facts in the instant case and as a clear matter of law the "regularly used, non-owned vehicle exclusion" is valid and enforceable under Pennsylvania law. This Trial Court concluded *Gallagher* focused on the "household vehicle exclusion" and not the "regularly used, non-owned vehicle exclusion" used by Appellee Insurance Co. to deny Appellants' UIM coverage.

Moreover, the facts and circumstances of the instant case, as well as the facts and circumstances surrounding application of the "regularly used, non-owned vehicle exclusion," generally, distinguish the instant case from *Gallagher* and "household vehicle exclusion" case law. These are two distinct exclusions arising from factual scenarios that are easily distinguishable from each other preventing case law regarding one exclusion from being readily applied to the other exclusion. The Pennsylvania Supreme Court in the cases of *Burnstein* and *Williams*, *see infra*, stated the "regularly used, non-owned vehicle exclusion" is valid and enforceable under the MVFRL and public policy. The *Gallagher* case did not directly impact these longstanding Pennsylvania Supreme Court decisions.

The factual and procedural history of the instant case is as follows: Appellants filed a Complaint against Appellee Insurance Co. on August 30, 2019, alleging one count of breach of contract. Appellee Insurance Co. filed an Answer, New Matter and Counterclaim on October 4, 2019. Appellee Insurance Co. filed a Motion for Judgment on the Pleadings on February 3, 2020. Appellants filed their response on March 2, 2020. Argument was scheduled and held on June 4, 2020. After this Trial Court issued its Opinion and Order granting Defendant Insurance Co.'s Motion for Judgment on the Pleadings on June 17, 2020, Appellee filed and entered judgment in its favor on June 30, 2020. Appellants filed their Notice of Appeal on July 13, 2020, and this Trial Court issued a Pa.R.A.P. 1925(b) Order on July 14, 2020. Appellants filed their 1925(b) Concise Statement of Matters Complained of on Appeal on July 31, 2020, wherein Appellants raise six (6) similar issues which this Trial Court has combined into one single issue: whether the "regularly used, non-owned vehicle exclusion," in light of the Pennsylvania Supreme Court decision in *Gallagher*, which focused only on the "household vehicle exclusion," is still enforceable under both the MVFRL and public policy where an insurer denied stacked UIM coverage to an insured without the insured's express waiver for a vehicle the insured does not own or pay to insure at all.

Pennsylvania Rule of Civil Procedure 1034(a) states: "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." "Entry of judgment on the pleadings is appropriate when there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law." *Okeke-Henry v. Southwest Airlines, Co.*, 163 A.3d 1014 (Pa. Super. 2017). In a motion for judgment on the pleadings, a trial court's scope of inquiry is limited to the averments

contained in the pleadings. *Aubrey v. Precision Airmotive, LLC.*, 7 A.3d 256, 266 (Pa. Super. 2010) (citations omitted). "A court presented with a motion for judgment on the pleadings must consider the plaintiff's complaint, the defendant's answer, and any written instruments or exhibits attached to the pleadings." *Bonnie F. Kaite v. Altoona Student Transportation,* 296 F. Supp. 3d 736 (W.D. Pa. 2017). A motion for judgment on the pleadings must be analyzed under the same standard as a motion to dismiss in that a trial court must accept all allegations in the opposing party's pleadings against whom the motion for judgment on the pleadings is addressed as true and draw all reasonable inferences in favor of the non-moving party. *Kaite* supra at 740. See also *Zimmerman v. Corbett*, 873 F.3d 414, 418 (3d Cir. 2017).

In Pennsylvania, the "regularly used, non-owned vehicle exclusion" has been held by the Supreme Court to be valid and enforceable under the MVFRL and public policy. *See Burnstein v. Prudential Property and Cas. Ins. Co.*, 809 A.2d 204 (Pa. 2002); *Williams v. Geico Government Employees Ins. Co.*, 32 A.3d 1195 (Pa. 2011); *see also Nationwide Affinity Ins. Co. of America v. Fong*, 2020 WL 2039720 (E.D. Pa. Apr. 28, 2020). The primary public policy concern behind passing the MVFRL is to prevent the rising cost of automobile insurance rates in Pennsylvania. *Burnstein*, 809 A.2d at 207-08. In *Burnstein*, the Pennsylvania Supreme Court stated invalidating the "regularly used, non-owned vehicle exclusion" would not serve this public policy concern; in fact, doing so is likely to increase automobile insurance rates. *Id*. at 208. "Here, voiding the exclusion would frustrate the public policy concern for the increasing costs of automobile insurance, as the insurer would be compelled to underwrite unknown risks that it had not been compensated to insure." *Id*. The Pennsylvania Supreme Court echoed this sentiment nine years later in *Williams* when it held invalidating the exclusion would be "untenable, as it would require insurers to compensate for risks they have not agreed to insure, and for which premiums have not been collected." *Williams*, 32 A.3d at 1209. As both cases demonstrate, the Pennsylvania Supreme Court has consistently found the "regularly used, non-owned vehicle exclusion" valid and enforceable under the MVFRL and public policy.

In *Gallagher*, the Pennsylvania Supreme Court overturned a different automobile insurance exclusion - the "household vehicle exclusion" - as the Court found use of the "household vehicle exclusion" violated § 1738 of the MVFRL. *Gallagher*, 201 A.3d at 138. The MVFRL provides for stacked UIM coverage across single or multiple automobile insurance policies as a default insurance coverage and also requires the express waiver of stacked UIM coverage before a policyholder may be excluded from such coverage. *Id*.; *see also* 75 Pa.C.S. §§ 1731; 1738. Section 1738 contains a form waiver to exclude UIM coverage to facilitate meeting this waiver requirement. *See* 75 Pa.C.S. § 1738(d). By placing the "household vehicle exclusion" within the language of the automobile insurance policy, an insurer could avoid § 1738's express waiver requirement. *Id*.; *see also Dunleavy v. Mid-Century Insurance Company*, 2020 WL 2536816 at *3 (W.D. Pa., May 19, 2020). The "household vehicle exclusion" operated as a *de facto* waiver of stacked UIM coverage, allowing an insurer to exclude stacked UIM coverage without having to prove the insured was aware of waiving said coverage. *Gallagher*, 201 A.3d at 138.

The *Gallagher* decision, however, focuses only on the "household vehicle exclusion." Justice Baer, writing for the Majority in *Gallagher*, expressly limited the scope of the Court's decision: "[W]e offer no opinion or comment on the enforceability of any other exclusion

to UM or UIM coverage or to coverage in general ... If, at some later date, the Court is presented with issues regarding the validity of other UM or UIM exclusions, then we will address them at that time. Our focus here is narrow ... " *Id*. at 138 n. 8. So while use of the "household vehicle exclusion" to preclude stacked UIM coverage violates § 1738 of the MVFRL, the Pennsylvania Supreme Court did not expand its ruling to include other UIM insurance exclusions such as the "regularly used, non-owned vehicle exclusion."

Gallagher focuses on an insurance company's use of the "household vehicle exclusion" to preclude stacked UIM coverage on vehicles included within a policy or policies paid for by the insured. The insured in *Gallagher* purchased two separate insurance policies: one for a motorcycle and another for vehicles, both from the same insurer and both of which contained stacked UIM coverage. After the insured suffered a motorcycle accident, he sought to stack UIM coverage across both policies and was denied by the insurer pursuant to the "household vehicle exclusion" and not due to an express waiver of his UIM stacked coverage. Also key to the *Gallagher* decision was that the insured had purchased both policies from the same insurer, meaning the insurer could easily discern the vehicles subject to stacked UIM coverage and set the premiums for both policies accordingly. Invalidating the "household vehicle exclusion" would not have required the insurer to take on unknown or undetermined risks as the insurer had already issued policies for all of the insured's vehicles subject to stacked UIM coverage.

The instant case is distinguishable from *Gallagher* in several important ways. First, Appellants as the insured were not deprived of stacked UIM coverage across policies they had purchased from Appellee Insurance Co. Instead, Appellants are seeking to attach UIM coverage included within their personal insurance policy to a commercial vehicle Appellants never owned nor insured. Appellants have not purchased any insurance policy for this bucket truck vehicle from either Appellee Insurance Co. or from any other insurer, let alone stacked UIM coverage for Appellant's employer's vehicle. The bucket truck was owned by Appellant's employer, Time Warner Cable, and should be insured by that company. Appellee Insurance Co. has not accounted for the risk of insuring Appellants' use of employer's bucket truck as it is not included within any policy issued by Appellee Insurance Co., and Appellants' insurance premium also does not reflect this risk.

Therefore, Appellants' attempt to expand the *Gallagher* decision to include the "regularly used, non-owned vehicle exclusion" does not fit the facts at hand. In the instant case, the "regularly used, non-owned vehicle exclusion" does not act as a *de facto* waiver of stacked UIM coverage because there is no stacked UIM coverage for Appellants to waive. Of course, Appellants retain stacked UIM coverage for any vehicles Appellants purchased such coverage for, but this does not extend stacked UIM coverage to vehicles Appellants do not insure at all. Unlike in *Gallagher*, Appellee Insurance Co. could not easily discern the vehicles subject to stacked UIM coverage as Appellant's employer's vehicle is not included on any policy owned and paid for by Appellants. Moreover, requiring insurers to take on the risk of applying stacked UIM coverage to any vehicle regularly used but neither owned nor insured by a policyholder would more than likely to increase automobile insurance rates. Increased insurance rates would defeat the public policy purpose of the MVFRL, as the Pennsylvania Supreme Court states in *Burnstein*. *See supra*.

Moreover, this Trial Court notes three Pennsylvania U.S. District Court Judges have

ruled *Gallagher* is limited to addressing the "household vehicle exclusion" and not the "regularly used, non-owned vehicle exclusion." The Honorable Marilyn Horan of the U.S. District Court for the Western District of PA, in *Barnhart v. Travelers Home and Marine Insurance Company*, held as a matter of law: "*Gallagher* [] does not extend to invalidate the 'regular use exclusion' or to overturn *Williams* [*v. Geico Government Employees Ins. Co.*] as the controlling precedent for this case." 417 F.Supp.3d at 658. The Honorable J. Nicholas Ranjan, also of the U.S. Western District Court stated in *Dunleavy v. Mid-Century Insurance Company*: "But for [stacked UIM coverage] to exist, each of the policies being stacked must 'provide' uninsured or underinsured motorist coverage. *Gallagher* did not alter this requirement. Instead, in *Gallagher*, the Pennsylvania Supreme Court stopped insurance companies from using the household vehicle exclusion as an end-run around the requirement of a signed form to waive stacked coverage." 2020 WL 2536816 at *3 (W.D. Pa., May 19, 2020). The Honorable Chad F. Kenney of the U.S. District Court for the Eastern District found, in *Nationwide Affinity Insurance Company of America v. Fong, et al.*, defendants' argument that *Gallagher* applied to the "regularly used, non-owned vehicle exclusion" unpersuasive: "As discussed previously ... the [Pennsylvania Supreme] Court's holding in *Gallagher* does not affect *Williams* [*v. Geico Gov't Employees Ins. Co., see supra*] as the facts of *Gallagher* are wholly distinguishable to the facts in the instant matter, as conceded by Defendants." 2020 WL 2039720 at *4; *see also* *3 n. 3.

Since no material issues of fact exist between the parties when taking all of Appellants' factual allegations as true and drawing all reasonable inferences therefrom in Appellants' favor; since it is clear as a matter of law that the "regularly used, non-owned vehicle exclusion" is valid and enforceable under the MVFRL and public policy; and in light of the Pennsylvania Supreme Court's stated intention to apply the *Gallagher* decision only to the "household vehicle exclusion," this Trial Court requests the Pennsylvania Superior Court affirm this Trial Court's Order of June 17, 2020, granting judgment on the pleadings to Appellee Insurance Co.

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

COMMONWEALTH OF PENNSYLVANIA

v.

JAQUEL SHAMON TIRADO

CRIMINAL LAW / WEIGHT AND SUFFICIENCY OF EVIDENCE IN GENERAL

A claim in which the sufficiency of the evidence is challenged is a question of law.

CRIMINAL LAW / REASONABLE DOUBT

Evidence is sufficient to support a verdict if it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt.

CRIMINAL LAW / WEIGHT AND CONCLUSIVENESS IN GENERAL

If evidence offered in support of the verdict is contradictory to the physical facts in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law.

CRIMINAL LAW / INFERENCES OR DEDUCTIONS FROM EVIDENCE

The court is required to view the evidence in the light most favorable to the verdict winner when reviewing a sufficiency of the evidence claim.

CRIMINAL LAW / WEIGHT AND SUFFICIENCY

Circumstantial evidence alone may be sufficient to convict.

CRIMINAL LAW / WEIGHT AND SUFFICIENCY

Circumstantial evidence is sufficient as long as the inferences arising from this evidence prove the facts in question beyond a reasonable doubt.

HOMICIDE / FIRST DEGREE, CAPITAL, OR AGGRAVATED MURDER

To sustain a conviction for Murder of the First Degree, the jury must find beyond a reasonable doubt a victim is dead; defendant killed said victim; and did so with specific intent to kill and with malice.

HOMICIDE / INTENT OR MENS REA

A court may infer specific intent from the use of a deadly weapon upon a vital part of the victim's body.

CONSPIRACY / COMBINATION OR AGREEMENT

As to whether Commonwealth presented sufficient evidence to sustain a conviction for Conspiracy to Commit Murder of the First Degree under 18 Pa.C.S. § 903, a conviction for conspiracy requires: an unlawful agreement or an agreement to do an act in an unlawful manner, and an agreement that makes each member criminally responsible for the acts of the other members.

CONSPIRACY / COMBINATION OR AGREEMENT

A conspiracy may be inferentially established by showing the relation, conduct or circumstances of the parties, and overt acts by the conspirators have been held competent to prove that a corrupt confederation has in fact been formed.

CONSPIRACY / COMBINATION OR AGREEMENT

The Commonwealth must present evidence that the goal of the conspiratorial agreement was to commit first degree murder, and secondly the Appellant entered into a conspiratorial agreement.

CONSPIRACY / COMBINATION OR AGREEMENT

The overt act necessary to prove conspiracy must be done openly to accomplish the purpose of the conspiracy.

CONSPIRACY / COMBINATION OR AGREEMENT

In the instant case, Commonwealth was required to prove a combination of two or more persons existed, with criminal motive or criminal intent, to do a criminal or unlawful act or a legal act by criminal or unlawful means.

ASSAULT AND BATTERY / DEGREES AND AGGRAVATED OFFENSES IN GENERAL

As to whether Commonwealth presented sufficient evidence to sustain a conviction for Aggravated Assault under 18 Pa.C.S. § 2702(a)(1), a person is guilty of Aggravated Assault if he attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting an extreme indifference to the value of human life.

ASSAULT AND BATTERY / ENDANGERMENT

As to whether Commonwealth presented sufficient evidence to convict Appellant of Recklessly Endangering Another Person (REAP) under 18 Pa.C.S. § 2705, a person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

ASSAULT AND BATTERY / ENDANGERMENT

To convict Appellant of REAP, Commonwealth must present sufficient evidence to prove Appellant's conduct was reckless, causation, and a particular result must be reached.

OBSTRUCTING JUSTICE / TAMPERING IN GENERAL

As to whether Commonwealth presented sufficient evidence under 18 Pa.C.S. § 4910(1), a person commits misdemeanor of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he alters, destroys, conceals or removes any record, document or thing with intent to impair its veracity or availability in such proceeding or investigation.

OBSTRUCTING JUSTICE / TAMPERING IN GENERAL

Commonwealth must have proven Appellant knew an official inquiry into the crime was pending or going to be instituted; Appellant concealed or altered the item in question; and Appellant intended the concealed item be impaired as to its veracity or availability for use in the proceeding or investigation.

DISORDERLY CONDUCT / INSTRUMENTS OF CRIME

As to whether Commonwealth presented sufficient evidence to convict Appellant of Possession of an Instrument of Crime under 18 Pa.C.S. § 907(a), a person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally.

DISORDERLY CONDUCT / INSTRUMENTS OF CRIME

A conviction for Possession of an Instrument of Crime will be upheld if Commonwealth proves a defendant possessed an instrument that is commonly used for criminal purposes, under circumstances not manifestly appropriate for lawful use, with the intent to employ it criminally.

DISORDERLY CONDUCT / INSTRUMENTS OF CRIME

An instrument of a crime is defined as anything specially made … or adapted for criminal use, or anything commonly used for criminal purposes and possessed by the actor under circumstances not manifestly appropriate for lawful uses it may have.

CRIMINAL LAW / COMMENTS ON EVIDENCE OR WITNESSES

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 LAW / STATEMENTS AS TO FACTS AND ARGUMENTS

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 LAW / CONDUCT OF COUNSEL IN GENERAL

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

CRIMINAL LAW / CONDUCT OF COUNSEL IN GENERAL

In determining whether a prosecutor engaged in impermissible conduct during closing argument, Pennsylvania follows Section 5.8 of the American Bar Association (ABA) Standards.

CRIMINAL LAW / EXHIBITS AND ILLUSTRATIONS

The prosecutor may use visual aids 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. Significantly, this rule applies equally to demonstrative aids used during the actual trial phase and during the parties' opening and closing arguments.

CRIMINAL LAW / EXHIBITS AND ILLUSTRATIONS

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.

CRIMINAL LAW / EXHIBITS AND ILLUSTRATIONS

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

CRIMINAL LAW / EXHIBITS AND ILLUSTRATIONS

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 an appellate court will not revers absent an abuse of discretion.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
CR 3831 of 2016
1225 WDA 2019

Appearances: Emily M. Merski, Esq., for Appellant Jaquel Shamon Tirado
John H. Daneri, Erie County District Attorney, for Appellee Commonwealth of Pennsylvania

1925(a) OPINION

Domitrovich, J. October 15, 2019

On July 30, 2019, this Trial Court granted the request of Appellant Jaquel Shamon Tirado [hereinafter Appellant] by and through his counsel's "Supplement to Motion for Post-Conviction Collateral Relief" [hereinafter Supplemental PCRA], with no objection by the Commonwealth, to reinstate Appellant's appellate rights *nunc pro tunc*. Appellant's counsel, Emily M. Merski, Esq., on appeal raises nine (9) issues as to the sufficiency of the evidence of nine (9) of his ten (10) criminal convictions and also raises an issue as to an allegation of prosecutorial misconduct in Commonwealth's closing argument. This Trial Court provides the following procedural history:

On December 22, 2016, the District Attorney's Office filed a Criminal Information charging Appellant and his co-conspirators with shooting and killing Stephen Bishop [hereinafter Victim] at or near the 2000 block of Cottage Street in Erie, Pennsylvania. The District Attorney's Office filed the following criminal counts against Appellant: 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 under 18 Pa.C.S. 2501(a), in violation of 18 Pa.C.S. § 903; Criminal Conspiracy-Aggravated Assault under 18 Pa.C.S. 2702(a)(1), in violation of 18 Pa.C.S. § 903; Criminal Conspiracy-Aggravated Assault under 18 Pa.C.S. 2702(a)(4), 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, Appellant, by and through his prior counsel, Nathaniel E. Strasser, Esq., filed Appellant's Petition for Writ of Habeas Corpus. On April 19, 2017, a hearing was held on Appellant's Petition for Writ of Habeas Corpus at which time 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 Appellant 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 Appellant's Petition for Writ of Habeas Corpus to the extent this Trial Court dismissed Counts Five and Six from his 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 Appellant on all ten of 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, Appellant's counsel filed a Motion for Judgment of Acquittal and/or Motion for New Trial. On April 11, 2018, argument was held on said Motions, and by Order dated the same day, April 11, 2018, this Trial Court directed both counsel for Appellant and Commonwealth to file Memoranda of Law on the relevant issues presented in Appellant's Motion. On May 1, 2018, Appellant's counsel filed a Motion for Extension to File Memorandum of Law wherein counsel for Appellant indicated the court reporter needed additional time to transcribe the relevant portions of the jury trial in this matter. By Order dated May 2, 2018, this Trial Court granted Appellant's Motion for Extension to File Memorandum of Law. On June 4, 2018, Appellant's counsel filed Appellant's Memorandum of Law in Support of Appellant's Post-Sentence Motion, and on June 12, 2018, counsel for Commonwealth filed a Memorandum of Law in Opposition to Appellant's Post-Sentence Motion. Before this Trial Court issued its decision on Appellant's Motion, Appellant's counsel provided to this Trial Court the following relevant transcripts: testimony of Detective Christopher Janus [hereinafter Detective Janus] from August 1 and 3, 2017, and Commonwealth's closing argument from August 2, 2017. On July 6, 2018, this Trial Court issued an Opinion and Order denying Appellant's Motion for Judgment of Acquittal and/or Motion for New Trial.

