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Reports of Cases Decided in the Several Courts of
Erie County for the Year
2021

CIV

ERIE, PA

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

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HONORABLE JOSEPH M. WALSH, III --------------- President Judge
HONORABLE DANIEL J. BRABENDER, JR. ------------------- Judge
HONORABLE ERIN CONNELLY MARUCCI --------------------- Judge
HONORABLE STEPHANIE DOMITROVICH ------------------- Judge
HONORABLE ELIZABETH K. KELLY --------------------------- Judge
HONORABLE JOHN J. MEAD ------------------------------------ Judge
HONORABLE MARSHALL J. PICCININI ------------------------ Judge
HONORABLE DAVID RIDGE -- Judge
HONORABLE JOHN J. TRUCILLA--------------------------------- Judge

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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.

JUDGMENT / PRESUMPTIONS AND BURDEN OF PROOF

Even if the facts are undisputed, a party moving for summary relief has the burden of proving that its right to relief is so clear as a matter of law that summary relief is warranted. In ruling on a motion for summary relief, the evidence must be viewed in the light most favorable to the non-moving party, and the court may enter judgment only if: 1) there are no genuine issues of material fact, and 2) the right to relief is clear as a matter of law.

CONTRACTS / INTENTION OF PARTIES / LANGUAGE OF CONTRACT

In Pennsylvania, the law is well-settled that the fundamental rule in contract interpretation is to ascertain the intent of the contracting parties; when the words of a contract are clear and unambiguous, the intent of the parties is to be discovered from the express language of the agreement. Specifically, the intent of the parties to a contract is to be regarded as embodied within the writing itself, and, as such, the entire agreement must be taken into account in determining contractual intent. A reviewing court does not assume that contractual language is chosen carelessly, nor does it assume that the parties were ignorant of the meaning of the language they employed; thus, when a writing is clear and unequivocal, its meaning must be determined only by its terms.

EVIDENCE / COMPLETENESS OF WRITING AND PRESUMPTION IN RELATION THERETO / INTEGRATION

Where the parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement. All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract ... and unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms and agreements cannot be added to or subtracted from by parol evidence.

EVIDENCE / CONTRACTS IN GENERAL / PAROL EVIDENCE RULE

The purpose of the parol evidence rule is to preserve the integrity of the written agreements by refusing to permit the contracting parties to attempt to alter the import of their contract through the use of contemporaneous oral declarations.

EVIDENCE / CONTRACTS IN GENERAL / PAROL EVIDENCE RULE

The parol evidence rule applies only to previous negotiations, conversations and verbal agreements.

EVIDENCE / COMPLETENESS OF WRITING AND PRESUMPTION IN RELATION THERETO / INTEGRATION

Before the parol evidence rule is applied, the court must determine, as a matter of law, whether the writing at issue is an integrated agreement. An integration clause which states that a writing is meant to represent the parties' entire agreement is a clear sign that the writing is meant to be just that and thereby expresses all of the parties' negotiations, conversations, and agreements made prior to its execution. Where an unambiguous contract contains a merger clause indicating that it is the entire and final expression of the agreement, extrinsic evidence may not be used to vary or contradict those terms, absent fraud.

JUDGMENT / PRESUMPTIONS AND BURDEN OF PROOF

Under Pennsylvania law, in a summary judgment proceeding, where the nonmoving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a nonmoving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law.

JUDGMENT / PRESUMPTIONS AND BURDEN OF PROOF

Even in the absence of counter-affidavits, the moving party in a summary judgment motion must still satisfy its burden of showing there are no genuine issues of material fact.

JUDGMENT / PRESUMPTIONS AND BURDEN OF PROOF

The case of *Borough of Nanty-Glo v. American Surety Co. of New York*, 163 A. 523 (Pa. 1932) established the long held Pennsylvania Summary Judgment doctrine that summary judgment may not be granted where the moving party relies exclusively upon oral testimony, either through testimonial affidavits or deposition testimony, to establish the absence of a genuine issue of material fact.

JUDGMENT / PRESUMPTIONS AND BURDEN OF PROOF

Under *Nanty-Glo*, testimonial affidavits of the moving party on summary judgment or his witnesses, not documentary, even if uncontradicted, will not afford sufficient basis for the entry of summary judgment, since the credibility of the testimony alone is still a matter for the factfinder. If, however, the moving party supports its motion for summary judgment with admissions by the opposing party, *Nanty-Glo* does not bar entry of summary judgment.

JUDGMENT / PRESUMPTIONS AND BURDEN OF PROOF

Further, when a motion for summary judgment is made and supported as provided in the rule, the adverse party may not rest only on the mere allegations or denials in his pleadings, but must set forth in his response by affidavits, or as otherwise provided, specific facts in dispute.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
Civil Court
No. 13272 - 2019

Appearances: Timothy D. McNair, Esq. appeared on behalf of Plaintiff Randall N. Rydzewski
Michael C. Kilmer, Esq. appeared on behalf of Defendants Erie Petroleum, Inc. and Patrick F. Callahan

OPINION AND ORDER

Domitrovich, J., December 1, 2020

In the instant case, Plaintiff Randall N. Rydzewski [hereinafter Plaintiff] filed a Motion for Summary Judgment against Defendants Erie Petroleum, Inc. and Patrick F. Callahan [hereinafter Defendants]. Argument on Plaintiff's Motion for Summary Judgment was held before this Trial Court on November 17, 2020, wherein Timothy D. McNair, Esq. appeared on behalf of Plaintiff, and Michael C. Kilmer, Esq. appeared on behalf of Defendants.

The controversy in the instant case centers on the Commercial Lease Agreement signed by the parties as well as subsequent amendments and extensions to said Lease Agreement also signed by the parties. Defendant Patrick F. Callahan, the President of Erie Petroleum, Inc., individually signed a guaranty for the Commercial Lease Agreement.

The factual and procedural history of the instant case is as follows: On August 1, 1996, Plaintiff Randall N. Rydzewski and Defendant Patrick F. Callahan, on behalf of Erie Petroleum, Inc., initially executed a 15-year Commercial Lease Agreement [hereinafter Commercial Lease Agreement] for the property located at 4917 Peach St., Erie, PA. At the same time, Defendant Patrick F. Callahan executed a Guaranty of Lease Suretyship Agreement [hereinafter Guaranty of Lease] in order to guarantee Defendant Erie Petroleum, Inc's obligations under the Commercial Lease Agreement. Plaintiff agreed to provide Defendants with a check for $200,000.00 for the construction of a convenience store on the leased property. Defendants intended to operate a gas station and convenience store on the leased property. The Commercial Lease Agreement provided Defendants pay $4,100.00 per month for the first ten years with an increase to $4,875.00 per month for the final five years. The Commercial Lease Agreement also provided for two successive five year renewal options with rent to be negotiated; however, during the first five-year option, the maximum base rent was not to exceed $8,525.00 per month, and during the second five-year option, the base rent was not to exceed $10,800.00 per month.

Defendants, with Plaintiff's approval, sublet their interest in the instant property to William Wykoff, who managed operations of the business located there. In 2004, William Wykoff informed Defendants he did not have sufficient cash flow to pay for the Commercial Lease Agreement's impending rental increase. On September 29, 2004, the parties executed an Amendment and Extension [hereinafter 2004 Amendment and Extension] of the Commercial Lease Agreement. The 2004 Amendment and Extension provided the rent remained at $4,100.00 per month until August, 2009; then increase to $4,600.00 per month until August, 2012; and then increase to $5,200 per month until September, 2015. In 2009, William Wykoff, again having cash flow problems, informed Defendants he was unable to meet the rental increase due according to the 2004 Amendment and Extension. On October 22, 2009, the parties executed a second Amendment and Extension [hereinafter 2009 Amendment and Extension] of the Commercial Lease Agreement. The 2009 Amendment and Extension provided the rent remained at $4,100.00 per month until August, 2012; then increased to $5,200.00 per month until October, 2018, at which time the lease terminated.

The 2004 Amendment and Extension as well as the 2009 Amendment and Extension were virtually identical agreements other than the relevant dates and rental amounts. Both documents reference the Commercial Lease Agreement and state: "It is understood and agreed that the primary lease term will be extended until [insert final date provided in respective

Amendment and Extension] and the monthly base rent for the leased premises will be paid according to the following schedule ... All other terms and conditions remain the same."

On May 28, 2010, and due to a corporate merger, Erie Petroleum, Inc. changed its corporate name to MKP Enterprises, Inc.[1] In August of 2016, Defendants commenced making partial rental payments below the contracted for amounts required by the terms of the 2009 Amendment and Extension. With the exception of September, 2016, Defendants failed to pay the $5,200.00 per month as required under the 2009 Amendment and Extension. In fact, Defendants made only partial payments of $4,419.66 per month beginning in October, 2016 until August, 2018. For September, 2018, Defendants made a partial payment of only $1,954.49. In October, 2018, when the Commercial Lease Agreement terminated, Defendants, as per the Commercial Lease Agreement, removed the underground gasoline storage tank system and vacated the property without any further repairs to the leased property.

On December 2, 2019, Plaintiff filed the instant Complaint containing two counts of breach of contract, one against Defendant Erie Petroleum, Inc., as lessee of the property, and one against Defendant Patrick F. Callahan, as guarantor of the Commercial Lease Agreement. On February 7, 2020, this Trial Court issued a Case Management Order providing Discovery shall be completed by October 3, 2020.

On February 10, 2020, Defendants filed their Answer, New Matter, and Counterclaims to the Complaint. Defendants asserted two Counterclaims against Plaintiff: 1) Unjust Enrichment and 2) Detrimental Reliance/Promissory Estoppel. Defendants' Counterclaim for Unjust Enrichment is based on Defendants' having paid for environmental remediation of the property pursuant to the Underground Storage Tank Indemnification Fund (USTIF). Defendants allege Plaintiff was at fault for the contamination of the property and was unjustly enriched by the remediation of the property. Defendants' Counterclaim for Detrimental Reliance/Promissory Estoppel alleged Plaintiff orally promised Defendants he would find a new tenant to take over the Commercial Lease Agreement in order to mitigate Defendants' damages, despite nothing in any of the written agreements confirming this promise. Defendants assert they never would have agreed to the 2009 Amendment and Extension without Plaintiffs alleged oral promise given William Wykoff's inability to meet the scheduled rental increases.

Plaintiff filed his Reply to Defendants' New Matter and Answer to Defendants' Counterclaims on March 2, 2020. Plaintiff filed a "Motion for Determination of Sufficiency of Answers to Requests for Admission" on August 21, 2020. Plaintiff alleged Defendants' responses to Plaintiffs Requests for Admission violated Pa.R.C.P. 4014 in several ways, and that Defendants failed to respond at all to Plaintiffs Interrogatories or Plaintiffs Request for Production of Documents. Plaintiff requested this Trial Court deem admitted all of Plaintiffs Admission requests.[2]

[1] It should be noted that throughout the record in this case, both Patrick F. Callahan and Michael Callahan are listed on documents regarding both Erie Petroleum, Inc. and MKP Enterprises, Inc. For example, Patrick F. Callahan signed the Commercial Lease Agreement as President of Erie Petroleum, Inc. and Michael Callahan signed a verification of Defendants' "Modified Responses and Objections to Plaintiff's First Set of Request for Admissions Directed to Defendant ... " as President of MKP Enterprises, Inc. For the purposes of this case, MKP Enterprises, Inc. will be considered equivalent to Erie Petroleum, Inc., and any reference to Michael Callahan will be a reference to Defendant Erie Petroleum, Inc.

[2] Plaintiff filed Requests for Admission, Interrogatories, and Production of Documents on April 9, 2020. Defendants filed responses to Plaintiff's Request for Admission on June 3, 2020 but did not respond to Plaintiff's Interrogatories

Plaintiff filed the instant Motion for Summary Judgment on August 21, 2020. Plaintiff filed an Appendix to said Motion for Summary Judgment, as well as a Brief in Support of said Motion for Summary Judgment on the same date. On September 21, 2020, Defendants filed their Response and Brief in Opposition to Plaintiff's Motion for Summary Judgment, as well as their Response and Brief in Opposition to Plaintiff's "Motion for Determination of Sufficiency of Answers to Requests for Admission." On October 9, 2020, Plaintiff filed his Reply Brief in Support of his Motion for Summary Judgment.

On October 12, 2020, this Trial Court heard argument from both counsel regarding both Plaintiff's "Motion for Determination of Sufficiency of Answers to Request for Admission" and Plaintiff's Motion for Summary Judgment. Due to the inadequacy of both Plaintiff's counsel's Requests for Admissions and Defendants' counsel's responses to Plaintiff's Requests for Admissions, reviewed in detail during argument, this Trial Court directed Plaintiff's counsel to revise his Admission Requests to enable Defendants' counsel to file modified responses to said revised requests, and this Trial Court continued the argument to a new date and time regarding Plaintiff's Motion for Summary Judgment to November 17, 2020 at 1:30 p.m. Despite Discovery having closed in the instant case on October 3, 2020, this Trial Court, in the interests of justice, permitted counsel for the parties to revise the instant Admission Requests and responses thereto. The fact of the Covid-19 pandemic and Defendants having filed responses to Plaintiff's Interrogatories and Requests for Production of Documents after Plaintiff filed his Motion for Summary Judgment weighed in favor of granting Defendants additional time to re-submit said revised responses. Also weighing in favor of continuing argument on Plaintiff's Motion for Summary Judgment was the fact that this Motion was filed prior to the close of Discovery, and Plaintiff had yet to respond to Defendants' Interrogatories and Requests for Production of Documents, filed on September 21, 2020.[3]

On November 17, 2020, this Trial Court held oral argument on Plaintiff's Motion for Summary Judgment. Plaintiff's counsel argues Plaintiff is entitled to summary judgment for the breach of contract claims for two reasons. First, Plaintiff's counsel argues the clear and unambiguous terms of the Commercial Lease Agreement and 2009 Amendment and Extension state the amount of rent due each month, and Defendants breached these agreements by failing to pay the full amount of rent. Second, Plaintiff's counsel argues the clear terms of the Commercial Lease Agreement required Defendants to vacate the property in the condition it was in when they entered in 1996, and Defendants are, therefore, liable for any repair or remediation costs required to meet this condition. Plaintiff's counsel asserts Defendants damaged the leased property and abandoned fixtures at the leased property. Plaintiff's counsel submitted receipts for costs incurred to repair and remediate the leased

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[2 continued] or Request for Production of Documents until September 21, 2020. As shown, Plaintiff's "Motion for Determination of Sufficiency of Answers to Request for Admission" and Plaintiffs Motion for Summary Judgment were both filed on August 21, 2020. Plaintiff's Motions demonstrate the contentious Discovery issues between the parties in the instant case. Plaintiff raised a specific issue with Defendants' responses to Plaintiff's Discovery requests: Plaintiffs "Motion for Detennination of Sufficiency ... " requests this Trial Court deem admitted all of Plaintiff's Admission requests, and Plaintiffs Motion for Summary Judgment argues Plaintiff is entitled to summary judgment due to Defendants' failure to support their pleadings' defenses or counterclaims during discovery.

[3] Plaintiff filed their responses to Defendants' Interrogatories and Requests for Production of Documents on October 22, 2020. Defendants also provided Plaintiff with modified answers to Plaintiff's Request for Admission prior to the November 17, 2020 argument but did not file said modified answers until the same date, which was also the date of argument before this Trial Court.

property after Defendants vacated in October, 2018.

Moreover, Plaintiff's counsel argues Plaintiff is entitled to summary judgment regarding Defendants' Counterclaim for Unjust Enrichment as the Commercial Lease Agreement clearly provides Plaintiff is not liable for environmental remediation of the property. Plaintiff's counsel further argues past environmental reports indicate the leased property was not contaminated prior to Defendants occupying the leased property. Plaintiff's counsel argues Plaintiff is entitled to summary judgment regarding Defendants' Counterclaim for Detrimental Reliance/Promissory Estoppel as Plaintiff never made an oral promise to Defendants. Furthermore, Plaintiff contends any evidence of this promise is barred by the Parol Evidence Rule as the Commercial Lease Agreement, executed between two sophisticated parties, is a fully integrated agreement. Therefore, parol evidence of any prior or contemporaneous agreements that contradict or modify the terms of the Commercial Lease Agreement, as well as the Amendments and Extensions, cannot be considered by this Trial Court.

Finally, Plaintiff's counsel argues Plaintiff is entitled to summary judgment regarding both of Defendants' Counterclaims as Defendants failed to submit any evidence in any form regarding either of Defendants' Counterclaims, and Defendants improperly relied only on allegations contained in their pleadings for support.

Defendants' counsel argues Plaintiff is not entitled to summary judgment first because Plaintiff's Motion for Summary Judgment is premature. Defendants' counsel argues Discovery is still ongoing in the instant case and will produce more evidence in support of Defendants' case.[4] Furthermore, Defendants argue material disputes of fact regarding their counterclaims preclude Plaintiff from being granted summary judgment. Defendants allege there is a material dispute of fact regarding Defendants' Unjust Enrichment Counterclaim as there is sufficient evidence to prove Defendants are entitled to remuneration for environmental remediation expenses. Defendants allege Plaintiff's environmental report evidence is inadequate and allege alternative environmental reports prove Plaintiff contaminated the property. Defendants allege there is a material dispute of fact regarding Defendants' Detrimental Reliance/Promissory Estoppel Counterclaim. Defendants allege Plaintiff orally promised to find a new tenant for the property, which Defendants allegedly relied upon to their detriment, and Defendants claim they never would have entered the 2009 Amendment and Extension without an oral promise from Plaintiff. Defendants allege, without any support, to provide testimony to this effect and also, without any support, that Plaintiff twice rejected prospective tenants to take over the Commercial Lease Agreement.

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 the 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.*,

[4] This claim is moot at this point as Discovery closed in this case on October 3, 2020; however, at the time Plaintiff filed the instant Motion for Summary Judgment, August 21, 2020, Discovery was still ongoing. When this Trial Court heard argument regarding the instant Motion for Summary Judgment on November 17, 2020, Discovery had been closed for approximately six weeks. *See supra*, notes 1 & 2.

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).

"Even if the facts are undisputed, a party moving for summary relief has the burden of proving that its right to relief is so clear as a matter of law that summary relief is warranted." *T.S. v. Pennsylvania State Police*, 231 A.3d 103, 118 (Pa. Commw. Ct. 2020) (quoting *Naylor v. Dep't of Pub. Welfare*, 54 A.3d 429, 431 n. 4 (Pa. Commw. Ct. 2012), *aff'd*, 76 A.3d 536 (Pa. 2013)). "In ruling on a motion for summary relief, the evidence must be viewed in the light most favorable to the non-moving party, and the court may enter judgment only if: 1) there are no genuine issues of material fact, and 2) the right to relief is clear as a matter of law." *MFW Wince Co., LLC v. Pennsylvania Liquor Control Bd.*, 231 A.3d 50, 56 (Pa. Commw. Ct. 2020).

As the moving party, Plaintiff bears the burden of proof regarding the instant Motion for Summary Judgment. This Motion for Summary Judgment centers on whether the language of the lease agreements is clear and unambiguous, and whether this language entitles Plaintiff to summary judgment. This Trial Court must closely examine the Commercial Lease Agreement, Amendments and Extensions, and Guaranty of Lease, as well as Pennsylvania contract law, and all other relevant law, to rule on Plaintiff's Motion for Summary Judgment.

In Pennsylvania, the law is well-settled that "the fundamental rule in contract interpretation is to ascertain the intent of the contracting parties; when the words of a contract are clear and unambiguous, the intent of the parties is to be discovered from the express language of the agreement." *Hornberger v. Dave Gutelius Excavating, Inc.*, 176 A.3d 939, 944 (Pa. Super. 2017). "Specifically, the intent of the parties to a contract is to be regarded as embodied within the writing itself, and, as such, the entire agreement must be taken into account in determining contractual intent." *Binswanger of Pennsylvania, Inc. v. TSG Real Estate, LLC*, 217 A.3d 256, 262 (Pa. 2020). "A reviewing court does not assume that contractual language is chosen carelessly, nor does it assume that the parties were ignorant of the meaning of the language they employed; thus, when a writing is clear and unequivocal, its meaning must be determined only by its terms." *Id.*

"Where the parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement. All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract ... and unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms and agreements cannot be added to or subtracted from by parol evidence." *Yocca v. Pittsburgh Steelers Sports, Inc.*, 854 A.2d 425, 436-37 (Pa. 2004). "The purpose of the parol evidence rule is to preserve the integrity of the written agreements by refusing to permit the contracting parties to attempt to alter the import of their contract through the use of contemporaneous oral declarations." *Kehr Packages, Inc. v. Fidelity Bank, Nat. Ass'n*, 710 A.2d 1169, 1173 (Pa. Super. 1998). "The parol evidence rule applies only to previous negotiations, conversations and verbal agreements." *Krishman v. Cutler Group, Inc.*, 171 A.3d 856, 887 (Pa. Super. 2017).

"Before the parol evidence rule is applied, the court must determine, as a matter of law, whether the writing at issue is an integrated agreement." *Id.* "An integration clause which states that a writing is meant to represent the parties' entire agreement is a clear sign that the writing is meant to be just that and thereby expresses all of the parties' negotiations, conversations, and agreements made prior to its execution." *Pass v. Palmiero Automotive of Butler, Inc.*, 229 A.3d 1, 7 (Pa. 2020). "Where an unambiguous contract contains a merger clause indicating that it is the entire and final expression of the agreement, extrinsic evidence may not be used to vary or contradict those terms, absent fraud." *Suffolk Construction Co. v. Reliance Ins. Co.*, 221 A.3d 1205, 1212 (Pa. 2019).

In the instant case, the Commercial Lease Agreement contains several provisions relevant to determining Plaintiff's Motion for Summary Judgment. The Commercial Lease Agreement provides for Defendants' obligation to pay rent to Plaintiff in certain sums per month according to a set schedule for use of the instant property. *See* Commercial Lease Agreement, p. 2 ¶ 5, "RENT." The 2004 and 2009 Lease Amendments and Extensions incorporate the Commercial Lease Agreement and provide all other terms and conditions of the Commercial Lease Agreement remain unchanged. The 2004 and 2009 Lease Amendments and Extensions alter the Commercial Lease Agreement's rental amounts and payment schedule; however, both Amendments and Extensions maintain the Commercial Lease Agreement's requirement Defendants pay rent in certain sums per month according to a schedule, in addition to all of the other terms of the Commercial Lease Agreement.

The Commercial Lease Agreement provides Defendants agreed to remove the underground storage tank system upon the Commercial Lease Agreement's expiration. *See* Commercial Lease Agreement, p. 10 ¶ 20. Paragraph 20 of the Commercial Lease Agreement, titled *UNDERGROUND STORAGE TANKS*, states: "At the Lessor's option, upon termination of this Lease Agreement or any extension or renewal term thereof, the lessee shall remove the underground storage tank system ... from the leased premises, and **Lessee shall perform any underground storage tank system closure, remedial and corrective actions as may be required by applicable law, at Lessee's sole expense."** *Id.* (emphasis added).

Moreover, the Commercial Lease Agreement states in Paragraph 24 the condition the leased property shall be returned to upon termination of the Commercial Lease Agreement, and requires Defendants incur any costs needed to meet this condition. *See* Commercial Lease Agreement, p. 11, 24. Paragraph 24 of the Commercial Lease Agreement, titled *SURRENDER OF PREMISES*, states: **"Upon the expiration or termination of the term hereof or on the last day of any renewal or extended term, Lessee shall surrender the Leased premises to Lessor in the same condition as present** ... Lessee shall remove from the Leased Premises on or prior to such expiration or termination all personal property situated thereat which is owned by Lessee, and property of Lessor, and Lessor may cause such property to be removed from the leased Premises and disposed of, **but the cost of any such removal and disposal of repairing any damage caused by such removal shall be borne by Lessee."** *Id.* (emphasis added).

The Commercial Lease Agreement contains an "as is" clause regarding the condition in which Defendants accepted the leased property when Defendants executed the Commercial Lease Agreement in 1996. *See* Commercial Lease Agreement, p. 12, 26. Paragraph 26 of the Commercial Lease Agreement, titled *"AS IS CONDITION."* states: "Lessee has inspected the

Leased Premises and accepts the same in an "AS IS" condition and with all faults and without any warranties or representations, either express or implied. In particular, without limitation, **Lessor makes no representations or warranties with respect to the use, condition, occupation or management of the Leased Premises (including without limitation any facilities, buildings or other improvements thereon, surface or subsurface conditions, soils, or groundwater thereon or thereunder, or ambient air)** ... Lessee acknowledges and agrees that it has agreed to lease the Leased premises from Lessor upon the basis of its familiarity and experience with the Leased Premises and **shall bear and assume the risk that its investigations and inspections of the Premises may not have revealed adverse or undesirable physical conditions (including without limitation environmental matters and/or subsurface conditions)** ... " *Id.* (emphasis added).