On August 7, 2018, Appellant filed a Notice of Appeal to the Pennsylvania Superior Court of this Trial Court's Post-Sentence Order dated July 6, 2018. This Trial Court filed its 1925(b) Order on August 9, 2018. Appellant filed his Statement of Matters Complained of on Appeal on August 29, 2018. On December 14, 2018, the Pennsylvania Superior Court quashed Appellant's appeal for failure of defense counsel file a timely Notice of Appeal as required by Pa.R.A.P. 902.

On May 15, 2019 Appellant filed a *pro se* Post-Conviction Relief Act petition [hereinafter PCRA], alleging ineffective assistance of counsel for failure of Appellant's previous counsel to file a timely Notice of Appeal. On May 17, 2019 Attorney William J. Hathaway, Esq. was appointed as "PCRA counsel." On June 17, 2019, Attorney Hathaway filed Appellant's "Supplement to Motion For Post-Conviction Collateral Relief." As relevant to the instant appellate case and as explained earlier, this Trial Court granted Appellant's Supplemental PCRA on July 30, 2019 to the extent Appellant's appellate rights were restored *nunc pro tunc*. Appellant's new appellate counsel, Emily Merski, Esq. [hereinafter Appellant's Counsel], subsequently filed a timely Notice of Appeal on August 9, 2019.

This Trial Court issued its 1925(b) Order on August 9, 2019 directing Appellant's counsel to file a concise statement of matters complained on appeal within twenty-one (21) days of said date. Upon the first request of Appellant's counsel for additional time to review Appellant's record filed on August 27, 2019, this Trial Court granted her request to file her concise statement providing an additional ten (10) days. Appellant's counsel then filed a second request for additional time on September 6, 2019. This Trial Court granted this second request, and provided an additional five (5) days for Appellant's counsel to file her concise statement. Appellant's counsel filed her "Concise Statement of the Matters Complained on Appeal" on September 11, 2019.

Appellant challenges nine (9) of his ten (10) convictions arguing Commonwealth failed to

provide sufficient evidence to convict him of those charges. A claim in which the sufficiency of the evidence is challenged is a question of law. *Commonwealth v. Stahl*, 175 A.3d 301, 303 (Pa. Super. 2017) (citing *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751 (2000)). Evidence is sufficient to support a verdict if it "establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt." *Id*. If evidence offered in support of the verdict is contradictory to the physical facts "in contravention to human experience and the laws of nature," then the evidence is insufficient as a matter of law. *Id*. at 303-04. The court is required to view the evidence in the light most favorable to the "verdict winner" when reviewing a sufficiency of the evidence claim. *Id*. at 304.

Circumstantial evidence alone may be sufficient to convict. *Commonwealth v. Littlejohn*, 250 A.2d 811, 828 (1969). Circumstantial evidence is sufficient as long as the inferences arising from this evidence prove the facts in question beyond a reasonable doubt. *Id*.

To sustain a conviction for Murder of the First Degree, the jury must find beyond a reasonable doubt a victim is dead; defendant killed said victim; and did so with specific intent to kill and with malice. *Commonwealth v. Bracey*, 662 A.2d 1062, 1066 (1995). A court may infer specific intent from "the use of a deadly weapon upon a vital part of the victim's body." *Id*.

At Appellant's trial, in the instant case, Commonwealth presented evidence that when Officer Carducci arrived at the scene, Victim was "pulseless, no carotid pulse was present, bleeding profusely from the mouth." (*See* Notes of Testimony, Jury Trial, Day 2 ("N.T.2.") at pg. 38:20-24). Furthermore, Officer Carducci stated the breaths Victim was taking at the scene were not able to support his life. (N.T.2. at pg. 38:25-39:1).

Dr. Eric Vey, a forensic pathologist for twenty-five (25) years and licensed in forensic pathology having done over four thousand (4000) autopsies with approximately five hundred (500) to seven hundred fifty (750) autopsies involving fatal shootings, was qualified by this Trial Court as an expert in forensic pathology. Dr. Vey provided his expert testimony as to the cause of death of Victim, in which Dr. Vey opined and concluded Victim "died as a result of a gunshot wound to the chest, with the entrance in the left proximal arm." (N.T.2. at pg. 119:11-12). Dr. Vey further found and concluded Victim expelled blood from his mouth, and the bullet wounded a number of major organs such as Victim's left lung, brachiocephalic artery, and trachea. (N.T.2. at pg. 122:6-123:24). Dr. Vey ultimately concluded Victim's "cause of death, technically, is from bleeding to death, both internally and externally with a component of having his lungs fill up with blood." (N.T.2 at pg. 123:12-16). Dr. Vey indicated Victim drowned "in his own blood at the same time." (*Id*.) Therefore, Commonwealth presented sufficient evidence to satisfy the first element of Murder of the First Degree in that Victim is dead.

The second element is whether sufficient evidence existed to prove beyond a reasonable doubt Appellant killed the victim. *See Bracey* at 1066. While showing the video to the jury, Detective Janus narrated that the video from August 18, 2016 demonstrated Victim was walking with Appellant and two other individuals prior to the 911 call when Victim was shot. (N.T.2. at pg. 178:15-24). Detective Janus further indicated that prior to the shooting, Appellant and another individual were supporting the right pocket of their pants as if their pockets contained firearms. (N.T.2. at pg. 181:5-13, pg. 183:12-23, pg. 185:13-486:16). Eight gunshots were heard via audio recordings from the videos. (N.T.2. at pg. 194:13-195:25).

Appellant and another individual were recorded running away from the scene immediately after Victim was shot. (N.T.2. at pg. 194:13-195:25). Appellant and another individual were running from the area with their left hands free but with their right hands supporting an item in each of the right pockets of their pants. (*Id*.).

Ralph Green, a bystander witness, stated on August 18, 2016, he heard gun shots while he as sitting on his porch. (*See* Notes of Testimony, Jury Trial, Day 3 ("N.T.3.") at pg. 197:16-19). Mr. Green further noted after the gunshots, he witnessed Appellant staring back at him, placing his gun back into his pants, and proceeding to run away from the scene. (*Id*.). Futhermore, Mr. Green stated Appellant was wearing a white t-shirt and tan or grey pants on August 18, 2016, as Appellant stared back at Mr. Green. (N.T.3. at pg. 200:18-21).

Moreover, when several of the Erie City Police searched Appellant's residence following the shooting, police officers discovered white t-shirts and a pair of tan pants. (N.T.3. at pg. 232:13-19, 237:4-23). This evidence directly corroborated statements made by Ralph Green, a bystander witness, describing Appellant's clothing earlier on August 18, 2016. (N.T.3. at 200:18-21) Appellant's pants were found in a plastic bag in his bedroom. (*See* Notes of Testimony, Jury Trial, Day 4 ("N.T.4.") at pg. 41:8-20). Allison Laneve [hereinafter Expert Laneve], Manager and Forensic Scientist for RJ Lee Group, who has testified approximately one hundred five (105) times as an expert witness, was qualified by this Trial Court as an expert witness in primer gunshot residue analysis and interpretation. Expert Laneve stated gunshot residue was found on both of these tan pants and white t-shirt which were recovered from Appellant's residence. (N.T.4. at pg. 71:1-22,74:3-75:4). Moreover, Commonwealth's video evidence shown to the jury indicated no other individual was wearing the same clothes as Appellant wore on any of the surveillance videos from August 18, 2016. (N.T.2. at pg. 198:17-25). Therefore, Commonwealth presented sufficient evidence to satisfy the second element of Murder of the First Degree in that Appellant killed this Victim.

For Murder of the First Degree, Commonwealth must satisfy the third element in that Appellant acted with specific intent to kill and malice. *See Bracey* at 1066. Detective Janus stated Appellant and another individual were with the Victim prior to the shooting, as evidenced by video from August 18, 2016. (N.T.2. at pg. 178:15-24). These individuals were protecting their right front pants pockets prior to the shooting of Victim as illustrated on the video displayed to the jury. (N.T.2. at pg. 181:5-13, 183:12-23, 185:13-486:16). Prior to Appellant and another man luring the Victim down Cottage Avenue, Mr. Green noted he initially saw the Victim on the sidewalk prior to hearing gunshots. (N.T.3. at pg. 199:20-23). Furthermore as stated in *Bracey*, specific intent may be inferred from use of a deadly weapon to a vital area of the victim's body. *Commonwealth v. Bracey*, 662 A.2d 1062, 1066 (1995). Dr. Vey opined and concluded the bullet wounded a number of major organs such as Victim's left lung, the brachiocephalic artery, and the trachea. (N.T.2. at pg. 122:6-123:24). Furthermore, Dr. Vey ultimately concluded Victim died from a bullet wound thereby bleeding to death, drowning in Victim's own blood. (*See* N.T.2. at 123:12-16). Specific intent to kill was inferred from Appellant's conduct and his actions and, therefore, Commonwealth presented specific evidence to satisfy the third element of Murder of the First Degree.

Contrary to argument by Appellant's counsel, Commonwealth did meet its burden of proof by sufficient evidence proving that Appellant caused the death of Victim as indicated above. Therefore, Commonwealth presented sufficient evidence to convict Appellant of Murder of

the First Degree thereby satisfying all three elements of Murder of the First Degree.

As to whether Commonwealth presented sufficient evidence to sustain a conviction for Conspiracy to Commit Murder of the First Degree under 18 Pa.C.S. §903, a conviction for conspiracy requires: an unlawful agreement or an agreement to do an act in an unlawful manner, and an agreement that makes each member criminally responsible for the acts of the other members. *Commonwealth v. Tingle*, 419 A.2d 6, 10 (Pa. Super 1980). "[A] conspiracy may be inferentially established by showing the relation, conduct or circumstances of the parties, and overt acts by the conspirators have been held competent to prove that a corrupt confederation has in fact been formed." *Id*. (citing *Commonwealth v. Roux*, supra, 465 Pa. 482, 350 A.2d 867 (1976); *Commonwealth v. Kinsey*, 249 Pa. Super. 1, 8, 375 A.2d 727, 730 (1977)).

The Commonwealth must present evidence that the goal of the conspiratorial agreement was to commit first degree murder, and secondly the Appellant entered into a conspiratorial agreement. *Tingle* at 10. The overt act necessary to prove conspiracy must be done openly to accomplish the purpose of the conspiracy. *Commonwealth v. Cohen*, 199 A.2d 139, 154 (Pa. Super. 1964).

In the instant case, Commonwealth presented sufficient evidence Appellant and another individual were present with Victim in the moments prior to this shooting. (N.T.2. at pg. 178:15-24). Furthermore, Commonwealth presented sufficient evidence Appellant and another individual were walking while protecting an item in their right front pants' pockets. (N.T.2. at pg. 181:5-13, 183:12-23, 185:13-486:16). Mr. Green noted he initially saw Victim, prior to two men luring Victim down Cottage Avenue. (N.T.3. at pg. 199:20-23). It is uncontested Victim is dead achieving the goal sought by the criminal conspiracy; therefore an overt act was present to sustain Appellant's conviction. In summary, Commonwealth presented evidence from August 18, 2016 in which Appellant and another individual were following Victim, carrying firearms, and lured Victim down Cottage Avenue moments before Victim was shot. The overt act proving conspiracy, if not the following of Victim while carrying a firearm, would be luring Victim down Cottage Avenue immediately before Appellant and another individual shot Victim. Therefore, Commonwealth presented sufficient evidence to sustain Appellant's conviction of Conspiracy to Commit Murder of the First Degree under 18 Pa.C.S. §903(a)/2501(a).

As to whether Commonwealth presented sufficient evidence to sustain a conviction for Aggravated Assault under 18 Pa.C.S. §2702(a)(1), a person is guilty of Aggravated assault if he "attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." *Commonwealth v. Bullock*, 170 A.3d 1109, 1119 (Pa.Super. 2017). In order to convict Appellant of this charge, Commonwealth must have presented sufficient evidence that Appellant caused serious bodily harm to Victim and Appellant acted intentionally, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life.

Appellant possessed a firearm capable of causing bodily harm, based on statements by Detective Janus that demonstrate Appellant and another individual were protecting items in their right front pants' pockets, and Expert Laneve's opinion that gunshot residue was found on both Appellant's pants as well as inside the pocket of these same pants. (N.T.2. at pg.

181:5-13, 183:12-23, 185:13-486:16; N.T.4. at pg. 74:3-75:4). Mr. Green stated after watching Victim being lured back down Cottage Avenue, Mr. Green heard gun shots. (N.T.3. at pg. 199:20-23; N.T.3. pg. 197:16-19). Mr. Green then witnessed Appellant placing his gun back into his pants. N.T.3. at pg. 197:16-19). Video evidence depicted to the jury that Appellant and another individual ran from the location of the shooting. (N.T.2. at pg. 194:13-195:25).

In the instant case, elements of aggravated assault are satisfied since Appellant lured Victim down Cottage Avenue intending to cause serious bodily harm to Victim by way of a firearm. Commonwealth's evidence clearly showed Appellant acted intentionally by shooting Victim, knowing the goal Appellant achieved would be death or serious bodily harm to Victim. The death of Victim constituted obvious serious bodily injury. Therefore, Commonwealth presented sufficient evidence to convict Appellant of Aggravated assault under 18 Pa.C.S. §2702(a)(1).

As to whether Commonwealth presented sufficient evidence to sustain a conviction for Conspiracy to Commit Aggravated Assault under 18 Pa.C.S. §903, a conviction for conspiracy requires: an unlawful agreement or an agreement to do an act in an unlawful manner, and an agreement that makes each member criminally responsible for the acts of the other members. *Commonwealth v. Tingle*, 419 A.2d 6, 10 (Pa. Super. 1980). "[A] conspiracy may be inferentially established by showing the relation, conduct or circumstances of the parties, and overt acts by the conspirators have been held competent to prove that a corrupt confederation has in fact been formed." *Id*. (citing *Commonwealth v. Roux*, supra, 465 Pa. 482, 350 A.2d 867 (1976); *Commonwealth v. Kinsey*, 249 Pa. Super. 1, 8, 375 A.2d 727, 730 (1977)).

In the instant case, Commonwealth was required to prove a combination of two or more persons existed, with criminal motive or criminal intent, to do a criminal or unlawful act or a legal act by criminal or unlawful means. *Commonwealth v. Petrosky*, 166 A.2d 682, 688 (Pa. Super. 1960). The overt act necessary to prove conspiracy must be done openly to accomplish the purpose of the conspiracy. *Commonwealth v. Cohen*, 199 A.2d 139, 154 (Pa. Super. 1964).

Commonwealth presented sufficient evidence Appellant and another individual were following Victim on August 18, 2016 prior to the shooting. (N.T.2. at pg. 178:15-24). Futhermore, Commonwealth presented sufficient evidence Appellant and another individual were walking as portrayed on the surveillance video protecting firearm in their right front pants' pockets as testified to by Detective Janus. (N.T.2. at pg. 181:5-13, 183:12-23, 185:13-486:16). Expert Laneve noted gunshot residue (GSR) was found on Appellant's clothing items recovered from the location Appellant resided. (N.T.4. at pg. 71:1-22, 74:3-75:4).

Presence of Appellant and another individual prior to the death of Victim on August 18, 2016 demonstrated the agreement between the parties to engage in conspiratorial acts. Futhermore, bystander witness testimony from Mr. Green that Appellant and another man lured Victim down Cottage Street sufficiently demonstrated Appellant and another man were engaged in the criminal act resulting in the death of Victim. (N.T.3. at pg. 199:20-23). Victim, as a result of being lured by Appellant and the other man down Cottage Avenue, is now deceased achieving Appellant's criminal goal. Therefore, Commonwealth presented sufficient evidence to convict Appellant of Conspiracy to Commit Aggravated Assault under 18 Pa.C.S. §903(a)/2702(a)(1).

As to whether Commonwealth presented sufficient evidence to sustain a conviction for Aggravated Assault under 18 Pa.C.S. §2702(a)(4), Commonwealth must have proven "attempt[] to cause or intentionally or knowingly cause[] bodily injury to another with a deadly weapon." 18 Pa.C.S. §2702(a)(4). A deadly weapon is defined as "[a]ny firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or serious bodily injury, or any other device or instrumentality which ... is calculated or likely to produce death or serious bodily injury." 18 Pa.C.S. §2301. To convict Appellant of this crime, Commonwealth must have presented sufficient evidence for the jury to find Appellant caused bodily injury to another, acting intentionally or knowingly to achieve such a result, and caused such an injury or harm with a deadly weapon.

Shooting a person with a gun will cause serious bodily injury or death and Victim is now deceased as a result of gunshot wounds sustained on August 18, 2016. Commonwealth presented sufficient evidence to prove Appellant possessed a gun, a deadly weapon, on August 18, 2016, and knew and intended to cause serious bodily harm to Victim.

Contrary to Appellant's argument, Commonwealth presented sufficient GSR evidence which was found from Appellant's clothing recovered at Appellant's residence. (N.T.4. at pg. 71:1-22, 74:3-75:4). Both Appellant's tan pants recovered, and Appellant's right front pants' pocket tested positive for GSR as shown by expert evidence and testimony. (*Id*.) Furthermore, gun shots were heard in the area where Victim was shot. (N.T.3. at pg. 197:16-19). Evidence also demonstrated Appellant clutched his right front pocket as if Appellant were supporting a firearm in that pocket. (N.T.2. at pg. 181:5-13, 183:12-23, 185:13-486:16). Therefore, sufficient evidence existed for this jury to convict Appellant of Aggravated Assault under 18 Pa.C.S. §2702(a)(4).

As to whether Commonwealth presented sufficient evidence to prove Appellant was guilty of Conspiracy to Commit Aggravated Assault under 18 Pa.C.S. §903, an unlawful agreement or an agreement to do an act in an unlawful manner must exist, and the agreement makes each member criminally responsible for the acts of the other members. *Commonwealth v. Tingle*, 419 A.2d 6, 10 (Pa. Super. 1980). "[A] conspiracy may be inferentially established by showing the relation, conduct or circumstances of the parties, and overt acts by the conspirators have been held competent to prove that a corrupt confederation has in fact been formed." *Id*. (citing *Commonwealth v. Roux*, supra, 465 Pa. 482, 350 A.2d 867 (1976); *Commonwealth v. Kinsey*, 249 Pa. Super. 1, 8, 375 A.2d 727, 730 (1977)).

In the instant case, Commonwealth was required to prove a combination of two or more persons existed, with criminal motive or criminal intent, to do a criminal or unlawful act or a legal act by criminal or unlawful means. *Commonwealth v. Petrosky*, 166 A.2d 682, 688 (Pa. Super. 1960). The overt act necessary to prove conspiracy must be done openly to accomplish the purpose of the conspiracy. *Commonwealth v. Cohen*, 199 A.2d 139, 154 (Pa. Super. 1964).

Commonwealth presented sufficient evidence Appellant and another individual were following Victim on August 18, 2016 prior to the shooting. (N.T.2. at pg. 178:15-24). Furthermore, Commonwealth presented the surveillance videos shown to the jury that Appellant and another individual when walking, protected items presumed to be firearms in their right front pants pockets. (N.T.2. at pg. 181:5-13, 183:12-23, 185:13-486:16). Expert Laneve stated gunshot residue (GSR) was found on Appellant's clothing items recovered

from the location Appellant resided. (N.T.4. at pg.71:1-22, 74:3-75:4).

Furthermore, video surveillance illustrated Appellant and another individual immediately prior to the death of Victim on August 18, 2016 demonstrated the agreement between Appellant and another individual to engage in conspiratorial acts. Bystander witness statements from Mr. Green demonstrated Appellant and another man lured Victim down Cottage Street and were sufficient to show Appellant and another man were engaged in the criminal act resulting in the death of Victim. (N.T.3. at pg. 199:20-23). Victim, as a result of following Appellant and another man down Cottage Avenue, is now deceased achieving Appellant and the other man's criminal result. Therefore, Commonwealth satisfied proving elements of conspiracy and provided sufficient evidence to convict Appellant of Conspiracy to Commit Aggravated Assault under 18 Pa.C.S. §903/2702(a)(4).

As to whether Commonwealth presented sufficient evidence to convict Appellant of Recklessly Endangering Another Person (REAP) under 18 Pa.C.S. 2705, "[a] person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." 18 Pa.C.S. §2705. To convict Appellant of REAP, Commonwealth must present sufficient evidence to prove Appellant's conduct was reckless, causation, and a particular result must be reached. *Commonwealth v. Reynolds*, 835 A.2d 720, 727 (Pa. Super. 2003).

Commonwealth presented sufficient evidence through Ralph Green who saw Victim being called back down Cottage Avenue on August 18, 2016. (N.T.3. at pg. 199:20-23, pg. 201:11-25). Furthermore, Mr. Green stated he heard a series of gun shots and saw Victim who had been shot. (N.T.3. at pg. 197:16-24). Mr. Green also stated he saw a man wearing a white t-shirt and tan or grey pants place a gun into his pocket and run away. (N.T.3. at pg. 197:16-19, 198:14-18). Victim subsequently died from his wounds, achieving the goal sought by Appellant. "But for" Appellant's actions of luring Victim back down Cottage Street to be subsequently shot by Appellant, Victim would not have been seriously harmed and placed in danger of death. Appellant's actions on August 18, 2016 directly placed Victim in danger of death or serious bodily injury. Therefore, Commonwealth presented sufficient evidence to prove Appellant placed Victim in a dangerous situation resulting in serious bodily injury or death. Commonwealth sufficiently presented evidence to support the jury's finding of Appellant's guilt as to Recklessly Endangering Another Person under 18 Pa.C.S. §2705.

As to whether Commonwealth presented sufficient evidence to convict Appellant of Tampering With or Fabricating Physical Evidence under 18 Pa.C.S. §4910(1), "[al person commits a misdemeanor of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he alters, destroys, conceals or removes any record, document or thing with intent to impair its verity or availability in such proceeding or investigation." 18 Pa.C.S. §4910(1). Commonwealth must have proven Appellant knew an official inquiry into the crime was pending or going to be instituted; Appellant concealed or altered the item in question; and Appellant intended the concealed item be impaired as to its verity or availability for use in the proceeding or investigation. *Commonwealth v. Toomer*, 159 A.3d 956, 961 (Pa. Super. 2017).

In the instant case, sufficient evidence was presented to the jury that a pair of tan pants were found in a garbage bag upon searching the bedroom of where Appellant was residing. (N.T.3. at pg. 232:11-19). Furthermore, other items in Appellant's gray trash bag were soiled

baby diapers, balled up tissues, four potato chip bags, and a label discarded from a new article of clothing. (N.T.3. at pg. 233:22-234:4). These items were in Appellant's gray trash bag and, therefore, no longer desired by Appellant. (*Id*.). Appellant's pants discovered in this bag were subsequently tested by an expert qualified in primer gunshot residue analysis and interpretation, Expert Laneve, as to whether gunshot residue was present. Expert Laneve opined and concluded both the pants and the right front pocket of these pants tested positive for gunshot residue. (N.T.4. at pg. 71:1-22, 74:3-75:4). Mr. Green stated he saw a person wearing a white t-shirt and tan or grey pants place a firearm into his right front pocket on August 18, 2016. (N.T.3. at pg. 197:16-19; 198:14-18). Commonwealth is entitled to inferences that the reason the pants were amongst other trash was because this item was intended to be disposed of after Appellant committed this crime.

Commonwealth presented sufficient evidence Appellant knew or should have known an investigation would follow the shooting death of Victim, Appellant, with knowledge of the forthcoming investigation, intentionally placed these tan pants among other discarded items in that trash bag in an attempt to hide evidence of the shooting of Victim on August 18, 2016. Therefore, as Appellant intended to conceal this item in response to the pending investigation involving the death of Victim, Commonwealth satisfied all elements for this crime and sufficiently presented evidence to convict Appellant of Tampering With or Fabricating Physical Evidence under 18 Pa.C.S. §4910(1).

As to whether Commonwealth presented sufficient evidence to convict Appellant of Possession of an Instrument of Crime under 18 Pa.C.S. §907(a), "[a] person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally." 18 Pa.C.S. §907(a). A conviction for this crime will be upheld if Commonwealth proves "a defendant possessed an instrument that is commonly used for criminal purposes, under circumstances not manifestly appropriate for lawful use, with the intent to employ it criminally." *Commonwealth v. Foster*, 651 A.2d 163, 165 (Pa. Super. 1994). An instrument of a crime is defined as "anything specially made ... or adapted for criminal use," or "anything commonly used for criminal purposes and possessed by the actor under circumstances not manifestly appropriate for lawful uses it may have." *Commonwealth v. Eddowes*, 580 A.2d 769, 774 (Pa. Super. 1990).

In the instant case, Commonwealth presented sufficient evidence to the jury that Mr. Green, a bystander, saw Appellant place a gun into his pants pocket after Mr. Green heard gunshots. (N.T.3. at pg. 197:16-19, 198:14-18). Mr. Green identified Appellant as the person wearing clothing identical to the clothing found at Appellant's residence. (*Id*.; *See also* N.T.3. at pg. 232:13-19, 237:4-23). Furthermore, the discarded pants recovered from Appellant's residence contained gunshot residue on both the pants and inside the right front pocket. (N.T.4. at pg. 71:1-22, 74:3-75:4). A gun, which is clearly an instrument of crime, was not used for a lawful purpose in the killing of Victim. Therefore, Commonwealth presented sufficient evidence to the jury to convict Appellant of Possession of an Instrument of Crime under 18 Pa.C.S. §907(a).

With respect to Appellant's nine (9) challenges to nine (9) of his ten (10) convictions, Commonwealth presented sufficient evidence for the jury to find Appellant guilty on the nine (9) counts, and this Trial Court requests the Pennsylvania Superior Court affirm the jury verdicts and this Trial Court for reasons as set forth above in this Opinion.

Appellant's counsel also alleges Commonwealth conducted prosecutorial misconduct in its closing argument. 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 engaged in impermissible conduct during closing argument, Pennsylvania follows Section 5.8 of the American Bar Association (ABA) Standards provides the following standards:

> (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, the prosecutor may use visual aids "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.").

The Pennsylvania Supreme Court in *Jordan* concluded the trial court did not commit an abuse of discretion in permitting Commonwealth's counsel to play a slow-motion surveillance videotape during closing argument where two 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 Commonwealth repeatedly reminded to the jury; and Commonwealth during closing argument emphasized the slowed-down portion actually encompassed only two seconds. *Commonwealth v. Jordan*, 65 A.3d 318, 330 (Pa. 2013).

Courts in other jurisdictions have concluded prosecutors are permitted to play video exhibits, including excerpts of the video exhibits, during closing arguments 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 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. (emphasis added). 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 Appellant. Both counsel also stipulated to the authenticity of said unedited videos. (*See* N.T.2. at 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 Appellant and his co-conspirators, as well as

Victim prior to the shooting and killing of Victim and the events occurring shortly thereafter.

During Commonwealth's case-in-chief, the jury in the instant case had the opportunity to watch and hear the individual unedited video surveillance recordings of Exhibits 36(a)-(j) from different angles and different surveillance cameras while Detective Janus simultaneously narrated as 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 any of these videos. Particularly relevant to this analysis, this 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 Appellant 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 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"). Commonwealth explained this Compilation Video Exhibit 38 provided an overview to the jury of the events prior to and after the shooting of Victim. As explained by Detective Janus during Commonwealth's case-in-chief, 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).

Commonwealth then moved to admit Compilation Video Exhibit 38, which this Trial Court admitted with no objection from Appellant's 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?

Q: 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) (emphasis added).

The jury again viewed and heard Unedited Video Exhibit 36(h) in Commonwealth's case-in-chief when Counsel for Appellant cross-examined Detective Janus regarding 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 Appellant's trial counsel cross-examined Detective Janus, Commonwealth's counsel during redirect examination of Detective Janus again played Compilation Video Exhibit 38 without objection from Appellant's trial counsel:

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). Thus, 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 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 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).

In Appellant's Post-Sentence Motion, Appellant's trial counsel cited to the nonprecedential case in *Commonwealth v. Jackson* as supporting authority for his claim 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 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 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*, Commonwealth's utilization of Compilation Video Exhibit 38 in closing argument did not convey ADA Burns' personal belief or opinion on Appellant'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 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 counsel'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 Appellant. Unlike *Jackson*, where the PowerPoint was created for purposes of Commonwealth's closing argument, in the instant case Unedited Video Exhibit 38 was admitted into evidence in Commonwealth's case-in-chief before Commonwealth's closing argument and played several times. 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 which is a mere lull in the video. Thus, to the extent *Jackson* applies to the instant case, *Jackson* supports the conclusion Commonwealth did not commit prosecutorial misconduct during closing argument.

Therefore, after review of all transcripts as well as an independent review of both the Unedited Video Exhibit 36(h) and the Compilation Video Exhibit 38, this Trial judge who presided over the entire trial and who reinstated Appellant's appeal rights continues to find and conclude Commonwealth's presentation of Compilation Video Exhibit 38 during closing argument did not constitute prosecutorial misconduct. The seventy-three second timeframe that transpired was repeatedly explained by Commonwealth's counsel 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 of the videotapes existed during the entire trial, including closing argument: one version being the Unedited Video Exhibit 36(h) and one version being Compilation Video Exhibit 38. Commonwealth was transparent in both the Commonwealth's case-in-chief and closing argument by informing fully the jury that the seventy-three seconds was excised; therefore, this jury was properly explained that these seventy-three seconds were not present in Compilation Video Exhibit 38. Consequently, ADA Burns during closing argument did not mislead nor did he impede this jury's ability to weigh the evidence objectively in order to render its true verdicts as to Appellant's guilt on all ten charges.

For the above reasons, this Trial Court respectfully requests the Pennsylvania Superior Court affirm this Trial Court's rulings and this jury's verdicts of Appellant's convictions.

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

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN EARL POOLE, JR.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

The purpose of the Post-Conviction Collateral Relief Act, 42 Pa.C.S.A. § 9541 et seq., is to afford persons who have been convicted of a crime they did not commit an avenue to obtain collateral relief. *See* 42 Pa.C.S.A. § 9542.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

A cognizable claim pursuant to the Post-Conviction Collateral Relief Act is "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." *See* 42 Pa.C.S.A. § 9543(a)(2)(vi).

CRIMINAL PROCEDURE / GUILTY PLEAS

Generally, an appellant who has pleaded guilty "waives all claims and defenses other than those sounding in the jurisdiction of the court, the validity of the plea, and what has been termed the 'legality' of the sentence imposed." *Commonwealth v. Heaster*, 171 A.3d 268, 271 (Pa. Super. 2017). A post-sentence guilty plea may not be withdrawn absent ". . . a showing of prejudice on the order of manifest injustice." *Commonwealth v. Starr*, 301 A.2d 592, 595 (Pa. 1973). "Manifest injustice may be established if the plea was not tendered knowingly, intelligently, and voluntarily." *Commonwealth v. Broaden*, 980 A.2d 124, 129 (Pa. Super. 2009).

CRIMINAL PROCEDURE /POST- CONVICTION RELIEF ACT / DUE PROCESS

The due process requirements of *Brady v. Maryland*, 373 U.S. 83 (1963) do not extend to the context of post-conviction relief. *See District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 68 (2009). The inquiry of a claim of after-discovered evidence after conviction and sentencing is governed by the state procedures for post-conviction relief rather than the *Brady* framework.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT / AFTER-DISCOVERED EVIDENCE

A claim based on after-discovered evidence must prove: (1) the evidence was discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) the evidence is not being used solely to impeach credibility; and (4) the evidence would likely compel a different verdict.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT / AFTER-DISCOVERED EVIDENCE

In considering whether the after-discovered evidence "would likely compel a different verdict," the court should consider the evidence's integrity, the motive of the offeror, and the overall strength of the evidence supporting conviction. *See Commonwealth v. Padillas*, 997 A.2d 356 (Pa. Super. 2010).

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT / GUILTY PLEAS

In the context of a Post-Conviction Collateral Relief proceeding, after-discovered evidence which would justify a new trial would also entitle a defendant to withdraw his guilty plea.

CRIMINAL PROCEDURE / POST-CONVICTION RELIEF ACT

It is the duty of the Post-Conviction Collateral Relief Court to make independent findings of fact and conclusions of law concerning the credibility of testimony.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 1472 - 2017

Appearances: Michael Burns, Esquire, for the Commonwealth
William R. Hathaway, Esquire on behalf of John Earl Poole, Jr.

MEMORANDUM OPINION AND ORDER

October 28, 2019. This matter is before this Court on John Earl Poole, Jr.'s (hereinafter "Petitioner") Motion for Post Conviction Collateral Relief (hereinafter "PCRA") filed on April 11, 2019, and supplemented by Attorney William Hathaway on July 19, 2019. After an independent review of the record, consideration of Petitioner's *pro se* PCRA, the Supplemental PCRA filed by PCRA counsel, the Responses filed by the Commonwealth, the evidence presented at the evidentiary hearings conducted on September 30, 2019 and October 7, 2019, and the evidence presented at the status conference held on October 15, 2019, this Court finds that Petitioner has failed to prove a meritorious claim under the Post Conviction Relief Act (PCRA). Accordingly, Petitioner's request for relief is hereby **DENIED.**

Factual and Procedural History

The relevant factual history was set forth in the undersigned's Opinion of October 16, 2018:

> On February 5, 2017, Defendant and his friend, Robert McCarthy, (hereinafter "the victim") were drinking alcohol and smoking crack in the victim's apartment located at 539 East 9th Street in Erie, PA. At some point in the evening, Defendant stabbed the victim several times in the head and neck, causing the victim's demise. Defendant also took the victim's wallet and a bottle of his prescription medication and left the victim's apartment. Several hours later, the Defendant returned to the victim's apartment, doused the victim with an accelerant, and set his body on fire.

(1925(a) Opinion, October 16, 2018, 1.)

Additionally, relevant to the proceedings *sub judice*, the following facts were elicited during the hearing on Petitioner's Omnibus Pretrial Motion on October 9, 2017. On February 5, 2017, through the investigation conducted by the City of Erie Police Department ("EPD") subsequent to the discovery of the victim's body, Petitioner was identified as a person of interest. (Notes of Testimony, Omnibus Pre-Trial Motion, October 9, 2017, hereinafter "N.T., October 9, 2017", 6). At approximately 10:00 a.m. on February 6, 2017, Petitioner voluntarily drove himself to the EPD to speak with the investigators about a homicide. (N.T., October 9, 2017, 6-7). Petitioner was read his rights and signed a *Miranda* waiver. (N.T., October 9, 2017, 8). Petitioner also consented to a search of his vehicle, a search of his cell phone, and a search of his jacket. (N.T., October 9, 2017, 14-21). The victim's personal items were found in Petitioner's vehicle, including the victim's prescription pill bottle and wallet. (N.T., October 9, 2017, 92-93). Further, a towel with the victim's blood was also recovered from Petitioner's vehicle. (N.T., October 9, 2017, 93). Petitioner was the last person to see the victim alive. (N.T., October 9, 2017, 95). Additionally,

Petitioner's vehicle was seen outside the victim's apartment on surveillance video. (N.T., October 9, 2017,95-97).

As a result, on June 7, 2017, Petitioner was charged by Criminal Information with Criminal Homicide/First Degree Murder, Possessing Instruments of Crime, Aggravated Assault, seven counts of Recklessly Endangering Another Person, Robbery, Receiving Stolen Property, two counts of Arson, Abuse of a Corpse, Theft by Unlawful Taking, and Tampering With Physical Evidence.[1] The Commonwealth and Petitioner reached a plea agreement where Petitioner would plead guilty to Murder of the Third Degree and Robbery.[2] In exchange, the Commonwealth would *nolle pros* the remaining charges.

On March 15, 2018, four days before jury selection was set to commence, the Petitioner appeared before this Court and entered negotiated guilty pleas to the charges of Murder of the Third Degree (reduced from Murder of the First Degree) and Robbery. All remaining charges were thereby withdrawn. At the time of the guilty plea, an extensive guilty plea colloquy was conducted by this Court wherein this Court determined Petitioner knowingly, voluntarily, and intelligently entered his plea of guilty to the charges set forth above. (*See* Plea and Sentencing Transcript, March 15, 2018, hereinafter "Tr., March 15, 2018"). Immediately following entry of the guilty plea, Petitioner waived a presentence investigative report and elected to proceed with sentencing. *See* 42 Pa.C.S.A. § 9731. The Court sentenced Petitioner at Count One, Murder of the Third Degree, to a term of twenty (20) years to forty (40) years of incarceration, and at Count Eleven, Robbery, to a term of ten (10) years to twenty (20) years of incarceration consecutive to Count One. (*See* Sentencing Order, March 15,2018).

On July 13, 2018, Petitioner filed a *pro se* "Notice of Appeal (*nunc pro tunc*)" [sic]. The Court directed Petitioner to file a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On October 3, 2018, Counsel for Petitioner filed a Statement of Intent to File *Anders* Brief as well as an Application to Withdraw as Counsel. The Court issued its 1925(a) Opinion on October 16, 2018.

On February 22, 2019, while the direct appeal was still pending with the Pennsylvania Superior Court, Petitioner filed a *pro se* PCRA in which he raised the exact issues as he has raised in the PCRA *sub judice*. By Order of March 18, 2019, the Court dismissed the February 22, 2019 PCRA as a premature filing and outside of the Court's jurisdiction. (*See* Memorandum Opinion and Order, March 18, 2019).

On March 20, 2019, the Superior Court of Pennsylvania affirmed Petitioner's judgment of sentence and granted the Application to Withdraw as Counsel. *Commonwealth v. Poole,* No. 1034 WDA 2018 (Pa. Super. 2019).

Subsequently, Petitioner filed the instant *pro se* Motion for Post Conviction Collateral Relief on April 11, 2019. Attorney William Hathaway was appointed by this Court on April 24, 2019. On May 21, 2019, Attorney Hathaway filed a Motion for Extension of Time, requesting sixty days to file a Supplement to the PCRA. This extension request was granted by Order of May 23, 2019. On July 19, 2019, Attorney Hathaway filed a Supplement to Motion for Post Conviction Collateral Relief (hereinafter "PCRA"). At the Court's direction,

[1] 118 P.S. § 2501(a)/ 18 P.S. § 2502(a); 18 Pa.C.S.A. § 907(a); 18 Pa.C.S.A. § 2702(a)(1); 18 Pa.C.S.A. § 2705; 18 Pa.C.S.A. § 3701(a)(l); 18 Pa.C.S.A. § 3295(a); 18 Pa.C.S.A. § 3301(a)(l) and (c)(2); 18 Pa.C.S.A. § 5510; 18 Pa.C.S.A. § 3291(a); 18 Pa.C.S.A. § 3301(c)(2); and 18 Pa.C.S.A. § 4910(1), respectively.

[2] 18 P.S. § 2501(a)/ 18 P.S. § 2502(c) and 18 Pa.C.S.A. § 3701(a)(l).

the Commonwealth filed a Response to the PCRA on August 8, 2019. After reviewing the filings, the Court directed the Commonwealth to file a Supplemental Response for further clarification of some key evidentiary issues. The Commonwealth filed the Supplemental Response on September 11, 2019.

Due to the matters raised in the PCRA, the Court concluded the claim set forth by the Petitioner in the PCRA and the Responses received from the Commonwealth " ... raised material issues of fact" requiring an evidentiary hearing pursuant to Pa.R.Crim.P. 908. Thereafter, the Court conducted an evidentiary hearing commencing on September 30, 2019 and continued on October 7, 2019, to consider the merits of Petitioner's claim. Prior to rendering a decision, the Court scheduled a final status conference on October 15, 2019, to provide counsel the opportunity to supplement the record with additional evidence or argument. At this hearing, the Commonwealth submitted Commonwealth Exhibits 4A, 4B, 4C, and 5, and rested. Petitioner offered no further evidence or testimony. Therefore, the record was closed.

Discussion

I. Relevant Legal Principles

In the PCRA, Petitioner claims, *inter alia*, he is entitled to withdraw his guilty plea pursuant to 42 Pa.C.S.A. §9543(a)(2)(vi), which provides relief where a petitioner can prove "[t]he 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." 42 Pa.C.S.A. § 9543 (a)(2)(vi). Petitioner alleges a number of claims in his PCRA seeking the withdrawal of his guilty plea couched as after-discovered evidence. Dissecting the claims, it becomes clear the only issue of legal significance, and agreed to by the parties, is whether the confession of an inmate by the name of Regis Brown is after-discovered evidence that would justify the withdrawal of Petitioner's guilty plea.[3] The Commonwealth's Response to the PCRA filed on August 8, 2019 posits Brown's alleged confession had no indicia of reliability and Petitioner's guilty plea was not unlawfully induced.