The Commercial Lease Agreement also contains an express merger clause. *See* Commercial Lease Agreement, p. 7, 16. Paragraph 16 of the Commercial Lease Agreement, titled *ENTIRE CONTRACT*, states: **"This agreement embodies the entire contract between the parties hereto relating to this Lease.** No variations, modifications or charges herein or hereof shall be binding upon any party hereto unless executed by it or by a duly authorized officer ... or a duly authorized agent of the particular party ... This Agreement supersedes and replaces in its entirety all prior leases between the parties relating to the Leased Premises, including without limitation the most recent prior Lease dated January 5, 1995." *Id.* (emphasis added).

The Guaranty of Lease provides for Defendant Patrick F. Callahan's, as well as Geraldine Callahan's,[5] unconditional guaranty of Erie Petroleum, lnc.'s obligations under the Commercial Lease Agreement. Clause 1 of the Guaranty of Lease states: "The Guarantor unconditionally guarantees to the Landlord and the successors and assigns of the Landlord the full and punctual performance and observance, by the Tenant, of all the terms, covenants and conditions of the said Lease contained on Tenant's part to be kept, performed and observed." Guaranty of Lease, ¶ 1 (a). "If, at any time, default shall be made by the Tenant in the performance or observance of any of the terms, covenants or conditions in said Lease contained on the Tenant's part to be kept, performed or observed, the Guarantor will keep, perform and observe the same, as the case may be, in place and stead of the Tenant." *Id.* at l(b).

In the instant case, Plaintiff's counsel argues the terms cited above entitle Plaintiff to summary judgment regarding Defendants' failure to pay rent and damages to the property when Defendants vacated the leased property in October, 2018, as well as to Defendants' Counterclaims. Defendants argue summary judgment is inappropriate, alleging Plaintiff orally promised to find a new tenant for the property and that environmental reports suggest Plaintiff contaminated the property, creating alleged material disputes of fact regarding Plaintiff's claims and Defendants' counterclaims.

Upon examining the Commercial Lease Agreement, the Amendments and Extensions, and the Guaranty of Lease, this Trial Court finds and concludes the language of said agreements is clear and unambiguous. This Trial Court finds and concludes the instant merger clause indicates the Commercial Lease Agreement and Amendments and Extensions are fully integrated agreements, ensuring these agreements form the only evidence of the instant

[5] Geraldine Callahan was the wife of Patrick F. Callahan, who also executed the Guaranty of Lease along with Patrick F. Callahan. She has passed away since signing the Guaranty of Lease and prior to the initiation of the instant case.

lease agreement and supersede all prior verbal agreements between the parties. Therefore, this Trial Court finds and concludes, as a matter of law, the intent of the parties regarding their Commercial Lease Agreement is contained in the express terms of said agreement, as well as the Amendments and Extensions, and these agreements constitute all evidence of the lease agreement, excluding contrary parol and extrinsic evidence.

In order to decide the instant Motion for Summary Judgment, this Trial Court is required to examine all evidence in the light most favorable to the Defendants. Given the evidence of the instant lease agreement is contained entirely within the Commercial Lease Agreement and Amendments and Extensions, the terms of these agreements must be viewed in the light most favorable to Defendants. However, in the instant case, because the language of the agreements is clear and unambiguous, this Trial Court's interpretation of the parties' intent contained in the Commercial Lease Agreement and Amendments and Extensions remains the same when viewed in the light most favorable to the non-moving party as when viewed in any other light.

The language of the Commercial Lease Agreement and Amendments and Extensions was negotiated by two sophisticated parties. The language of these agreements clearly and unambiguously expresses the parties' intent to lease the instant property to Defendants, who in turn pay rent in certain amounts per month according to a set time schedule. The language of these agreements clearly and unambiguously expresses the parties' intent that Defendants must remove the underground storage tank system and any related equipment at Defendants' expense and cost. The language of these agreements clearly and unambiguously expresses the parties' intent that Defendants vacate the leased property in the same condition as when Defendants entered the leased property, and Defendants must bear the cost of any required repairs. The language of the agreements clearly and unambiguously expresses the parties' intent that Defendants accept the leased property "as is," and Defendants bear the risk of any environmental contamination of the property. The merger clause clearly and unambiguously states the parties' intent that the Commercial Lease Agreement and Amendments and Extensions are fully integrated agreements containing the full expression of the terms regarding the lease of the property. Finally, the Guaranty of Lease clearly and unambiguously expresses the parties' intent that Defendant Patrick F. Callahan must answer for any breach of the Commercial Lease Agreement or its Amendments and Extensions by Erie Petroleum, Inc.

Despite Defendants' assertion to the contrary, and regardless of whether contamination of the property existed or was caused by Plaintiff prior to the beginning of the lease term, the Commercial Lease Agreement expressly shifted the risk of any such environmental contamination of the leased property to Defendants. This shift of Plaintiff's risk to Defendants renders both Plaintiff's and Defendants' arguments regarding their respective environmental reports moot as the risk of environmental contamination was clearly and unambiguously placed onto Defendants. Defendants affirmed they had the full opportunity to investigate the property and bore the risk of any environmental contamination not revealed by said investigation. According to the Commercial Lease Agreement, Defendants are not entitled to remuneration for the environmental remediation of the property when contamination was discovered after the beginning of the lease term.[6]

[6] As Defendants accepted the shift of responsibility for environmental contamination of the property via the "as is" clause and did not raise any issue of the clause's enforceability, this Trial Court interpreted the clause's plain language to detennine the parties' intent regarding liability for environmental contamination of the property throughout Defendants' occupation of the property.

Moreover, while it is clear to this Trial Court the Commercial Lease Agreement shifts all risk of environmental contamination of the leased property onto Defendants, this Trial Court notes the Commercial Lease Agreement does not provide Defendants with a set-off in rent or damages to the leased property for environmental remediation costs. Accordingly, Defendants did not file any such claim against Plaintiff or seek any such set-off when the instant environmental contamination was discovered in 2010. A February 4, 2011 letter from ICF International, the claim handler for the USTIF, to Michael Callahan states the contamination was discovered in 2010 and that the USTIF would not cover 20% of the remediation costs.[7] *See* Supplemental Exhibits for Plaintiff, Exhibit E. Despite being informed they would be liable for significant costs to remediate the leased property, Defendants did not file any claim, under the Commercial Lease Agreement or otherwise, regarding Plaintiff's liability for said costs until Plaintiff initiated the instant lawsuit.

Defendants' Detrimental Reliance/Promissory Estoppel claim as to Plaintiff allegedly orally agreeing to find a new tenant for the property in question is also precluded by the Commercial Lease Agreement and 2009 Amendment and Extension. Defendants seek to introduce parol and extrinsic evidence of a term agreed to by the parties prior to executing the 2009 Amendment and Extension that directly contradicts its terms. Plaintiff's alleged oral promise to find another tenant contradicts the 2009 Amendment and Extension since the 2009 Amendment and Extension provides for continuous monthly rental payments until the scheduled termination of the lease term. This intent is mirrored in the 2004 Amendment and Extension as well as the Commercial Lease Agreement, and the Commercial Lease Agreement is incorporated by the 2009 Amendment and Extension. If Plaintiff allegedly orally agreed to seek a new tenant to replace Defendants prior to the expiration of the lease term, this term or provision should have been placed in the language of the agreements to be enforceable. Instead, Defendants argue this Trial Court should enforce an alleged oral promise because Defendants relied on an alleged oral promise to their detriment. However, in the absence of fraud or mistake, the presence of the merger clause precludes this Trial Court from considering parol or extrinsic evidence of an oral lease term made prior to the agreement that either alters, modifies, or contradicts the parties' integrated agreement. Defendants have not alleged either fraud or mistake, and a review of the entire record demonstrates these two sophisticated parties negotiated and executed a relatively detailed commercial lease agreement.

Moreover, at the close of Discovery in the instant case on October 3, 2020, Defendants had provided barely any evidence for this Trial Court's consideration in support of their Counterclaims. In fact, other than their responses to Plaintiff's Discovery Requests, Defendants did not submit anything else into the record other than their pleadings. Besides a single letter, *see supra* note 7, and a series of invoices for environmental remediation

[7] In this February 4,2011 letter, ICF International states that since the underground storage tank system was installed prior to the establishment of the USTIF, the USTIF would only cover 80% of the remediation costs. In a subsequent February 10, 2011 letter from Michael Callahan to Plaintiff, Defendants claim ICF International determined 20% of the environmental contamination was caused prior to the establishment of the USTIF, and that was why the USTIF would not cover the entire cost of remediation. Despite this self-serving interpretation of ICF International's letter, Defendants did not provide any evidence in the record they ever alleged Plaintiff was liable for the environmental remediation costs until after the instant lawsuit was filed.

costs, Defendants' responses to Plaintiff's Discovery requests simply echo their pleadings' allegations.[8]

Under Pennsylvania law, "In a summary judgment proceeding, where the nonmoving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment." *Selective Way Ins. Co. v. MAK Services, Inc.*, 232 A.3d 762, 767 (Pa. Super. 2020) (quoting *Carlino East Brandywine, L.P. v. Brandywine Village Ass'n*, 197 A.3d 1189,1199-1200 (Pa. Super. 2018)). "Failure of a nonmoving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law." *Id.*

Defendants bear the burden of proof regarding both Counterclaims but did not submit any documents, affidavits, or deposition transcripts into the record in support of said Counterclaims. Defendants rely entirely upon their responses to Plaintiff's Discovery Requests to survive summary judgment. A prime example is that it was Plaintiff, not Defendants, who actually introduced into the record the environmental reports Defendants' cited in their pleadings to support their Unjust Enrichment Counterclaim. During summary judgment argument, Defendants' counsel was unable to show this Trial Court any record evidence in support of Defendants' Counterclaims. Defendants' counsel merely reiterated the allegations contained in counsel's pleadings and brief in opposition to Plaintiff's Motion for Summary Judgment.

Despite the clear and unambiguous expression of the parties intent contained in the Commercial Lease Agreement and its Amendments and Extensions, and despite Defendants' lack of evidentiary support for their counterclaims, the law is clear that Plaintiff must still proffer sufficient evidence, viewed in the light most favorable to Defendants, in order to be granted summary judgment. Plaintiff must provide sufficient evidence to prove there are no material disputes of fact regarding Defendants' failure to pay the rent or damaging the property upon vacating in October, 2018. "Even in the absence of counter-affidavits, the moving party in a summary judgment motion must still satisfy its burden of showing there are no genuine issues of material fact." *Woodford v. Pennsylvania Ins. Dep't*, 201 A.3d 899, 903 (Pa. Commw. Ct. 2019). "Under *Nanty-Glo*,[9] testimonial affidavits of the moving party on summary judgment or his witnesses, not documentary, even if uncontradicted, will not afford sufficient basis for the entry of summary judgment, since the credibility of the testimony alone is still a matter for the factfinder." *DeArmitt v. New York Life Ins. Co.*, 73 A.3d 578, 595 (Pa. Super. 2013). "If, however, the moving party supports its motion for summary judgment with admissions by the opposing party, *Nanty-Glo* does not bar entry

[8] For example, Defendants, in response to Plaintiff's Request for Admission 5 regarding Plaintiff's alleged oral promise to find a new tenant, quoted Defendants' own New Matter, Paragraph 21. Defendants' response to Plaintiff's Interrogatory 5, which requested dates, times, places, etc. of any communications by Michael Callahan to Plaintiff regarding Plaintiff's alleged oral promise to find a new tenant, essentially restated Paragraphs 21 and 23 of Defendants' New Matter. Defendants' response to Plaintiff's Request for Production of Documents 5, which requested documentation of any alleged oral promise by Plaintiff, stated "Defendants shall prove such via oral deposition and/or any other form allowable under the Rules of Civil Procedure." At the close of Discovery, no such deposition is of record.

[9] The case of *Borough of Nanty-Glo v. American Surety Co. of New York*, 163 A. 523 (Pa. 1932) established the long held Pennsylvania Summary Judgment doctrine that summary judgment may not be granted where the moving party relies exclusively upon oral testimony, either through testimonial affidavits or deposition testimony, to establish the absence of a genuine issue of material fact.

of summary judgment." *Id.* "Further, when a motion for summary judgment is made and supported as provided in the rule. 'the adverse party may not rest only on the mere allegations or denials in his pleadings, but must set forth in his response by affidavits, or as otherwise provided, specific facts in dispute.'" *Sanchez-Guardiola v. City of Philadelphia*, 87 A.3d 934, 938 (Pa. Commw. Ct. 2014) (quoting *Kniaz v. Benton Borough*, 642 A.2d 551, 553 (Pa. Commw. Ct. 2014)).

In the instant case, Plaintiff, in support of his Motion for Summary Judgment, provided not only a signed Affidavit as well as copies of emails and letters addressed to Defendants in support of Plaintiff's claims, but also the relevant agreements, including the Commercial Lease Agreement, the Amendments and Extensions, and Guaranty of Lease. Plaintiff also provided photographs of the leased property taken after Defendants vacated, as well as receipts for the repairs Plaintiff made to the leased property. Furthermore, Defendants, also in their responses to Plaintiff's Discovery requests as well as in their pleadings and briefs regarding this Motion for Summary Judgment, admitted to having executed the agreements in question, admitted to their failure to pay the full amount of rent in the exact amounts Plaintiff stated, and admitted to removing the underground storage tank system when vacating the property in October, 2018. Defendants did not allege fraud or mistake and did not question the validity of the Commercial Lease Agreement, its Amendments and Extensions, or the personal guaranty in any way. Defendants did not contradict Plaintiff's assertion that Defendants did not make any repairs to the property after extracting the underground storage tank system or prior to vacating the property. While Plaintiff's signed Affidavit would not suffice, in and of itself, to grant Plaintiff summary judgment regarding Plaintiff's breach of contract claims and Defendants' counterclaims, the clear and unambiguous language of the fully integrated Commercial Lease Agreement and its Amendments and Extensions, as well as the emails, receipts, letters, photos, Defendants' Admissions, and Defendants' lack of evidence in support of their Counterclaims, collectively entitle Plaintiff to summary judgment.

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

ORDER

AND NOW, to wit, on this 1st day of December, 2020, for all of the reasons stated in this Trial Court's Opinion attached hereto, it is hereby **ORDERED, ADJUDGED, AND DECREED** Plaintiff's Motion for Summary Judgment is **GRANTED** in Plaintiff's favor regarding Plaintiff's claims for breach of contract against both Defendant Erie Petroleum, Inc. and Defendant Patrick F. Callahan, and in Plaintiff's favor regarding Defendants' Counterclaims for Unjust Enrichment and Detrimental Reliance/Promissory Estoppel. Defendants Counterclaims for Unjust Enrichment and Detrimental Reliance/Promissory Estoppel are dismissed with prejudice. Therefore, Plaintiff shall have judgment against Defendants jointly, severally, and individually in the amount of $50,207.00, together with reasonable attorney's fees and expenses (to be determined by this Trial Court), interest, and costs of suit.

Plaintiff's counsel shall file with the Prothonotary a Statement of Legal Services rendered by Plaintiff's counsel with a Statement of Expenses incurred within ten (10) days of the date of this Order for this Trial Court's hearing to determine reasonable attorney's fees and

expenses due Plaintiff. Plaintiff shall provide a copy to this Trial Court (by emailing this Trial Court's law clerk, at awilkinson@eriecountypa.gov) and CC opposing counsel. Any response to Plaintiff's Statement by Defendants' counsel shall be filed prior to this hearing date with a CC to this Trial Court. A hearing by telephone on said attorney's fees and expenses application is scheduled for December 21, 2020 at 1:30 p.m. in Courtroom G, Room 222, Erie County Courthouse, before the undersigned Judge. Counsel are to telephone this Trial Court prior to the start of said hearing in order to be transferred into the Courtroom for said hearing.

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

COMMONWEALTH OF PENNSYLVANIA
v.
DEANDRE LEVON JONES

CRIMINAL LAW / POST-CONVICTION RELIEF

A [PCRA] petitioner must meet all four requirements of [42 Pa.C.S. § 9543(a)] to be eligible for relief.

CRIMINAL LAW / VOLUNTARY CHARACTER

In determining whether a guilty plea is valid, the court must examine the totality of the circumstances surrounding the plea.

CRIMINAL LAW / VOLUNTARY CHARACTER

The law does not require that a defendant be pleased with the outcome of his decision to plead guilty; the law requires only that a defendant's decision to plead guilty be made knowingly, voluntarily, and intelligently.

CRIMINAL LAW / VOLUNTARY CHARACTER

A valid guilty plea must be made knowingly, voluntarily, and intelligently.

CRIMINAL LAW / WITHDRAWAL OF GUILTY PLEA

In order to withdraw a guilty plea, a defendant must make a showing of prejudice which resulted in manifest injustice. A defendant must demonstrate that his guilty plea was entered involuntarily, unknowingly, or unintelligently.

CRIMINAL LAW / DEFICIENT REPRESENTATION AND PREJUDICE

To prevail on a claim of ineffective assistance of counsel, a PCRA petitioner must prove each of the following: 1) the underlying legal claim was of arguable merit, 2) counsel had no reasonable strategic basis for his action or inaction, and 3) the petitioner was prejudiced — that is, but for counsel's deficient stewardship, there is a reasonable likelihood the outcome of the proceedings would have been different.

CRIMINAL LAW / EFFECT OF ILLEGAL DETENTION OR VIOLATION OF CONSTITUTIONAL RIGHTS

Allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an unknowing or involuntary plea.

CRIMINAL LAW / VOLUNTARY CHARACTER

Where the defendant enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.

CRIMINAL LAW / PLEA

Thus, to establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

CRIMINAL LAW / EVIDENCE AS TO VOLUNTARINESS

In Pennsylvania, once a Defendant enters a guilty plea, it is presumed that he was aware of what he was doing. Consequently, defendants are bound by statements they make during their guilty plea colloquies and may not successfully assert any claims that contradict those statements.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
Criminal Court
No. 1457 of 2017

Appearances: William J. Hathaway, Esq. appeared on behalf of Defendant
Grant T. Miller, Assistant District Attorney, appeared on behalf of the Commonwealth

OPINION AND ORDER

Domitrovich, J., December 4, 2020

AND NOW, to wit, on this 4th day of December, 2020, after conducting an evidentiary hearing on September 21, 2020, regarding Defendant Deandre Levon Jones' [hereinafter Petitioner] Petition for Post-Conviction Collateral Relief, wherein Petitioner was represented by court-appointed PCRA counsel Attorney William J. Hathaway; Commonwealth was represented by Assistant District Attorney Grant T. Miller; this Trial Court weighed the credibility of the testimony from Petitioner, Mrs. Linda Pope, Ms. Mercedes Brown, and Attorney Jason Checque, who was Petitioner's plea and direct appeal counsel, in the instant hearing; after a thorough review of Petitioner's *pro se* Motion for Post-Conviction Collateral Relief, filed on March 5, 2020; Petitioner's court-appointed counsel's, Attorney William J. Hathaway's, Supplement to Motion for Post-Conviction Collateral Relief, filed on June 1, 2020; Commonwealth's Response to Petitioner's Supplement to Motion for Post-Conviction Collateral Relief, filed on July 7, 2020, by Assistant District Attorney Grant T. Miller; Petitioner's Supplemental Brief in Support of Motion for Post-Conviction Collateral Relief; and Commonwealth's Supplemental Reply Brief to Petitioner's Supplemental Brief in Support of Motion for Post-Conviction Collateral Relief; in full consideration of the entire record in the instant case and the credible testimony offered by Mrs. Linda Pope, Ms. Mercedes Brown, and Attorney Jason Checque directly refuting Petitioner's PCRA claims that his plea was not entered knowingly and voluntarily due to alleged misrepresentations made by Attorney Jason A. Checque to Petitioner, Mrs. Pope, and Ms. Brown regarding Petitioner's sentence, as well as claims that Attorney Jason A. Checque indicated to Petitioner he would abandon his representation if Petitioner did not plead guilty, it is hereby **ORDERED, ADJUDGED, AND DECREED** Petitioner's PCRA Petition is **DENIED** as said PCRA Petition states no ground for which relief may be granted under the Post-Conviction Relief Act, 42 Pa.C.S. §§ 9541 *et seq.*, for the reasons stated below.

The instant PCRA Petition stems from Petitioner's arrest on or about April 6, 2017 for charges related to Petitioner's delivery of illegal narcotics to a confidential informant of the Erie City Police Dept. The Erie County District Attorney's Office filed a Criminal Information against Petitioner on June 16, 2017, charging him with the following eleven (11) offenses: two (2) counts of Possession With Intent to Deliver, 35 P.S. § 780-113(a)(30); two (2) counts of Possession of Controlled Substances, 35 P.S. § 780-113(a)(16); two (2) counts of Possession of Drug Paraphernalia, 35 P.S. § 780-113(a)(32); two (2) counts of Criminal Use of a Communication Facility, 18 Pa.C.S. § 7512(a); two (2) counts of Recklessly Endangering Another Person, 18 Pa.C.S. § 2705; and one (1) count of Driving While Operating Privileges Suspended or Revoked, 75 Pa.C.S. § 1543(a).

Following Petitioner's Preliminary Hearing on June 26, 2017, Petitioner, with the assistance of counsel, Attorney Jason A. Checque, Esq., entered a guilty plea before this Trial Court on August 8, 2017 to three (3) charges: 1) Possession with Intent to Deliver, 35 P.S. § 780-113(a)(30); 2) Criminal Use of a Communication Facility, 18 Pa.C.S. § 7512(a); and 3) Driving While Operating Privileges Suspended or Revoked, 75 Pa.C.S. § 1543(a), while the remaining charges were nolle prossed. On September 26, 2017, Petitioner was sentenced to six (6) years to fourteen (14) years of incarceration for the three offenses. On October 6, 2017, Petitioner filed a Post-Sentence Motion arguing his sentence should be reduced, which, following an October 24, 2017 hearing, was denied by this Trial Court on October 25, 2017.

Petitioner filed a Notice of Appeal with the Pennsylvania Superior Court and Erie County Prothonotary on November 22, 2017. Petitioner argued this Trial Court erred by considering Petitioner's juvenile record when sentencing Petitioner and that Petitioner was entitled to fifty-eight (58) days of credit time he did not receive at sentencing. On November 26, 2018, in a non-precedential decision, the Pennsylvania Superior Court affirmed this Trial Court's use of Petitioner's juvenile record during sentencing and, only "out of an abundance of caution," remanded Petitioner's case to this Trial Court to determine within thirty (30) days if Petitioner was entitled to said credit time. *See Commonwealth v. Jones*, 1781 WDA 2017 at 6 (Pa. Super. Ct., 2/26/18). On November 29, 2018, this Trial Court granted Petitioner fifty-eight (58) days of credit time. On January 11, 2019, this Trial Court's judgment of sentence was affirmed by the Pennsylvania Superior Court. Petitioner filed for allowance of appeal in the Pennsylvania Supreme Court on February 11, 2019, which was denied on August 26, 2019.

On March 5, 2020, Petitioner filed *pro se* a Motion for Post-Conviction Relief. On March 12, 2020, this Trial Court appointed Attorney William J. Hathaway to represent Petitioner regarding the instant PCRA Petition. On June 1, 2020, Attorney Hathaway filed Petitioner's Supplement to Motion for Post-Conviction Collateral Relief. On July 7, 2020, the Commonwealth filed its Response to Petitioner's Supplement to Motion for Post-Conviction Collateral Relief. On September 7, 2020, this Trial Court conducted a hearing regarding Petitioner's PCRA Petition. During said hearing, Petitioner was represented by Attorney Hathaway; the Commonwealth was represented by District Attorney Grant T. Miller; and Petitioner, Petitioner's Grandmother Mrs. Linda Pope, Petitioner's Sister Ms. Mercedes Brown, and Petitioner's plea and direct appeal counsel, Attorney Jason A. Checque, all provided testimony.

Under the Post-Conviction Collateral Relief Act, a petitioner must plead and prove by a preponderance of the evidence the following four (4) prongs:

(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:
   i. Is currently serving a sentence of imprisonment, probation or parole for the crime;
   ii. Awaiting execution of a sentence of death for the crime; or
   iii. Serving a sentence which must expire before the person may commence serving the disputed sentence;

(2) That the conviction or sentence resulted from one or more of the following:

i. A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States, which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place;
ii. Ineffective assistance of counsel which in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place;
iii. A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent;
iv. The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court;
v. The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced;
vi. The imposition of a sentence greater than the lawful maximum;
vii. A proceeding in a tribunal without jurisdiction;

(3) That the allegation of error has not been previously litigated or waived; and

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

42 Pa.C.S. § 9543(a). A petitioner must meet all four requirements of the statute to be eligible for relief. *Commonwealth v. Rachak*, 62 A.3d 389, 394 (Pa. Super. 2012).

Petitioner's PCRA Petition alleges Petitioner's plea and direct appeal counsel, Attorney Checque, caused Petitioner to enter an unknowing and involuntary plea when Attorney Checque allegedly counseled Petitioner he would be sentenced to two (2) years of incarceration for all of Petitioner's charges if he pled guilty. Petitioner does not allege Attorney Checque promised Petitioner personally he would receive a two (2) year sentence; rather, Petitioner alleges Attorney Checque promised Petitioner's Grandmother, Mrs. Linda Pope, and Sister, Ms. Mercedes Brown, he would receive said sentence. Petitioner alleges Attorney Checque enlisted Mrs. Pope and Ms. Brown to convince Petitioner to plead guilty after Petitioner allegedly rebuked Attorney Checque's efforts to convince Petitioner to plead guilty. Moreover, Petitioner alleges he maintained his innocence before counsel at all times but, despite Petitioner's insistence, Attorney Checque allegedly told Petitioner he would abandon Petitioner's representation and Petitioner would receive a twenty (20) year sentence if he did not plead guilty. Petitioner requests this Trial Court grant him leave to withdraw his guilty plea due to Attorney Checque's ineffective assistance of counsel.

"In determining whether a guilty plea is valid, the court must examine the totality of circumstances surrounding the plea." *Commonwealth v. Jabbie*, 200 A.3d 500, 505 (Pa.

Super. 2018). "The law does not require that a defendant be pleased with the outcome of his decision to plead guilty; the law requires only that a defendant's decision to plead guilty be made knowingly, voluntarily, and intelligently." *Id.* "A valid guilty plea must be made knowingly, voluntarily, and intelligently." *Commonwealth v. Kelley*, 136 A.3d 1007, 1013 (Pa. Super. 2016). In order to withdraw a guilty plea, a defendant "must make a showing of prejudice which resulted in manifest injustice." *Commonwealth v. Culsoir*, 209 A.3d 433, 437 (Pa. Super. 2019) (quoting *Commonwealth v. Flick*, 802 A.2d 620, 623 (Pa. Super. 2002). A defendant must "demonstrate that his guilty plea was entered involuntarily, unknowingly, or unintelligently." *Culsoir*, 209 A.3d at 437 (quoting *Commonwealth v. Stork*, 737 A.2d 789, 790 (Pa. Super. 1999)).

Petitioner is alleging Attorney Checque's ineffective assistance of counsel caused him to enter an invalid guilty plea. "To prevail on a claim of ineffective assistance of counsel, a PCRA petitioner must prove each of the following: 1) the underlying legal claim was of arguable merit, 2) counsel had no reasonable strategic basis for his action or inaction, and 3) the petitioner was prejudiced — that is, but for counsel's deficient stewardship, there is a reasonable likelihood the outcome of the proceedings would have been different." *Commonwealth v. Pier*, 182 A.3d 476, 478 (Pa. Super. 2018) (quoting *Commonwealth v. Simpson*, 112 A.3d 1194, 1197 (Pa. 2015)). In all ineffective assistance of counsel claims, counsel is initially presumed to be effective. *Id.*

"Allegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused the defendant to enter an unknowing or involuntary plea. Where the defendant enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Pier*, 182 A.3d at 478-79 (quoting *Commonwealth v. Moser*, 921 A.2d 526, 531 (Pa. Super. 2007)). "Thus, to establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Pier*, 182 A.3d at 479 (quoting *Commonwealth v. Barndt*, 74 A.3d 185, 192 (Pa. Super. 2013)); *see also Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

In the instant case, this Trial Court conducted an evidentiary hearing to examine fully Petitioner's PCRA claims of ineffective assistance of counsel. However, each witness' testimony, including Petitioner's, contradicted Petitioner's PCRA claims. Petitioner testified he never discussed his case with Attorney Checque prior to entering his guilty plea on August 8, 2017. "Q: So the first opportunity you had to speak with [Attorney Checque] before you entered a guilty plea was at [the plea hearing] ... ? A: Yes, sir." N.T., Evidentiary Hearing, 9/21/20, at 7:8-11. "Q: So you never gave any factual account to Attorney Checque before entering the plea? A: No, sir. Q: You never professed your innocence to him of the charges? A: No, sir." *Id.* at 8:1 — 10; *see also* 20:5 — 10.[1]

Petitioner testified he was made aware during his plea colloquy the maximum penalty he could receive if convicted of the charges he faced was twenty-two (22) years. *See id.* at 8:25 — 9:1-5. Petitioner further testified Attorney Checque told his grandparents only

[1] Petitioner contradicted this testimony when he stated later in the hearing "Well, after [the preliminary hearing], [Petitioner's grandparents] tried to get me to take a plea. And Mr. Checque, he wanted me to take a plea at my preliminary hearing." N.T., Evidentiary Hearing, 9/21/20, at 17:15 — 17.

what Petitioner could face if convicted, and Petitioner testified it was this potential exposure that motivated his decision to plead guilty. "Well, actually, he told my grandparents that if I didn't take a plea that I could be facing up to 22 years if I get found guilty for all the charges. So after that, my grandparents talked to me and I took a plea thinking I would get a lighter sentence to my understanding." *Id.* at 8: 15 — 19; *see also* 19:18 — 21. "[Petitioner's grandparents] told me that after my preliminary hearing [Attorney Checque] came and talked to them in the hallway and basically if I didn't take the plea that I would be facing up to 22 years. And, you know, to talk to me to make a better choice for myself." *Id.* at 10:18 — 22.

Petitioner testified Attorney Checque informed his grandparents there was a possibility Petitioner could receive boot camp if he pled guilty. "Taking a guilty plea, I could be — there's a possibility of me getting boot camp." *Id.* at 11:15 — 17; *see also* 21:19 — 21. Petitioner testified he was made aware it was not certain he would receive boot camp if he pled guilty. "Q: And are you saying that you relied on [the possibility of boot camp] ... was that the reason why you entered your plea? A: Yes, sir. Q: Even though you knew that boot camp would not be a guarantee? A: Yes, sir." *Id.* at 12 — 18.

Petitioner's Grandmother's, Mrs. Linda Pope's, testimony further contradicted many of Petitioner's PCRA claims. Mrs. Pope stated she had requested to speak with Attorney Checque following Petitioner's preliminary hearing. "Yes. I asked to speak to [Attorney Checque] as he was leaving the courtroom." *Id.* at 9 — 10. Mrs. Pope stated Attorney Checque told Mrs. Pope he thought Petitioner's best outcome would be if Petitioner pled guilty. "Q: Did he advise you that he thought his best option was to enter guilty pleas? A: Yes." *Id.* at 27:8 — 10. " ... I think I remember asking him, you know, if he go [sic] for trial what was the chance of him, you know, getting off. [Attorney Checque] just said it didn't look good." *Id.* at 28:15 — 18. Mrs. Pope stated Attorney Checque did not make any promises regarding Petitioner's sentence nor did he attempt to convince Petitioner to plead guilty. "Q: Did [Attorney Checque] promise you anything in terms of your grandson entering pleas? A: No." *Id.* at 28:3 — 5; *see also* 34:21 — 35:1. "Q: Did you make any effort to convince your grandson to enter the guilty pleas? A: No. I just basically told him, you know, to speak what he feels in his heart was right and be truthful and just speak from his heart and say what he had to say, you know, to the judge." *Id.* at 31 :6 — 11.

Petitioner's Sister's, Ms. Mercedes Brown's, testimony also contradicted Petitioner's PCRA claims. First, Ms. Brown was unclear as to which hearing she attended where she spoke with Attorney Checque. Ms. Brown stated, although she was unsure, that she attended the sentencing hearing, but also stated Attorney Checque was still recommending Petitioner accept a plea prior to this hearing. *See id.* at 37:1 — 7; 20 — 22. Ms. Brown stated Attorney Checque never promised her or Mrs. Pope Petitioner would receive a certain sentence if he pled guilty. "Q: Did [Attorney Checque] ever make any promises to you or your grandmother as to what your brother would receive if he accepted the plea deal? A: No. 1 just told him, like, this is what it is. And if you feel this is the best choice for you, then that's what you need to make. But if it's not the best choice then you need to make your decision." *Id.* at 38:23 — 39:4.

During Attorney Checque's testimony, he directly refuted Petitioner's ineffective assistance claims. Attorney Checque testified to his recollection of Petitioner's preliminary hearing, and stated his general policy of discussing with his clients their options concerning taking a plea or going to trial. "I believe I would have, at least, discussed the possibility of a plea at

the preliminary hearing ... Obviously, at that time, I also explained to Deandre and the other clients that I'm here to help you with your case. You tell me what you want to do and then we'll kind of go from there." *Id.* at 42:6 — 12. Attorney Checque stated that he believed Petitioner's best option was to plead guilty upon evaluating the Commonwealth's evidence against Petitioner during the preliminary hearing. *See id.* at 43:8 — 44:7. Attorney Checque stated he never promised Petitioner or any of Petitioner's family members Petitioner would receive a specific sentence if he pled guilty. "Q: Do you recall ever promising to any of [Petitioner's family] what sentence [Petitioner] would receive if he entered a plea? A: I would not promise the sentence." *Id.* at 45:2 — 4; *see also* 46:12 —14; 47:16 —18. Attorney Checque stated he believed Petitioner's best option would be to plead guilty hoping to receive a low enough sentence for the instant charges, combined with his sentence from another criminal case he had been convicted and sentenced for, to become eligible for boot camp. *See id.* at 45:5 — 46:11. Attorney Checque stated this was what he recommended to Petitioner. *See id.* at 46:6 — 11. Attorney Checque stated Petitioner was receptive to the plea deal, and that he never pressured Petitioner, or any of Petitioner's family, to accept, or encourage Petitioner to accept, a plea deal. *See id.* at 51:22 — 52:5; 55:6 — 15; 55:16 — 56:11.

During the evidentiary hearing, none of the witnesses, including Petitioner, confirmed Petitioner's allegation Attorney Checque told Petitioner he would abandon Petitioner's representation or that Petitioner would be convicted and sentenced to twenty (20) years in prison if he did not plead guilty. Instead, the testimony established Attorney Checque informed Petitioner of the maximum number of years he could be sentenced to if he was convicted at trial. None of the witnesses confirmed Petitioner's allegation that Attorney Checque ignored Petitioner's assertion he was innocent of all charges. The testimony credibly demonstrated Attorney Checque recommended Petitioner plead guilty after examining the evidence Commonwealth would offer against Petitioner if he proceeded to trial. Most importantly, none of the witnesses confirmed Attorney Checque told them Petitioner would be sentenced to two (2) years in prison if he pled guilty or encouraged them to pressure Petitioner to plead guilty. Petitioner alleged he was told by his grandparents he would be sentenced to two (2) years in prison if he pled guilty, which Mrs. Pope, Petitioner's Grandmother, denied. Ms. Brown, Petitioner's Sister, stated she never heard Attorney Checque promise Petitioner would be sentenced to only two (2) years in prison and she did not pressure Petitioner into pleading guilty. This Trial Court notes Petitioner himself called these witnesses to testify on his behalf.

In order to grant Petitioner PCRA relief for ineffective assistance of counsel regarding the entry of a guilty plea, Petitioner must be able to show Attorney Checque's ineffectiveness caused Petitioner to enter his guilty plea. However, Petitioner's alleged claims of Attorney Checque's misrepresentation of Petitioner were not supported by any witnesses, including Petitioner, and were directly refuted by Mrs. Pope, Ms. Brown, and Attorney Checque. Petitioner failed to provide sufficient evidence to sustain his claims of ineffective assistance of counsel against Attorney Checque, and, therefore, Petitioner's PCRA claims must be denied. This Trial Court finds and concludes Petitioner has not provided credible evidence his underlying legal claims are of arguable merit or Petitioner was in any way prejudiced by Attorney Checque's actions during his representation of Petitioner.

Attorney Checque encouraged Petitioner to accept a guilty plea given the evidence

Commonwealth would have offered against Petitioner and in order for Petitioner to receive a sentence qualifying him for boot camp and this Trial Court's recommendation for the same.[2] While Petitioner's sentence ultimately made him ineligible for boot camp, Petitioner received a six (6) year to fourteen (14) year sentence from a possible maximum sentence of twenty-two (22) years — a sentence affirmed by the Pennsylvania Superior Court. *See Jones*, 1781 WDA 2017 at 6. Regardless of Petitioner's not receiving a sentence that would qualify for boot camp and this Trial Court's recommendation for boot camp, this Trial Court finds and concludes counseling Petitioner to plead guilty was sound legal advice given Petitioner's potential conviction and subsequent sentence. For these reasons, this Trial Court finds and concludes Attorney Checque had a reasonable basis for his actions in the instant case, and Attorney Checque's advice to Petitioner was within the range of competence demanded of attorneys in criminal cases.

Moreover, Petitioner acknowledged during his guilty plea colloquy the possibility that regardless of what Attorney Checque allegedly promised Petitioner, Petitioner's sentence was at the discretion of this Trial Court. In Pennsylvania, "[o]nce a Defendant enters a guilty plea, it is presumed that he was aware of what he was doing." *Culsoir*, 209 A.3d at 437 (quoting *Stork*, 737 A.2d at 790). "Consequently, defendants are bound by statements they make during their guilty plea colloquies and may not successfully assert any claims that contradict those statements." *Culsoir*, 209 A.3d at 437 (quoting *Commonwealth v. Muhammad*, 794 A.2d 378, 384 (Pa. Super. 2002)).

Assistant District Attorney of Erie County Michael Garcia informed Petitioner of the following during his August 8, 2017 plea hearing: "Paragraph 5 contains the plea bargain in your case, the charges you're going to plead guilty to, and what charges may be going away as a result of your plea bargain. Paragraph 4 contains the maximum possible penalty you could face ... Understand the Judge could choose to impose that maximum penalty if she wanted to, though it is unlikely. Also understand the Judge is not bound by the terms of any plea bargain and she is free to reject any plea if she chooses to. The judge is also free to reject any recommendations that are made by our office on your behalf. If the judge were to reject a recommendation that's made by our office on your behalf, that would not be grounds to withdraw your guilty plea." N.T., Plea, 8/8/17, at 4:8 —12; 4:18 — 5:3. Assistant District Attorney Garcia then asks Petitioner if he understood the rights he would give up should he plead guilty: "Sir, did you understand those rights?" *Id.* at 7:21 — 22. To which Petitioner responds "Yes." *Id.* at 7:23. Petitioner is then informed of the maximum sentences for the three charges he pled guilty to and informed of the cumulative maximum sentence he could receive for all three charges, to which Petitioner acknowledged he understood. *See id.* at 7:24 — 8:20. Petitioner also affirmed his understanding by signing a statement to that effect before this Trial Court. *See id.* at 8: 17 — 21.

In the instant PCRA Petition, Petitioner claims his plea was involuntary and should be withdrawn due to Attorney Checque's alleged statements that Petitioner would receive a two (2) year sentence if he pled guilty and that Petitioner would be sentenced to twenty (20) years in prison if he did not. Petitioner's claims, however, are directly contradicted by statements

[2] In addition to finding Attorney Checque's testimony credible on this issue, this Trial Court notes the transcript of Petitioner's plea hearing confirms Attorney Checque's efforts to secure boot camp for Petitioner. *See* N.T., Plea, 8/8/17, at 9:3 — 9.

Petitioner made during his guilty plea colloquy. Petitioner stated he understood any plea bargain may be rejected by this Trial Court, this Trial Court makes the determination as to Petitioner's sentence, and Petitioner could be sentenced to a maximum of twenty-two (22) years in prison even if he pled guilty. Furthermore, Petitioner was also informed of his right to file a Post-Sentence Motion challenging his plea, which Petitioner instructed Attorney Checque to do following his sentencing. Petitioner's actions here provide additional support for concluding Petitioner fully understood what he was informed of during the instant plea colloquy.

Pennsylvania law presumes Petitioner was aware of what he was doing during the instant plea colloquy. Petitioner is held to the statements he made during the instant plea colloquy, and Petitioner may not assert claims that contradict those statements. Petitioner's acknowledgement of this Trial Court's discretion as well as Petitioner's exercise of his post-sentence rights in accordance with what he was informed during the instant colloquy indicate he understood what was being explained to him, and indicate he knowingly, intelligently, and voluntarily pled guilty. This Trial Court finds and concludes the totality of the circumstances indicate Petitioner's guilty plea was valid.

Petitioner failed to provide credible evidence Attorney Checque promised Petitioner would receive a two (2) year sentence, told Petitioner he would abandon Petitioner's representation, or told Petitioner he would receive a twenty (20) year sentence if he did not plead guilty. Petitioner failed to provide credible evidence Attorney Checque's actions prejudiced Petitioner in any way or caused Petitioner to enter an unknowing or involuntary guilty plea. Attorney Checque had a reasonable basis and acted within the range of reasonable competence in representing Petitioner by counseling Petitioner to plead guilty, and the totality of the circumstances indicate Petitioner's guilty plea was valid. For all of these reasons, this Trial Court enters the following Order:

ORDER

AND NOW, to wit, on this 7th day of December, 2020, for the reasons set forth in the Opinion attached above, it is hereby **ORDERED, ADJDUGED, AND DECREED** Petitioner Deandre Levon Jones' PCRA Petition is **DENIED**.

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

DEBORAH A. LOMAX, ADMINISTRATRIX FOR THE ESTATE OF RUFUS LOMAX, DECEASED
v.
CARE ONE, LLC; 4114 SCHAPER AVENUE OPERATING COMPANY, LLC D/B/A PRESQUE ISLE REHABILITATION AND NURSING CENTER; CARE ONE MANAGEMENT, LLC; HEALTHBRIDGE MANAGEMENT, LLC; DES HOLDING CO., INC.; THCI HOLDING COMPANY, LLC; THCI COMPANY, LLC; CARE VENTURES, INC.; CARE REALITY, LLC; SHOLIN J. MONTGOMERY, NHA

ALTERNATIVE DISPUTE RESOLUTION / ARBITRATION / PERFORMANCE, BREACH, ENFORCEMENT, AND CONTEST

A trial court must permit additional evidence to determine the issue of whether compelling arbitration is appropriate since preliminary objections in the nature of compelling arbitration cannot be resolved from mere pleadings of record.

ALTERNATIVE DISPUTE RESOLUTION / ARBITRATION / PERFORMANCE, BREACH, ENFORCEMENT, AND CONTEST

A trial court must exercise its discretion properly with findings supported by substantial evidence in ruling on preliminary objections in the nature of compelling arbitration.

ALTERNATIVE DISPUTE RESOLUTION / ARBITRATION / AGREEMENTS TO ARBITRATE

Pennsylvania courts employ a two-part test in determining whether to compel arbitration: (1) whether a valid agreement to arbitrate exists; and (2) whether the dispute is within the scope of the agreement.

ALTERNATIVE DISPUTE RESOLUTION / ARBITRATION

The party seeking to compel arbitration has the burden of proving a valid agreement to arbitrate existed between the parties.

CONTRACTS / VALIDITY OF CONTRACT

Trial courts must consider three factors in determining whether an agreement is valid: whether both parties have manifested an intent to be bound by the terms of the agreement, whether the terms are sufficiently definite, and whether consideration existed. If a trial court finds all three factors exist, said agreement shall be considered valid and binding.

CONTRACTS / CAPACITY TO CONTRACT

Under Pennsylvania law, it is presumed that an adult is competent to enter into an agreement, and a signed document gives rise to the presumption that it accurately expresses the state of mind of the signing party. The challenger must present clear, precise and convincing evidence to rebut this presumption.

ALTERNATIVE DISPUTE RESOLUTION / ARBITRATION / WHAT LAW GOVERNS

The intent of the Federal Arbitration Act is to place arbitration agreements upon the same footing as other contracts. Pennsylvania courts also hold arbitration agreements are to be analyzed on the same footing as other contracts. Pennsylvania has a well-established public policy that favors arbitration, and this policy aligns with the federal approach expressed in the Federal Arbitration Act. However, applying state law equally to all contracts is not preempted by the FAA.

CONTRACTS / LEGALITY / DEFENSES / UNCONSCIONABILITY

The doctrine of unconscionability is both a statutory and common law defense to enforcement of an allegedly unfair contract or provision in a contract. Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. The party challenging the agreement bears the burden of proof.

CONTRACTS / LEGALITY / DEFENSES / UNCONSCIONABILITY

An unconscionability analysis requires a two-fold determination: (1) that the contractual terms are unreasonably favorable to the drafter (substantive unconscionability), and (2) that there is no meaningful choice on the part of the other party regarding the acceptance of the provisions (procedural unconscionability).

CONTRACTS / LEGALITY / CONTRACTS OF ADHESION

Pennsylvania case law indicates a contract of adhesion is a standardized contract form offered to consumers of goods and services on essentially 'take it or leave it' basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. The most distinctive feature of an adhesion contract is that the "weaker party" has no realistic choice as to its terms.

ALTERNATIVE DISPUTE RESOLUTION / ARBITRATION / WHAT LAW GOVERNS

The purpose of the Federal Arbitration Act is to alleviate parties from expensive litigation and to facilitate the already crowded court calendars. Passage of the FAA was intended to enforce arbitration agreements between parties according to the terms of the agreement.

ALTERNATIVE DISPUTE RESOLUTION / ARBITRATION / AGREEMENTS TO ARBITRATE

An agreement to arbitrate and a liberal policy favoring arbitration does not mean a court simply can rubber stamp these disputes as subject to arbitration. A trial court must still determine whether or not to compel arbitration.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
NO. 10167-2017
344 WDA 2020

Appearances: Corey S. Young, Esq., for Plaintiff/Appellee
John C. Eustice, Esq., for Defendants/Appellants

1925(a) OPINION

Domitrovich, J., April 30, 2020

Deborah Lomax [hereinafter Appellee] commenced this civil action as Administratrix for her deceased uncle, Rufus Lomax [hereinafter Decedent]. In her Complaint, Appellee alleged Appellants were negligent in their care of Decedent for numerous reasons such as: failing to hire and train sufficient staff, failing to provide adequate hygiene to prevent infection, failing to turn and reposition Decedent once every two hours, failing to render appropriate medical treatment for Decedent's conditions, failing to provide and administer appropriate medication to Decedent, and failing to notify Decedent's family and personal representatives

of significant changes in his condition. Appellants filed Preliminary Objections to dismiss Appellee's Complaint under Pa.R.C.P. 1028(a)(6) and compel this instant civil action to arbitration. Appellants alleged a valid agreement to arbitrate exists and that the claims brought by Appellee are subject to the Arbitration Clause signed by Decedent. After making specific Findings of Fact and Conclusions of Law, this Trial Court entered an Order whereby this Trial Court overruled Appellants' Preliminary Objections to compel the instant civil action to arbitration.

On appeal, counsel for Appellants set forth nine (9) paragraphs in their "Defendants' Statement of Errors Complained of on Appeal" which this Trial Court combines into two issues consistent with the two issues below: (1) Whether the Trial Court properly analyzed the validity of this agreement to arbitrate according to the Federal Arbitration Act and Pennsylvania contract law; and (2) Whether this Trial Court properly found and concluded this Arbitration Clause is procedurally and substantively unconscionable under the Federal Arbitration Act and Pennsylvania contract law.

After considering testimony of witnesses and exhibits and reviewing Appellee's Proposed Findings of Fact and Conclusions of Law and Appellants' Proposed Findings of Fact and Conclusions of Law and accompanying Briefs and Rebuttal Briefs as well as pleadings and memoranda of law of record, this Trial Court entered the following specific Findings of Fact:

Rufus Lomax [hereinafter Decedent] is a double amputee below the knee who was completely bedbound and also diagnosed, among other medical issues, with dementia and depression. Decedent had been hospitalized in March of 2015 prior to admission to Presque Isle Rehabilitation and Nursing Center. (77:23-78:1). Thereafter, Decedent voluntarily presented himself for admission at Presque Isle Rehabilitation and Nursing Center on March 27, 2015. (Plaintiffs Ex 1; 42:10-12). Decedent died on September 26, 2015. (See Plaintiff's Complaint).

On December 26, 2016, the Register of Wills of Erie County appointed Decedent's niece, Deborah Lomax [hereinafter Appellee], as Administratrix for the Estate of Decedent. (*See* Plaintiff's Complaint). Appellee, as Administratrix of the Estate of Decedent, filed a Writ of Summons on January 1, 2017. (*See* Writ of Summons).

In 2005, Decedent moved to an assisted living facility, Schmid Towers, where he resided in a handicap apartment with bathroom facilities built for a person in a wheelchair. Schmid Towers as a facility had a nurse on duty. (74:9-75:5). While at Schmid Towers, Decedent was cared for by Appellee who made his meals, ran his errands, attended his emergency room and doctors' visits and acted as his "spokesperson." (75:10-19). After Appellee retired, she began working for Decedent through a senior program at Greater Erie Community Action Committee ("GECAC") from 2010 until he entered Presque Isle Rehabilitation and Nursing Center. (75:20-76:24).