A. Alleged *Brady* Violation

As a preliminary matter, in the Supplement to PCRA Petitioner raised a claim that the Commonwealth had engaged in a *Brady* violation in failing to disclose Brown's confession. This Court notes the United States Supreme Court has held the due process requirement of *Brady* does not extend to the postconviction context, as a convicted criminal defendant "... does not have the same liberty interests as a free man." *District Attorney's Office for*

[3] In his *pro se* PCRA, Petitioner attached "Exhibit C", a copy of a statement allegedly signed by an inmate named Alexander Corder, regarding verbal statements allegedly made by Brown as well as reference to a letter by Brown and intercepted by Corder. Additionally, Corder sent an *ex parte* letter to the Court which was forwarded to counsel, and sent another letter to the District Attorney's office. However, neither "Exhibit C," the intercepted letter, nor the letters to the Court or the District Attorney's office were admitted into evidence.

Subsequent to the *pro se* PCRA and as discussed *infra*, at the evidentiary hearing testimony was provided directly by the Pennsylvania State Troopers who interviewed Brown. The Court was further provided with a copy of the actual recording of the interview between the Troopers and Brown, marked as Courtroom Exhibit 2, 2A. Due to the significant additional evidence submitted on behalf of Petitioner and the Commonwealth, as well as both parties' informal confirmation that neither intended to interview or present Corder as a witness, the Court can glean no relevance to Corder's involvement other than being the catalyst for the filing of the PCRA. Therefore, the Court will not rely on the statement by Corder submitted with the *pro se* PCRA in its analysis and instead will rely on the evidence properly of record.

Third Judicial District v. Osborne, 557 U.S. 52, 68 (2009). Rather, the inquiry of a claim of after-discovered evidence after conviction and sentencing is governed by the state procedures for postconviction relief rather than the *Brady* framework. *Id*. at 69. Consequently, Petitioner's allegation of a *Brady* violation is not a matter for this PCRA Petition or this Court's consideration. However, out of an abundance of caution, this Court ordered the Commonwealth to specifically address the claim by identifying what information, if any, it had in its possession regarding Regis Brown's statements and his admission of killing Robert McCarthy. (*See* Order, August 27, 2019). The Court also sought this information for use in addressing the issue of after-discovered evidence.

By Supplemental Response filed September 11, 2019, the Commonwealth affirmed it had received notice of the alleged confession by Regis Brown on or about September 21, 2018, more than six months after Petitioner's entry of a guilty plea on March 15, 2018. (*See* Commonwealth's Supplemental Response to PCRA, September 11, 2019). At the evidentiary hearing on September 30, 2019, Petitioner conceded and agreed there was no basis for a *Brady* claim upon receipt of the Commonwealth's averment. Petitioner's claim of an alleged *Brady* violation is therefore dismissed as both moot and without legal relevance to this current PCRA.

B. PCRA Claim of After-Discovered Evidence

There are several avenues available to a petitioner to seek relief under the provisions of the PCRA. However, Petitioner asserts essentially only one basis for relief, that being his claim of "after-discovered evidence." (*See* Supplement to Motion for PCRA, July 19, 2019). The Court, as well as PCRA counsel and the Commonwealth, agree that only assessment and analysis of the "after-discovered evidence" subsection of the PCRA is relevant to the case *sub judice*.

The Post-Conviction Relief Act, 42 Pa.C.S.A. § 9541, et seq., "[p]rovides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief." 42 Pa.C.S.A. § 9542. Pursuant to 42 Pa.C.S.A. § 9543(a)(2)(iv), a Petitioner must " ... plead and prove by a preponderance of the evidence ... (2) That the conviction or sentence resulted from ... (vi) 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." 42 Pa.C.S.A. § 9543(a)(2)(iv). Claims brought under this subsection are commonly termed "after-discovered evidence claims." *See, e.g., Commonwealth v. Johnson*, 179 A.3d 1105, 1123 (Pa. Super. 2018). In order for Petitioner to be eligible for post-conviction collateral relief based upon after-discovered evidence, he must prove: "(1) the evidence has been discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) it is not being used solely to impeach credibility; and (4) it would likely compel a different verdict." *Johnson* at 1123 (citing *Commonwealth v. Cox*, 146 A.3d 221,228 (2016)).

All parties and the Court agree that the first three prongs of what constitutes after-discovered evidence have been satisfied in this case. It is only the fourth factor — whether the after-discovered evidence would likely compel a different verdict — that is to be analyzed by the Court. In considering "whether the evidence would likely compel a different verdict," the court should consider " ... the integrity of the alleged after-discovered evidence, the motive of those offering the evidence, and the overall strength of the evidence supporting the conviction."

Commonwealth v. Padillas, 997 A.2d 356, 365 (Pa. Super. 2010) (citations omitted).

Thereby, this is the legal framework the Court will confine its analysis to. The Court must consider whether the confession of Regis Brown is sufficient after-discovered evidence that would likely compel a different verdict. However, in this case, Petitioner entered a knowing, voluntary and intelligent guilty plea. Therefore, in the case *sub judice*, the issue is narrowed to whether application of the after-discovered evidence rule to the voluntariness of a guilty plea would compel this Court to allow Petitioner to withdraw his plea. For the reasons set forth *infra*, Petitioner's request for relief is **DENIED** and his guilty plea and sentence are again upheld.

C. Withdrawal of a Guilty Plea

Generally, an appellant who has pleaded guilty "waives all claims and defenses other than those sounding in the jurisdiction of the court, the validity of the plea, and what has been termed the 'legality' of the sentence imposed." *Commonwealth v. Heaster*, 171 A.3d 268, 271 (Pa. Super. 2017). A post-sentence guilty plea may not be withdrawn absent " ... a showing of prejudice on the order of manifest injustice." *Commonwealth v. Starr*, 301 A.2d 592, 595 (Pa. 1973). "Manifest injustice may be established if the plea was not tendered knowingly, intelligently, and voluntarily." *Commonwealth v. Broaden*, 980 A.2d 124, 129 (Pa. Super. 2009) (citations omitted).

Pennsylvania Rule of Criminal Procedure Rule 590 mandates that pleas be taken in open court and that the court conduct a colloquy on the record to ascertain whether a defendant is aware of his rights and the consequences of the plea. *See* Pa.R.Crim.P. 590(A)(1),(3); Pa.R.Crim.P. 590(B)(2). "[W]here the record clearly demonstrates that a valid guilty plea colloquy was conducted, during which it became evident that the defendant understood the nature of the charges against him, the voluntariness of the plea is established." *Commonwealth v. Rush*, 909 A.2d 805, 808 (Pa. Super. 2006) (citing *Commonwealth v. McCauley*, 797 A.2d 920, 922 (Pa. Super. 2001)); *see also*, Pa.R.Crim.P. 590; *Commonwealth v. Kpou*, 153 A.3d 1020, 1024 (Pa. Super. 2016). "A person who elects to plead guilty is bound by the statements he makes in open court while under oath and he may not later assert grounds for withdrawing the plea which contradict the statements he made at his plea colloquy." *Commonwealth v. Turetsky*, 925 A.2d 876, 881 (Pa. Super. 2007) (citing *Commonwealth v. Pollard*, 832 A.2d 517, 524 (Pa. Super. 2003)). "A criminal defendant who elects to plead guilty has a duty to answer questions truthfully." *Id*.

However, the Court is fully cognizant of the Pennsylvania Supreme Court's holding in *Commonwealth v. Peoples*, 319 A.2d 679 (Pa. 1974), wherein the high Court determined "[a]ny after-discovered evidence which would justify a new trial ... also entitle[s] a defendant to withdraw his guilty plea." *Commonwealth v. Peoples* at 681. Despite the fact *Peoples* was decided under the Post Conviction Hearing Act (PCHA), the statutory predecessor of the PCRA, the holding continues to be applied in the context of after-discovered evidence claims. *See, e.g., Commonwealth v. Heaster, supra*, at n.6[4]; *see also, Commonwealth v. Perez*, 2019 WL 4338336 (Pa. Super. September 12, 2019) (a non-precedential memorandum cited for its "persuasive value" pursuant to 210 Pa. Code § 65.37).

[4] Procedurally, *Heaster* involved a direct appeal and request for a post-sentence motion to withdraw a guilty plea based on after-discovered evidence pursuant to Pa.Crim.R.P. 720; however, the Pennsylvania Superior Court relied on *Commonwealth v. Peoples* in analyzing the claim.

Peoples and the more recent *Heaster* and the line of cases that follow therefore suggest that the after-discovered evidence analysis applies to guilty pleas. However, the Courts go no further in these holdings. Inevitably, in an after-discovered evidence assessment done in the context of a guilty plea, when considering whether the after-discovered evidence would compel a different result, it is fair for a reviewing court to consider the underlying plea for the "overall strength of evidence supporting conviction." *See Commonwealth v. Padillas, supra* at 365. Consequently, this would warrant a review of the underlying knowledge, voluntariness, and intelligence of the guilty plea.

Instantly, Petitioner's guilty plea was knowing, voluntary, and intelligent. (*See* Tr., March 15, 2018, 3-9; 21-33; *see also* Statement of Understanding of Rights Prior to Guilty/No Contest Plea, March 15, 2018). Petitioner was found to be mentally competent, appropriately responsive, articulate, and capable of entering his plea. (*See* Tr., March 15, 2018, 7-9). The plea agreement was reviewed on the record and Petitioner acknowledged he understood his rights and the rights he would be giving up by entry of the plea. (*See* Tr., March 15, 2018, 18-22; 26). Petitioner confirmed he did not have any questions about the plea deal and verified he had knowingly and voluntarily signed the Statement of Understanding of Rights Prior to Guilty/No Contest Plea before the Court. (*See* Tr., March 15, 2018, 20-22; 26). Petitioner affirmed in his colloquy that no one had forced or threatened him to enter the plea, that he was satisfied with plea counsel, and he entered the plea voluntarily. (*See* Tr., March 15, 2018, 21-33). The Court found Petitioner's guilty pleas to Count One, Murder of the Third Degree, and Count Eleven, Robbery, were knowing, voluntary, and intelligent as well as supported by a legal and factual basis. (*See* Tr., March 15, 2018,22-25).

The record indicates the Court underwent an extensive plea colloquy with Petitioner to ensure his understanding of his Constitutional rights and protections and the consequences of his admission. He was not forced, coerced or promised anything other than the terms of the plea agreement. His statements to the Court were knowing, voluntary, and intelligently made and supported the factual and legal basis for the plea. The Information setting forth the charges with the legal definitions and elements and the factors supporting these charges were read and explained to Petitioner. (*See* Tr., March 15, 2018, 23-25). He acknowledged his understanding of these elements and admitted to committing these crimes under oath on the record. *Id.*

He cannot now claim he gave false statements regarding his culpability for the murder of Mr. McCarthy because he sees a convenient opportunity. It is well-established that " ... post-sentence claims of innocence do not demonstrate manifest injustice." *Kpou, supra,* at 1024. In considering Petitioner's PCRA claim, it is difficult for this Court to overcome the fact that Petitioner gave a knowing, voluntary, and intelligent guilty plea. Petitioner's admission and plea is another important, if not the most important, factor impacting the "overall strength of the evidence supporting the conviction." *See, Commonwealth v. Padillas, supra* at 365.

Under this framework and the law and facts set forth below, the Court must continue its analysis of Brown's statement as after-discovered evidence to determine the integrity of the statement, the motive of Brown and Petitioner, and the overall strength of the Commonwealth's evidence supporting Petitioner's conviction. *See Commonwealth v. Padillas, supra* at 365.

D. Analysis of Petitioner's After-Discovered Evidence: Regis Brown's Confession

At the start of the evidentiary hearing, both parties agreed with the Court that the appropriate

assessment was an after-discovered evidence analysis pursuant to 42 Pa.C.S.A. § 9543(a)(2)(iv). Further, the parties stipulated prongs one, two, and three were met regarding the after-discovered evidence claim. Therefore, the only issue remaining before the Court is whether Petitioner can prove by a preponderance of the evidence that the after-discovered evidence, to-wit, Brown's alleged confession, would "likely compel a different verdict." *Commonwealth v. Johnson, supra,* at 1123; *Commonwealth v. Padillas, supra,* at 365; *see also*, 42 Pa.C.S.A. § 9543(a)(2)(iv). Further, the credibility of such evidence is fully within the purview of the PCRA Court. *See, e.g., Commonwealth v. Small*, 189 A.3d 961, 978 (Pa. 2018); *Commonwealth v. Treiber*, 121 A.3d 435, 444 (Pa. 2015); *Commonwealth v. Johnson*, 966 A.2d 523, 537 (Pa. 2009); *Commonwealth v. D'Amato*, 856 A.2d 806, 825 (Pa. 2004); *Commonwealth v. Williams*, 732 A.2d 1167 (Pa. 1999); *Commonwealth v. Lehr,* 583 A.2d 1234 (Pa. Super. 1990).

"Matters of credibility are vested in the sound discretion of ... the PCRA court." *Commonwealth v. Lehr, supra* at 1236. In fact, it is the express duty of the PCRA court to "render its own, independent findings of fact and conclusions of law concerning ... credibility and the impact, if any, upon the truth-determining process which can be discerned from such testimony." *Commonwealth v. Williams, supra,* at 1180-81; *see also, Commonwealth v. Small, supra*, 978. "Indeed, one of the primary reasons PCRA hearings are held in the first place is so that credibility determinations can be made; otherwise, issues of material fact could be decided on pleadings and affidavits alone." *Commonwealth v. Johnson, supra,* at 539.

In assessing the credibility of testimony and evidence to determine if Petitioner has met his burden of proof by a preponderance of the evidence, the Court will now undergo an intensive review of the evidentiary hearing record.

1. Testimony of the Troopers

On September 30, 2019, Petitioner presented the testimony of now-retired Trooper Joseph Vascetti and Trooper Justin Werner of the Pennsylvania State Police ("PSP"). In September 2018, both Troopers were stationed at the New Castle barracks in Lawrence County, Pennsylvania and working in the criminal investigation unit. Trooper Vascetti had been investigating the 1988 cold case homicide of Bryce Tompkins in Lawrence County, Pennsylvania. Trooper Vascetti testified that in or about March 2018, Regis Brown, previously known as Rex Knight, confessed to murdering Tompkins. As a follow-up to the Tompkins homicide investigation, Troopers Vascetti and Werner came to Erie, Pennsylvania on September 21, 2018 to conduct another interview with Brown, who was incarcerated at the Erie County Prison. During the recorded interview (admitted as Courtroom Exhibit 2, 2A), Troopers Vascetti and Werner asked Brown about the murder of Robert McCarthy.[5] In the interview, Brown confessed to murdering Robert McCarthy and stated that he did it because McCarthy had reneged on an agreement involving drugs. It is this confession that is at the center of the PCRA set forth as after-discovered evidence.

[5] Trooper Vascetti testified he had received a request from Trooper Susan Edelhman of the PSP in Erie to specifically ask Brown about the McCarthy murder. Trooper Edelhman was informed by Major Gary Seymour from the Erie County Prison that Brown had written a letter wherein Brown was taking responsibility for the murder of Robert McCarthy and Brown was concerned that "Big John" had "taken the case." All parties agree that "Big John" is a reference to Petitioner, John Poole, who is a physically large man at approximately 6'5" and 340 lbs. (*See* Sent. Tr., March 15, 2018, 45). In other words, the reference "had taken the case" meant Petitioner had taken responsibility for the murder and was serving a sentence for it.

In the statement, Brown claimed on February 6, 2017, he had driven his green 2008 Jeep Patriot to Mr. McCarthy's apartment to physically confront Mr. McCarthy about the agreement. Brown alleged the two parties had agreed to exchange cocaine for Vicodin pills. Brown stated he gave Mr. McCarthy the pills but Mr. McCarthy had not given Brown the cocaine in return. After repeated attempts to collect, Brown stated he went to Mr. McCarthy's residence to get the cocaine or money for the pills. When Brown arrived at the apartment and Mr. McCarthy gave him another excuse, Brown stated he pulled out his 6-inch hunting knife and stabbed Mr. McCarthy three times in the neck. Brown noted Mr. McCarthy fell to the floor and Brown had stood over top of him and left without taking anything. Although evidence and reports indicate Mr. McCarthy's upper torso was burned, Brown did not make any statements that he burned the body. Trooper Vescetti testified Brown "felt bad" Petitioner was charged in the McCarthy murder and wanted to "clear things up." Immediately after the interview the Troopers forwarded the information and recording up the PSP chain of command per standard operating procedures. The following day, the PSP notified the City of Erie Police Department ("EPD") which in turn notified the Erie County District Attorney's office.

Both Trooper Vascetti and Trooper Werner testified that Brown was cooperative and answered all of their questions during the interview. Both Troopers further opined that they felt Brown's confession was credible. However, and important to this Court's assessment, both Troopers conceded they were in no way involved with the Robert McCarthy homicide investigation and did not have the benefit of personal knowledge of the details of the McCarthy murder. The Troopers had not read any reports regarding the EPD's investigation and were not armed with any knowledge of the McCarthy murder prior to the interview. Additionally, the Troopers were unaware of whether Petitioner and Brown were housed together at the Erie County Prison in March 2018 through May 2018. Therefore, Brown could not be confronted with the facts of Mr. McCarthy's murder and Brown's statement went unverified and simply accepted by the Troopers. The Troopers had no further follow-up regarding the McCarthy murder with Brown or any officials with Erie County.

At the conclusion of the Troopers' testimony, Petitioner rested.

2. Testimony of the Commonwealth

The Commonwealth presented the testimony of Erie County Assistant District Attorney Jeremy Lightner ("ADA Lightner"). ADA Lightner was the co-prosecutor for the McCarthy murder case, and as such was intimately familiar with the evidence at the crime scene, witness statements, the autopsy report, the evidence recovered from Petitioner's vehicle, the surveillance footage around Mr. McCarthy's residence and neighborhood, and all other aspects of the investigation.[6]

ADA Lightner testified that upon receipt of the information from the PSP regarding Brown's alleged confession, the Erie County District Attorney's Office ("DA") investigated further. ADA Lightner listened to the tape of Brown's statement to Troopers Vascetti and Werner. ADA Lightner testified he found Brown's statement contrary to the facts and evidence of this case.

ADA Lightner's testimony included references to discrepancies in Brown's statement to the Troopers. ADA Lightner's testimony revealed he was personally responsible for reviewing the video surveillance evidence obtained of Mr. McCarthy's neighborhood in and around the time

[6] The other co-prosecutor in this case, former Assistant District Attorney Robert Marion, has since left the Erie County District Attorney's Office.

of the murder (February 4 and 5, 2017). ADA Lightner testified that Brown's vehicle, a green Jeep Patriot, was never seen on the surveillance footage. Conversely, Petitioner's vehicle, a Dodge Charger, was viewed several times. In fact, not only did Petitioner's vehicle appear on the video, but it was seen parked in the vicinity of Mr. McCarthy's apartment at 539 E. 9th Street at all times relevant to the murder and subsequent arson. As ADA Lightner explained, the fire had been called in by other tenants in Mr. McCarthy's building at approximately 4:00 a.m. on February 5, 2017, at which time Mr. McCarthy's charred body was discovered. ADA Lightner testified a timeline was reconstructed to determine what happened to Mr. McCarthy by utilizing the autopsy report and video surveillance. He stated the autopsy report indicated Mr. McCarthy had been deceased at the time his body was ignited, and the physical evidence regarding the cause and manner of death, including the blood loss, indicated he had died hours prior to the arson. ADA Lightner described that the primary surveillance footage near Mr. McCarthy's residence revealed Petitioner's Dodge Charger was the last vehicle parked in Mr. McCarthy's driveway on the evening of February 4, 2017. He testified Petitioner's vehicle was observed on the video driving by the victim's residence multiple times later at night on February 4, 2017 and through the early morning hours of February 5, 2017. ADA Lightner explained footage from a second surveillance camera in the neighborhood showed the Dodge Charger parked nearby Mr. McCarthy's residence around 4:00 a.m. on February 5, 2017, shortly before the report of the fire at 539 E. 9th Street was called in. He testified the fire at 539 E. 9th Street became visible on the primary surveillance video around the same time the Dodge Charger is seen leaving the area on the second surveillance video at approximately 4:00 a.m. ADA Lightner went on to conclude that based on the autopsy report and the video footage, as well as witness statements placing Petitioner with Mr. McCarthy on the evening of February 4, 2017, the Commonwealth's theory was that Petitioner murdered Mr. McCarthy at approximately 7:00 p.m. on February 4, 2017. ADA Lightner continued and stated that because of the presence of Petitioner's vehicle at the scene of the crime, and the later discovered evidence of personal items of the victim in Petitioner's vehicle, the Commonwealth believed Petitioner returned to the victim's residence at approximately 4:00 a.m. to burn the body in an attempt to conceal his involvement in the murder and robbery.