Decedent was also an outpatient at the Erie Eye Clinic. Appellee often assisted Decedent due to his poor eyesight. (83:19-84:13). Appellee stated Decedent was supposed to have cataract surgery on his eyes, but "[h]e didn't want it. He said after the surgeries he had had previously, that he did not want no more surgeries." (89:3-13). Appellee stated Decedent had told her he had trouble reading small print during his last year of life. (84:10-13). Appellee recalled Decedent stopped reading the newspaper a few years before Decedent's death. Appellee stated Decedent never read anything including books or sports box scores. Decedent had "a couple of books in his apartment but he never read them. They had a library

in the basement of Schmid and he would pick up a book, but never read it." (88:4-19). When Appellee attempted to throw his newspapers away, Decedent stopped her from doing so. Decedent told her "[o]h, no, no, no, I'm going to get to it." (83:24-85:3). Appellee would also "restart [Decedent's] television" since Decedent was unable to see the buttons on the remote and would "mess the TV up." (84:4-9).

While Decedent was living at Schmid Towers, Decedent was in a significant amount of pain. He experienced sores on his body as well as he fell and injured his head due to his weakness and other health issues. (77:8-18). Decedent was "depressed a lot, sad. A lot of times." Decedent was becoming more of a "loner." (77:3; 77:17-18). In March of 2015, Decedent was hospitalized at Saint Vincent Hospital due to a urinary tract infection and resulting complications. (77:23-78:1). During his time at Saint Vincent Hospital, Decedent made the decision to enter a nursing home. (79:24-80: 10). Presque Isle Rehabilitation and Nursing Center "was one of the only open facilities for [Decedent], due to his insurance." (95:9-14).

Appellee was not with Decedent on the day of his admission to Presque Isle Rehabilitation and Nursing Center. The first time Appellee saw him after his admission was the following Monday, three days later. (80:14-22). When Decedent was admitted to Presque Isle Rehabilitation and Nursing Center, he was underweight which "made him more weak." (93:11-25). Since Decedent was "substantially thinner than what he was" at the time of admission to Presque Isle Rehabilitation and Nursing Center, this impacted his physical state. (93:11-94:11).

Several witnesses testified such as Darlene Stokes. Darlene Stokes [hereinafter Ms. Stokes] worked as a Licensed Practical Nurse [hereinafter LPN] at Presque Isle Rehabilitation and Nursing Center for approximately nine (9) years until June 2015. (36:3-37:13). As an LPN at Presque Isle Rehabilitation and Nursing Center, Ms. Stokes regularly administered admission assessments. (44:14-45:7). On March 27, 2015, Ms. Stokes administered the admission assessment on Decedent. (Plaintiff's Ex 1; 42:10-12). Darlene Stokes does not remember first-hand seeing either Decedent or Plaintiff at Presque Isle Rehabilitation and Nursing Center. (38:1-14).

Ms. Stokes diagnosed Decedent with several conditions, including a bilateral amputation below the knee, dementia, and depression. (Plaintiff's Exhibit 1; 45:8-23). Ms. Stokes's notes on the Resident Evaluation Form indicated Decedent was "happy" to be receiving the help he needed at Presque Isle Rehabilitation and Nursing Center. (Plaintiff Exhibit 1; 46:13-16).

Ms. Stokes also analyzed Decedent's vision and found vision was poor in both eyes. (Plaintiff Exhibit 1; 46:20-47:4). When completing the Resident Evaluation Form, Ms. Stokes defined Decedent's poor vision as: "Poor, it can be a difference of, you know, when they're writing something or looking at something that may be difficult for them, but they may recognize faces or, you know, it depends on the proximity of the person that's in front of them[.]" (47:10-14). When Ms. Stokes administered a "fall risk assessment" on Decedent, Ms. Stokes determined Decedent's vision was "poor with or without glasses." (50:19-23). Ms. Stokes stated he had "poor vision" and if Decedent did "have glasses, then his vision would still be poor." (51:9-11).

Decedent was extremely dependent on the staff at Presque Isle Rehabilitation and Nursing Center to assist him with his daily needs such as: transfer from his bed, using the toilet, dressing himself, daily hygienic needs, and bathing. (55:8-56:11). Presque Isle Rehabilitation

and Nursing Center was responsible for providing Decedent with all levels of assistance that he needed. (57:12-15).

Another witness was Wendy Stockhausen [hereinafter Ms. Stockhausen], the Director of Nursing at Presque Isle Rehabilitation and Nursing Center in March of 2015. (165:23-25). Ms. Stockhausen oversaw the nursing at Presque Isle Rehabilitation and Nursing Center and performed audits of the residents' charts to comply with state and federal regulations. (166:13-168:4). Ms. Stockhausen stated Decedent's vision status was poor based on the Resident Evaluation Form. She indicated: "It means he probably needed glasses. Or, you know, even with his glasses on, he probably didn't see that well." (185:17-22).

Another witness is Kara Calandrelli [hereinafter Ms. Calandrelli], the former admissions coordinator at Presque Isle Rehabilitation and Nursing Center. (101:17-20). During her time as admissions coordinator, Ms. Calandrelli was responsible to "sign people in, give them tours, talk to the families." (104:11-15).

Ms. Calandrelli was responsible for presenting the admissions paperwork with an incoming resident and would admit approximately ten (10) to fifteen (15) residents a week. (104:16-23). When Decedent entered Presque Isle Rehabilitation and Nursing Center, Ms. Calandrelli was the Admissions Coordinator. (101:23-102:16). Ms. Calandrelli had no specific independent recollection of Decedent at this facility. (108:11-109:12). Ms. Calandrelli had no recollection of the day Decedent was admitted and did not recall presenting the admissions agreement to Decedent. (108:11-18). Ms. Calandrelli had no independent recollection of whether Decedent talked to her on the date of his admission or whether Decedent asked any questions during the admissions process. (108:25-109:5).

Upon entering the facility, Ms. Calandrelli would present a resident with a twenty (20) page admissions agreement and additional exhibits. (110:1-10). Ms. Calandrelli presented the admissions agreement to a resident in that resident's room. (111:5-8). This admissions process commenced with Ms. Calandrelli visiting a resident's room and introducing herself. (111:9-11). Ms. Calandrelli testified she would have a resident read each page to themselves and then sign or initial where appropriate. (111:12-15). Ms. Calandrelli looked at what topics were on the page and then would introduce the topics on each page to a resident. Several topics were on each page. (119:12-15). Ms. Calandrelli asked a resident whether he or she had any questions. If a resident did, Ms. Calandrelli answered the questions herself. (111:16-21).

Ms. Calandrelli indicated she worked with residents who had difficulty reading admissions agreements page by page. (111:22-25). The total time to process each resident for admission was approximately forty-five (45) minutes to one (1) hour. (112:1-5). When a resident encountered difficulty reading certain pages of the admissions agreement, Ms. Calandrelli, a non-lawyer, offered her own explanation as to what she thought that page meant. (112:17-21).

Ms. Calandrelli determined whether a resident was not competent to read or could not answer simple questions such as "who are they, what the dates (*sic*) is." In these scenarios, she involved a family member, a power of attorney, or a guardian who was "in charge" of the resident. (113:3-12). However, the record indicates Appellee, a close family member of Decedent, was never involved in Ms. Calandrelli's routine admissions procedure. (80:14-22).

During her time as admissions coordinator, Ms. Calandrelli worked with residents who were visually impaired. (113:17-19). If a resident was visually impaired, Ms. Calandrelli involved a family member to ensure the resident understood the terms of the agreement.

(113:20-23). Although Ms. Calandrelli indicated she would not be able to proceed with the admissions process if a resident was alone "because they [resident] needed somebody to help them," Ms. Calandrelli proceeded with the admissions process and review of the agreement with Decedent who arrived alone. (113:24-114:1). Ms. Calandrelli explained if a resident was visually impaired and did not have a family member present with them, she could not proceed with the admissions process since the resident would be unable to agree to anything. (114:2-11). However, the record does not explain why Ms. Calandrelli did not incorporate her routine procedure with Decedent.

When a resident did not have any family members, Ms. Calandrelli routinely contacted the Erie Office on Aging for someone to assist the resident. (115:20-24). This record does not demonstrate Ms. Calandrelli contacted the Erie Office on Aging to assist Decedent although no family member was with Decedent. Ms. Calandrelli admitted she would not have gone forward with the admissions process knowing Decedent could not read small print, like the admissions agreement, and was without a family member to support him. (118:17-21). When asked why Ms. Calandrelli still presented the agreement to Decedent, Ms. Calandrelli was unable to answer as she did not independently recall who Decedent was. (118:22-25).

Ms. Calandrelli testified if a resident would not sign the admission agreement, she would then seek direction from her boss, resulting in Presque Isle Rehabilitation and Nursing Center contacting a family member to be present during the time of presentation of the admission agreement with the resident. (120:18-121:3). The record does not indicate she did so in this case. Having admitted ten (10) to fifteen (15) patients per week, Ms. Calandrelli never informed a resident the admissions agreement was optional nor does Ms. Calandrelli remember any resident ever asking if the admissions agreement was mandatory or optional. (121:10-122:7). The admissions agreement contains a clause in which a resident can be involuntarily discharged from this facility for non-payment of fees. (124:1-18). In the admissions agreement, a number of clauses such as inclusion in the facility directory and consent for photography contained options in which a resident can opt-in or opt-out of those specific clauses. (125:24-126:25). Other clauses, such as consent to care and consent to arbitration, did not contain such opt-in or opt-out provisions. (127:1-12; 131:2-7).

As to consent to care, Ms. Calandrelli knew residents did not have to sign the Agreement to receive care as Presque Isle Rehabilitation and Nursing Center is responsible for the resident from the time they arrive. (130:5-9). Regarding the Arbitration Clause, Ms. Calandrelli introduced this section by having a resident read the page to himself or herself and then asking if that resident had any questions. If a resident had questions regarding the page, Ms. Calandrelli would then address that resident's questions. (130:12-19). If a resident had no questions, Ms. Calandrelli did not offer an explanation. Ms. Calandrelli explained the Arbitration Clause to residents as follows: "So I would say arbitration is where parties meet and an arbitrator would be there to hear both sides. And then the arbitrator would make the decision, just like a judge. And it's binding and it's a legal — like whatever the outcome is, it's a legal finding, so." (130:20-25). The explanation given by Ms. Calandrelli above is her full and complete routine explanation of this Arbitration Clause she gave to a resident who had questions. (131:20-23). Ms. Calandrelli only provided an explanation to a resident if a resident had a question, but she would not provide an explanation if a resident had no questions regarding the Arbitration Clause. (132:1-13). Ms. Calandrelli did not explain to a

resident the following: a resident could not sue the facility in court; the Arbitration Clause applied even if the facility injured or killed a resident; and that a resident was relinquishing his or her right to a jury trial. (132:23-133:7; 133:19-21).

Furthermore, Ms. Calandrelli did not include topics such as fees or costs associated with arbitration; damages awarded from arbitration; and selection of an arbitrator. (134:2-135:3). Ms. Calandrelli is not familiar with the Commercial Arbitration Rules of the American Arbitration Association and did not include an explanation of these rules when she talked to a resident during the admissions process. (134:24-136:4). Ms. Calandrelli indicated no resident ever negotiated provisions of the agreement and no resident ever provided a counteroffer to this admissions agreement. (144:12-25). When asked whether a resident could have negotiated as to the terms contained in the admissions agreement, Ms. Calandrelli responded “No.” (144:20-145:1). When asked whether she had any reason to believe Decedent understood the admissions agreement, Ms. Calandrelli stated: “Well, he signed the pages.” (146:21-23).

Ms. Calandrelli testified she signed her name on Decedent’s admissions agreement and indicated she printed Decedent’s name on the admissions agreement. (106:21-107-16). However, Appellee stated the signatures and initials on the admission agreement were not Decedent’s signature or initials. (82:14-83:18). Appellee indicated she was very familiar with Decedent’s signature since she had been reimbursed by Decedent for purchases and viewed his signature in the past from documents associated with the visiting nurse, hospitals, and discharge papers. (81:3-16). When a resident signed the admissions agreement, Ms. Calandrelli provided no other basis as to why she believed this Decedent actually understood the contents of the agreement and what he was signing. (146:24-148:12). Ms. Calandrelli determined a resident’s competency to sign the admissions agreement by only reviewing written documentation such as nurse’s assessment records and hospital documents. (154:16-24).

The Arbitration Clause as contained within the admissions agreement reads as follows:

ARTICLE XIV
DISPUTE RESOLUTION AND ARBITRATION

ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT AND BROUGHT BY THE RESIDENT, HIS/HER PERSONAL REPRESENTATIVE, HEIRS, ATTORNEYS OR THE RESPONSIBLE PARTY SHALL BE SUBMITTED TO BINDING ARBITRATION BY A SINGLE ARBITRATOR SELECTED AND ADMINISTERED PURSUANT TO THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION. A CLAIM SHALL BE WAIVED AND FOREVER BARRED IF, ON THE DATE THE DEMAND FOR ARBITRATION IS RECEIVED, THE CLAIM (IF ASSERTED IN A CIVIL ACTION) WOULD BE BARRED BY THE APPLICABLE STATE OR FEDERAL STATUE OF LIMITATIONS. ANY CLAIMANT CONTEMPLATED BY THIS PARAGRAPH HEREBY WAIVES ANY AND ALL RIGHTS TO BRING SUCH CLAIM OR CONTROVERSY IN ANY MANNER NOT EXPRESSLY SET FORTH IN THIS PARAGRAPH INCLUDING, BUT NOT LIMITED TO, THE RIGHT TO A JURY TRIAL.
____ (Initialed on behalf of Resident Parties)

No reciprocal clause is contained within the Admissions Agreement in which Presque Isle Rehabilitation and Nursing Center relinquishes its right to a trial by jury or its right to pursue a legal action in a court of law. No clause requires Presque Isle Rehabilitation and Nursing to submit to arbitration or alternative dispute resolution in pursuing its claims against a resident. (*See* Admissions Agreement).

Appellants' first issue concerns this Trial Court's analysis of the validity of the agreement to arbitrate. First of all, a trial court must permit additional evidence to determine the issue of whether compelling arbitration is appropriate since preliminary objections in the nature of compelling arbitration cannot be resolved from mere pleadings of record. *Davis v. Center Management Group, LLC*, 192 A.3d 173, 183 (Pa. Super. 2018). A trial court must exercise its discretion properly with findings supported by substantial evidence in ruling on preliminary objections in the nature of compelling arbitration. *Washburn v. Northern Health Facilities, Inc.*, 2015 PA Super 168, 121 A.3d 1008, 1012 (2015). In the instant case, this Trial Court permitted additional evidence and made specific Findings of Fact and Conclusions of Law derived from reviewing the testimony of witnesses as well as the exhibits.

This Trial Court then determined the validity of this agreement to arbitrate by citing relevant Pennsylvania contract case law: Pennsylvania courts employ a two-part test in determining whether to compel arbitration: (1) whether a valid agreement to arbitrate exists; and (2) whether the dispute is within the scope of the agreement. *Bair v. Manorcare of Elizabethtown, PA, LLC*, 108 A.3d 94, 96 (Pa. Super. 2015). If a trial court determines a valid agreement to arbitrate exists, said trial court must then determine if the dispute is within the scope of the agreement. *Id*. The party seeking to compel arbitration has the burden of proving a valid agreement to arbitrate existed between the parties. *Id*. Trial courts must consider three factors in determining whether an agreement is valid: "whether both parties have manifested an intent to be bound by the terms of the agreement, whether the terms are sufficiently definite, and whether consideration existed." *Johnston the Florist, Inc. v. TEDCO Const. Corp.*, 657 A.2d 511, 516 (Pa. Super. 1995). If a trial court finds all three factors exist, said agreement "shall be considered valid and binding." *Id*.

Moreover, "[t]here must be a meeting of minds in order to constitute a contract." *Quiles v. Financial Exchange Co.*, 879 A.2d 281, 285 (Pa. Super. 2005) (*citing Cohn v. Penn Beverage Co.*, 169 A. 768-69 (Pa. 1934); *Parsons Brothers Slate Company v. Commonwealth*, 211 A.2d 423, 424 (Pa. 1965)). A meeting of the minds exists when "both parties mutually assent to the same thing, as evidence by an offer and its acceptance." *Prieto Corp. v. Gambone Const. Co.*, 100 A.3d 602, 609 (Pa. Super. 2014) (*citing Refuse Management Systems, Inc. v. Consolidated Recycling and Transfer Systems, Inc.*, 671 A.2d 1140, 1146 (Pa. Super. 1996)). Meeting of the minds is "whether the parties agreed in a clear and unmistakable manner to arbitrate their disputes." *Bair* at 97.

"Under Pennsylvania law, it is presumed that an adult is competent to enter into an agreement, and a signed document gives rise to the presumption that it accurately expresses the state of mind of the signing party." *Cardinal v. Kindred Healthcare, Inc.*, 155 A.3d 46, 50 (Pa. Super. 2017). The challenger must present clear, precise and convincing evidence to rebut this presumption. *Id*. "This burden of proof requires that the witnesses must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct,

weighty and convincing as to enable the [finder of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Cardinal* at 50 (citing *Evans v. Marks*, 218 A.2d 802, 804 (Pa. 1966)).

In the instant case, Appellee presented evidence to rebut the presumption Decedent knew what he was signing when he signed the Admissions Agreement containing the Arbitration Clause. The evidence indicated Decedent had poor eyesight and difficulty reading with or without glasses. Since Appellee was a very close niece of Decedent and acted as a spokesperson for Decedent at doctors' appointments, Decedent told her he had trouble reading small print during his last year of life. (84:10-13). Decedent was an outpatient at the Erie Eye Clinic, and Appellee often assisted Decedent due to his poor eyesight. (83: 19-84:13). Appellee stated Decedent was supposed to have cataract surgery on his eyes, but "[h]e didn't want it. He said after the surgeries he had had previously, that he did not want no more surgeries." (89:3-13).

Appellee recalled Decedent stopped reading the newspaper a few years before Decedent's death. Appellee stated Decedent never read anything including books or sports box scores. Decedent had "a couple of books in his apartment but he never read them. They had a library in the basement of Schmid and he would pick up a book, but never read it." (88:4-19).When Appellee attempted to throw his newspapers away, Decedent stopped her from doing so. Decedent told her "[o]h, no, no, no, I'm going to get to it." (83:24-85:3). Appellee would also "restart [Decedent's] television" since Decedent was unable to see the buttons on the remote and would "mess the TV up." (84:4-9).

This Trial Court's Findings of Fact indicate Decedent entered Presque Isle Nursing and Rehab Center on March 27, 2015 following a hospitalization at Saint Vincent Hospital. Upon entry to the facility, Decedent was assessed by a Licensed Practical Nurse [LPN] as indicated by Ms. Stokes's signature on Decedent's admissions assessment. Ms. Stokes determined Decedent's vision was "poor" with or without glasses and also diagnosed Decedent with dementia and depression. (45:8-23; 50:19-23)

Ms. Stockhausen was the Director of Nursing at Presque Isle Rehabilitation and Nursing Center in March of 2015. Ms. Stockhausen determined Decedent's vision was "poor" based on the Resident Evaluation Form. Ms. Stockhausen defined "poor" as: "It means he probably needed glasses. Or, you know, even with his glasses on, he probably didn't see that well" based on the Resident Evaluation Form. (185:17-22).

Ms. Calandrelli, as the former admissions coordinator at Presque Isle Rehabilitation and Nursing Center, was responsible to "sign people in, give them tours, talk to the families." (104:11-15). Ms. Calandrelli was responsible for presenting the admissions paperwork to an incoming resident. She would admit approximately ten (10) to fifteen (15) residents a week. (104:16-23). Ms. Calandrelli indicated that if a resident arrived alone, Ms. Calandrelli would contact a family member to be present during the admissions procedure. If a resident had poor eyesight, her normal procedure was to have a family member present to assist with explanation of the Admissions Agreement. Ms. Calandrelli stated she would not move forward with the Admissions Agreement being signed by a resident if she knew a resident could not read small print. The record indicates she did not call a family member to be present to assist with Decedent's admissions process. If no family member was available, Ms. Calandrelli would have contacted the Erie Office on Aging in her normal routine. The record does not indicate Ms. Calandrelli contacted the Erie Office on Aging to assist Decedent.

During the admissions process, Ms. Calandrelli merely introduced topics on each page of the agreement and residents such as Decedent were expected to read the requisite page of the Admissions Agreement to themselves. Ms. Calandrelli introduced the Arbitration Clause to Decedent as she did with other residents in her normal routine: "So I would say arbitration is where parties meet and an arbitrator would be there to hear both sides. And then the arbitrator would make the decision, just like a judge. And it's binding and it's a legal — like whatever the outcome is, it's a legal finding, so." (130:20-25). Clearly, this Arbitration Clause refers to the Commercial Arbitration Rules of the American Arbitration Association; however, Ms. Calandrelli never explained the Commercial Arbitration Rules of the American Arbitration Association to a resident during the admissions process because she was not familiar with said rules and their application. (134:24-136:4).

Moreover, Ms. Calandrelli did not seek advice from her boss when the record demonstrates Decedent's vision was "poor" with or without glasses. Ms. Calandrelli proceeded with the admissions process knowing Decedent was both alone and would have difficulty reading small print such as the Admissions Agreement. Ms. Calandrelli did not incorporate her normal routine practice in administering the Admissions Agreement to Decedent.

Also, Decedent received no consideration for his relinquishment of his right to a trial by jury and his right to pursue a cause of action against Presque Isle Rehabilitation and Nursing in a court of law. Presque Isle Rehabilitation and Nursing Center provided no explanation why Decedent would relinquish his important right to a trial by jury and to pursue his cause of action in court, and yet Presque Isle Rehabilitation and Nursing Center retained its right to a trial by jury and its right to pursue a legal action in a court of law. Presque Isle Rehabilitation and Nursing Center did not agree to arbitrate its own claims against Decedent instead of seeking judicial adjudication. No additional benefit was provided to Decedent for relinquishing his right to a trial by jury. Decedent was a customer and patient who sought medical care and treatment from Presque Isle Rehabilitation and Nursing Center and paid for the medical care and treatment he received.

Therefore, Appellee presented clear, precise and convincing evidence that Decedent was unaware as to the meaning of or the impact on him as to the Arbitration Clause in signing the Admissions Agreement. Decedent had poor eyesight and trouble reading with or without glasses. Decedent was not capable of reading and comprehending this Admissions Agreement which waived his important rights through this Arbitration Clause. Decedent did not manifest an intent or a meeting of the minds to be bound by the terms of this Arbitration Clause. Furthermore, Ms. Calandrelli did nothing to inform fully and completely Decedent of the Arbitration Clause and the repercussions of said Clause. The parties did not agree in a clear and unmistakable manner to arbitrate their disputes, and thus, no meeting of the minds existed with the Decedent.

Furthermore, when analyzing the validity of an arbitration clause, trial courts should generally apply ordinary state-law principles governing the formation of contracts, "but in doing so, must give due regard to the federal policy favoring arbitration." *Cardinal v. Kindred Healthcare, Inc.*, 155 A.3d 46, 53 (Pa. Super. 2017). The intent of the Federal Arbitration Act [hereinafter FAA] is to place arbitration agreements "upon the same footing as other contracts." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974). Pennsylvania courts also hold arbitration agreements are to be analyzed on the "same footing" as other contracts. *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 501 (Pa. 2016); *Salley*

v. Option One Mortg. Corp., 925 A.2d 115, 118-19 (Pa. 2007); *Kohlman v. Grane Healthcare Company*, No. 114 WDA 2019, --- A.3d --- *3 (Pa. Super, 2020); *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 879 (Pa. Super. 2006).

Pennsylvania law and Federal law require arbitration agreements be enforced as written. *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 880 (Pa. Super. 2006). Moreover, arbitration provisions can "be set aside only for generally recognized contracted defenses such as duress, illegality, fraud and unconscionability." *Id*. "Pennsylvania has a well-established public policy that favors arbitration, and this policy aligns with the federal approach expressed in the Federal Arbitration Act." *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660 (Pa. Super. 2013). However, applying state law equally to all contracts is not preempted by the FAA. *Thibodeau* at 880. As indicated in this Trial Court's Conclusions of Law at page 15, "Trial courts generally apply state law contract principles, but must give consideration to the federal policy favoring arbitration." (Trial Court's Conclusions of Law at p. 15). This Trial Court in the instant case properly considered and analyzed general state contract law principles applicable to all contracts in evaluating the validity of the Arbitration Clause and in due regard to the Federal Arbitration Act. Therefore, Appellants' first issue is without merit.

Appellants' second issue concerns this Trial Court's finding and concluding this Arbitration Clause is procedurally and substantively unconscionable. As recognized by this Trial Court in the instant case in this Trial Court's Findings of Fact and Conclusions of Law at page 20, under both Pennsylvania law and the Federal Arbitration Act, contract defenses include unconscionability, fraud, or duress and may be invoked to invalidate arbitration agreements. *Salley v. Option One Mortg. Corp.*, 925 A.2d 115, 119 (Pa. 2007).