ADA Lightner testified that additional surveillance videos obtained from stores in the area indicate Petitioner changed clothes after the murder and these clothes were never recovered.

The autopsy report, which ADA Lightner reviewed with the medical examiner, Dr. Vey, indicated Mr. McCarthy had suffered nine stab wounds and the wounds were more consistent with an "unusual sharp object." ADA Lightner testified that a blue, plastic, sharp-tipped object which appeared to have been broken off a larger object was found in the pool of Mr. McCarthy's blood on the couch. ADA Lightner testified that Dr. Vey would have stated this item was consistent with the type of weapon used to murder Mr. McCarthy. This is in complete conflict with Brown's testimony that he stabbed Mr. McCarthy three times with a 6-inch knife.

ADA Lightner testified that the physical evidence, including a large amount of blood on Mr. McCarthy's couch that had soaked through the couch and the lack of blood on the floor near Mr. McCarthy's charred body (*See* Commonwealth Exhibit 5) indicated Mr. McCarthy was killed on the couch and then burned on the floor. This also refutes Brown's statement that he stabbed Mr. McCarthy three times with the victim falling to the floor, and no statement by Brown regarding Mr. McCarthy on the couch or of the burning of Mr. McCarthy's body.

In his testimony regarding the strength of the Commonwealth's case against Petitioner, ADA Lightner noted that during the police interview the day following the murder, Petitioner made statements that he had "screwed up" and "he would never see his kids again." During the interview, Petitioner signed a consent for the detectives to search his vehicle, the Dodge Charger. He told the detectives they would find Mr. McCarthy's wallet and a bottle of prescription pills that belonged to Mr. McCarthy in the center console of the vehicle. ADA Lightner testified that Petitioner was observed on video surveillance from the Wine and Spirits store at approximately 7:15 p.m. on February 4, 2017, which according to the Commonwealth's theory was shortly after Petitioner had killed Mr. McCarthy. In the trunk of the vehicle the detectives found a Wine and Spirits bag with a receipt dated February 4, 2017 at 7:15 p.m. Inside the bag, the detectives found Lysol spray, wipes, and a bloody towel. Subsequent testing confirmed the blood on the towel belonged to Mr. McCarthy.

ADA Lightner testified that the most notable detail of the McCarthy murder aside from the nine stab wounds was the fact that the body had been burned. However, Brown never mentioned burning Mr. McCarthy in his statement. ADA Lightner testified that Brown's confession did not contain any detail not made public.

ADA Lightner also testified that the statement by Brown was eerily similar to a statement relayed to the DA's office by an inmate named Faysal Muhammad. Muhammad, an acquaintance of Petitioner, contacted the DA's office to relay that another inmate named Tyree Salter had committed the murder of Robert McCarthy. ADA Lightner stated that further investigation into this claim was unsubstantiated and without merit. Based on this, ADA Lightner drew a parallel to this case and viewed Brown's confession as another contrived attempt by Petitioner to avoid the consequences of his heinous act. As this opinion unfolds and the record is reviewed, the Court agrees.

ADA Lightner testified that throughout the investigation there was no evidence linking any individual other than Petitioner to the crimes. ADA Lightner reiterated that there was "not one iota of evidence" linking Regis Brown to Mr. McCarthy's murder and he thereby felt Brown's statement was unbelievable and hardly exculpatory.

To further support their position that Brown's confession was fabricated and bore no credible or evidentiary value, the Commonwealth called Detective Matthew Berarducci of the City of Erie Police Department. Detective Berarducci was the lead investigator assigned to the McCarthy homicide along with Detective Sean Bogart. In fact, Detective Berarducci attended Mr. McCarthy's autopsy. Detective Berarducci elaborated on the extensive physical evidence connecting Petitioner to Mr. McCarthy's murder. His direct involvement with the McCarthy homicide armed him with the facts and details of the murder. As further emphasized by Detective Berarducci, all evidence pointed to Petitioner.

Detective Berarducci testified that after listening to Brown's statement, he also did not find it credible. He explained there was no physical evidence, eyewitness testimony, or surveillance footage linking Brown to the crime scene. When questioned about where the evidence indicated Mr. McCarthy had died, Detective Berarducci testified it was believed to be on the blood-soaked couch. (*See* Commonwealth Exhibit 5). This again refuted Brown's confession. Detective Berarducci referenced the plastic, sharp tip found in Mr. McCarthy's blood as being consistent with the weapon used to stab Mr. McCarthy. This was supported by Dr. Vey and his autopsy report and observations.

Throughout the entirety of the investigation, Detective Berarducci had never found any connection between Brown and Mr. McCarthy. He testified there was no evidence that Brown had murdered Mr. McCarthy. Detective Berarducci found no associations between Robert McCarthy and Brown. Brown was not known by Mr. McCarthy's family members or associates. Detective Berarducci confirmed that neither the name Regis Brown nor "Rex Knight" ever came up during the initial investigation into the McCarthy murder or any time after. Brown was never mentioned as a possible person of interest and had no known connection to Mr. McCarthy.

To further support this testimony, Detective Berarducci noted that Brown was not a known drug dealer in the area. He explained the area where Mr. McCarthy's residence is located is a high crime area with a high police presence where the police routinely and proactively run license plates. A search of police records by Detective Berarducci confirmed Brown's license plate never appeared on police scans in the area. This also reinforces ADA Lightner's testimony that his review of the video surveillance footage of Robert McCarthy's residence and neighborhood never once revealed Brown's Jeep Patriot which he claimed to have driven there the night of the murder.

Further, Detective Berarducci testified that based on Brown's claim that he called Robert McCarthy on February 4, 2017, he reviewed Mr. McCarthy's phone records. The records did not contain any numbers connected to Brown.

As follow-up to listening to Brown's taped statement, Detective Berarducci stated he and Detective Bogart made several attempts to interview Brown, but were unsuccessful because Brown had moved several times within the state prison system. Finally, on September 19, 2019, Detective Berarducci and Detective Bogart located Brown and arranged for a face-to-face interview with him. However, before questioning even commenced, Brown refused to speak with them, citing "legal" and "health issues." No further interview was attempted.

Finally, to demonstrate that Petitioner and Brown had ample opportunity to manufacture this scenario, the Commonwealth called Major Gary Seymour, Deputy Warden of Security and Safety at the Erie County Prison. Deputy Seymour is the custodian of records at the prison and authenticated the logs regarding the prison cell assignments of Petitioner and Brown between March 2018 through May 2018 (admitted as Commonwealth Exhibits 2 and 3).

Major Seymour explained the configuration of the Erie County Prison and described how the prison is divided into "pods" which can hold up to 94 inmates each. Each pod is then subdivided into four smaller groups of approximately 24 inmates ("A", "B", "C", and "D") to limit the number of inmates out of their cells at one time. When they are out of their cells, inmates have unmonitored and face-to-face access to each other in the day room and/or the gym. Major Seymour confirmed Petitioner and Brown were housed together at the Erie County Prison in pod "F-B" and sleeping only three cells apart from at least March 27, 2018 to May 15, 2018. (*See also*, Commonwealth Exhibit 2 and Commonwealth Exhibit 3). Consequently, Petitioner was provided nearly unrestricted access and opportunity to share facts of the McCarthy homicide with Brown.

At the conclusion of Major Seymour's testimony, the Commonwealth rested.

3. Independent Credibility Determination by the Court

Pursuant to the duty that a PCRA Court "render its own, independent findings of fact and conclusions of law concerning [the] credibility and the impact, if any, upon the truth-

determining process which can be discerned from such testimony," this Court has undertaken an exhaustive and independent review of the after-discovered evidence and the entire record in making its determination that Brown's statement is not credible and therefore Petitioner is not entitled to relief. *See, Commonwealth v. Williams, supra,* at 1180-81; *see also, Commonwealth v. Small, supra,* 978.

At the close of the hearing on October 7, 2019, the Court directed the Commonwealth to provide the Court with a copy of the audio recording of Brown's alleged confession (Courtroom Exhibit 2, 2A), a copy of the investigative report (Courtroom Exhibit 3) and the autopsy report (Courtroom Exhibit 3A). The Court subsequently listened to Brown's recorded statement and reviewed the investigative report and autopsy report.

The Court scheduled a status conference for October 15, 2019 to allow the parties to further supplement the record. The Commonwealth supplemented the record with pictures of the exterior of the McCarthy residence at 539 E. 9th Street (*See* Commonwealth Exhibits 4A, 4B, and 4C) and a picture of the interior of the crime scene (*See* Commonwealth Exhibit 5). Commonwealth Exhibit 5 displayed the blood-soaked couch and the victim's body lying on the floor next to the couch. It also showed the victim's charred upper torso.

After reviewing the testimony of record, the exhibits, the statements and arguments of counsel, and the relevant and applicable caselaw, the Court does not find the after-discovered evidence of Brown's confession credible or of sufficient reliability to justify the withdrawal of Petitioner's guilty plea. Quite simply, it does not bear an indicia of reliability or the ring of truth necessary to carry the day for satisfying the low threshold burden of preponderance of the evidence. Cognizant of its duty to assess the credibility of evidence and whether the Petitioner's burden of preponderance of the evidence has been satisfied, the Court will undergo a review of the evidence of record.

First, the Court determines that ADA Lightner, Detective Berarducci, and Major Seymour provided credible evidence which was independently corroborated by other evidence and the exhibits of record.

Second, while the Court finds the testimony of Trooper Vascetti and Trooper Werner was certainly credible as to their belief about the veracity of the alleged confession, the Troopers simply did not have sufficient details about Mr. McCarthy's murder to challenge Brown's statements. The Troopers were from Lawrence County and had never worked in Erie County. Trooper Vascetti had been called upon to question Brown because of the rapport they had built working on the Lawrence County murder. Trooper Werner had never even met Brown before. Neither Trooper was involved in the investigation of the McCarthy murder, nor did they participate in any further investigation subsequent to Brown's statements.

Third, after review of Courtroom Exhibit 2, 2A, the audio recording, the Court notes while Brown's statement touched upon general details, such as the approximate location of Mr. McCarthy's home and Mr. McCarthy's physical description, these are details that could have easily been learned through public sources or interaction with Petitioner. Crucially, Brown failed to provide distinguishing details that he would have known if he was the actual perpetrator of the crime. Brown was unable to provide these crucial facts because he did not murder Robert McCarthy — Petitioner did.

The notable lack of credibility of Brown's confession is set forth as follows:

1. Brown indicated he was familiar with Robert McCarthy and had "dealt with him a

couple times and he seemed solid." (*See* Courtroom Exhibit 2, 2A). However, Brown's name never came up during the investigation into Mr. McCarthy's homicide. Detective Berarducci testified there was no evidence that Brown was a known drug dealer in the area or even an acquaintance of Robert McCarthy. Brown's license plate had never appeared on scans in the area, which would have been expected if Brown was dealing drugs in the area. There were no witnesses placing Brown at the crime scene, whereas Petitioner was identified by Robert McCarthy's neighbor, Kim Barnes, as the last person seen with Mr. McCarthy on the evening of February 4, 2017. (*See also*, Commonwealth Exhibit 1). ADA Lightner's testimony further corroborated Detective Berarducci's testimony regarding the lack of a connection between Mr. McCarthy and Brown, as his review of the video surveillance of Robert McCarthy's residence and neighborhood never captured Brown's vehicle. It did, however, consistently show Petitioner's Dodge Charger. There is absolutely no independent evidence of any kind that Brown even knew Robert McCarthy and clearly nothing connecting Brown to Robert McCarthy's homicide. The Court does not find Brown's statement that he "knew" Robert McCarthy to be credible.

2. Brown stated he drove to McCarthy's residence in his green Jeep Patriot. (*See* Courtroom Exhibit 2, 2A). This is completely belied by the surveillance footage obtained from the area the night of the murder. Not only is there no footage of Brown's vehicle parked nearby, but every other vehicle that appeared in the footage was identified and none had a connection to Brown. As ADA Lightner testified, he personally reviewed the entire surveillance video and no vehicle matching or resembling a green Jeep Patriot appears at any point. In fact, ADA Lightner testified at no time was a Jeep of any kind observed the day or night of the murder (February 4 and 5, 2017). Conversely, Petitioner's vehicle, a Dodge Charger, was seen multiple times throughout the evening. The Court finds ADA Lightner's testimony reliable and corroborated by the credible testimony of Detective Berarducci that there was nothing connecting Brown to Mr. McCarthy or to the crime scene. Therefore, these factors render Brown's statement false.

3. Brown confessed that he called Mr. McCarthy on the telephone early in the evening before the murder prior to arriving at the residence. (*See* Courtroom Exhibit 2, 2A). Detective Berarducci testified there was no phone activity from Mr. McCarthy's number after 6:15 p.m. on the evening of February 4, 2017. Upon receiving Brown's confession, Detective Berarducci reviewed Mr. McCarthy's phone records and found no record of calls with the number connected to Brown. The phone records did, however, show phone calls between Mr. McCarthy and Petitioner. The Court finds Brown's claim he called Mr. McCarthy the evening of February 4, 2017 is not credible.

4. Brown identified the address of the McCarthy residence as "592 East 9th Street" and described the residence as "a regular house" with "white siding" and "little steps." (*See* Courtroom Exhibit 2, 2A). First, the Court takes judicial notice that there is no "592 E. 9th Street" in Erie, Pennsylvania, Further, "592" is not even an inverted derivative of the correct address of 539 E. 9th Street, Mr. McCarthy's residence. Next, Brown's description of the McCarthy residence is also inaccurate and lacks credibility. As depicted in the photos at Commonwealth Exhibit 4A, 4B, and 4C, Mr. McCarthy's residence was not a "regular house" but was part of a larger house converted into apartments. As police reports and testimony reveal, Mr. McCarthy's residence at 539 E. 9th Street was part of a four unit

apartment complex. While the portion encompassing 539 E. 9th Street does have white siding, the front of the building is mainly comprised of brown stone. There are no "little steps" to the door; instead, the property has a large wooden handicapped ramp leading up to the door. Mr. McCarthy's apartment at 539 E. 9th Street has a bright red door, red porch, and red iron post. When asked by Trooper Vescetti to describe Mr. McCarthy's home, Brown never mentioned a home with a handicapped ramp, or the apartment with a red door, or the house with the stone front facade and two doors in the front. None of these unique and distinguishing factors were stated by Brown. Brown's generic description and lack of detail reveal his unfamiliarity with Mr. McCarthy's residence and also rings untrue. The Court finds that Brown's claim that he was ever at Mr. McCarthy's home the night of the murder or any other night is not credible.

5. In his statement, Brown claimed he used a 6-inch hunting knife to attack Mr. McCarthy. (*See* Courtroom Exhibit 2, 2A). While it is true that Mr. McCarthy was stabbed and the weapon was not located, there was an evidentiary inference that the sharp plastic tip found in the puddle of blood on the couch was a remnant of the murder weapon as it was consistent with the victim's wounds. ADA Lightner and Detective Berarducci testified that based upon the investigation and a review by the forensic examiner, Dr. Vey, the pointed piece of plastic was consistent with Mr. McCarthy's wounds. Brown's claim that he used a hunting knife that he later "threw into Lake Erie" also appears contrived.

6. Brown also stated he stabbed Mr. McCarthy three times. He specifically stated he stabbed Mr. McCarthy once "in the side of the neck," "in the back of the neck," then again "in the side of the neck." (*See* Courtroom Exhibit 2, 2A). This statement is entirely inconsistent with the forensic findings. In the autopsy report (admitted as Courtroom Exhibit 3A), Dr. Vey determined Mr. McCarthy had been stabbed **nine** times. Specifically, the autopsy report indicates:

ANATOMIC DIAGNOSES:

I. NINE SHARP FORCE INJURY WOUNDS TO THE HEAD AND NECK.
   A. SUPERFICIAL STAB WOUND TO THE LEFT OCCIPITAL SCALP.
   B. SUPERFICIAL SHARP FORCE INJURY WOUND TO THE POSTERIOR MEDIAN MID NECK.
   C. FOUR PREDOMINANTLY SUPERFICIAL SHARP FORCE INJURY INCISED WOUNDS TO THE LEFT SIDE OF THE NECK.
   D. THREE STAB WOUNDS TO THE RIGHT SIDE OF THE NECK.
      1. STAB WOUND #8 WITH PENETRATION INTO THE RIGHT INTERNAL CAROTID ARTERY AND HYPOPHARYNX.
      2. STAB WOUND #9 WITH PENETRATION INTO THE LARYNGOPHARYNX.

(Courtroom Exhibit 3A). Clearly, Brown's claim that he stabbed Mr. McCarthy three times is in absolute conflict with the autopsy report and the fact that the victim suffered nine stab wounds. This evidence belies Brown's confession.

7. Brown's statement is further dismantled by his claim that after stabbing Mr. McCarthy, he left him lying on his back in the living room. However, this is inconsistent with the evidence

at the crime scene. It was determined that Mr. McCarthy had bled out on his couch and was moved to the floor before his body was burned. (*See also*, Commonwealth Exhibit 5). In fact, according to Detective Berarducci who was present at the scene of the crime, blood had "soaked through the frame of the couch." Commonwealth Exhibit 5, the picture of the interior of the residence, shows Mr. McCarthy's charred body lying on the floor next to a blood-soaked couch. There is no visible blood on the floor. Therefore, Brown's claim that Mr. McCarthy was stabbed three times and fell to the floor is again in conflict with the physical evidence at the crime scene and thus not credible.

8. Furthermore, Brown never mentioned anything about burning the body. Anyone with first-hand knowledge of the crime would know Mr. McCarthy's body was burned from the waist up. As ADA Lightner testified, that fact was so distinct that the case was locally known as ''the burned body case." Detective Berarducci responded to the scene and took photographs of the body. The image of Mr. McCarthy's charred body is depicted in Commonwealth Exhibit 5. Though Petitioner may argue that Brown committed the murder and someone else came back later and burned the body, there is a dearth of evidence supporting this theory. There was overwhelming testimony that nothing connected Brown to this crime and the overall strength of the evidence against Petitioner was strong. The most rational conclusion this Court can draw is because Brown lacked the knowledge of burning the body, he did not commit the murder. Although perhaps not the most persuasive factor to discredit Brown's confession, it is a factor nonetheless worthy of consideration.

Finally, in assessing the credibility of Brown's statement, it is not lost on the Court that Brown is serving life without parole for his double homicide and therefore faces no punitive consequences for admitting to another murder. In fact, as testified to by Trooper Vascetti, Brown may be described as somewhat of a serial killer because of his suspected role in other homicides.

Based on the above, the Court does not find Brown's alleged confession to be credible. The vague details provided by Brown wholly conflict with the reality of the autopsy findings, the evidence at the crime scene, and the other physical and circumstantial evidence linking Petitioner alone to the crime (*see* review of evidence and testimony from evidentiary hearing, *supra*). Instead of specific details of the crime, Brown provided somewhat generic descriptions which could easily be obtained from public sources or the Petitioner himself. Having presided over all stages of Petitioner's case, this Court is intimately familiar with the extensive media coverage it generated, which included details of the homicide as well as depictions of the victim's home. Further, it does not take an extraordinary leap of faith to think that Petitioner and Brown could not have concocted this scheme while they spent six weeks together in the same pod at the Erie County Prison.

The Court is not swayed by the general details Brown was able to provide in his statement. Petitioner may argue that Brown correctly identified the block on which the homicide occurred; that he identified the general location of the wounds; or that he gave an accurate physical description of Mr. McCarthy. However, the credibility of Brown's statement disintegrates when the minutia and detail of the crime is considered. The overall weight of Brown's statement crumbles under the weight of the evidence and overall strength of the Commonwealth's case against Petitioner, including Petitioner's own plea of guilty. Quite simply, Brown's incredible account fails to survive as after-discovered evidence and

consequently, Petitioner cannot satisfy his burden necessary for relief.

The Court has canvassed the Pennsylvania appellate courts for precedent and guidance. However, there is limited Pennsylvania caselaw concerning cases involving a collateral appeal seeking relief based on after-discovered evidence and the withdrawal of a guilty plea. Making this case unique is that the after-discovered evidence is the confession to a murder by another inmate. However, the Court finds support for its finding in decisions by sister-states faced with strikingly similar circumstances. For instance, in *People v. Cress*, 664 N.W.2d 174 (Mich. 2003), the Supreme Court of Michigan considered a confession by an inmate, Ronning, to a murder for which another man, Cress, was convicted and concluded the confession conflicted with the established facts and that Ronning was not credible. In 1985, Cress was convicted of murdering seventeen-year-old Patty Rosansky. In 1997, Ronning, housed in a prison in Arkansas, agreed to confess to multiple murders in exchange for a transfer to a prison in Michigan closer to his family. In his alleged confession, Ronning gave details about the murder of Ms. Rosansky. Specifically, he stated she did not struggle; he removed her clothing but did not penetrate her anus; he murdered her by strangulation; and after she died he threw a rock at her head. *People v. Cress*, *supra*, at 177. Ronning accompanied police twice to try to identify the crime scene and described it as "a clearing" and a "flat piece of ground, a clearing next to a two-track." *Id*. at 180.

The court in *Cress* conducted a hearing during which it heard testimony from four expert witnesses regarding the manner of death, which was determined to be multiple blows to the victim's head. *Id*. at 179, 182. The weapon used was described as a rod-shaped object. *Id*. The victim had been anally penetrated. *Id*. Testimony was presented regarding the presence of defensive wounds on the victim, and the lack of evidence of strangulation. *Id*. Most compelling to the court was Ronning's inability to identify the crime scene, as the victim's body was found not in a clearing, but in a ravine near identifiable landmarks. *Id*. at 180. The court stated: "When looking at the differences between inmate's description and photos of crime scene, the difference in topography and terrain is dramatic. When one compares his description of the crime scene to the actual crime scene, the only reasonable conclusion one can draw is that Mr. Ronning didn't know where the crime scene was because he did not commit the crime." *Id*. at 181 (internal citations omitted). The court found Ronning's confession riddled with inconsistencies and concluded that he was not credible. *Id*. at 183.

Likewise, in the case of *State ex ref. Smith v. McBride*, 681 S.E.2d 81 (W.Va. 2009), the Supreme Court of Appeals of West Virginia considered the confession by a death row inmate, Sells, to the murders of a mother and daughter for which another man, Smith, was convicted and found the confession to be incredible and not aligned with the true facts. During Smith's trial, some of the compelling evidence introduced included Smith's admission that he stole the victims' car; the fact that a key was used to start the car and the car keys were kept inside the victims' house; Smith had stolen a VCR, CB radio and a Walkman, all of which were kept inside the victims' home; and the t-shirt Smith was wearing belonged to the daughter and the daughter's blood was found on the shirt. *State ex ref. Smith v. McBride*, *supra*, at 95. Several years after Smith was convicted, Sells gave a videotaped confession to prison officials at the Texas prison where he was serving on death row. *Id*. at 87. Sells claimed he was actually the one who had killed the victims, stating he had met the daughter during a drug deal and she allowed him to live in the attic (which he described as an upstairs apartment

that had a bedroom and bathroom) without the mother's knowledge. *Id*. After several days, the mother discovered Sells was living in the attic and after an argument Sells stabbed both victims. *Id*. Sells stated there was a dog in the house but he would never harm a dog. *Id*. Sells described the crime scene as having a brown couch with a black afghan. *Id*. He stated after the murder he stole a CB radio and left the house on foot. *Id*. Sells acknowledged he and Smith were in prison together for a period of time in West Virginia but claimed they did not have contact. *Id*. at 87-89.

During the hearing on the after-discovered evidence of Sells' confession, the court heard testimony from the investigating officer that the victims had two dogs, one of which was found killed and hidden in the laundry room. *Id*. at 88. The only CB radio the victims had was the same one taken by Smith. *Id*. It was proven the victims did not have a couch with a black afghan, and more importantly, the victims' home did not have an upstairs bedroom and bathroom. *Id*. Upon review of the alleged confession and its discrepancies with the facts of the case, the court found Sells confession was implausible and not credible. *Id*. at 96.

Here, as the courts determined in *Cress and McBride*, this Court finds Brown's alleged confession inconsistent with the facts of the case and simply not credible when considered in totality of all the facts and evidence of record. Rather, this Court recognizes this after-discovered evidence claim as a desperate attempt by Petitioner to take advantage of the serendipitous circumstances of being housed together in pod F-B at the Erie County Prison with Brown, who was an inmate who was being investigated for committing several other homicides (*See* testimony of Trooper Vascetti, *supra*).[7] It is inconceivable that Petitioner and Brown weren't aware of each other when they were housed together in pod F-B at the Erie County Prison for the better part of two months with daily access to each other. It does not require a stretch of the imagination to consider Petitioner may have convinced Brown, an easy target facing life imprisonment with no possibility of parole and already on the police radar for other murders, to take the fall for McCarthy's murder too. Brown's confession lacked the necessary detail to make it credible because he did not commit the murder of Robert McCarthy. The Petitioner did.

Petitioner has not met his burden of proof. Specifically, he has not proven by a preponderance of the evidence that exculpatory evidence has become available that would have changed the outcome if it had been introduced. *See* 42 Pa.C.S.A. § 9543(a)(2)(iv). The Court has considered the "integrity of the after-discovered evidence" of Brown's alleged confession and, as discussed in detail above, has found it lacks overall integrity. *See Commonwealth v. Padillas, supra*, at 365. This is premised on the following: Brown had no known connections to the victim; the surveillance footage did not place his vehicle at or near the victim's residence; Brown's lack of detail in describing the victim's home; the error in the number of wounds inflicted; and other inconsistencies as set forth in this Opinion, *supra*. Pursuant to *Padillas, supra*, the Court has considered the various motivations of Petitioner and Brown in offering the evidence and finds Petitioner certainly has a strong motive in being permitted to withdraw his guilty plea while Brown truly has nothing to

[7] Regis Brown was charged with two counts of Murder/Homicide, *inter alia*, at Docket No. CP-25-CR-0001608-2018 in Erie County, Pennsylvania for killing his wife and stepdaughter. Brown was also being investigated for the 1988 Lawrence County murder of Bryce Tompkins, and was formally charged in that case in October 2018. Trooper Vascetti testified he also suspects Brown may have murdered Dawn Morgan in Erie County in 1988, but the case was ultimately cleared due to the inability to establish cause or manner of death.

lose in taking the blame. *Id*. The Court has also considered the "overall strength of the evidence" against Petitioner and finds the evidence supports the Commonwealth's assertion that Petitioner was the individual who murdered Mr. McCarthy. *Id*. This would include the following substantial physical evidence connecting Petitioner to Mr. McCarthy's murder: Mr. McCarthy's personal items (wallet and pill bottle) found in Petitioner's vehicle; the towel with the victim's blood found in Petitioner's vehicle; the cleaning supplies found in the trunk of Petitioner's car; witnesses placing Petitioner with Mr. McCarthy immediately prior to the murder; Petitioner's changing his clothes subsequent to the murder; Petitioner's vehicle being in close proximity to Mr. McCarthy's apartment at the approximate times of the murder and the subsequent fire; and Petitioner's statements that he "screwed up" and "would never see his kids again." The overall strength of the Commonwealth's case is also bolstered by Petitioner's own knowing, voluntary, and intelligent guilty plea to the murder and robbery of Robert McCarthy.

Therefore, on application of the after-discovered evidence analysis, this Court finds there is nothing set forth by Petitioner that is likely to have compelled a different outcome, and no manifest injustice has occurred to permit Petitioner to withdraw his guilty plea. Petitioner is not entitled to relief.

Conclusion

Upon a review of the PCRA, the Supplemental PCRA, the responses by the Commonwealth, and the entirety of the record, including the evidentiary hearing and exhibits, this Court has determined Petitioner's after-discovered evidence claim is patently frivolous and without factual or legal support. Rather, as discussed in-depth *supra*, this Court views the claim as an opportunistic attempt by Petitioner to take advantage of a sensational local news story to attempt to re-litigate convictions for which he accepted culpability and entered a knowing, voluntary, and intelligent guilty plea. Therefore, Petitioner's PCRA is hereby **DISMISSED** and his request for relief is **DENIED**. An Order will follow.

ORDER

AND NOW, to wit, this 28th day of October 2019, it is hereby **ORDERED** that the Petitioner's Petition for Post Conviction Collateral Relief is **DISMISSED** for the reasons set forth in the Memorandum Opinion above.

The Petitioner shall have thirty (30) days from the date of this Order to file an appeal to the Superior Court of Pennsylvania.

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

STATE FARM FIRE AND CASUALTY COMPANY
v.
JOHN P. GRAZIOLI and DENISE KATZ, Individually, and as Administratrix of the Estate of AMANDA GRAZIOLI

DECLARATORY JUDGMENTS / SUBJECTS OF RELIEF IN GENERAL

While Plaintiff Insurance Co.'s Declaratory Judgment refers only to Plaintiff Insurance Company's duty to John Grazioli, Katz was joined as an indispensable party as Katz initiated the underlying Civil Action. *See Vale Chemical v. Hartford Accident & Indemnity Co., et al.*, 516 A.2d 684 (Pa. 1986).

JUDGMENT / ABSENCE OF ISSUE OF FACT

Pennsylvania Rule of Civil Procedure 1035.2 states in relevant part: "After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law: (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report…" "Summary judgment is appropriate if moving party shows no genuine issue of material fact exists and that he or she is entitled to judgment as a matter of law."

JUDGMENT / PRESUMPTIONS AND BURDEN OF PROOF

The party moving for summary judgment has the burden of proving no genuine issue of material fact exists. In considering a motion for summary judgment, a court views 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.

INSURANCE / PLEADINGS

An insurer's duty to defend and indemnify the insured may be resolved via declaratory judgment actions. In [declaratory judgment] actions, the allegations raised in the underlying complaint alone fix the insurer's duty to defend.

INSURANCE / PLEADINGS

An insurer's duty to defend is broader than the duty to indemnify. The duty to defend is a distinct obligation, separate and apart from the insurer's duty to provide coverage. Accordingly, even if there are multiple causes of action and one would potentially constitute a claim within the scope of the policy's coverage, the insurer would have a duty to defend until it could confine the claim to a recovery excluded from the policy.

INSURANCE / QUESTIONS OF LAW OR FACT

The interpretation of an insurance contract regarding the existence or non-existence of coverage is generally performed by the court.

INSURANCE / POLICIES CONSIDERED AS CONTRACTS / INTENTION

Insurance policies are contracts, and the rules of contract interpretation provide that the mutual intention of the parties at the time they formed the contract governs its interpretation. Such intent is to be inferred from the written provisions of the contract.

INSURANCE / UNCERTAINTY, AMBIGUITY OR CONFLICT

If doubt or ambiguity exists it should be resolved in the insured's favor.

INSURANCE / PLEADINGS / POLICIES CONSIDERED AS CONTRACTS

The question of whether a claim against an insured is potentially covered is answered by comparing the four corners of the insurance contract to the four corners of the complaint.

INSURANCE / PLEADINGS / DUTY TO DEFEND

The language of the policy and the allegations of the complaint must be construed together to determine the insurer's obligation. An insurer may not justifiably refuse to defend a claim against its insured unless it is clear from an examination of the allegations in the complaint and the language of the policy that the claim does not potentially come within the coverage of the policy.

INSURANCE / PLEADINGS / TERMINATION OF DUTY

It is not the actual details of the injury, but the nature of the claim which determines whether the insured is required to defend. Thus, the insurer owes a duty to defend if the complaint against the insured alleges facts which would bring the claim within the policy's coverage if they were true.

INSURANCE / ACCIDENT, OCCURRENCE OR EVENT

In Pennsylvania, insurance is not available for losses that the policyholder knows of, intended, or is aware are substantially certain to occur. An insured intends an injury if he desired to cause the consequences of his act or if he acted knowing that such consequences were substantially certain to occur.

JUDGMENT / CIVIL OR CRIMINAL PROCEEDINGS

Prior criminal convictions, pursuant to the doctrine of collateral estoppel, are conclusive evidence in subsequent civil actions arising out of the same incidents and concerning the same activity which was criminally prosecuted in the prior action.

MURDER / DEGREES IN GENERAL

Pennsylvania defines first-degree murder as a criminal homicide committed by an intentional killing.

INSURANCE / PLEADINGS / DUTY TO DEFEND

An insurer must even defend an insured against claims that are factually baseless, false, or even fraudulent. A Trial Court's duty is to look past the artful pleading of a party when reviewing whether the underlying complaint contains sufficient factual allegations for an insured to incur the duty to defend. A party's couching of its allegations in terms of negligence does not automatically result in a duty of the insured to defend the insured.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
No. 11403-2018

OPINION AND ORDER

Domitrovich, J. August 31, 2020

In the instant case, Plaintiff State Farm Fire and Casualty Company [hereinafter Plaintiff Insurance Co.] has moved for summary judgment on Plaintiff Complaint in Declaratory Judgment against Defendant John P. Grazioli and Denise Katz. Argument was scheduled and held on August 10, 2020 regarding this Motion for Summary Judgment.

The controversy in this case stems from the untimely demise of Amanda Grazioli, the wife of John Grazioli, who died at the Grazioli residence from a bullet fired from the gun used by John Grazioli. Plaintiff Insurance Co. had issued a homeowner's liability insurance policy to Defendant John Grazioli, Insurance Policy # 38-CZ-S888-6. Plaintiff Insurance Co. seeks a declaration from this Trial Court that Plaintiff Insurance Co. has no duty to defend or

indemnify John Grazioli in another separate Civil Action at Docket No. 10717-2018, which was instituted against John Grazioli by his mother-in-law Denise Katz [hereinafter Katz], individually and as Administratrix of the Estate of Amanda Grazioli as plaintiff therein. Katz is also a Defendant in this Declaratory Judgment. While Plaintiff Insurance Co.'s Declaratory Judgment refers only to Plaintiff Insurance Company's duty to John Grazioli, Katz was joined as an indispensable party as Katz initiated the underlying Civil Action. *See Vale Chemical v. Hartford Accident & Indemnity Co., et al.*, 516 A.2d 684 (Pa. 1986); *see also Katz v. Grazioli,* Docket No. 10717-2018; *Commonwealth v. Grazioli,* 2020 WL 1158730 (Pa. Super. Ct., Mar. 10, 2020).

The procedural history of this Declaratory Judgment case is inextricably linked to the underlying Civil Action at Docket No. 10717-2018 and to John Grazioli' s criminal prosecution as follows: On March 19, 2018, Katz filed a Complaint against John Grazioli before this Trial Court. *See* Docket No. 10717-2018. Katz alleged: 1) negligence toward Denise Katz, individually; 2) negligence toward Amanda Grazioli; 3) wrongful Death on behalf of herself and Amanda Grazioli; 4) survival on behalf of herself and Amanda Grazioli; and 5) battery on behalf of herself and Amanda Grazioli. The facts alleged in the Complaint centered on the shooting death of Amanda Grazioli. For example, ¶ 4 of the Complaint reads, "On or about March 8, 2018, Defendant murdered Ms. Grazioli via a gunshot to the head."

On June 1, 2018, Plaintiff Insurance Co. filed the instant Complaint in Declaratory Judgment. Plaintiff Insurance Co. alleged there is no duty to indemnify or defend John Grazioli in the underlying civil action, which is established by the terms of his insurance policy. Plaintiff Insurance Co. asserted four claims for relief, three of which are based on the language in Plaintiff Insurance Co.'s policy: 1) definition of the word "occurrence," limiting coverage to only accidental causes of bodily injury; 2) exclusion of coverage for bodily injury intentionally caused by the "insured" or bodily injury that is the result of "willful and malicious acts of the insured"; and 3) exclusion of coverage for bodily injury to an "insured," which includes the spouse of the policy holder. Plaintiff Insurance Co.'s fourth claim is Plaintiff Insurance Co. is not liable to insure for punitive damages under Pennsylvania law, which are being claimed by Katz. Plaintiff Insurance Co. indicated the underlying Complaint alleged only intentional acts perpetrated by John Grazioli against his spouse Amanda Grazioli and, therefore, John Grazioli is not covered under his policy for these actions.

While both of these cases have been proceeding before this Trial Court, the District Attorney of Erie County successfully prosecuted John Grazioli for the murder of his wife. He was charged on May 29, 2018 with the following offenses: 1) Murder of the First Degree, 2) Aggravated Assault, 3) Recklessly Endangering Another Person, 4) Possession of an Instrument of Crime With Intent to Employ It Criminally, and 5) Firearm Not to Be Carried Without a License. *See* Docket No. MJ-06202-CR-0000086-2018. In fact, before even filing an Answer in the Civil Action initiated against him by Katz, John Grazioli filed a Motion for Stay of Civil Proceedings on April 19, 2018. This Trial Court granted John Grazioli's Motion to Stay Proceedings on June 7, 2018 pending the resolution of John Grazioli's criminal prosecution, and Katz's Civil Action against John Grazioli remained stayed until February 26, 2019. This Trial Court's decision regarding staying Katz's Civil Action focused on the overlap of issues between the civil and criminal actions against him,

as well as the clarity that a resolution of the criminal case would bring to the civil action. *See* Opinion and Temporary Order of Court, 6/7/18, Docket No. 10717-2018, at 4 ("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 [John Grazioli] in the Criminal Information are based.").

Ultimately, a jury convicted John Grazioli of all five offenses, including First Degree Murder, on February 8, 2019. He appealed this conviction and his sentence to the Pennsylvania Superior Court, which affirmed his judgment of sentence on May 22, 2020. John Grazioli sought no Allowance of Appeal in the Pennsylvania Supreme Court.

Prior to John Grazioli's jury conviction, however, and while the underlying Civil Action against him was stayed, Plaintiff Insurance Co. filed the first of two Motions for Judgment on the Pleadings. The first, filed on December 24, 2018, was dismissed as premature on February 26, 2019 by this Trial Court — the same day the stay in the underlying civil action was lifted. After dismissing Plaintiff's motion, this Trial Court granted Plaintiff leave to file an Amended Complaint in Declaratory Judgment. Also on February 26, 2019, this Trial Court granted Katz the opportunity to file an amended complaint in the underlying Civil Action.

On March 11, 2019, Katz filed an Amended Complaint against John Grazioli. The facts now included John Grazioli's conviction in his criminal prosecution but alleged "[t]he gunshot that killed Ms. Grazioli was either negligently or intentionally fired by Mr. Grazioli." *See* Amended Complaint, Docket No. 10717-2018, at 3, ¶ 7. The Amended Complaint summarizes John Grazioli's testimony wherein he stated he did not intend to shoot his wife. *Id*. at ¶ 14. After John Grazioli filed Preliminary Objections to this Amended Complaint, counsel for both parties stipulated to the claims that would continue in the underlying Civil Action, all filed by Katz: 1) Negligence on behalf of Amanda Grazioli; 2) Negligence per se on behalf of Denise Katz, individually, and Amanda Grazioli; 3) Wrongful Death on behalf of Amanda Grazioli; 4) Survival on behalf of Amanda Grazioli; and 5) Battery on behalf of Amanda Grazioli. *See* Stipulation as to the Amended Complaint, 6/17/2019, at 2. This Amended Complaint now contained only one claim for injuries to Denise Katz suffered due to John Grazioli's actions, while the remaining five claims are based on injuries suffered by Amanda Grazioli.

Plaintiff Insurance Co.'s Amended Complaint for Declaratory Judgment was filed on July 9, 2019 and, but for facts regarding John Grazioli's conviction for first degree murder, remained relatively unchanged. Plaintiff Insurance Co. argued the language of its insurance policy precluded any duty to represent or indemnify John Grazioli in the underlying Civil Action by Katz. The facts set forth in said Amended Complaint as to an intentional action committed by John Grazioli against Amanda Grazioli stated said action is not covered by Plaintiff Insurance Co.'s liability insurance policy.

Plaintiff Insurance Co.'s second Motion for Judgment on the Pleadings was filed on September 25, 2019, and this Trial Court dismissed said Motion as premature on December 20, 2019. After this second dismissal, Plaintiff Insurance Co. filed for an Interlocutory Appeal of this Trial Court's Order on January 14, 2020, which was quashed by the Pennsylvania Superior Court on February 7, 2020. Following the Superior Court's affirmance of John Grazioli's judgment of sentence, Plaintiff Insurance Co. filed the instant Motion for Summary Judgment on June 5, 2020.

Plaintiff Insurance Co.'s Motion for Summary Judgment avers Plaintiff Insurance Co. is

entitled to judgment as a matter of law because the facts pled in the underlying Civil Action allege conduct and persons not subject to coverage under Plaintiff Insurance Co.'s liability insurance policy. Therefore, Plaintiff Insurance Co. asserts it is not bound to defend or indemnify John Grazioli for any of the claims made by Katz in the underlying Civil Action. Plaintiff Insurance Co. argues its policy precludes coverage for: 1) injuries suffered by the spouse of an insured whom resides with the insured; 2) non-accidental injuries; and 3) bodily injury suffered due to intentional and malicious acts of the insured. Plaintiff Insurance Co. also argues it has no duty to defend or indemnify John Grazioli against Katz's individual claim of negligence per se as the underlying Civil Action does not allege Katz suffered any injuries covered by the insurance policy, and Plaintiff Insurance Co. is not liable to defend or indemnify an insured against claims for punitive damages.