The doctrine of unconscionability is both a statutory and common law defense to enforcement of an allegedly unfair contract or provision in a contract. *Id*. "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. The party challenging the agreement bears the burden of proof." *Cardinal v. Kindred Healthcare, Inc.*, 155 A.3d 46, 53 (Pa. Super. Ct. 2017), reargument denied (Apr. 3, 2017). appeal denied, 642 Pa. 620, 170 A.3d 1063 (2017) (internal citations removed). "An unconscionability analysis requires a two-fold determination: (1) that the contractual terms are unreasonably favorable to the drafter ('substantive unconscionability'), and (2) that there is no meaningful choice on the part of the other party regarding the acceptance of the provisions ('procedural unconscionability')." *Id*.

As to substantive unconscionability, the Pennsylvania Superior Court in the *Cardinal* case considered a number of terms within an arbitration agreement to determine whether the contractual terms were unreasonably favorable to the drafter: "(1) the parties shall pay their own fees and costs, similar to civil litigation practice in common pleas court; (2) a conspicuous, large, bolded notification that the parties, by signing, are waiving the right to a trial before a judge or jury; (3) a notification at the top of the agreement, in bold typeface and underlined, that it is voluntary, and if the patient refuses to sign it, 'the Patient will still be allowed to live in, and receive services' at the facility; (4) a provision that the facility will pay the arbitrators fees and costs; (5) a statement that there are no caps or limits on damages other than those already imposed by state law; and (6) a provision allowing the patient to rescind within thirty days." *Cardinal v. Kindred Healthcare, Inc.*, 2017 PA Super 19,

155 A.3d 46, 53 (Pa. Super. Ct. 2017), reargument denied (Apr. 3, 2017), appeal denied, 642 Pa. 620, 170 A.3d 1063 (2017). The holding in *Cardinal* indicates an arbitration agreement lacking these terms is unconscionable. *Id*. at 55.

The instant Arbitration Clause states:

ARTICLE XIV
DISPUTE RESOLUTION AND ARBITRATION

ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT AND BROUGHT BY THE RESIDENT, HIS/HER PERSONAL REPRESENTATIVE, HEIRS, ATTORNEYS OR THE RESPONSIBLE PARTY SHALL BE SUBMITTED TO BINDING ARBITRATION BY A SINGLE ARBITRATOR SELECTED AND ADMINISTERED PURSUANT TO THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION. A CLAIM SHALL BE WAIVED AND FOREVER BARRED IF, ON THE DATE THE DEMAND FOR ARBITRATION IS RECEIVED, THE CLAIM (IF ASSERTED IN A CIVIL ACTION) WOULD BE BARRED BY THE APPLICABLE STATE OR FEDERAL STATUE OF LIMITATIONS. ANY CLAIMANT CONTEMPLATED BY THIS PARAGRAPH HEREBY WAIVES ANY AND ALL RIGHTS TO BRING SUCH CLAIM OR CONTROVERSY IN ANY MANNER NOT EXPRESSLY SET FORTH IN THIS PARAGRAPH INCLUDING, BUT NOT LIMITED TO, THE RIGHT TO A JURY TRIAL.
____ (Initialed on behalf of Resident Parties).

In the instant case as to the issue of substantive unconscionability, this Arbitration Clause ***does not*** state: the parties shall pay their own fees and costs similar to civil litigation practice in common pleas court; a conspicuous, large, **bolded** notification that the parties, by signing, are waiving the right to a trial before a judge or jury; a notification at the top of the agreement, in **bold typeface** and underlined, that it is voluntary, and if the patient refuses to sign it, the patient is still allowed to live in and receive medical care at the facility; that the facility will pay arbitrators' fees and costs; a statement that no caps or limits on damages other than those already imposed by state law exist; and a provision allowing the patient or resident to rescind within thirty (30) days. In fact, the introduction of the Admission Agreement in the instant case states:

> "The Resident Parties acknowledge that they want the Resident to be admitted and receive the services provided by Facility. By signing this Agreement, the Facility and the Resident Parties are legally bound by it."

Taken as a whole, this Arbitration Clause in the instant case was meant to be a part of the Admissions Agreement, without the ability for Decedent to rescind this clause. On behalf of Appellants, Ms. Calandrelli did not provide Decedent any notice that his acquiescence to this Arbitration Clause was not required to obtain treatment in the facility. Ms. Calandrelli only explained this arbitration clause to a resident if the resident specifically asked questions about this Arbitration Clause and even then Ms. Calandrelli did not sufficiently explain the

significant impact of this Arbitration Clause on Decedent's life as a resident there. Again, Ms. Calandrelli introduced this Arbitration Clause to residents as follows: "So I would say arbitration is where parties meet and an arbitrator would be there to hear both sides. And then the arbitrator would make the decision, just like a judge. And it's binding and it's a legal — like whatever the outcome is, it's a legal finding, so." (130:20-25). Clearly, this Arbitration Clause refers to the Commercial Arbitration Rules of the American Arbitration Association; however, Ms. Calandrelli never explained the Commercial Arbitration Rules of the American Arbitration Association to any residents during the admissions process because she was not familiar with said rules and their application. (134:24-136:4).

After review of the entire Admission Agreement, this Trial Court found this agreement did not require Decedent to initial after every clause, but rather, just a few select clauses chosen by the drafters of the Admissions Agreement such as the Arbitration Clause. Ms. Calandrelli did not make residents aware they were not required to sign said Admission Agreement and still could receive medical care and treatment; residents were not aware they were not required to consent to the Arbitration Clause; and residents were not permitted to rescind their consent to the Arbitration Clause within thirty (30) days. By initialing this Arbitration Clause, residents were forever relinquishing their fundamental rights to a trial by jury and to pursue an action in a court of law. This Arbitration Clause is also not reciprocal in that Presque Isle Rehabilitation and Nursing Center still retained its right to a trial by jury and its right to pursue a legal action in a court of law. A review of this Arbitration Clause in the Admissions Agreement demonstrates all terms described in *Cardinal* are not present. Thus, Appellee presented clear and convincing evidence this Arbitration Clause is unreasonably favorable to the drafters, the Appellants, and therefore, is substantively unconscionable.

For a contract to be unconscionable, a contract or contractual term must also be procedurally unconscionable which is the second part of the unconscionability analysis. Procedural unconscionability is defined as "no meaningful choice on the part of the other party regarding the acceptance of the provisions." *Cardinal v. Kindred Healthcare, Inc.*, 155 A.3d 46, 53 (Pa. Super. Ct. 2017), reargument denied (Apr. 3, 2017), appeal denied, 642 Pa. 620, 170 A.3d 1063 (2017) (internal citations removed).

Pennsylvania case law indicates a contract of adhesion "is a standardized contract form offered to consumers of goods and services on essentially 'take it or leave it' basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract." *Denlinger. Inc. v. Dendler*, 608 A.2d 1061, 1966 (Pa. Super. Ct. 1992). The most distinctive feature of an adhesion contract is that the "weaker party has no realistic choice as to its terms." *Id.*

In the instant case, Decedent decided to seek medical care and treatment from this nursing home after his hospitalization at Saint Vincent Hospital in March of 2015. Decedent, a double amputee suffering from dementia and depression, entered Presque Isle Rehabilitation and Nursing Center as the only nursing home his medical insurance would cover.

Through a number of assessments performed by the staff at Presque Isle Rehabilitation and Nursing Center, Decedent was diagnosed as having extremely poor vision. Decedent had "poor vision" with or without glasses. Decedent never read books or newspapers and often had trouble with the television remote. Appellee was not present to assist Decedent during his admission to Presque Isle Rehabilitation and Nursing Center although Ms. Calandrelli

indicated that if a resident had difficulty reading, she would not present the agreement to the resident until a member of the family or guardian was present.

Moreover, Decedent was unable to negotiate or counter the terms of the Arbitration Clause. Decedent also knew he needed a significant amount of assistance daily such as help with transferring from his bed, using the toilet, dressing himself, daily hygienic needs, and bathing. Decedent was never informed he would be allowed to remain in the facility if he chose not to agree to the Arbitration Clause. Decedent had no realistic choice as to the terms of the Arbitration Clause. Decedent knew he needed medical care and treatment, and if he did not sign the Admissions Agreement he would not receive said medical care and treatment he needed. Thus, Appellee presented through clear, precise and convincing evidence that this Arbitration Clause leaves the "weaker party with no realistic choice as to its terms," and therefore, is procedurally unconscionable.

As this Trial Court indicated previously, when analyzing the validity of an arbitration clause, trial courts should generally apply ordinary state-law principles governing the formation of contracts, "but in doing so, must give due regard to the federal policy favoring arbitration." *Cardinal v. Kindred Healthcare, Inc.*, 155 A.3d 46, 53 (Pa. Super. 2017). The intent of the Federal Arbitration Act [hereinafter FAA] is to place arbitration agreements "upon the same footing as other contracts." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974). Pennsylvania courts also hold arbitration agreements to be analyzed on the "same footing" as other contracts. *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 501 (Pa. 2016); *Salley v. Option One Mortg. Corp.*, 925 A.2d 115, 118-19 (Pa. 2007); *Kohlman v. Grane Healthcare Company*, No. 114 WDA 2019, --- A.3d --- *3 (Pa. Super, 2020); *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 879 (Pa. Super. 2006).

Pennsylvania law and Federal law require arbitration agreements be enforced as written. *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 880 (Pa. Super. 2006). Moreover, arbitration provisions can "be set aside only for generally recognized contracted defenses such as duress, illegality, fraud and unconscionability." *Id*. "Pennsylvania has a well-established public policy that favors arbitration, and this policy aligns with the federal approach expressed in the Federal Arbitration Act." *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660 (Pa. Super. 2013). However, applying state law equally to all contracts is not preempted by the FAA. *Thibodeau* at 880. As indicated in this Trial Court's Conclusions of Law at page 20, "Under both Pennsylvania law and the Federal Arbitration Act, contract defenses include unconscionability, fraud, or duress and may be invoked to invalidate arbitration agreements." (Trial Court's Conclusions of Law at p. 20). This Trial Court in the instant case considered and analyzed general state contract law principles applicable to all contracts in evaluating the validity of the Arbitration Clause and with due regard to the Federal Arbitration Act.

Since no meeting of the minds and consideration was present in formation of the Admissions Agreement and this Arbitration Clause is both substantively and procedurally unconscionable, this Trial Court properly concluded no valid agreement to arbitrate exists with due regard to the FAA. Since no valid agreement exists, this Trial Court did not proceed to the second prong of the test to determine whether the dispute is within the scope of the agreement.

Furthermore, the purpose of the Federal Arbitration Act [hereinafter FAA] is to alleviate parties from expensive litigation and to facilitate the already crowded court calendars. *Id*. Passage of the FAA was intended to enforce arbitration agreements between parties according

to the terms of the agreement. *Trombetta v. Raymond James Financial Services, Inc.*, 907 A.2d 550, 564 (Pa. Super. 2006).The FAA intended to place arbitration agreements on the same footing as other contracts. *Id*. at 569. An agreement to arbitrate and a "liberal policy favoring arbitration" does not mean a court simply can "rubber stamp" these disputes as "subject to arbitration." *Pisano* at 661. Both Pennsylvania law and Federal law indicate parties are not required to arbitrate when they have not agreed to do so. *Id*. (*see also Gaffer Ins. Co. v. Discover Reinsurance Co.*, 936 A.2d 1109, 1113 (Pa. Super. 2007). A trial court must still determine whether or not to compel arbitration. *Pisano* at 661. In the instant case, this Trial Court recognizes the significance and importance of the FAA and the necessity of giving the FAA due regard in determining whether a valid agreement to arbitrate exists.

Lastly, the coordinate jurisdiction doctrine applies in the instant case. The Honorable John Garhart of the Erie County Court of Common Pleas deals with the same Admissions Agreement in an unrelated case regarding the same Defendants, the Appellants in the instant case. *See Christina LaJohn v. Care One et al.*, Erie County Docket No. 12054-2014. The Supreme Court of Pennsylvania in the *Ario* case states Pennsylvania Law favors stability and certainty in judicial decisions:

> Pennsylvania law generally favors certainty and stability and these principles are embodied in various doctrines. Under the doctrine of stare decisis, a conclusion reached in one matter should be applied to future substantially similar matters. *See Stilp v. Commonwealth*, 588 Pa. 539, 905 A.2d 918, 954 (2006) ("The basic legal principle of stare decisis generally commands judicial respect for prior decisions of this Court and the legal rules contained in those decisions."). The law of the case doctrine sets forth various rules that embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter. *Commonwealth v. Starr*, 541 Pa. 564, 664 A.2d 1326, 1331 (1995). Pursuant to the coordinate jurisdiction doctrine, judges of equal jurisdiction sitting in the same case should not overrule each other's decisions. *Id*.

Ario v. Reliance Ins. Co., 602 Pa. 490, 505, 980 A.2d 588, 597 (2009). On October 17, 2017, at Docket Number 12054-2014, the Honorable John Garhart addresses the same Admissions Agreement at issue in the instant case. Judge Garhart concluded by finding this same Arbitration Clause was unconscionable. Judge Garhart states "Despite our federal and state policy favoring arbitration, we find the Arbitration Clause in this case unreasonably favorable to Presque Isle and offering a complete absence of meaningful choice on the part of the Resident, Mrs. LaJohn. For this reason, we find the Arbitration Agreement unconscionable and invalid." (Judge Garhart's Opinion, *LaJohn v. Care One et al*., Erie County Docket No. 12054-2014. October 17, 2017). No appeal was taken from Judge Garhart's decision. *Id*. Therefore, Judge Garhart's decision is a final decision finding this same Arbitration Agreement is unconscionable and invalid.

Therefore, for all of the reasons set forth above, this Trial Court respectfully requests the Pennsylvania Superior Court affirm this Trial Court's Order dated February 10, 2020, overruling Appellants' Preliminary Objections.

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

PNC BANK, N.A., CUSTODIAN FOR THE PETER J. FEDORKO, JR., INDIVIDUAL RETIREMENT ACCOUNT
v.
ANDREA LEHR

JUDGMENTS / SUMMARY

A grant of summary judgment is appropriate where the right to such judgment is clear and free from all doubt. Summary judgment may be granted when pleadings, depositions, interrogatories, etc. show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law.

CONTRACTS / SURETY AGREEMENTS / FORMATION

A suretyship agreement is present when a third party agrees to provide additional credit to a debtor for repayment of the debt by agreeing to undertake the debtor's obligation to the creditor if the debtor fails to perform. Generally, a suretyship agreement represents a three-party arrangement where a creditor is entitled to performance of a contract or contractual duty by the original debtor or the debtor's surety in instances where the debtor defaults.

CONTACTS / SURETY AGREEMENTS / TYPES OF SURETY AGREEMENTS

A surety agreement is a contract and the language of the surety agreement determines the surety's rights and liabilities. Under Pennsylvania law, sureties are divided into two classes: gratuitous sureties and compensated sureties. Pennsylvania courts distinguish between a gratuitous and compensated surety based on whether said surety received any pecuniary benefit from their status as surety.

CONTRACTS / SURETY AGREEMENTS / DISCHARGE OF SURETY

Pennsylvania courts have uniformly recognized that where the creditor and the debtor materially modify the terms of their relationship without obtaining the surety's assent thereto, the surety's liability may be affected. Where, without the surety's consent, there has been a material modification in the creditor-debtor relationship, a gratuitous (uncompensated) surety is completely discharged.

CONTRACTS / SURETY AGREEMENTS / DISCHARGE OF SURETY

Pennsylvania law discharges gratuitous sureties from liability following any alteration, material or not, to the underlying agreement between the parties: a gratuitous or accommodation guarantor is discharged by any change, material or not, and, even if he sustains no injury by the change, or if it be for his benefit, he has a right to stand upon the very terms of his obligation and is bound no further.

CONTRACTS / SURETY AGREEMENTS / DISCHARGE OF SURETY

Material modifications in the creditor-debtor relationship will not serve to discharge the surety where the surety has given prior consent to such material modification as part of the suretyship contract. In determining whether a surety contract must be given effect according to its own expressed intention as gathered from all the words and clauses used, taken as a whole, due regard being had also to the surrounding circumstances.

CONTRACTS / SURETY AGREEMENTS / DISCHARGE OF SURETY

To determine a party gave prior consent to a material modification that substantially increased the surety's risk, the suretyship agreement must contain express and specific language indicating the surety gave prior consent to such a material modification.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 10592-2017
501 WDA 2020

Appearances: John C. Melaragno, Esq., on behalf of Appellant PNC Bank
Kurt L. Sundberg, Esq., on behalf of Appellee Andrea Lehr

1925(a) OPINION

Domitrovich, J., June 15, 2020

This Trial Court denied Appellant's [PNC Bank, N.A.'s] Motion for Summary Judgment and granted Appellee's [Ms. Andrea Lehr's] Motion for Summary Judgment. On appeal, Appellant sets forth five (5) paragraphs in Appellant's 1925(b) Statement of Matters Complained of on Appeal, which this Trial Court has combined into a single issue: whether this Trial Court erred by denying Appellant's Motion for Summary Judgement and granting Appellee's Motion for Summary Judgment, where Appellee was a "gratuitous guarantor" who was discharged from her liability under a Lease Guaranty when Appellee was not provided notice and did not give her consent to material modifications that substantially increased her risk made to the three year Commercial Lease Agreement.

The facts of this case are as follows: On March 9, 2007, Appellant and Knoxville Restaurant Ventures, LLC [hereinafter KRV, LLC], entered into a three-year Commercial Lease Agreement [hereinafter Lease Agreement] for property located in Knoxville, Tennessee. KRV, LLC signed the lease to operate a "Quaker Steak and Lube" restaurant at the location. Also on March 9, 2007, Appellee and her spouse, Lance L. Lehr, an owner of KRV, LLC, executed a Lease Guaranty in favor of Appellant for any and all liability under this Lease Agreement. Appellee is the wife of Lance L. Lehr but is not associated with his business dealings in any way. Appellee was not a party to the Lease Agreement. Appellee was neither a member nor an owner of KRV, LLC, and she was never involved in any of KRV, LLC's operations. Appellee never visited the property in Knoxville, Tennessee.

The relevant terms of the Lease Agreement are clear and unambiguous. The Lease Agreement provided for a strict three-year term:

> 2. The Leased Property is leased to Lessee subject to all the terms, covenants and conditions contained herein for a term of three (3) years commencing on March 9, 2007 (hereinafter "Commencement Date") and through March 9, 2010, the Lease **to be fully complete and ended at the expiration of the period without notice.**

See Plaintiff's Motion for Summary Judgment, Exhibit C, "TERM" (emphasis added). The Lease Agreement provided for a strict rental payment schedule:

	ANNUAL	MONTHLY
Year 1	$150,000.00	$12,500.00
Year 2	$154,500.00	$12,875.00
Year 3	$159,135.00	$13,261.25

ADDITIONAL PAYMENT

Year 3	$66,306.24	$5,525.52

See Plaintiff's Motion for Summary Judgment, Exhibit C, "RENT". The Lease Agreement also explicitly precluded any potential renewal or extension of the lease:

> 3. **There are no renewal or extension options under the terms of this Lease.** Unless the Lessee has exercised its Option to Purchase as set forth in this Lease, any occupancy or use of the Leased Property subsequent to the 3 year Term shall be at the sole discretion of the Lessor and on such terms and conditions as are acceptable to Lessor.

See Plaintiff's Motion for Summary Judgment, Exhibit B, "RENEWAL OPTIONS" (emphasis added). The Lease Agreement's express and unambiguous terms set forth Appellee's obligation, secured under the Lease Guaranty, to a three-year Lease Agreement with a certain payment schedule that terminated without the possibility of renewal or extension unless KRV, LLC purchased the property. Contrary to the firm obligations as stated in the Lease Agreement between KRV, LLC and Appellant, both parties' performance during KRV, LLC's tenancy belied any intent of Appellant and KRV, LLC to follow the Lease Agreement. KRV, LLC consistently failed to perform under the Lease Agreement, and Appellant consistently allowed KRV, LLC to remain as a tenant. Now, Appellant seeks to hold Appellee liable not just under the Lease Agreement. Appellant and KRV, LLC did not adhere to themselves but to hold Appellee responsible for the material modifications Appellant and KRV, LLC made to the Lease Agreement without her consent.

KRV, LLC began making the scheduled rental payments in April of 2007 but missed its first payment by December of the same year. KRV, LLC simultaneously initiated bankruptcy court proceedings in December of 2007, becoming a Chapter 11 debtor-in-possession until December of 2009, when KRV, LLC filed a Motion to Dismiss this bankruptcy case. On January 19, 2010, KRV, LLC's case was dismissed by the U.S. Bankruptcy Court for the Western District of Pennsylvania. On February 21, 2014, Lance L. Lehr filed Chapter 13 Bankruptcy, which was subsequently converted to Chapter 7 Bankruptcy on May 19, 2014, and a Bankruptcy Court discharge was entered on November 12, 2014. Appellee was never a party to KRV's Chapter II bankruptcy proceedings nor was she involved in her spouse's subsequent Chapter 7 bankruptcy proceedings.

Despite KRV, LLC's financial troubles, Appellant and KRV, LLC continued to maintain their ongoing business relationship. KRV, LLC made payments on the property from January 2008 to September 2008, albeit in amounts that deviated from the Lease Agreement, after which time the Appellant and KRV, LLC began to exchange emails that described material modifications to the Lease Agreement. Both Appellant and KRV, LLC agreed the Bankruptcy Court had rejected the lease and structured a new weekly payment schedule, beginning in October of 2008. And while KRV, LLC fell short of its obligations here, making low and inconsistent payments, Appellant continued to allow KRV, LLC to occupy the property.[1]

[1] As this factual pattern demonstrates, Appellant was aware of KRV, LLC's material defaults of the Lease Agreement beginning in December of 2007. KRV, LLC consistently did not meet its rental payment obligations under the Lease Agreement. This is discussed further in footnote 3, *infra.*, which addresses the applicable statute of limitations.

On March 27, 2009, however, Appellant sought rental payment increases from KRV, LLC: "the winter months are over and it is time for a rental increase ... In the meantime, advice [sic] what the rent increase will be commencing in April so that the IRA can decide how it wishes to proceed." *See* Fedorko Depo., Exhibit 14. While KRV, LLC was making these 2009 payments, Appellant discovered KRV, LLC had not been paying the required taxes on the property, and Appellant again modified the payment terms to allow KRV, LLC to focus on paying the property taxes. All the while, Appellant and KRV, LLC continued to meet and discuss extending the lease term and reasonable rental payments for such extension, as shown by emails between Appellant and KRV, LLC. *See* Fedorko Dep., Exhibits 16, 17, & 18. This ongoing negotiation was also demonstrated by Appellant allowing KRV, LLC to remain Appellant's tenant until December 31, 2013 without Appellant ever filing a notice of default or suggesting a new lease was required.

All of the negotiations between Appellant and KRV, LLC regarding rental payments and the extension of the Lease Agreement occurred unbeknownst to Appellee. Appellee was never informed of any of these new items and never gave her consent or approval to any of these new items. And while Appellant and KRV, LLC parted ways in December of 2013, it was not until June 26, 2017 that Appellant filed a Complaint against Appellee to recover $2,317,681.60 in damages, covering KRV, LLC's tenancy from April of 2007 to December of 2013.

1. This Trial Court did not err by granting Appellee's Motion for Summary Judgment and Denying Appellant's Motion for Summary Judgment.

a. Summary Judgment

The legal standard for granting a Motion for Summary Judgment in Pennsylvania is as follows. Rule 1035.2 of the Pennsylvania Rules of Civil Procedure states in relevant part: " ... any party may move for summary judgment ... 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, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to the jury."

A grant of summary judgment is appropriate "where the right to such judgment is clear and free from all doubt." *Toy v. Metropolitan Life Ins. Co.*, 928 A.2d 186, 195 (2007). Summary judgment may be granted when [pleadings, depositions, interrogatories, etc.] show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law. *Coleman v. Coleman*, 663 A.2d 741 (Pa. Super. 1995). Where the non-moving party bears the burden of proof on an issue, they may not merely rely on their pleadings or answers to survive summary judgment. *Thompson v. Ginkel*, 95 A.3d 900, 904 (Pa. Super. 2014) (quoting *JP Morgan Chase Bank, N.A. v. Murray*, 63 A.3d 1258, 1261-62 (Pa. Super. 2013)). To defeat a summary judgment motion, the adverse party must come forth with evidence showing the existence of the facts essential to the cause of action or defense. *See* Pa.R.Civ.P. 1035.2, Note.

b. Suretyship Agreements

Relevant case law on suretyship agreements is summarized as follows. A suretyship

agreement is present when a third party agrees to provide additional credit to a debtor for repayment of the debt by agreeing to undertake the debtor's obligation to the creditor if the debtor fails to perform. *See Continental Bank v. Axler*, 510 A.2d 726, 729 (Pa. Super. 1986). Generally, a suretyship agreement represents a three-party arrangement where a creditor is entitled to performance of a contract or contractual duty by the original debtor or the debtor's surety in instances where the debtor defaults. *Id*.

A surety agreement is a contract and the language of the surety agreement determines the surety's rights and liabilities. *Beckwith Machinery Co. v. National Union Fire Ins. Co. of Pittsburgh*, 809 A.2d 403, 406 (Pa. Super. 2005). Under Pennsylvania law, sureties are divided into two classes: gratuitous sureties and compensated sureties. Pennsylvania courts distinguish between a gratuitous and compensated surety based on whether said surety received any pecuniary benefit from their status as surety. *McIntyre Square Associates* 827 A.2d at 452 n.8. For example, in the case of *J.F. Walker Co., Inc. v. Excalibur Oil Group, Inc.*, the Pennsylvania Superior Court held the sole shareholder in a corporation was a compensated surety where the shareholder's guarantee secured a line of credit to his corporation, despite not receiving direct compensation for the guaranty. 792 A.2d 1269, 1272 (Pa. Super. 2002). Pennsylvania courts protect gratuitous sureties from having their obligations extended by implication or by construction. *Id*. (citing *Barratt v. Greenfield*, 9 A.2d 188, 189 (Pa. Super. 1939). Their liability is "*strictissimi juris*." *Id*.

A surety may be discharged from liability depending on both modifications to the underlying agreement being secured and on whether the surety is compensated or gratuitous. Our Supreme Court has explained: " ... Pennsylvania courts have uniformly recognized that where the creditor and the debtor materially modify the terms of their relationship without obtaining the surety's assent thereto, the surety's liability may be affected. **Where, without the surety's consent, there has been a material modification in the creditor-debtor relationship, a gratuitous (uncompensated) surety is completely discharged.**" *McIntyre Square Assoc. v. Evans*, 827 A.2d 446, 452 (Pa. Super. 2003) (quoting *Reliance Ins. v. Penn Paving, Inc.*, 734 A.2d 833, 838 (Pa. 1999)) (emphasis added). The presence of a material modification in the creditor-debtor relationship is sufficient to discharge a gratuitous surety from their obligation if it is made without the surety's consent.

"A material modification in the creditor-debtor relationship consists of a significant change in the principal debtor's obligation to the creditor that in essence substitutes an agreement substantially different from the original agreement on which the surety accepted liability." *J.F. Walker Co., Inc.*, 792 A.2d at 1274 (citing *Continental Bank*, 510 A.2d at 729; Restatement (First) of Security § 128, cmt. d). Material modifications occur when the principal debtor and creditor insert new obligations into an agreement or replace current obligations with new obligations. *See* Restatement (First) of Security § 128, cmt. d, Illustrations. For example, altering the specifications and timetable in a construction contract for the building of a home or extending a lease and increasing the rent are both considered material modifications to the principal debtor-creditor relationship. *Id*. This was the case in *McIntyre Square Assoc.* 827 A.2d 446, where the Pennsylvania Superior Court held the doubling of the lease term and the significant increase in the rent were not only material modifications, but material modifications that substantially increased the surety's risk. *Id*. at 452.

Moreover, Pennsylvania law discharges gratuitous sureties from liability following any

alteration, material or not, to the underlying agreement between the parties: **"[a] gratuitous or accommodation guarantor is discharged by any change, material or not**, and, even if he sustains no injury by the change, or if it be for his benefit, he has a right to stand upon the very terms of his obligation and is bound no further." *Magazine Digest Pub. Co. v. Shade*, 199 A. 190, 192 (Pa. 1938) (emphasis added).

While material modifications made without the surety's consent will discharge a gratuitous surety from liability under an agreement, a surety can give prior consent to such material modifications in the surety agreement itself. " ... [M]aterial modifications in the creditor-debtor relationship will not serve to discharge the surety where the surety has given prior consent to such material modifications as part of the suretyship contract." *Reliance Ins. Co. v. Penn Paving, Inc.*, 734 A.2d 833, 838 (Pa. 1999). "In determining whether a surety has consented to a material modification, the suretyship 'contract must be given effect according to its own expressed intention as gathered from all the words and clauses used, taken as a whole, due regard being had also to the surrounding circumstances.'" *Id.* (quoting *Continental Bank*, 510 A.2d at 730). The suretyship agreement must be interpreted, in light of the surrounding circumstances of the agreement, to determine whether a party consented to the material modification in question.

Furthermore, to determine a party gave prior consent to a material modification that substantially increased the surety's risk, **the suretyship agreement must contain express and specific language** indicating the surety gave prior consent to such a material modification. *Reliance Ins. Co.*, 734 A.2d at 838-39 (emphasis added). Otherwise, the Trial Court must discharge the surety from the surety's liability if the material modifications substantially increase the surety's risk.

c. This Trial Court did not err by finding Appellee was a gratuitous surety who was discharged from liability under the Lease Guaranty after Appellant and KRV, LLC materially modified the Lease Agreement by increasing the rent payments and extending the lease term thereby substantially increasing her risk without her consent.

This Trial Court found that Appellee, as a gratuitous surety, was discharged from her liability under the Lease Guaranty after Appellant and KRV, LLC materially modified the Lease Agreement by increasing the rent payments and by extending the lease term. Furthermore, this Trial Court found the modifications made by Appellant and KRV, LLC to the rent payments and lease term were material modifications that substantially increased Appellee's risk. This Trial Court, after examining the Lease Guaranty, giving due regard to the surrounding circumstances of the transaction, and finding the Lease Guaranty did not include express or specific language contemplating waiver of material modifications that substantially increased Appellee's risk, found Appellee did not give prior consent to material modifications of the Lease Agreement that substantially increased Appellee's risk.

Appellee was a gratuitous surety. Appellee was not compensated in any recognized manner for her guaranty of the Lease Agreement. She was not directly compensated for her guaranty, nor did she have any ownership interest in KRV, LLC. Appellee was not involved in KRV, LLC's management of the property; in fact, she never visited the property located in Knoxville, Tennessee. Appellant alleges Appellee is a compensated surety solely through

here status as Lance L. Lehr's spouse.[2] Extending Appellee's obligations under the Lease Guaranty by such implied compensation, however, is improper. No such "compensation via marriage" doctrine exists in Pennsylvania law. Therefore, this Trial Court concluded, as a matter of law, Appellee was a gratuitous surety, and the issue then became whether Appellee gave her consent to modifications made to the Lease Agreement.

It is undisputed that Appellee was never notified of any modifications to the Lease Agreement nor did she give her consent to any modifications to the Lease Agreement. Appellee stated in her deposition she never received notice concerning any modification of the Agreement, to which Appellant's counsel agreed during this Trial Court's Hearing on Summary Judgment. (N.T.: Motion for Summary Judgment Hearing, February 25, 2020, p. 25: 2-13; 14-20). It is also undisputed no modified agreement in writing was ever produced or presented to Appellee memorializing any of the modifications Appellant and KRV, LLC made to the Agreement. Given that Appellee was never notified of any discussions or negotiations between Appellant and KRV, LLC concerning the Lease Agreement, Appellee could never have given her consent to any modification made to the Lease Agreement.

The modifications KRV and Appellant made to the Lease Agreement were not only material but substantially increased Appellant's risk under the Lease Agreement as well. The terms of the Lease Agreement Appellee signed on March 9, 2007 stipulated a three-year term complete with a consistent payment schedule to conclude on March 9, 2010. *See* Appellant's Motion for Summary Judgment, Exhibit C, "TERM". This Lease Agreement did not contain any extension or renewal provisions. *Id*. at "RENEWAL OPTIONS". The Lease Agreement called for monthly payments of $12,500.00 in year 1; $12,875.00 in year 2; and $13,261.25 in year 3; for a total of $463,635 over three years. *Id*. at "EXHIBIT B". The Agreement only provided for a month-to-month holdover tenancy should KRV remain on the premises past the three-year term. *Id*. at "HOLDING OVER".

Due to the financial difficulties KRV, LLC experienced during its tenancy, however, Appellant and KRV, LLC engaged in a series of material modifications to the Lease Agreement to ensure the continued tenancy of KRV, LLC. Appellant and KRV, LLC more than doubled the initial Lease Agreement term, extending it from three to over six years, and increased the monthly rental payments. *See* Fedorko's Depo., Exhibit 14. Appellee was obligated to secure a three-year lease with rental payments to total $463,635 plus various other expenses such as property taxes. The degree to which these material modifications increased Appellee's risk is shown by Appellant's initial complaint establishing KRV, LLC's last date of tenancy was December 31, 2013, resulting in over $2 million in damages. The obligations under the initial Lease Agreement had clearly been substituted for substantially different and riskier obligations. The initial Lease Agreement was substituted for a new

[2] Compensated sureties are not discharged from their liability under a surety agreement as easily as gratuitous sureties. The only instance where a material modification, made without the surety's consent, will not discharge a gratuitous surety from liability is if the material modification is entirely to the surety's benefit. On the other hand, the only material modification, made without the surety's consent, that will discharge a compensated surety from liability is if the material modification substantially increases the surety's risk. *See* Restatement (First) of Security § 128. Appellant argues both sides of this distinction: that Appellee was a compensated surety compensated by her marriage to Lance Lehr; and that even if she was a gratuitous surety, the modifications were entirely to the benefit of Appellee. However, this Trial Court found Appellant's arguments unconvincing. Appellee is a gratuitous surety, and even if she were a compensated surety, she would be discharged from liability as the material modifications substantially increased her risk.

agreement Appellee never secured, similar to the surety in *McIntyre Square Assoc.* 827 A.2d at 452 (see *supra*). The Pennsylvania Superior Court found the surety's lease was materially modified the surety's risk increased. *Id*.

As a gratuitous surety, Appellee was entitled to give her consent to material modifications Appellant and KRV, LLC planned to make to the Lease Agreement that substantially increased her risk. Alternatively, assuming *arguendo* Appellee was a compensated surety, she would still be discharged from her liability, as compensated sureties are discharged from all liability if material changes that substantially increase their risk are made without their consent. *See McIntyre Square Assoc.*, 827 A.2d at 452. Since she was never notified, she could not have given her consent at the time Appellant and KRV, LLC made these material modifications. Moreover, the Lease Guaranty itself, giving due regard to the surrounding circumstances of the transaction, cannot be interpreted to have granted prior consent to Appellant and KRV, LLC's material modifications that substantially increased Appellee's risk. The Lease Guaranty did not contain any provision that expressly or specifically contemplated granting material modifications that substantially increased Appellee's risk. Appellee, as a gratuitous surety, who secured an express and unambiguous three-year lease, could not have contemplated or predicted the modifications in question. A review of the relevant case law guides this Trial Court's analysis as the facts of the instant case are very similar to the facts in *Reliance Ins. Co.* and *McIntyre Square Assoc.*

In *Reliance*, the Pennsylvania Supreme Court, following the reasoning of the Superior Court in *Continental Bank*, held the party in question did not waive notice of material modifications that substantially increased the surety's risk because no express or specific language was in the agreement demonstrating the surety gave prior consent to such modifications. *Reliance Insurance Company*, 734 A.2d at 451. The surety had its risk in a payment bond agreement increased from $200,000 to $5 million, which substantially increased the surety's risk, and the bond insurer, *Reliance Insurance Co.*, claimed the surety gave prior consent to future loans in the surety's indemnification agreement. *Id*. at 833-34. The Supreme Court disagreed: "[p]ursuant to the twelfth paragraph, [surety] waived the right to notice of an assent, assignment, change in time or manner of payment, or other change or extension in the terms of a bond approved by *Reliance*. **The excerpted provisions do not contain any language constituting consent to a material increase in the risk of liability to [surety] or language expressly waiving notice of a material modification in the risk of liability.** Nor do the provisions expressly refer to a material modification of the bonding line." *Id*. at 452-53 (emphasis added).

In *Continental Bank*, the Pennsylvania Superior Court ruled the surety was still bound to the underlying agreement since their surety agreement stipulated they were bound to the liabilities of successor entities. 510 A.2d at 729-30. The surety claimed they were discharged from liability by the debtor company's sale to a third party. *Id*. Key to the Pennsylvania Superior Court's analysis, as explained by the Pennsylvania Supreme Court, is the specific language contained in the surety agreement itself: "[t]he suretyship contract signed by [sureties] **specifically provided that [sureties] had waived notice of any fact which might materially increase their risk**, that [creditor] had the right without notice to or consent of [sureties] to modify, change or supplement any indebtedness without affecting or discharging [sureties'] liabilities, and that **[sureties] would be obligated for the liabilities**

of any partnership, firm, corporation or other company which may be a successor to [debtor].” *Id.*; *Reliance*, 734 A.2d at 838-39.

Finally, in *McIntyre Square Assoc.*, the Pennsylvania Superior Court held the doubling of a lease term and a significant rental increase to be material modifications that substantially increased the surety’s risk. 827 A.2d at 453. The Superior Court then examined the surety agreement, specifically the “No Discharge of Guaranty” provision to determine if the surety gave prior consent to material modifications that substantially increased the surety’s risk. *Id.* at 453-54. The Court held the provision’s language that the liability of the Guarantor hereunder shall not be discharged notwithstanding **“any amendment or modification of the provisions of the Lease Agreement”** made without notice **was not, under *Reliance*, a grant of prior consent to material modifications that substantially increase the surety’s risk.** *Id.* While the Pennsylvania Superior Court found the language “any act, thing, omission or delay to do any act or thing that may, in any manner, or to any extent, vary the risk of Guarantor ... ” would have been sufficient to give prior consent to material modifications that substantially increase the surety’s risk, the language contained within the same sentence “or that would otherwise operate as a discharge of any Guarantor as a matter of law ... ” made the language ambiguous. *Id.*

In the instant case, the Lease Guaranty does not contain any express or specific language such as “any act, thing, omission or delay to do any act or thing that may, in any manner, or to any extent, vary the risk of Guarantor ... ” that could be interpreted as the surety’s grant of prior consent to material modifications that substantially increase the surety’s risk. The instant Lease Guaranty is thus distinguishable from the agreements analyzed in *Continental Bank* and *McIntyre Assoc.*, that were found to have given or would have given, respectively, prior consent to material modifications that substantially increase the surety’s risk.

The instant Lease Guaranty contains only one provision that contemplates waiver of notification. *See* Appellant’s Motion for Summary Judgment, Exhibit A, “Waiver of Notices.” The waiver provision states: “[w]ithout notice to or further assent from the Guarantor, the Landlord **may waive or modify any of the terms or conditions of the Lease ... ”** (emphasis added). This term, as the agreement examined in *Reliance*, does not contain express or specific language regarding material modifications that substantially increase Appellee’s risk. The Lease Guaranty also contains a discharge of liability provision; however, the provision in the instant case does not contain any language contemplating a variance in the risk of the surety based on the actions of the principal debtor-creditor.

Moreover, when you consider the circumstances surrounding the transaction between Appellee, Appellant, and KRV, LLC, it becomes even clearer Appellee had no intention of waiving her right to notification and consent to material modifications that would substantially increase her risk. Appellee is not a commercial party nor was she connected in any way to the subject of the transaction. She was not a member of KRV, LLC, and she did not benefit financially, either directly or indirectly, in any way from the restaurant or from KRV, LLC’s tenancy on the property. Appellee was a gratuitous surety who guaranteed her spouse’s company’s initial three-year Lease Agreement.

The instant Lease Agreement itself in the instant case denotes a strict payment schedule and states multiple times its term is for three years. This Lease Agreement did not contain an extension or renewal provision but rather expressly forbade any extension or renewal.

Appellee could not have been put on notice to expect such modifications; and, of course, Appellant and KRV, LLC did not notify her of any modification or any default. Given Appellee did not have any direct connection to the business dealings of KRV, LLC, Appellant, or the restaurant itself, Appellee could not have been expected to become informed of the financial status between the Appellant and KRV, LLC. In fact, Appellant never communicated with Appellee in any manner and continuously granted KRV, LLC the opportunity to remain on the premises instead of claiming default. Appellant is now suing Appellee over four years after KRV, LLC last occupied the property and approximately ten years after KRV, LLC missed its first rental payment. Appellant's behavior clearly indicates Appellant did not consider Appellee as having given prior consent to the material modifications that Appellant and KRV, LLC made to the Lease Agreement.

After reviewing the instant Lease Guaranty, giving due regard to the surrounding circumstances of the transaction, this Trial Court found Appellee did not give prior consent to material modifications of the Agreement that substantially increased Appellee's risk. Appellant was required to obtain Appellee's consent to any material modifications that substantially increased her risk before Appellant and KRV, LLC made the material modifications in order to maintain Appellee's liability under the Lease Guaranty. Since Appellant failed to obtain her consent and since the extension of the lease term and the increase in rental payments were material modifications that substantially increased her risk, Appellee was discharged of her liability under the Lease Guaranty. Moreover, Appellee was discharged whether the modifications were material or not, as Pennsylvania law still holds gratuitous guarantors are discharged from liability following any modification to the Lease Agreement, as gratuitous guarantors have the right to stand on the terms to which they initially agreed.

For all of the above reasons, this Trial Court granted Appellee's motion for Summary Judgment and denied Appellant's Motion for Summary Judgment. This Trial Court also found the issue of the statute of limitations to be moot after finding Appellee was discharged of any liability under the lease guaranty.[3] Therefore, this Trial Court respectfully requests the Pennsylvania Superior Court affirm this Trial Court's Order dated March 19, 2020, denying Appellant's Motion for Summary Judgment and granting Appellee's Motion for Summary Judgment, thereby dismissing Appellant's civil action with prejudice.

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

[3] This Trial Court notes the statute of limitations would have barred Appellant's cause of action. The Superior Court stated in *Leedom v. Spano*, 647 A.2d 221, 224-29 (Pa. Super. 1994), "[i]t is a fundamental principle of surety law that upon default by the principal, both principal and surety thereupon become liable on the original undertaking ... Thus, the creditor's cause of action against the surety accrues upon material default by the debtor." In the instant case, as demonstrated in the facts listed above, Appellant was well aware of KRV, LLC's material defaults under the Lease Agreement beginning in December of 2007. Rather than declare KRV, LLC in default, Appellant began a series of material modifications to the Lease Agreement to allow KRV, LLC to remain in the property. And even assuming *arguendo* Appellee is liable for KRV, LLC's material defaults for the Lease Agreement's full three-year term — that term ended on April 9, 2010. Appellant did not declare default on KRV, LLC during this period and did not attempt to hold Appellee liable under the Lease Guaranty until it filed its cause of action on June 26, 2017, well after the expiration of the four year statute of limitations. *See* 42 Pa.C.S. § 5525(a)(8) (Surety agreement is a contract. *See Beckwith Machinery Co.*, 809 A.2d at 406 (*supra*)).

IN RE: NOMINATION PETITION OF EDWARD T. DIMATTIO, JR. FOR THE OFFICE OF CLERK OF RECORDS, ERIE COUNTY, PA IN THE MAY 18, 2021 MUNICIPAL PRIMARY

ELECTION LAW

Section 1104 of the Public Official and Employee Ethics Act ("Ethics Act"), 65 Pa.C.S.A. §§1101 *et seq.*, requires candidates for county-level or local office to file a statement of financial interests for the preceding calendar year with the governing authority of the political subdivision in which he is a candidate on or before the last day for filing a petition to appear on the ballot for election. This provision also requires a copy of the statement of financial interests to be appended to such petition. 65 Pa.C.S.A. §1104(b)(2).

ELECTION LAW

Section 1104(b)(3) of the Ethics Act sets out the consequence for non-compliance with the requirements for filing the statement of financial interests as follows: "Failure to file the statement in accordance with the provisions of this chapter shall, in addition to any other penalties provided, be a fatal defect to a petition to appear on the ballot. 65 Pa.C.S.A. §1104(b)(3).

ELECTION LAW

The legislature, by the plain wording of the Ethic Act, has provided for strict enforcement of the requirements for the statement of financial interests, on pain of disqualification from ballot access.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 10531-2021

Appearances: J. Timothy George, Esq., for Petitioner, Heather Weismiller
Thomas A. Pendleton, Esq., and William S. Speros, Esq., for Respondent, Edward T. DiMattio, Jr.
Erie County Board of Elections

MEMORANDUM

Brabender, Jr., J. March 29, 2021

"There was a man named Willie Jay,
Who died maintaining his right of way;
He was right, dead right, as he sped along,
But he's just as dead as if he were wrong."

The above was my father's adaptation of a poem in Dale Carnegie's famous 1936 book, *How to Win Friends and Influence People* (Simon & Shuster). The whimsical rhymes beg the question: can Willie Jay live because he knew he had the right of way and did nothing morally or ethically wrong?

On March 9, 2021, Edward T. DiMattio, Jr., the Respondent herein, filed several petitions to have his name as a candidate printed on the official ballot of the Republican Party for

the primary election for the year 2021, for the office of Clerk of Records of Erie County, Pennsylvania. The Respondent also filed a Statement of Financial Interests which was appended to the petitions. A Statement of Financial Interests is required, by statute to be filed for the preceding calendar year, in this instance for the year 2020. At box number 7 of the form, the Respondent indicated that his statement is for the year "2021." The statement is further unsigned, unattested and undated.

On March 16, 2021, one week after the last date to file nominating petitions, the Respondent did file another Statement of Financial Interests. The completely new form has the year filled in at box number 7 as "2020," and the said statement is signed, attested and dated.

Also on March 16, 2021, Erin Magorien, the original Petitioner herein, filed a Petition to Set Aside Nomination Petition and Objections to Nomination Petition in Accordance with the Pennsylvania Election Code, 25 P.S. Section 2937. The Petitioner avers that the Respondent's nomination petitions are fatally defective and, as such, the Respondent's name should not be placed on the 2021 Republican primary ballot. Specifically, the Petitioner avers that the March 9, 2021 Statement of Financial Interests is inadequate because the form was completed for the calendar year 2021, rather than for the "preceding calendar year" as required by 65 Pa.C.S.A. Section 1104 (b)(2). The Petitioner avers this defect is "fatal," thereby precluding the Respondent from having his name placed on the ballot for the 2021 primary election, pursuant to 65 Pa.C.S.A. Section 1104 (b)(3). See *In re: Nomination Petition of Robert Guzzardi*, 99 A.3d 381 (Pa. 2014). The Court later granted a request to substitute Petitioner Magorien with Petitioner Heather Weismiller in this action.[1]

The Petitioner relies on those same authorities to aver that the Statement of Financial Interests is fatally defective "because the … Statement … fails to fully disclose financial interests for the preceding calendar year, is substantially incomplete, unsigned, undated and/or materially inaccurate such that it is, therefore, the functional equivalent of not being filed at all …" (Petition, paragraph 6).

On March 22, 2021, the Respondent filed an Answer to the Petition, a New Matter, and Motion to Strike Portions of Paragraph 6(c) of the Petition. In his Answer, the Respondent admits the Statement of Financial Interests appended to the Petition identifies the incorrect year, "2021", at box number 7 of the form. The Respondent maintains this was merely inadvertent error and an honest mistake; and that the statement actually describes the Respondent's financial interests for 2020. The Respondent avers he corrected the error by the filing of the second Statement of Financial Interests on March 16, 2021. The Respondent agrees that the holding in *Guzzardi* is that a petitioner's failure to file a nomination petition *by the required deadline* is a fatal defect; but, that *Guzzardi* and the "fatal defect rule" should not apply to content-based clerical errors made in good faith, which the Respondent contends occurred in this case. The Respondent further asserts that, pursuant to *In re Alexandroff*, 399 C.D. 2017 (Pa. Commw. 2017) and *In re Wissinger*, 18 A.3d 445 (Pa. Commw. 2011), good faith errors or omissions, including the failure to sign the Statement of Financial Interests, are defects amenable to correction.

In the New Matter, the Respondent asserts that the Statement of Financial Interests filed

[1] On March 23, 2021, the Court granted the request to substitute Petitioner Magorien with Petitioner Heather Weismiller in this action, due to scheduling conflict.

on March 16, 2021 is an amendment to the original statement; it is permissible; and it cures the alleged defects.

In the Motion to Strike, the Respondent asserts that paragraph 6(c) of the Petition to Set Aside Nomination Petition and Objections to Nomination Petition contains the following boilerplate and impermissible averments: a) the statement fails to fully disclose financial interests for the preceding calendar year, and b) the statement is substantially incomplete and/or materially inaccurate.