Defendant Katz argues John Grazioli's conviction for first degree murder does not necessarily bar coverage under his homeowner's liability insurance policy. Katz cites to two past cases, *Stidham v. Millvale Sportsmen's Club*, 618 A.2d 945, 956 (Pa. Super. 1992) and *Erie Insurance Exchange v. Moore*, 228 A.3d 258 (Pa. 2020), for the proposition that simply because a defendant has been convicted of a crime involving a firearm does not alleviate defendant's insurer from its duty to defend and indemnify defendant in a civil action. Katz also points to the case of *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286 (Pa. 2007) in support of Katz's argument that an intentional shooting can still be considered an accident subject to coverage. According to Katz, Plaintiff Insurance Co. has distorted the wording of Plaintiff Insurance Co.'s own policy, which does not, in fact, alleviate Plaintiff Insurance Co.'s duty to defend and indemnify John Grazioli. Katz asserts that provisions providing for coverage of bodily injury clearly cover injuries arising from a gunshot, and, contrary to Plaintiff Insurance Co.'s interpretation of the policy, Amanda Grazioli is not precluded from coverage as John Grazioli's spouse. Moreover, Katz argues John Grazioli's actions in this case are not necessarily intentional as John Grazioli testified at trial that the shooting was an accident. Katz further argues the issue of indemnification is not yet ripe as no judgment has been entered against John Grazioli in the underlying Civil Action.

Pennsylvania Rule of Civil Procedure 1035.2 states in relevant part: "After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law: (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report ... " "Summary judgment is appropriate if moving party shows no genuine issue of material fact exists and that he or she is entitled to judgment as a matter of law." *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010) (citations omitted). The party moving for summary judgment has the burden of proving no genuine issue of material fact exists. *Holmes v. Lado*, 602 A.2d 1389, 1391-92 (Pa. Super. 1992)(citations omitted). In considering a motion for summary judgment, a court views 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. *SLT Holdings, LLC v. Mitch-Well Energy, Inc.*, 217 A.3d 1258, 1263 (Pa. Super. 2019).

"An insurer's duty to defend and indemnify the insured may be resolved via declaratory judgment actions." *Erie Insurance Exchange v. Claypoole*, 673 A.2d 348, 355 (Pa. 1996). **"In such actions, the allegations raised in the underlying complaint alone fix the insurer's**

duty to defend." *Id*. (emphasis added). A duty to defend, however, is "broader than the duty to indemnify." *Peccadillos, Inc*., 27 A.3d at 265 (citations omitted). "The duty to defend is a distinct obligation, separate and apart from the insurer's duty to provide coverage." *American and Foreign Ins. Co. v. Jerry's Sport Center, Inc*., 948 A.2d 834, 845-46 (Pa. Super. 2008). "Accordingly, even 'if there are multiple causes of action and one would potentially constitute a claim within the scope of the policy's coverage, the insurer would have a duty to defend until it could confine the claim to a rccovery excluded from the policy.'" *Id*. at 846 (quoting *Sclabassi v. Nationwide Mut. Fire Ins. Co*., 789 A.2d 699, 703 n. 2 (Pa. Super. 2011)).

"The interpretation of an insurance contract regarding the existence or non-existence of coverage is 'generally performed by the court.'" *Penn-America Ins. Co. v. Peccadillos, Inc.*, 27 A.3d 259, 264 (Pa. Super. 2011) (quoting *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286, 290-91 (Pa. 2007)). "Insurance policies are contracts, and the rules of contract interpretation provide that the mutual intention of the parties at the time they formed the contract governs its interpretation. Such intent is to be inferred from the written provisions of the contract. If doubt or ambiguity exists it should be resolved in insured's favor." *Peccadillos, Inc*., 27 A.3d at 264 (quoting *American and Foreign Ins. Co. v. Jerry's Sport Center, Inc*., 2 A.3d 526, 540 (Pa. 2010)).

"The question of whether a claim against an insured is potentially covered is answered by comparing the four corners of the insurance contract to the four corners of the complaint." *Jerry's Sport Center, Inc.*, 2 A.3d at 541. "The language or the policy and the allegations of the complaint must be construed together to determine the insurer's obligation." *Baumhammers*, 938 A.2d at 290. "An insurer may not justifiably refuse to defend a claim against its insured unless it is clear from an examination of the allegations in the complaint and the language of the policy that the claim does not potentially come within the coverage of the policy." *Jerry's Sport Center*, 2 A.3d at 541. "It is not the actual details of the injury, but the nature of the claim which determines whether the insurer is required to defend." *Aetna Cas. and Sur. Co. v. Roe*, 650 A.2d 94, 98 (Pa. 1994). "Thus, the insurer owes a duty to defend if the complaint against the insured alleges facts which would bring the claim within the policy's coverage if they were true," *D'Auria v. Zurich Ins. Co.*, 507 A.2d 857, 859 (Pa. Super. 1986).

"In Pennsylvania, as elsewhere, 'insurance is not available for losses that the policyholder knows of, intended, or is aware are substantially certain to occur.'" *State Farm Fire & Cas. Co. v. Estate of Mehlman*, 589 F.3d 105, 112 (3d Cir. 2009) (quoting Ostrager & Newman, Handbook on Insurance Coverage Disputes 442-44 § 8.03(e) (10th ed. 2000)). "An insured intends an injury if he desired to cause the consequences of his act or if he acted knowing that such consequences were substantially certain to result." *Id*. (citing *United Servs. Auto Ass'n v. Elitzky*, 517 A.2d 982, 989 (Pa. 1986)). Furthermore, "[p]rior criminal convictions, pursuant to the doctrine of collateral estoppel, are conclusive evidence in subsequent civil actions arising out of the same incidents and concerning the same activity which was criminally prosecuted in the prior action." *Harsh v. Petroll*, 840 A.2d 404, 444 (Pa. Commw. 2003) (citing *Folino v. Young*, 568 A.2d 171 (Pa. 1990)).

In the instant matter, the validity of the instant insurance policy is not in question. Moreover, counsel do not contest John Grazioli's adjudication of guilt for first degree murder or that his sentence is final. It is also undisputed John Grazioli and Amanda Grazioli were married and lived in the same residence at the time of Amanda Grazioli's death. Most importantly,

counsel, as set forth in their briefs regarding this Summary Judgment Motion, are not contesting the underlying civil action arose from the shooting death of Amanda Grazioli at the hands of John Grazioli. The instant case then turns on the resolution of a single issue: whether the underlying Civil Action against John Grazioli asserts any claims or alleges any facts that could potentially come under Plaintiff Insurance Co.'s policy, triggering Plaintiff Insurance Co.'s duty to defend and/or indemnify John Grazioli.

John Grazioli was convicted by a jury of first-degree murder for the shooting death of his wife, Amanda Grazioli. Pennsylvania defines first-degree murder as a criminal homicide "committed by an intentional killing." *See* 18 Pa.C.S. § 2502. In order to find someone guilty of first-degree murder, that person must be found guilty beyond a reasonable doubt of having committed an intentional killing of another person. Since John Grazioli was convicted of first-degree murder, he was found guilty beyond a reasonable doubt by a jury of having intentionally killed Amanda Grazioli. As detailed above, this criminal conviction for first-degree murder establishes conclusive evidence of John Grazioli's intent to kill Amanda Grazioli in any underlying civil action arising out of her shooting death. John Grazioli's actions cannot then be found in Katz's Civil Action to have been the result of negligence due to the doctrine of collateral estoppel.

Because John Grazioli's act was intentional and not negligent, this Trial Court must interpret the instant insurance policy to determine if said policy covers intentional acts committed by the insured. The first provision to consider is the definition of the word "occurrence" as used in the instant insurance policy. This is important because personal liability coverage under the policy is limited to when " ... a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence ... " *See* State Farm Homeowners Policy, Coverage L - Personal Liability, at 15. Occurrence is defined in the policy as "an accident ... which first results in: a. bodily injury; or b. property damage." *Id*., at 2 ¶ 7. The second provision to consider is the exclusion of coverage for " ... bodily injury or property damage: (1) which is either expected or intended by the insured; or (2) which is the result of willful and malicious acts of the insured ... " *Id*. at 16, § II (1)(a).

While John Grazioli's conviction brings his conduct well within these two provisions excluding coverage for intentional acts, the instant insurance policy contains additional provisions that exclude coverage in this case as well. Section 1(h) of this policy's exclusions to personal liability excepts coverage under the policy for bodily injury to any "insured within the meaning of part a. or b. of the definition of the insured," which is defined as any relatives "if residents of your household." *Id*., at 17, ¶ h; 1, ¶ 4(a). Finally, the definitions section of the policy defines "you" and "your" as the "named insured" shown in the Declarations, which includes "Your spouse ... if a resident of the household." *Id*., at 1.

After interpreting these provisions, this Trial Court finds and concludes the instant insurance policy does not include coverage for losses caused by intentional acts committed by the insured. This policy clearly and unambiguously states it does not cover claims or suits arising from intentional, malicious, non-accidental acts resulting in bodily injury or property damage. This Trial Court also finds and concludes the instant insurance policy does not include coverage for bodily injury caused to one's spouse who resides with the insured. This policy clearly and unambiguously states there is no coverage for injuries to any insured

and that a spouse is included within the definition of insured, as well as injury to any relatives that reside with the insured. Because John Grazioli is guilty beyond a reasonable doubt of intentionally killing Amanda Grazioli, his wife and co-habitant, any claims or suits seeking liability and damages for John Grazioli's shooting of Amanda Grazioli are not covered under this policy. This policy is entirely consistent with Pennsylvania law that has long held insurance is not provided for losses a party intends to occur. *See Estate of Mehlman, supra*. Therefore, this Trial Court finds and concludes Plaintiff is under no duty to indemnify John Grazioli for the intentional murder of Amanda Grazioli.

Simply because Plaintiff Insurance Co. is under no duty to indemnify John Grazioli for the murder of Amanda Grazioli does not necessarily mean Plaintiff Insurance Co. is under no duty to defend John Grazioli in the underlying civil action. The duty to defend an insured is broader than the duty to indemnify. An insurer must even defend an insured against claims that are factually baseless, false, or even fraudulent. *See Jerry's Sport Center, Inc.*, 2 A.3d at 540. This Trial Court is required to take all allegations made by Katz as true and liberally construe them in favor of coverage for John Grazioli. *Id*. In order for Plaintiff Insurance Co. to avoid this duty to defend, it must be clear from Katz's Amended Complaint that no factual allegations or claims could come within the coverage of this policy. In other words, if Katz's Amended Complaint contains any factual allegations or claims that could result in John Grazioli incurring liability other than through intentionally murdering Amanda Grazioli, Plaintiff Insurance Co. must still defend John Grazioli in this civil action.

Katz's Amended Complaint is based solely on causes of action arising from John Grazioli's intentional murder of Amanda Grazioli. Both Katz's Complaint and Amended Complaint limit the factual allegations contained therein to John Grazioli's shooting of Amanda Grazioli. For example, Katz's Complaint, one of only two factual averments, states: "On or about March 8, 2018, Defendant murdered Ms. Grazioli via a gunshot to the head." Complaint, Docket No. 10717-2018, at 2, ¶ 7. Katz's Amended Complaint states: "Defendant breached that duty by: a) Handling a loaded gun in Ms. Grazioli's presence and by accidentally discharging that weapon." Amended Complaint, Docket No.10717-2018, at 2, ¶ 14. And despite the language of negligence being used by Katz in her Amended Complaint, the allegations still involve only two persons who were married and resided in the same household when the incident took place. Therefore, even accepting all of Katz's factual allegations as true, John Grazioli's murder of Amanda Grazioli does not come under Plaintiff's insurance policy since these allegations rely on establishing liability for John Grazioli's intentional murder of Amanda Grazioli, his wife and co-habitant. This is true even of Katz's claim individually for damages based on a negligence per se theory. Therefore, this Trial Court finds and concludes Plaintiff Insurance Co. is under no duty to defend John Grazioli in the underlying civil action asserted against him by Denise Katz.

This Trial Court's duty in cases such as this is to look past the artful pleading of a party when reviewing whether the underlying complaint contains sufficient factual allegations for an insured to incur the duty to defend. *See Erie Ins. Exchange v. Muff*, 851 A.2d 919, 926 (Pa. Super. 2004); *Erie Ins. Exchange v. Fidler*, 808 A.2d 587, 590 (Pa. Super. 2002). A party's couching of its allegations in terms of negligence — a party's use of terms such as "duty" and "accidentally" — does not automatically result in a duty of the insurer to defend the insured. This Trial Court notes John Grazioli was convicted of the first-degree

murder of Amanda Grazioli prior to Katz filing her Amended Complaint in the underlying Civil Action. This was not true at the time of the filing of the Complaint and the initiation of the Civil Action against John Grazioli, but it was known by both parties when Katz filed her Amended Complaint. This Trial Court also notes the Amended Complaint's factual allegations of negligence, i.e. the "accidental discharging of the weapon in Ms. Grazioli's presence," traced the testimony of John Grazioli himself during his criminal trial. Obviously, the jury did not find John Grazioli's testimony credible as John Grazioli was convicted by the jury beyond a reasonable doubt of the intentional killing of his wife.

In the underlying Civil Action against John Grazioli, his jury criminal conviction of first-degree murder in his criminal trial prevents any possibility that John Grazioli could be found to have negligently killed Amanda Grazioli in the Civil Action. The doctrine of collateral estoppel prevents any further litigation over John Grazioli's intent regarding killing Amanda Grazioli as a jury has already found beyond a reasonable doubt that John Grazioli intentionally killed Amanda Grazioli. Therefore, accepting the factual allegations in Katz's Amended Complaint as true would mean accepting groundless factual allegations alleged by Katz over a criminal jury's finding that John Grazioli committed first degree murder of Amanda Grazioli beyond a reasonable doubt.

However, despite such concerns, the outcome in this case is not changed when Katz's factual allegations of John Grazioli's negligence are accepted as true. Plaintiff Insurance Co.'s policy does not cover liability for even the negligent killing of an insured's spouse who resides with the insured.

In conclusion, Plaintiff Insurance Co. clearly owes no duty to defend or indemnify John Grazioli in the underlying Civil Action for the murder of Amanda Grazioli as none of Katz's claims are covered under Plaintiff Insurance Co.'s policy. Since no genuine disputes as to any material facts exist to resolve, and since Plaintiff Insurance Co. is entitled to judgment as a matter of law, this Trial Court grants Plaintiff's Motion for Summary Judgment and enters the following Order:

ORDER

AND NOW, to wit, on this 31st day of August, 2020, for all of the reasons as set forth in this Trial Court's Opinion attached hereto, it is hereby **ORDERED, ADJUDGED, AND DECREED** Plaintiff's Motion for Summary Judgment is **GRANTED**.

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

TIMOTHY EDWARD FITZGERALD

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION

AUTOMOBILES / TRIAL DE NOVO AND DETERMINATION

Appeal of a decision to suspend an operator's license is heard *de novo* by this Trial Court.

AUTOMOBILES / REFUSAL TO TAKE TEST

In order to determine whether reasonable grounds existed for an officer to believe that a licensee was operating a vehicle while under the influence of alcohol, the court must consider the totality of the circumstances.

AUTOMOBILES / REFUSAL TO TAKE TEST

Determining whether reasonable grounds exist is not very demanding, and it is not necessary for the arresting officer to prove he was correct in his belief a motorist was operating the vehicle while intoxicated, and even if later evidence proves the police officer's belief was erroneous, this will not render the reasonable grounds void.

AUTOMOBILES / REFUSAL TO TAKE TEST

The police officer's belief the licensee was operating a vehicle while under the influence of alcohol or a controlled substance must only be objective in light of the surrounding circumstances.

AUTOMOBILES / ADMISSIBILITY

The Commonwealth Court has long held that out-of-court statements made by witnesses to a driver's operation of the vehicle and behavior exhibiting impairment or intoxication are not considered hearsay. Such statements are not offered for their truth but are instead offered to show they were made to the officer, who in turn formed a reasonable belief as to the driver's intoxication. Thus, an out-of-court statement is admissible to demonstrate motivation for an arresting officer's course of conduct.

AUTOMOBILES / REFUSAL TO TAKE TEST

Pennsylvania law is clear that a driver who requests to speak to an attorney is considered to have refused consent to take a chemical test; an unequivocal, unqualified assent to take a chemical test is required.

AUTOMOBILES / REFUSAL TO TAKE TEST

To make a knowing refusal to submit to a chemical testing as required for suspension of license, motorist who has asked to consult with someone prior to taking test must be informed: 1) his or her operating privileges will be suspended for one year if motorist refuses chemical testing, and 2) the motorist's *Miranda* right to counsel does not apply to chemical testing.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
No, 11179 - 2020

Appearances: Charbel G. Latouf, Esq., appeared on behalf of Appellant
Denise H. Farkas, Esq. appeared on behalf of Appellee

OPINION AND ORDER

Domitrovich, J. October 1, 2020

A hearing was held on August 26, 2020 before this Trial Court on Appellant Timothy Edward Fitzgerald's [hereinafter Fitzgerald] appeal of his license suspension for refusal to submit to a chemical test, wherein Charbel G. Latouf, Esq., appeared on behalf of Fitzgerald and Denise H. Farkas, Jr., Esq., appeared on behalf of Appellee Pennsylvania Dept. of Transportation [hereinafter Department of Transportation]. Officer John Melnik and Officer Maxwell Brozell, both officers of the Erie Police Dept., provided credible testimony during said hearing.

This Trial Court directed counsel for both parties to provide memoranda of law concerning three legal issues raised by Fitzgerald's counsel: 1) whether a police officer may rely on third party statements made by medical personnel regarding a vehicle driver's intoxication or impairment to establish reasonable grounds to suspect the vehicle driver was driving, operating, or in control of the movement of a vehicle while under the influence of alcohol, and may the officer testify as to those statements to establish said reasonable grounds; 2) Whether Officer Melnik's testimony that he observed both he and another officer reading the DL-26 warnings to Fitzgerald at the hospital was admissible; and 3) where Fitzgerald had already given consent to a blood test after being read the DL-26 by Officer Melnik while in the ambulance prior to being taken to the hospital, whether the acts of both Officers and a third officer in re-reading Fitzgerald the DL-26 form a second time at the hospital so affected Fitzgerald that his subsequent request for an attorney acted as a refusal to consent to a blood draw; or, in the alternative, whether Fitzgerald's initial consent in the ambulance prior to being taken to the hospital should have ended any further inquiry into Fitzgerald's consent and Officer Melnik could have requested the hospital provide the police with Fitzgerald's blood.

This Trial Court received Department of Transportation's Memorandum of Law on September 21, 2020. This Trial Court did not receive a Memorandum of Law on behalf of Fitzgerald. Department of Transportation argues Fitzgerald's license suspension should be upheld. Department of Transportation argues Officers Brozell and Melnik had reasonable grounds to believe Fitzgerald was operating his motor vehicle while under the influence of alcohol, and that statements made by medical personnel are admissible to prove Officer Brozell's state of mind regarding Fitzgerald's impairment and intoxication. Furthermore, Department of Transportation argues Fitzgerald was asked to submit to a chemical test, which Fitzgerald refused to do by requesting to first speak to his attorney after being read the DL-26 form at the hospital. Officer Melnik's testimony regarding his and another officer's reading of the DL-26 form to Fitzgerald and Fitzgerald's request for an attorney is admissible to prove these facts.

Fitzgerald's counsel, while not providing a written Memorandum of Law on these issues, argued orally during the instant hearing on the record that testimony from the medical professionals to Officer Brozell and testimony of Officer Melnik's of a third officer reading the DL-26 form to Fitzgerald were both inadmissible hearsay. Furthermore, Fitzgerald's counsel argued since Fitzgerald consented to a blood draw while Fitzgerald was in the ambulance prior to arriving at the hospital, Fitzgerald's subsequent request for an attorney does not constitute a withdrawal of consent. Fitzgerald's counsel argued the police officers have only one opportunity to ask for consent to a blood draw and police should not be allowed

to continue to request a driver submit to a blood draw until the driver does not consent. He argued since Fitzgerald consented, the police officers should have simply taken his blood while at the hospital without requesting Fitzgerald's consent at the hospital.