On March 23, 2021, the Petitioner filed a Brief in Support of Objections to Nomination Petition filed by the Respondent. Therein, the Petitioner avers the Respondent's nomination petitions must be stricken and set aside pursuant to the plain language of 65 PA.C.S.A. §1104(b)(3) for failure to properly file a Statement of Financial Interests for the preceding calendar year per 65 Pa.C.S.A. §1104(b)(2). Relying upon *Guzzardi*, supra, and *In re: Petition of Cioppa*, 626 A.2d 146 (Pa. 1993), the Petitioner avers that the said failure constitutes a *fatal defect* (emphasis added) in violation of the bright-line rule established by the Legislature and cannot be cured by untimely amendment. Petitioner further avers in the brief, as he did in the petition filed March 16, 2021, that the Statement of Financial Interests failed to fully disclose the Respondent's financial interests for the preceding year, and is substantially incomplete, ambiguous, unsigned, undated and/or materially inaccurate such that it is the functional equivalent of not being filed at all.

The Petitioner avers block number 10 fails to disclose any income for either 2020 or 2021 from any sources of employment. The Petitioner avers that, by failing to sign the statement filed March 9, 2021, the Respondent did not affirm the truth of the disclosures or verify under penalty of criminal prosecution the correctness of the Statement of Financial Interests, thereby rendering the filing unreliable and meaningless. The Petitioner avers these various defects are the functional equivalent of no filing of a Statement of Financial Interests at all; the defects are fatal; and the defects cannot be cured by re-filing an untimely Statement of Financial Interests. The Petitioner further avers the remedy established by the Legislature and as applied by the Pennsylvania Supreme Court is the striking of the nomination petition and removal of the Respondent from the ballot.

On March 24, 2021, a hearing was held on the petition and answer thereto. The Petitioner presented the testimony of Mr. DiMattio on cross-examination. The Petitioner introduced the following: Exhibit "A", the packet of Nominating Petitions and Statement of Financial Interests filed March 9, 2021; Exhibit "B", the Erie County Board of Elections packet of "General Information About Running For Office on 2021," which included a notice of the March 9, 2021 filing deadline and specific information on how to complete the Statement of Financial Interests; Exhibit "C", instructions published by the Commonwealth of Pennsylvania State Ethics Commission on completing the Statement of Financial Interests; Exhibit "D", a Statement of Financial Interests which the Respondent filed in March of 2017 when he sought to be placed on the ballot for Erie County Executive; and Exhibit "E", a packet of filings in a different petitioner's challenge to the nominating petition(s) and a Statement of Financial Interests of another person seeking office in a prior election.[2] Exhibit "E" included an Order of March 25, 2019 by the undersigned directing removal of

[2] The nominating petition challenge was filed at Erie County Civil Action Docket No. 10858-2019.

the name of the respondent therein from the ballot for certain defects in the Statement of Financial Interests including the incorrect year at box number 7.

Mr. DiMattio testified that the Statement of Financial Interests of March 7, 2017 (Petitioner's Exhibit "D"), which he filed with nominating petitions in March of 2017 for his name to be placed on the ballot in another primary election, was indeed for the then-current calendar year of 2017 per box number 7 on the form, rather than for the preceding calendar year, and no clerical or inadvertent error occurred in completing the form in this manner. Mr. DiMattio admitted he erroneously submitted the Statement of Financial Interests for the year 2017 rather than for 2016 and he did not complete the form for the "preceding year" as he should have. Since no challenge to his nominating petitions was raised, however, the error was of no consequence. As to the subject Statement of Financial Interests filed March 9, 2021, Mr. DiMattio stated that likewise, the current calendar year, "2021", is written in box number 7. Mr. DiMattio testified this year his placement in box number 7 of the current calendar year, rather than the preceding calendar year, was an oversight and inadvertent error with no intent to deceive, and that the form itself was eventually completed for the preceding year, 2020.

Mr. DiMattio testified he indicated at box number 6 of the Statement of Financial Interests form filed March 9, 2021 his occupation or profession was "Project Manager," though he has not been employed as such since 2019. He testified he considers this his profession. Mr. DiMattio admitted he erred in not signing and attesting as true and in not dating the Statement of Financial Interests form. Mr. DiMattio further testified he did not know how this occurred except that he had been signing a lot of forms around that particular time frame.

Appended as Exhibit 1 to the Respondent's Answer is the Statement of Financial Interests filed on March 16, 2021, one week after the last date to file nomination petitions. This statement appears to be a newly created document with box number 7 properly completed. It bears Mr. DiMattio's signature and is dated March 16, 2021. Mr. DiMattio testified he thought he was allowed to file an amendment to the form.

Tonia Fernandez, Elections Supervisor at the Erie County Board of Elections, attended the hearing and was called as the Court's witness. Ms. Fernandez testified that when common mistakes are made on Petitions filed with the office, the staff generally attempts to assist by reaching out and contacting the filer. However, this is not the practice of the office where there is an error or omission on a Statement of Financial Interests. Normally, if a Statement of Financial Interests is not signed, it would not be accepted by her office. In this case, Ms. Fernandez believes that the clerk who accepted the Respondent's statement on March 9, 2021 was new and she did not catch the error and omission.

The parties concurred that the issue for the Court to decide is whether any of the defects in the Statement of Financial Interests filed on March 9, 2021 is a fatal defect to the petition to appear on the ballot.

RELEVANT LEGAL PRINCIPLES AND DISCUSSION

Pursuant to Section 1104 of the Public Official and Employee Ethics Act ("Ethics Act"), 65 Pa.C.S.A. §§1101 *et seq.*, candidates for county-level or local office:

> *shall* file a statement of financial interests *for the preceding calendar year* with the governing authority of the political subdivision in which he is a candidate *on or before the last day for filing a petition to appear on the ballot* for election. A copy of the statement of financial interests shall also be appended to such petition.

65 Pa.C.S.A. §1104(b)(2) (emphasis added). *Id.* at 382.

Section 1104(b)(3) of the Ethics Act sets out the consequence for non-compliance with these requirements:

> "Failure to file the statement in accordance with the provisions of this chapter *shall*, in addition to any other penalties provided, *be a fatal defect to a petition to appear on the ballot*.

65 Pa.C.S.A. §1104(b)(3) (emphasis added).

As recognized by the Supreme Court of Pennsylvania in *In re Nomination Petition of Robert Guzzardi*, supra, the legislature, by the plain wording of the statute, has "provided for strict enforcement of this requirement, on pain of disqualification from ballot access." *Id.* at 382.

The Pennsylvania Supreme Court in *Guzzardi*, supra, addressed enforcement of the statutory "fatal defect rule" in the context of a candidate for a state-level public office who failed to make the mandatory filing of the statement of financial interests for the preceding calendar year with the state Ethics Commission within the time period proscribed, *i.e.*, on or before the last day for filing a petition to appear on the ballot pursuant to 65 Pa.C.S.A. §1104(b)(1). Nonetheless, the Court in Guzzardi determined disposition of the issue was governed by §1104(b)(3) which further provides:

> *No petition to appear on the ballot for election shall be accepted by the respective State or local election officials unless the petition has appended thereto a statement of financial interests as set forth in paragraphs (1) and (2).*

65 Pa.C.S.A. §1104(b)(3) (emphasis added).

It is clear by the wording of §1104(b)(3) that the consequence of noncompliance with §1104(b)(2) is equally driven by §1104(b)(3). As the Commonwealth Court of Pennsylvania has observed, "[S]ection 1104(b)(3) has real teeth and is quite harsh in its scheme." *In re Nomination Petition of Vernon T. Anastasio*, 820 A.2d 880, 881 (Pa. Commw. 2003) (claim of noncompliance with §1104(b) for failure to report certain income which error the potential candidate claimed was unintentional and harmless). See also, *In re Nomination Petition of Robert McMonagle*, 793. A.2d 174, 178 (Pa. Commw. 2002) ("Although the result is harsh, Section 1104(b)(3) leaves the courts no room for excusing such mistakes."; claim of error for filing in wrong place with error not corrected until after filing deadline.).

The cases cited by Respondent are factually distinguishable and not persuasive on the issue before this Court. Furthermore, with regard to objections to nomination petitions and papers, the Election Code provides:

> If the objections relate to material errors or defects apparent on the face of the nomination petition or paper, the court, after hearing, may, *in its discretion*, permit amendments within such time and upon such terms as to payment of costs, as the said court may specify.

25 P.S. §2937. See also, *Smith v. Brown*, 590 A.2d 816, 818 (Pa. Commw. 1991).

CONCLUSION

This Court reiterates that the Respondent's original Statement of Financial Interests was completed for the year 2021 and therefore presents a fatal defect for his name to appear on the 2021 Republican primary ballot. Moreover, the statement was not signed and properly attested, nor was it dated. In the normal course of business, according to Ms. Fernandez, the statement would have been rejected by the Erie County Bureau of Elections, but for the inexperience or oversight of the clerk who accepted the form. The second Statement of Financial Interests, filed March 16, 2021, is untimely. The Respondent cites to no authority permitting substitution of an untimely, amended Statement of Financial Interests for a fatally defective Statement of Financial Interests filed on the last day for the filing a petition to have a name appear on the ballot.

Closely similar to the case of Willie Jay, this Court believes that Mr. DiMattio made an honest mistake; did nothing ethically or morally wrong, and that he is a righteous person. The relative statute and the case law are clear, however, that the errors made are "fatal." Once Willie Jay's mishap was declared "fatal," he could not be risen, no matter how righteous he was. Likewise, the Respondent's clerical errors are deemed to be "fatal," giving him no life as a candidate.

ORDER

AND NOW, to-wit, this 29th day of March, 2021, upon consideration of the "Petition to Set Aside Nomination Petition and Objections to Nomination Petition in Accordance with the Pennsylvania Election Code, 25 P.S. §2937" and response thereto, it is **ORDERED:**

1. The Petition shall be **GRANTED**. The Nomination Petition of Edward T. DiMattio, Jr., for the office of Erie County Clerk of Records shall be stricken and the name of the Respondent shall not be placed on the ballot for the May 18, 2021 Municipal Primary Election for the Office of Clerk of Records of Erie County.

2. The Respondent's Motion to Strike Portions of Paragraph 6(c) of the Petition the Statement of Financial Interests is **GRANTED** as to the averments regarding failure to complete block numbers 5 and 10 of the statement and these averments were not considered.

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

IN RE: ANTHONY B. ANDREZESKI and CHAD HERSHEY, Appellees v. ERIE COUNTY BOARD OF ELECTIONS and AUBREA HAGERTY-HAYNES, Designated Appellants
Appeal of: AUBREA HAGERTY-HAYNES

IN RE: ANTHONY B. ANDREZESKI and CHAD HERSHEY, Appellees v. ERIE COUNTY BOARD OF ELECTIONS, Designated Appellant v. AUBREA HAGERTY-HAYNES, Designated Appellant
Appeal of: ERIE COUNTY BOARD OF ELECTIONS

ELECTION LAW

No nomination petition, nomination paper or nomination certificate shall be permitted to be filed if, *inter alia*, it contains material errors or defects apparent on the face thereof, or on the face of the appended or accompanying affidavits; or it contains material alterations made after signing without the consent of the signers; or it does not contain a sufficient number of signatures as required by law. *See* 25 P.S. Section 2936.

ELECTION LAW

The Election Code provides that candidates for nomination of public or party offices to be filled by a vote of the electors in counties of the third class at large shall present a nominating petition containing at least two hundred fifty (250) valid signatures of registered and enrolled members of the proper party. *See* 25 P.S. 2872.1(19).

ELECTION LAW

To have standing to challenge a nomination petition, one must be registered to vote in the district holding the primary election and be a member of the political party to which the nomination pertains. Members of one party do not have standing to contest the nomination process of an opposing party. *See In the Matter of Samms*, 674 A.2d 240, 242-243 (Pa. 1996); *In re Pasquay*, 525 A.2d 13, 14 (Pa. Commw. 1987), *aff'd*, 529 A.2d 1076 (Pa. 1987).

ELECTION LAW

Consistent with the rationale in *In re General Election*-1985, 531 A.2d 836, 839 (Pa. Commw. 1987), when a natural disaster creates an emergency situation that interferes with an election, courts may look to the direction of 25 P.S. Section 3046, "Duties of common pleas court on days of primaries and elections", which provides courts of common pleas the power, on the day of an election, to decide "matters pertaining to the election as may be necessary to carry out the intent" of the Election Code. *See Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 370 (Pa. 2020).

ELECTION LAW

As of September, 2020, the Supreme Court of Pennsylvania determined the ongoing COVID-19 pandemic equated to a natural disaster. *See Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 370 (Pa. 2020).

ELECTION LAW

To prevent disenfranchisement of voters in the 2020 Presidential Election in the midst of the COVID-19 pandemic, the Pennsylvania Supreme Court, *inter alia*, exercised the authority under its Extraordinary Jurisdiction to extend by three days the absentee and

mail-in ballot "received-by deadline" to allow for tabulation of ballots mailed by voters via USPS and post-marked by 8:00 p.m. on Election Day. *See Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 370-371 (Pa. 2020).

ELECTION LAW

In October of 2019, the General Assembly of Pennsylvania enacted Act 77 of 2019, which, *inter alia*, created for the first time in Pennsylvania the opportunity for qualified electors to vote by mail without requiring them to demonstrate their absence from the voting district on Election Day. *See* 25 P.S. Sections 3150.11 – 3150.17; *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 352 (Pa. 2020).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
No. 351 C.D. 2021
No. 357 C.D. 2021
CONSOLIDATED CASES

Appearances: Anthony B. Andrezeski, Esq., *pro se*
Anthony B. Andrezeski, Esq., counsel for Chad Hershey
Thomas Talarico, Esq., counsel for Erie County Board of Elections
J. Timothy George, Esq., counsel for Intervenor, Aubrea Hagerty-Haynes

OPINION

Brabender, Jr., J. April 7, 2021

This matter is before the Commonwealth Court of Pennsylvania on the consolidated appeals of Designated Appellant, Aubrea Hagerty-Haynes, from the Orders of March 22, 2021 and March 30, 2021 (No. 351 C.D. 2021), and Designated Appellant, Erie County Board of Elections, from the Order of March 30, 2021 (No. 357 C.D. 2021). For the reasons set forth herein and on the record at the hearings held on March 22, 2021 and March 30, 2021, these appeals should be dismissed.

ISSUE

At issue is whether, under the natural disaster or emergencies presented by the COVID-19 pandemic in Erie County, Pennsylvania, with its extraordinary circumstances and unprecedented challenges, the Trial Court properly determined that the Petitions to have the names of Anthony B. Andrezeski (Democratic candidate) and Chad Hershey (Republican candidate) Printed upon the Official Ballots for the May 18, 2021 Municipal Primary Election for the office of Erie County Clerk of Records should be accepted by the Erie County Board of Elections.

BACKGROUND

On March 12, 2021, Appellees Anthony B. Andrezeski, *pro se*, and Chad Hershey, by counsel, Attorney Anthony B. Andrezeski (same Appellee), filed a Petition to Extend the Date to Submit Nomination Papers for the Position of Erie County Clerk of Records. Therein, the Appellees indicate they each attempted to file nomination petitions with the Designated

Appellant-Erie County Board of Elections on March 9, 2021 and their respective petitions were rejected for lack of 250 signatures per 25 P.S. Section 2936 (c) of the Election Code. Appended to the Petition as Exhibit "A" is Appellee-Andrezeski's request to reduce the number of electors' signatures to 25. Appended to the Petition as Exhibit "B" is correspondence of March 10, 2021 from Mary Rennie, Chairperson, Erie County Board of Elections, indicating Andrezeski's nomination petition contained 88 rather than 250 signatures and was rejected for being defective on its face. Appended to the Petition as Exhibit "C" is a statement of Hershey indicating his nominating petition was rejected for the same reason. Appellee-Hershey's petition contained 209 signatures of electors. The Appellees aver that the COVID-19 pandemic restrictions imposed by the Centers for Disease Control and Prevention (CDC), Pennsylvania Governor Tom Wolf and Health Secretary Dr. Rachel Levine made it impossible for the Appellees to collect the requisite number of signatures to appear on their respective ballots by the March 9, 2021 deadline. The Appellees aver that the Appellant-Board of Elections possesses the authority to change or reduce the number of electors' signatures required on nominating petitions, but failed to exercise that authority. The Appellees further aver that, upon rejection of their nominating petitions, they filed with the Appellant-Board a Petition for a determination that the number of signatures on their nominating petitions was sufficient for their names to be placed on the ballot; or alternatively, reducing the number of signatures required to 25 signatures. The Appellant-Board denied the requests.

A hearing on the Petition was held before the undersigned on March 22, 2021. The Appellees attended the hearing and testified. The Appellant-Erie County Board of Elections failed to appear at the hearing. Ms. Tonia Fernandez, Erie County Elections Supervisor, confirmed that the Appellant-Board received notice of the hearing, but neither a representative from the office nor its legal counsel would be in attendance.

The Appellees both testified to the challenges they encountered in obtaining signatures on their respective nominating petitions. The challenges ranged from a lack of activities to attend and establishments to visit in order to collect signatures occasioned by the shutdown of businesses, restaurants and clubs, churches, nursing homes, sporting events and functions in general during the relevant period due to the pandemic; door-slamming in their faces and requests to vacate premises due to pandemic restrictions; and patrons' complaints that the Appellees respective attempts to collect signatures violated CDC and government six-feet social distancing guidelines.

Appellee-Hershey testified that during an information session or video presentation for potential candidates interested in running for office, County Clerk of Elections Douglas R. Smith advised there could potentially be a reduction in the number of signatures required on nominating petitions due to restrictions imposed by the COVID-19 pandemic and/or an extension of the deadline for signatures. Appellee-Hershey testified he was hopeful one or both changes would "go through", but neither did. Ms. Nicole Inan, an Elections Board employee, testified that the Appellant-Board of Elections did not meet or convene to consider the Petition to Extend the Date to Submit Nomination Papers for the Position of Erie County Clerk of Records, which Appellee-Andrezeski submitted to the Appellant-Board.

At the conclusion of the hearing on March 22, 2021, the Court granted the Petition, determining that the Appellees presented a compelling argument that, in these unprecedented

times presented by the COVID-19 pandemic and under the totality of circumstances, the nominating petitions for placement of Appellees' names on ballots were sufficient.

Specifically, the Court noted there was precedent in that the Commonwealth of Pennsylvania significantly modified its election process in the pandemic year 2020. The date of Pennsylvania's 2020 primary election was changed on March 27, from April 28 to June 2, 2020. Also, the absentee receipt deadline was, on June 1, the eve of the primary, changed from June 2 to June 9, 2020, specifically in Erie County and several other counties. Furthermore, the Pennsylvania Supreme Court specifically changed the date for receipt of votes from November 3 to November 6, 2020. All of these date changes were made specifically due to the ramifications of COVID-19.

The Commonwealth's manner of voting was also changed significantly due to COVID-19. Mail-in voting was permitted, with no excuses needing to be offered. The Commonwealth even provided pre-paid postage for mail-in voters. More importantly, the Pennsylvania Supreme Court ruled that election officials *could not reject* (emphasis added) mail-in ballots that had signatures that did not match.

The Court stated that the COVID-19 virus played havoc with what has always been, particularly in local elections, a high-contact, democratic process. In this pandemic time, however, with ordered lockdowns, health restrictions and social distancing mandates, the burden of a 250-signature requirement is not modest. Because of the pandemic crisis conditions, there are no campaign events or rallies; and canvassers and volunteers are homebound and not risking their health by violating CDC and government guidelines. In Erie County, during the time period at issue (February 16 to March 9, 2021), there were no fairs, parades or ethnic street festivals; church events were canceled and Friday Lenten dinners were strictly drive-thru; schools and extracurriculars such as PTA meetings were canceled; restaurants and clubs had limited capacity, if they were open at all, with many having been closed permanently; sporting events did not allow for spectators; bowling alleys were closed; nursing homes were closed to visitors; the Erie County Courthouse had limited access; and Erie City Hall was closed to the public and still is! Additionally, there was a government ban on large gatherings and even family gatherings were discouraged. The six-feet social distancing rule made traditional, high-level contact with electors completely impractical. The Commonwealth of Pennsylvania made no provisions for electronic signatures; there were no additional means to gain signatures; and there was also a limited time in which to collect them. The powers-that-be simply did not address these issues.

In its ruling, the Court did not extend the date in which to obtain signatures nor did it reduce the number needed from 250 to 25, as requested. Rather, the Court reasoned that Appellee-Andrezeski, with 88 signatures, and Appellee-Hershey, with 209 signatures, had a measureable modicum of support from the Erie County community and their names were to be placed on the ballot. The Court further reasoned that the granting of the Appellees' petition would not jeopardize the integrity of the upcoming election, and that the election itself will determine who the citizens want as their Clerk of Records. *See Transcript of Proceedings, Hearing held March 22, 2021 (Fr. 3/22/21), pp. 20-30*.

On March 25, 2021, the Erie County Board of Elections filed a Motion for Reconsideration, asserting that the Court erred or abused its discretion by reversing the Appellant-Board's

decision rejecting the petitions of the Appellees. The Appellant-Board asserts that the Appellees failed to obtain the requisite number of signatures, and abuse of discretion occurred in "attributing Plaintiffs' failure to secure the requisite number of signatures to the coronavirus pandemic." *See Motion/or Reconsideration, ¶10(b)*. The Appellant-Board avers that the Appellees did not account for the kind and number of difficulties they encountered in trying to secure signatures and did not testify to their effort, time, or actual difficulty attempting to secure signatures. *Id*. The Board of Elections avers that, while the Court properly took judicial notice of the pandemic, not all events and gatherings were completely shut down during the pandemic and three other candidates secured sufficient number of signatures. *Id.*, ¶11. The Court scheduled a hearing to occur on March 30, 2021 on the Motion for Reconsideration.

On March 26, 2021, Designated Appellant Aubrea Hagerty-Haynes filed a Petition to Intervene. She also seeks nomination for the office of Erie County Clerk of Records and filed nomination petitions for her name to appear as a Democratic Party candidate on the official ballot for the May 18, 2021 Primary Election. Appellant-Hagerty-Haynes asserts that Pa.R.Civ.P. 2327(4) authorizes intervention because she has a legally enforceable interest "in the first position on the Democratic ballot ... and [to] ensure that the Election Code is applied equally and fairly to all candidates in accordance with the law." *Petition to Intervene, ¶4*. Appellant-Hagerty-Haynes argument against Appellee-Hershey immediately fails, because she, as a registered Democrat, lacks standing to challenge the nominating petitions of a registered Republican for the May, 2021 Municipal Primary Election for the office of the Erie County Clerk of Records. *See: In the Matter of the Nomination Petition Gary M. Samms*, 674 A.2d 240, 242-243 (Pa. 1996); *In re Nominating Petition of Kevin Pasquay*, 525 A.2d 13, 14 (Pa. Commw. 1987).

Both Appellants argue that the Appellees should have taken petitions from the elections office out sooner, though there is no requirement as to what day during the three-week time period that one must secure petitions.

On March 29, 2021, the Appellees filed an Opposition to Motion to Reconsideration and concurrently filed an Opposition to Motion to Intervene. In the Opposition to Motion to Reconsideration, the Appellees aver that the Appellant-Board of Elections waived reconsideration by failing to appear at the hearing on March 22, 2021. Further, the Appellees aver that the Appellant-Board misstated the testimony at the hearing, and the averments of the Board's Motion are belied by the record. In the Opposition to Motion to Intervene, the Appellees aver that Appellant-Hagerty-Haynes lacks a legally enforceable interest in any particular ballot position. The Appellees aver that Appellant-Hagerty-Haynes possesses only the right to ensure the Appellant-Erie County Board of Elections conducts a casting of lots on a particular date, with the specified notice and with the personal attendance of candidates, pursuant to Section 2875 of the Election Code. The Appellees further aver that Appellant-Hagerty-Haynes does not possess the particularized legal interest contemplated by Pa.R.Civ.P. 2327 and possesses nothing more than the interest all citizens possess.

On March 29, 2021, Appellant-Hagerty-Haynes filed a Supplemental Petition to Intervene, asserting she has a legally enforceable interest "in protecting her voters, her electoral prospects, and the electoral prospects of similarly situated candidates who timely comply with the Election Code ... ." *Supplemental Petition, ¶4(f)*. Concurrently, Hagerty-Haynes filed

an Intervenor's Brief in Support of Reconsideration. Therein, Appellant-Hagerty-Haynes asserts that she obtained more than three times the minimum number of signatures required by statute. She asserts that she holds first position on the Democratic Party ballot by virtue of a lottery that did not include Appellee-Andrezeski, also a Democrat, because prior to the lottery the Appellant-Board of Elections rejected Appellee-Andrezeski's nomination petition. Appellant-Hagerty-Haynes asserts that, due to the undersigned's determinations of March 22, 2021, she "may lose the coveted first position on the Democratic ballot." *Intervenor's Brief p. 2, n. 3*. Paraphrased, Appellant-Hagerty-Haynes asserts that the Appellees' nominating petitions may not be amended; that the Appellees do not assert the signature requirement is unconstitutional; that the Appellees do not allege misrepresentation or fraud; and that it was possible for other candidates, including herself, to collect the required number of signatures. By Order dated March 29, 2021, the Court granted the Petition to Intervene.