Regarding the suspension of a licensee's motor vehicle operating privilege under 75 Pa.C.S. § 1547 (b)(1), Department of Transportation carries the burden of proof for the following four prongs: (1) Licensee was arrested for Driving Under the Influence of Alcohol (DUI) by a police officer who had reasonable grounds to believe Fitzgerald was operating or in actual physical control of the movement of a motor vehicle under the influence of alcohol; (2) Licensee was asked to submit to a chemical test; (3) Licensee refused to submit to said chemical testing; and (4) Licensee was specifically warned that his refusal to submit to chemical testing would result in the suspension of his operating privileges. Appeal of a decision to suspend an operator's license is heard *de novo* by this Trial Court. *See* 75 Pa.C.S. § 1550; *Commonwealth v. Strobel*, 100 A.2d 43 (Pa. 1953).

In order to determine whether reasonable grounds existed for an officer to believe that a licensee was operating a vehicle while under the influence of alcohol, the court must consider the totality of the circumstances. *See Demarchis v. Commonwealth, Dep't of Trans., Bureau of Driver Licensing*, 999 A.2d 639, 642-43 (Pa. Commw. 2010). The test is not very demanding, and it is not necessary for the arresting officer to prove he was correct in his belief a motorist was operating the vehicle while intoxicated, and even if later evidence proves the police officer's belief to be erroneous, this will not render the reasonable grounds void. *Hasson v. Commonwealth, Dep't of Trans., Bureau of Driver Licensing*, 866 A.2d 1181, 1185-86 (Pa. Commw. 2005). The police officer's belief the licensee was operating a vehicle while under the influence of alcohol or a controlled substance must only be objective in light of the surrounding circumstances. *Zwibel v. Commonwealth, Dep't of Trans., Bureau of Driver Licensing*, 832 A.2d 599, 604 (Pa. Commw. 2003).

During the hearing in the instant case, Officer Brozell credibly stated he arrived at the scene of a motor vehicle accident and witnessed Fitzgerald in the driver's seat of Fitzgerald's motor vehicle. N.T., License Suspension Appeal, 8/26/20, at 20. Officer Brozell stated Fitzgerald was in the driver's seat of the vehicle, which at the time of Officer Brozell's arrival was upside down with Fitzgerald suspended inside. *Id*. at 21. Officer Brozell then spoke with "EmergyCare" medics who informed Officer Brozell they believed Fitzgerald was impaired and had admitted to drinking. *Id*. at 24. Officer Melnik also testified Fitzgerald appeared impaired to him while Fitzgerald was at the hospital following the accident. *Id*. at 10, 18. Officer Melnik stated Fitzgerald had "bloodshot and/or glossy eyes" and that Fitzgerald was difficult to understand when Fitzgerald spoke. *Id*. at 17, 18.

This Trial Court finds the testimony of Officers Melnik and Brozell credible. Given the facts as established by these police officers, this Trial Court finds Officers Brozell and Melnik both had reasonable grounds to believe Fitzgerald was operating his vehicle while under the influence of alcohol. Fitzgerald was witnessed in the driver's seat of his vehicle which had just been involved in an accident. EmergyCare medics told Officer Melnik Fitzgerald appeared intoxicated and also admitted to drinking. Moreover, Officer Melnik stated Fitzgerald showed outward signs of being impaired at the hospital following the accident. This evidence is sufficient to form an objectively reasonable basis to believe Fitzgerald had been driving his vehicle while under the influence of alcohol.

As to Fitzgerald's objection to the admission of testimony from EmergyCare medics, such testimony has been held admissible to prove an officer's state of mind regarding a driver's impairment or intoxication. *See Schlag v. Dep't of Trans., Bureau of Driver Licensing*, 963 A.2d 598, 603 (Pa. Commw. 2009); *Duffy v. Dep't of Trans., Bureau of Driver Licensing*, 694 A.2d 6, 7 (Pa. Commw. 1997). The Commonwealth Court has long held that out of court statements made by witnesses to a driver's operation of the vehicle and behavior exhibiting impairment or intoxication are not considered hearsay. *See Haklits v. Commonwealth, Bureau of Driver Licensing*, 418 A.2d 772, 773-74 (Pa. Commw. 1979). Such statements are not offered for their truth but are instead offered to show they were made to the officer, who in turn formed a reasonable belief as to the driver's intoxication. "Thus, an out-of-court statement is admissible to demonstrate motivation for an arresting officer's course of conduct." *Olt v. Dep't of Trans., Bureau of Driver Licensing*, 218 A.3d 1, 7 (Pa. Commw. 2019). Here, Officer Brozell testified to these statements only to demonstrate why he believed Fitzgerald was impaired and why he requested Fitzgerald to submit to a chemical test. Fitzgerald's counsel also argued Officer Melnik's testimony regarding Corporal Eichler's second attempt to read the DL-26 was inadmissible hearsay; however, Officer Melnik was present and assisting Corporal Eichler so he observed first hand that the DL-26 was read by Corporal Eichler.

Following Officer Brozell's information of his reasonable belief of Fitzgerald's intoxication, Officer Brozell requested Officer Melnik speak to Fitzgerald about submitting to a chemical test. N.T., License Suspension Appeal, 8/26/20, at 24. Officer Melnik spoke with Fitzgerald in the ambulance prior to Fitzgerald being taken to the hospital, requesting Fitzgerald submit to a chemical test by reading the entire DL-26 form to Fitzgerald. *Id*. at 7-8. Fitzgerald clearly indicated he understood the warnings Officer Melnik had read to him, and Fitzgerald consented to a chemical test. *Id*. Officer Melnik encountered Fitzgerald again at the hospital and asked Fitzgerald to submit to a chemical test, at which point Fitzgerald became combative and demanded to speak to an attorney. *Id*. at 11, 16. Fitzgerald was warned he did not have the right to speak to an attorney prior to a chemical test but this did not change Fitzgerald's mind. *Id*. at 11-12. Officer Melnik then personally observed Corporal Eichler attempt to read the DL-26 form to Fitzgerald, who again indicated he would not submit to a chemical test until he spoke to an attorney. *Id*. at 11-12, 16-17.

Pennsylvania law is clear that a driver who requests to speak to an attorney is considered to have refused consent to take a chemical test; an unequivocal, unqualified assent to take a chemical test is required. *See Factor v. Dep't of Trans., Bureau of Driver Licensing*, 199 A.3d 492, 497 (Pa. Commw. 2018). "Motorist's request to speak with his attorney, in response to a request that he take breathalyzer test, was short of an unqualified, unequivocal assent to take a test, and thus constituted a 'refusal' to take a test, warranting suspension of motor vehicle operator's license for six months." *Commonwealth, Dep't of Trans., Bureau of Traffic Safety v. Wroblewski*, 461 A.2d 359 (Pa. Commw. 1983). "To make a 'knowing' refusal to submit to chemical testing as required for suspension of license, motorist who has asked to consult with someone prior to taking test must be informed: 1) his or her operating privileges will be suspended for one year if motorist refuses chemical testing, and 2) the motorist's *Miranda* right to counsel does not apply to chemical testing." *Kolaczynski v. Commonwealth, Dep't of Trans., Bureau of Driver Licensing*, 657 A.2d 522, 525-26 (Pa. Commw. 1995).

In the instant case, Fitzgerald was informed of the consequences of refusing to take a

chemical test — not once but twice. Fitzgerald was read the DL-26 form in its entirety and submitted to chemical testing after stating clearly he understood the DL-26. However, after Officer Melnik later encountered Fitzgerald at the hospital, Officer Melnik asked Fitzgerald to submit to a chemical test, and Fitzgerald refused until he could speak to his attorney. Fitzgerald was expressly informed he did not have a right to counsel, and Officers Melnik and Eichler attempted to read Fitzgerald the DL-26, but Fitzgerald became combative and continued to refuse to submit to a chemical test.

Given these facts, this Trial Court finds and concludes Fitzgerald fully understood the consequences of not submitting to a chemical test and that Fitzgerald knowingly refused to take a chemical test, nonetheless. Fitzgerald's request to speak to an attorney prior to submitting to a chemical test is a qualified, equivocal assent to a chemical test and, therefore, is not consent under Pennsylvania law. Fitzgerald demanded to speak to his attorney knowing he did not have the right to speak to an attorney. Fitzgerald has not provided any evidence to rebut that Fitzgerald's refusal was knowing and conscious, nor has Fitzgerald provided any evidence any factor other than his alcohol consumption affected his refusal to submit to a chemical test.

This Trial Court finds and concludes the Department of Transportation has met its burden of proof regarding all four prongs required to suspend an operator's license: (1) Fitzgerald was arrested for Driving Under the Influence of Alcohol (DUI) by a police officer who had reasonable grounds to believe Fitzgerald was operating or in actual physical control of the movement of a motor vehicle while under the influence of alcohol; (2) Fitzgerald was asked to submit to a chemical test; (3) Fitzgerald clearly refused to submit to said chemical testing by requesting to speak to his attorney; and (4) Fitzgerald was specifically warned he did not have a right to counsel and his refusal to submit to chemical testing would result in the suspension of his operating privileges. In the instant case, the burden then shifted to Fitzgerald to prove his refusal was not knowing and conscious and that such inability was not caused, in whole or in part, by his alleged consumption of alcohol. Fitzgerald did not meet said burden.

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

ORDER

AND NOW, to wit, on this 1st day of October, 2020, for all or the reasons as set forth in this Trial Court's Opinion as attached, it is **ORDERED, ADJUDGED, AND DECREED** Petitioner's License Suspension Appeal is hereby **DENIED**. Department of Transportation is authorized to reinstate the suspension imposed by Notice dated May 13, 2020.

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

COMMONWEALTH OF PENNSYLVANIA

v.

TYUNE BERRY

STATUTES / CONSTRUCTION

A basic tenet of statutory construction is words of a statute shall be construed according to their plain meaning. 1 Pa.C.S.A. §1903(a).

CRIMINAL PROCEDURE / MOTOR VEHICLE CODE / DRIVING VEHICLE AT SAFE SPEED

75 Pa.C.S.A. §3361, Driving Vehicle At Safe Speed, provides: "No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing, nor at a speed greater than will permit the driver to bring his vehicle to a stop within the assured clear distance ahead. Consistent with the foregoing, every person shall drive at a safe and appropriate speed when approaching and crossing an intersection or railroad grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions." 75 Pa.C.S.A. §3361.

CRIMINAL PROCEDURE / MOTOR VEHICLE CODE / DRIVING VEHICLE AT SAFE SPEED

The language of Section 3361 of the Vehicle Code is clear and unambiguous. The first sentence of Section 3361 sets forth two general and alternate types of conduct that, when a person is driving, constitute a violation: first, at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing; second, nor at a speed greater than will permit the driver to bring his vehicle to a stop within the assured clear distance ahead.

CRIMINAL PROCEDURE / MOTOR VEHICLE CODE / DRIVING VEHICLE AT SAFE SPEED

Under the second type of conduct specified in the first sentence of Section 3361 of the Vehicle Code, "assured clear distance" are the key words. In this regard, Section 3361 is usually the charging statute when the operator "rear-ends" another vehicle or crashes into some stationary object, circumstances not present in the instant case.

CRIMINAL PROCEDURE / MOTOR VEHICLE CODE / DRIVING VEHICLE AT SAFE SPEED

The second sentence of Section 3361 begins with the phrase "consistent with the foregoing" and sets forth several specific examples of conditions and hazards further defining when the general conduct — unreasonable or imprudent speed — constitutes a violation. Section 3361 concludes with the phrase "and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions." (Emphasis added).

CRIMINAL PROCEDURE / MOTOR VEHICLE CODE / DRIVING VEHICLE AT SAFE SPEED

There is no question that speeding alone does not constitute a violation of 75 Pa.C.S.A. §3361, Driving Vehicle At Safe Speed.

CRIMINAL PROCEDURE / MOTOR VEHICLE CODE / DRIVING VEHICLE AT SAFE SPEED

Under 75 Pa.C.S.A. §3361, Driving Vehicle At Safe Speed, absent facts bringing into play the alleged operation of a vehicle at a speed greater than will permit the driver to bring his vehicle to a stop within the assured clear distance ahead, there must be proof of speed that is unreasonable or imprudent under the circumstances, even if the driver has adhered to the posted speed limit.

CRIMINAL PROCEDURE / MOTOR VEHICLE CODE / MAXIMUM SPEED LIMITS

75 Pa.C.S.A. Section 3362, Maximum Speed Limits, is the provision of the Vehicle Code that specifically addresses speeding violations.

CRIMINAL PROCEDURE / MOTOR VEHICLE CODE / DRIVING VEHICLE AT SAFE SPEED

In the case at bar, where Defendant was not charged with a violation of 75 Pa.C.S.A. Section 3362, Maximum Speed Limits, and where the second type of conduct specified in the first sentence of Section 3361 (travel at a speed greater than will permit the driver to bring his vehicle to a stop within the assured clear distance ahead) is not in question, in the absence of proof of circumstances, conditions or actual and potential hazards then existing in the vicinity of the stop, the police lacked probable cause or reasonable suspicion to stop Defendant's vehicle for a violation of 75 Pa.C.S.A. §3361, Driving Vehicle At Safe Speed.

CRIMINAL PROCEDURE / MOTION TO SUPPRESS / BURDEN OF PROOF

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

CRIMINAL PROCEDURE / MOTION TO SUPPRESS / BURDEN OF PROOF / MANNER OF OPERATION OF VEHICLE

Where the Commonwealth contends the manner in which Defendant operated the vehicle violated Section 3361 of the Motor Vehicle Code, probable cause was required to justify the traffic stop. *See Commonwealth v. Feczko*, 10 A.3d 1285, 1290-1291 (Pa.Super. 2010).

CRIMINAL PROCEDURE / MOTION TO SUPPRESS / BURDEN OF PROOF / PROBABLE CAUSE

"Probable cause to arrest exists 'when the facts and circumstances within the police officer's knowledge and of which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested. Probable cause justifying a warrantless arrest is determined by the totality of the circumstances. It is the facts and circumstances within the personal knowledge of the police officer that frames the determination of the existence of probable cause.'" *Commonwealth v. Salter*, 121 A.3d 987, 996-997 (Pa.Super 2015), citing *Commonwealth v. Williams*, 941 A.2d 14, 27 (Pa.Super. 2008).

CRIMINAL PROCEDURE / MOTION TO SUPPRESS / BURDEN OF PROOF NOT MET / FRUIT OF POISONOUS TREE

The "fruit of the poisonous tree" doctrine dictates that the tangible evidence in this case must be suppressed.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
NO. 2589 of 2019

Appearances: Eric Hackwelder, Esq., counsel for Defendant
Molly Anglin, Esq., Assistant District Attorney for the Commonwealth

OPINION

Brabender, Jr., J. November 25, 2020

The matter is before the Court on the Defendant's Omnibus Pre-Trial Motion *Nunc Pro Tunc*. Following an evidentiary hearing and submission of briefs, the Motion shall be **GRANTED**.

FINDINGS OF FACT

The Defendant, TYUNE BERRY, is charged with Persons Not to Possess Firearms (F2), 18 Pa.C.S.A. §6105 (a)(1); Firearms Not to be Carried Without a License (F3), 18 Pa.C.S.A. §6106 (a)(1); Receiving Stolen Property (F2), 18 Pa.C.S.A. §3925 (a); Possession of Small Amount (M), 35 P.S. §780-113 (a)(31)(i); Possession of Small Amount (M), 35 P.S. §780-113 (a)(32); and Driving Vehicle at Safe Speed, 75 Pa.C.S.A. §3361. The charges arise from the stop of a vehicle operated by the Defendant and his arrest on May 25, 2019, at the 500 block of West 11th Street, City of Erie, Erie County, Pennsylvania, by the City of Erie Police Department.

On March 30, 2020, the Defendant filed an Omnibus Pre-Trial Motion *Nunc Pro Tunc*, alleging that the stop and arrest of the Defendant was pre-textual and without probable cause or reasonable suspicion and made in violation of the Fourth and Fourteenth Amendments of the United States Constitution; by Article I, Section 8 of the Pennsylvania Constitution; and thus, all evidence obtained pursuant to the illegal stop should be suppressed as the fruit of the poisonous tree.

A suppression hearing on the motion was held on August 25, 2020. The Commonwealth presented the testimony of EPD Corporal Jason Russell, who stated that on the date in question, he received information from a confidential informant that an individual had been refused entry to a club because he was in possession of a firearm. Corporal Russell observed an individual matching the CI's description enter a vehicle which he eventually stopped after measuring, per his own speedometer, that said vehicle was traveling at 40 mph in a 25 mph zone. After smelling an odor of marijuana, Corporal Russell conducted a search of the vehicle, producing items which led to the filing of the above-mentioned charges. This Court finds Corporal Russell's testimony to be credible.

The Commonwealth asserts Corporal Russell had probable cause that a violation of the traffic code occurred because of the evidence of record introduced at the suppression hearing noted that the Defendant was traveling at a rate 15 mph over the speed limit, and, therefore, the stop and search was lawful. It must be noted, however, that the Defendant was not charged with Maximum Speed Limits (speeding), 75 Pa.C.S.A §3362, but with Driving Vehicle at Safe Speed, 75 Pa.C.S.A. §3361.

Section 3361 of the Vehicle Code provides:

> No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing, nor at a speed greater than will permit the driver to bring his vehicle to a stop within the assured clear distance ahead. Consistent with the foregoing, every person shall drive at a safe and appropriate speed when approaching and crossing an intersection or railroad grade crossing, when approaching and going around curve, when approaching a hill crest, when traveling upon any narrow or winding roadway and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

The language of Section 3361 is clear and unambiguous. The basic tenet of statutory construction requires a court to construe the words of the statute according to their plain meaning. 1 Pa.C.S.A. §1903(a).

The first sentence of Section 3361 sets forth two general and alternate types of conduct that, when a person is driving, constitute a violation: first, at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing; second, nor at a speed greater than will permit the driver to bring his vehicle to a stop within the assured clear distance ahead. "Assured clear distance" are the key words. In this regard, this section is usually the charging statute when the operator "rear-ends" another vehicle or crashes into some stationary object. The second sentence of Section 3361 begins with the phrase "consistent with the foregoing" and sets forth several specific examples of conditions and hazards that further define when the general conduct — unreasonable or imprudent speed — constitutes a violation. The section concludes with the phrase "*and* when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions." (Emphasis added.)

There is no question that speeding alone does not constitute a violation of this section. It is Section 3362 that specifically addresses speeding violations. There must be proof of speed that is unreasonable or imprudent under the circumstances, even if the driver has adhered to the posted speed limit. Here, in the case at bar, there are no proof of circumstances, conditions or actual and potential hazards then existing on the 500 block of West 11th Street. There was no probable cause or reasonable suspicion for the Defendant's vehicle to be stopped for a violation of Section 3361. *See Commonwealth v. Heberling*, 360 Pa. Super. 481, 520 A.2d 1192 (1987).

The "fruit of the poisonous tree" doctrine dictates that the tangible evidence in this case must be suppressed. It is not necessary for this Court to address the issues of whether or not the alleged traffic violation was *de minimis*; or whether 75 Pa.C.S.A. §3368 (Speedometers authorized) be examined. Furthermore, this Court need not address the issue of whether or not this was an illegal pre-textual stop.

CONCLUSIONS OF LAW

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

2. As the Commonwealth contends the manner in which Defendant operated the vehicle violated Section 3361 of the Motor Vehicle Code, probable cause was required to justify the traffic stop. *See Commonwealth v. Feczko*, 10 A.3d 1285, 1290-1291 (Pa.Super. 2010).

3. "Probable cause to arrest exists 'when the facts and circumstances within the police officer's knowledge and of which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested. Probable cause justifying a warrantless arrest is determined by the totality of the circumstances. It is the facts and circumstances within the personal knowledge of the police officer that frames the determination of the existence of probable cause.'" *Commonwealth v. Salter*, 121 A.3d 987, 996-997 (Pa.Super. 2015), citing *Commonwealth v. Williams*, 941 A.2d 14, 27 (Pa.Super. 2008).

4. Under all of the circumstances, EPD Corporal Jason Russell lacked probable cause to stop the Defendant's vehicle. The Commonwealth failed to meet its burden of proof in establishing probable cause and/or reasonable suspicion that a violation of Section 3361 of the Motor Vehicle Code occurred.

The Defendant's Omnibus Pre-Trial Motion *Nunc Pro Tunc* is hereby granted **GRANTED** and the tangible evidence in this matter is hereby **SUPPRESSED**.

ORDER

AND NOW, to-wit, this 25th day of November 2020, upon consideration of Defendant's Omnibus Pretrial Motion *Nunc Pro Tunc*, and following an evidentiary hearing and submission of briefs, it is **ORDERED** said motion is **GRANTED**.

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