On March 30, 2021, the Court heard argument on the Appellant-Board of Elections' Motion for Reconsideration. *See Transcript of Proceedings, Hearing Held March 30, 2021 (Tr. 3/30/21), pp. 3-26*, Appellee-Hershey testified and was cross-examined by counsel for the Intervenor, Appellant-Hagerty-Haynes. *See Tr. 3/30/21, pp. 26-60*. Appellee-Hershey testified to the impediments he faced in collecting signatures due to the COVID-19 pandemic and the ensuing restrictions on social activities due to closures, reduced hours and functions; social distancing requirements; and heightened fears and social anxieties about contracting the virus. Appellee-Hershey testified to the concerns he had about potentially placing others at risk for contracting the virus due to his campaign activities and efforts in collecting signatures on the nominating petitions. He testified that the persons he believed were placed at risk included his petition circulators; his volunteers; and even signers who touched a pen which more than one person had touched. The essence of Appellee-Hershey's testimony is that the COVID-19 pandemic significantly hampered his efforts to collect signatures and, despite his best efforts and good intentions, as a practical matter, it was impossible to obtain the requisite number of signatures without violating public health social distancing guidelines.

Appellee-Hershey testified in pertinent part:

> Q. Is it your position, Mr. Hershey, that only you and Mr. Andrezeski respected the CDC restrictions and that everyone else that appears on the ballot this spring violated them?
>
> A. I would — with respect to Governor Wolf and CDC and coming from my background as a government employee, I would say that in order to obtain a large sum of signatures, which I would consider over ten, I would consider that to be very reckless and not appropriate to do that. And I would say if you want to follow the guidelines of our governor — which I respect our governor along with the current administration. I feel that if the candidates would have followed the guidelines — I would — yes. I would say there would have been an enormous amount of candidates that would have fell short of these signatures and — you know. Yeah.
>
> Q. So that's a yes?

A. I would say yes. An enormous amount of candidates would have fallen short. Not everyone. You know, there's people that, you know, are very groomed. They're professional people that have huge networks and have been doing this for many years in Erie County. But for an average person — and average person maybe —let's say like an entry-level average person that is not established —

Q. I don't know what you're talking about, Mr. Hershey. Is the answer to my question yes, only you and Mr. Andrezeski complied with the CDC guidelines and the other 382 candidates who appear on the ballot did not?

A. I don't feel that's a yes or no. I can't say yes or no.

The Court: I don't even think he said he complied with the guidelines.

A. Exactly. I actually feel bad, because I even broke the guidelines, and I was worried. Like, my father thought I was maybe going to get in trouble with the law or something, you know, with what I'm doing, especially for someone, you know, touching a pen that — more than one person touching the same pen or you're approaching people — groups of people. It just — it's not safe behavior.

Q. But your pen example is something over which you had control. You could have fixed that problem yourself, right?

Mr. Andrezeski: Your Honor, could we move on.

Mr. George: It's my last question.

Mr. Andrezeski: He's simply haranguing the witness.

The Court: If you have an answer to that, go ahead and answer.

A. Looking back — me standing here looking at you, sir, I would agree with you. I would say me standing here now — when you're in the heat of the battle, things are different. It's a little bit different thinking. But me standing here looking at you, I feel guilty about that. I feel guilty in a way that if someone else would potentially get the virus that I would be responsible for. That would bother me greatly.

Mr. George: Those are all my questions.

Tr. 3/30/31, pp. 58-60.

Appellee-Andrezeski presented legal argument on his own behalf and on behalf of Hershey. *Tr. 3/30/21, pp. 60-66*. Counsel for the Appellant-Board of Elections and counsel for Appellant Hagerty-Haynes also presented argument. *Tr. 3/30/21, pp. 66-73*. At the close

of the record, the Court again placed on the record its findings and conclusions, which are incorporated herein by reference as though set forth at length. *See Tr. 3/30/21, pp. 74-83*. In large part, the Court reiterated the findings and conclusions placed on the record at the hearing of March 22, 2021. *See Tr. 3/22/21, pp. 20-30*.

DISCUSSION

The Commonwealth of Pennsylvania significantly modified its election process in the 2020 pandemic year, which gives precedent to this Court to use its discretion in making a decision in this matter. There were several changes in dates due primarily to the COVID-19 pandemic and its restrictions.

Governor Tom Wolf signed Senate Bill 422, which rescheduled the 2020 primary election from April 28 to June 2, 2020, and made other election process changes, including many due to the COVID-19 emergency. The bill provided process improvements to Act 77 of 2019, to allow counties to begin processing and tabulating mail ballots beginning at 7 a.m. on election day, rather than after the polls close at 8 p.m. Additionally, the measure allowed counties to temporarily consolidate polling places without court approval and eased other rules regarding location and staffing of polling places for the primary, to respond to county concerns about a potential shortage of poll workers and appropriate polling place locations.

"Delaying this year's primary election as several other states have done is in the best interests of voters, poll workers and county election officials," said Governor Wolf. "I commend the General Assembly for acting quickly on this critical legislation. The Department of State will continue to work with local election officials to ensure Pennsylvania has a fair and accessible election." *See: Office of the Governor of Pennsylvania*, "Gov. Wolf Signs COVID-19 Response Bills to Bolster Health Care System, Workers, and Education and Reschedule the Primary Election," March 27, 2020.

On June 1, 2020, Governor Tom Wolf issued an executive order, due in large part to COVID-19 and to civil unrest, extending the absentee ballot receipt deadline for the June 2, 2020, primary to June 9, 2020 in Erie County, as well as Allegheny, Dauphin, Delaware, Montgomery and Philadelphia counties. See: *Executive Order*, Commonwealth of Pennsylvania Governor's Office, Extension of Deadline for Receipt of Absentee and Mail-In Ballots in Certain Counties, 2020-02.

On September 17, 2020, the Pennsylvania Supreme Court issued rulings that extended the mail-in ballot receipt deadline and authorized the use of drop boxes for returning mail-in ballots in the November 3, 2020, general election. As a result, mail-in ballots postmarked on or before November 3, 2020, and ballots lacking evidence that they were sent after this date were accepted if received by 5 p.m. on November 6, 2020. *Pennsylvania Democratic Party, et. al. v. Boockvar, et. al.*, 238 A.3d 345, Supreme Court of Pennsylvania, 133 MM 2020, submitted September 8, 2020. There is dictum in this case that supports the positions of the Appellees in the case at bar:

> Page 20: "Strict enforcement of this deadline, in light of the current COVID-19 pandemic ..., will result in extensive voter disenfranchisement in violation of the Pennsylvania Constitution's Free and Equal Elections Clause."

Page 21: "The COVID-19 pandemic ... caused many voters to be wary of congregating in polling places."

Pages 21-22: "Recognizing that the Election Code *granted the courts the authority to provide relief when there is a natural disaster or emergency* (emphasis added) that threatens to deprive electors of the opportunity to participate in the electoral process, the Courts of Common Pleas of Bucks and Delaware Counties extended the deadline for the return of mail-in ballots for seven days, so long as the ballot was postmarked by the date of the Primary. *In re: Extension of Time for Absentee and Mail-In Ballots to be Received by Mail and Counted in the 2020 Primary Election*, No. 2020-02322-37 (C.P. Bucks) (McMaster, J.); see also *In re: Extension of Time for Absentee and Mail-In Ballots to be Received By Mail and Counted in the 2020 Primary Election*, No.-CV 2020-003416 (C.P. Delaware)."

Page 28: "[C]ourts have previously granted temporary equitable relief to address natural disasters, given that neither the Election Code nor the Constitution 'provides any procedure to follow when a natural disaster creates an emergency situation that interferes with an election.' *Id*. at 19 (citing *In re: General Election-1985*, 531 A.2d at 839).21 The current pandemic is equivalent to other natural disasters ... "

Pages 35-36: "We have no hesitation in concluding that the ongoing COVID-19 pandemic equates to a natural disaster. *See Friends of DeVito v. Wolf*, 227 A.3d 872, 888 (Pa. 2020) (agreeing "that the COVID-19 pandemic qualifies as a 'natural disaster' under the Emergency Code"). Moreover, the effects of the pandemic threatened the disenfranchisement of thousands of Pennsylvanians during the 2020 Primary, when several of the Commonwealth's county election boards struggled to process the flow of mail-in ballot applications for voters who sought to avoid exposure to the virus in the ... midst of the pandemic where many voters are still wary of congregating in crowded location ... "

On October 19, 2020, the U.S. Supreme Court declined to block the Pennsylvania Supreme Court's order extending the receipt deadline for mail-in ballots from November 3 to November 6, 2020, for ballots postmarked on or before Election Day. Order in pending case of *Scarnati v. Boockvar*, 141 S. Ct. 644 (2020).

There were also several changes to the manner of voting. With Act 77 of 2019 signed into law by Governor Wolf, all eligible Pennsylvanians had the option of voting by mail-in ballot without having to provide an excuse. On July 31, 2020, Pennsylvania Secretary of State Kathy Boockvar announced that the state would provide prepaid return postage for all mail-in and absentee ballots in the November 3, 2020, general election, due primarily to the COVID-19 pandemic and its restrictions. *See: Pennsylvania Pressroom*, "Pennsylvania Will Provide Postage-Paid Return Envelopes with Mail and Absentee Ballots." July 31, 2020.

Most importantly, on September 14, 2020, Secretary Boockvar's office issued guidance stating that counties cannot reject mail-in ballots due solely to a perceived mismatch between the signature on the return envelope and the signature on the voter's registration record. The Secretary's office stated that Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by

the county board of elections. *See: Pennsylvania Department of State*, "Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes," September 11, 2020. This is significant in that signature requirements are now no longer considered very important to state election officials.

The Appellants have argued that this Court abused its discretion in ordering a modification of the signature requirements for the Appellees. When the governor's office, the secretary of state's office and the state legislature all failed to address this COVID-19 issue on signature requirements, it cannot be considered an abuse of discretion when the Election Code, 25 P.S. Section 3046, grants this Court the authority to provide relief when there is a natural disaster or emergency, per *Pennsylvania Democratic Party, et. al. v. Boockvar, supra*. There is precedent when no less than 13 states across the country refused to shirk responsibilities of dealing with pandemic signature requirements, as Pennsylvania did, to-wit: Connecticut — Governor Ned Lamont issued an executive order reducing petition signature requirement for all candidates by 30 percent; Georgia — petition signature requirements for independent and minor-party candidates reduced to 70 percent of their original numbers; Illinois — unaffiliated and new-party candidates authorized to collect petition signatures electronically and petition signature requirements for candidates reduced to 10 percent of their original numbers; Maryland — petition signature requirement for new political parties reduced to 5,000 and petition signature requirement for unaffiliated candidates reduced by 50 percent; Massachusetts — candidate petition signature requirements reduced to 50 percent of their statutory requirements and candidates authorized to collect petition signatures electronically; Michigan — petition signature requirements for primary candidates reduced to 50 percent of their original numbers and election officials directed to develop procedures allowing for the collection and submission of electronic petition signatures; New Hampshire — petition signature requirements for Libertarian candidates in the general election reduced by 35 percent; New Jersey — candidates permitted to collect petition signatures electronically and submit petitions online and petition deadline for unaffiliated candidates for non-presidential office extended to July 7, 2020; New York — petition signature requirements for primary candidates reduced and signature-gathering process suspended effective March 17, 2020 and filing deadline for independent nominating petitions extended to July 30, 2020; Rhode Island — petition signature requirements for both primary and general election congressional candidates reduced by half (from 1,000 to 500 for U.S. Senate candidates; from 500 to 250 for U.S. House candidates); Utah — candidates and/or campaigns authorized to deliver petition sheets to voters electronically and voters permitted to return signed petition sheets electronically or by mail; Vermont — candidate petition signature gathering requirements suspended for the August 2020 primary and November 2020 general elections; and Virginia — candidate petition signature gathering requirements suspended for the August 2020 primary and November 2020 general elections. Pennsylvania could have authorized signatures to be gained electronically; could have reduced the number of signatures required; could have extended the period of time beyond three weeks; or could have suspended signature requirements altogether because of the pandemic and its social distancing mandates. The state failed to address these issues, so it can hardly be viewed as an abuse of discretion when this Court acts during this natural disaster and emergency under powers given to him by the Election Code.

The quandary for this Court is this: it should be difficult to get on a ballot, but how difficult

should it be in the face of a recognized natural disaster? Mary Rennie, Chairperson of the Erie County Board of Elections, was quoted after she and other board members authorized an appeal: "It is very straightforward. You either meet the requirements of the law or you don't." See: *Erie Times-News*, April 2, 2021, page 4A. What Ms. Rennie fails to recognize, is for one to meet those requirements, one must break the laws — guidelines, mandates and restrictions imposed on citizens by the CDC, Governor Wolf, Dr. Levine and local governments as well. Citizens of this Commonwealth have been cited for failing to abide by the same.

This Court wants a fair resolution to this health issue. Signature requirements are not baked into the Pennsylvania Constitution and are not constitutionally necessary. It is in the public's interest to have more candidates involved in the election process. In this Court's discretion, 88 signatures gained by Appellee-Andrezeski and 209 collected by Appellee-Hershey during a national pandemic indicates that these gentlemen do have a measurable and appreciable modicum of public support to run for office. Affirming this Court's orders does not jeopardize the integrity of the upcoming primary election. The election itself should determine who the citizens of Erie County desire to have as their next Clerk of Records.

This Court is certainly not a supporter of voter suppression — nor is it a supporter of candidate suppression.

CONCLUSION

On April 1, 2021, the Board of Elections filed a Notice of Appeal from the Order of March 30, 2021. On March 31, 2021, Aubrea Hagerty-Haynes filed a Notice of Appeal from the Orders of March 22, 2021 and March 30, 2021. On April 1, 2021, the Commonwealth Court of Pennsylvania issued a scheduling Order.

Appellees Anthony B. Andrezeski and Chad Hershey presented compelling arguments for placement of their names on the ballots of their respective parties for the May, 2021 Municipal Primary Election for Erie County Clerk of Records. For the reasons placed herein and on the record, the Court's Orders of March 22, 2021 and March 30, 2021 should be affirmed. The Prothonotary is hereby directed to transmit the record to the Commonwealth Court of Pennsylvania.

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

COMMONWEALTH OF PENNSYLVANIA
v.
GUY BRADLEY DUMAS

CRIMINAL LAW / TRIAL PROCEDURE / SENTENCING AND PUNISHMENT

Statute that allowed the trial court to determine whether the Commonwealth had proved by clear and convincing evidence that defendant was a sexually violent predator (SVP), and thus subject to enhanced sentencing, was unconstitutional, and defendant's judgment of sentence, to the extent it required him to register as an SVP for life, was illegal; registration requirements under the Sexual Offender Registration and Notification Act (SORNA) constituted a form of criminal punishment, and thus, facts leading to registration requirements had to be found by a fact-finder chosen by the defendant, be it a judge or jury, beyond a reasonable doubt.

CRIMINAL LAW / POST-CONVICTION RELIEF ACT

The timeliness requirements of the PCRA are jurisdictional in nature and, accordingly, a PCRA court cannot hear untimely petitions.

CRIMINAL LAW / POST-CONVICTION RELIEF ACT

A court may not address the merits of the issues raised if the Post-Conviction Relief Act (PCRA) petition was not timely filed.

CRIMINAL LAW / POST-CONVICTION RELIEF ACT

Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final ... Despite this strict requirement, however, there are three codified exceptions that allow a court to hear an untimely PCRA petition: (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of the Commonwealth or the Constitution or laws of the United States; (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

CRIMINAL LAW / POST-CONVICTION RELIEF ACT

The newly discovered facts exception, under Post Conviction Relief Act (PCRA), relates to whether a court has jurisdiction to consider an untimely petition. The newly discovered facts exception to the time bar under the PCRA does not require a merits analysis. A petitioner satisfies the newly discovered facts exception to the time bar under PCRA when the petitioner pleads and proves that (1) the facts upon which the claim is predicated were unknown and (2) could not have been ascertained by the exercise of due diligence. In determination of whether newly discovered facts exception applies to allow a court jurisdiction to consider an untimely PCRA petition, due diligence requires reasonable efforts by a petitioner, based on the particular circumstances, to uncover facts that may support a claim for collateral relief, but does not require perfect vigilance or punctilious care.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
No. CR 2884 – 2016

Appearances: William J. Hathaway, Esq. appeared as PCRA counsel for Guy Bradley Dumas
Elizabeth A. Hirz, First Assistant District Attorney appeared on behalf of Commonwealth

1925(a) OPINION

Domitrovich, J., August 28, 2020

This case concerns a Motion for Post-Conviction Collateral Relief [hereinafter "PCRA Petition"] filed by Guy Bradley Dumas [hereinafter "Petitioner"] on July 8, 2019. Petitioner did not timely file his PCRA Petition, however, nor did he provide sufficient evidence to support any exception to the PCRA timeliness requirements to grant this Trial Court jurisdiction to review the merits of his PCRA Petition. After reviewing Petitioner's claims, Petitioner's court-appointed PCRA Counsel's "No-Merit" letters, Commonwealth's responses to these letters, and the entire factual record, this Trial Court determined a hearing on the instant PCRA Petition was not warranted. After twice issuing Petitioner a Notice of Intent to Dismiss his PCRA Petition, and receiving no objections from Petitioner in response, this Trial Court dismissed Petitioner's PCRA Petition on April 28, 2020.

The procedural history of this case is as follows: On November 2, 2016, Petitioner pled guilty before this Trial Court to six separate crimes: 1) Rape of a Child, 2) Involuntary Deviate Sexual Intercourse, 3) Aggravated Indecent Assault of a Child, 4) Endangering Welfare of Children, 5) Corruption of Minors, and 6) Indecent Assault of a Person Less Than 13 Years of Age. Petitioner was represented throughout this plea proceeding by Alan J. Natalie, Esq. Appellant filed a *pro se* Motion to Withdraw Guilty Plea on November 17, 2016; however, Petitioner verbally withdrew his Motion during his sentencing hearing on February 28, 2017. This Trial Court then sentenced Petitioner to thirty-eight (38) to seventy-six (76) years incarceration. This Trial Court also entered an Order classifying Petitioner as a "Sexually Violent Predator" ("SVP") and requiring him to register as a Sexual Offender for life.

Petitioner filed a Motion for Post-Sentence Relief on March 10, 2017. This Trial Court denied Petitioner's Motion on March 21, 2017. Petitioner then filed a Notice of Appeal with the Pennsylvania Superior Court on March 31, 2017, and this Trial Court issued Petitioner a Pa.R.A.P. 1925(b) Order on April 3, 2017. Petitioner filed his 1925(b) Concise Statement of Matters Complained of on Appeal on April 6, 2017.

On January 12, 2018, the Pennsylvania Superior Court issued a non-precedential memorandum affirming Petitioner's sentence. *See Commonwealth v. Dumas*, No. 516 WDA 2017 (Pa. Super. Ct., Jan. 12, 2018).[1] However, because the Pennsylvania Superior Court, during the pendency of Petitioner's appeal, held that allowing a judge to make SVP determinations requiring lifetime registration based on clear and convincing evidence was unconstitutional, the Superior Court remanded Petitioner's case to this Trial Court to issue Petitioner proper registration notice. *See Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. 2017), *rev'd on appeal*, 226 A.3d 972 (Pa. 2020). On March 5, 2018, this Trial Court held a remand hearing and issued Petitioner proper notice to register as a sexual offender for life

[1] Despite this appeal, Petitioner claimed in his PCRA Petition that no direct appeal had ever been filed in his case.

pursuant to his plea to three separate Tier-III sexual offenses.

Petitioner filed the instant PCRA Petition on July 8, 2019. On July 10, 2019, this Trial Court appointed William J. Hathaway, Esq. [hereinafter PCRA Counsel], to represent Petitioner during this proceeding. After reviewing Petitioner's claims, PCRA Counsel filed a "No-Merit" letter with this Trial Court on August 5, 2019 as well as a Motion to Withdraw as Counsel. *See Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988); *Pennsylvania v. Finley*, 481 U.S. 551 (1987). On September 26, 2019, the Commonwealth filed a response concurring with PCRA Counsel's assessment of this PCRA Petition. On November 14, 2019, this Trial Court ordered PCRA Counsel to re-evaluate this PCRA Petition, specifically Petitioner's two stated exceptions to the PCRA timeliness requirement. On December 10, 2019, PCRA Counsel filed a supplemental "No Merit" letter with this Trial Court and again requested leave to withdraw as Petitioner's counsel. The Commonwealth filed a response concurring with PCRA Counsel's supplemental "No Merit" letter on January 22, 2020.

On March 12, 2020, this Trial Court issued a Notice of Intent to Dismiss Petitioner's PCRA Petition and granted PCRA Counsel's Motion to Withdraw as Counsel. This Trial Court instructed Petitioner that he may file objections to this Notice of Intent to Dismiss. On April 2, 2020, this Trial Court issued a second Notice of Intent to Dismiss after receiving correspondence from Petitioner alleging he did not receive this Trial Court's initial Notice. This Trial Court also granted Petitioner additional time to file objections. After giving Petitioner well over twenty days to file objections and having received none, this Trial Court issued an Opinion and Order dismissing the instant PCRA Petition on April 28, 2020.

On July 2, 2020, Petitioner filed Notice of Appeal with the Pennsylvania Superior Court. This Trial Court issued a Rule 1925(b) Order to Petitioner on July 7, 2020. Petitioner filed his Concise Statement of Matters Complained of on Appeal on August 13, 2020.

Petitioner's Concise Statement of Matters Complained of on Appeal addresses several claims of ineffectiveness of Petitioner's trial counsel prior to Petitioner pleading guilty on November 2, 2016. The issues raised by Petitioner center largely around Petitioner's alleged mental incompetence prior to and during his plea, and his trial counsel's ineffectiveness for not recognizing and asserting Petitioner's incompetency. Petitioner raised the issue of his mental competency in his initial PCRA Petition; however, this Trial Court must first address the timeliness of the instant PCRA Petition.

"The timeliness requirements of the PCRA are jurisdictional in nature and, accordingly, a PCRA court cannot hear untimely petitions." *Commonwealth v. Sanchez*, 204 A.3d 524, 526 (Pa. Super. 2019). "A court may not address the merits of the issues raised if the Post Conviction Relief Act (PCRA) petition was not timely filed." *Commonwealth v. Whiteman*, 204 A.3d 448, 450 (Pa. Super. 2019).

Title 42 Pa.C.S. § 9545(b)(1), which governs the timely filing of PCRA petitions, states in relevant part: "Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final ... " Despite this strict requirement, however, there are three codified exceptions that allow a court to hear an untimely PCRA petition: (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of the Commonwealth or the Constitution or laws of the United States; (ii) the facts upon which the claim is predicated were unknown to the petitioner and

could not have been ascertained by the exercise of due diligence; or (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively." 42 Pa.C.S. §§ 9545(b)(1)(i)-(iii).

In the instant case, Petitioner's judgment of sentence was affirmed by the Pennsylvania Superior Court on January 12, 2018. Petitioner did not file for allowance of appeal in the Pennsylvania Supreme Court meaning Petitioner's sentence became final on February 12, 2018.[2] *See* 42 Pa.C.S. § 9545(b)(3) ("For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review."). Petitioner filed the instant PCRA Petition on July 8, 2019, almost seventeen months after judgment of his sentence became final. Therefore, this PCRA Petition was, in fact, untimely.

Despite this untimeliness, however, Petitioner cited two of the three exceptions to the timeliness requirement so that this Trial Court would still consider the merits of his PCRA Petition. Petitioner's first claim fell under the governmental interference exception to timeliness: "The Public Defender of Erie County and the Common Pleas Court impeded my right to Mental Health Court [*sic*]. In fact, I was denied any psychiatric and/or psychology services. As well as a Mental Health Review [*sic*]. Until I reached the state where I was deemed seriously mentally ill." PCRA Petition, July 7, 2019, at 3. Petitioner's claim here is that his case not being adjudicated in mental health court impeded his ability to timely file his PCRA Petition. As this Trial Court stated in its Opinion and Order dismissing this PCRA Petition, "Petitioner fails to state any meritorious reason for said claims, and, therefore, this claim is without merit." *See* Opinion and Order, Docket No. 2884-2016, at 5. Petitioner provides no support for his claim of a right to proceed before a mental health court, and clearly no automatic right attaches based on Petitioner's charges. Moreover, Petitioner does not state with any specificity how any of the actions of this Trial Court or his trial counsel prevented Petitioner from filing a PCRA claim based on this supposed right.[3]

Petitioner's second cited exception came under the "previously unknown facts" exception: "I had a Right [*sic*] to have my case heard before a Mental Health Court. Due to my serious mental illness diagnosis." PCRA Petition, July 7, 2018, at 3. Again, Petitioner claims a right of access to a Mental Health Court but does not state any basis for this right. "Petitioner makes a bald assertion as to access to Mental Health Court. Petitioner has failed to state any meritorious reason for this exception to the PCRA timeliness requirement." Furthermore, Petitioner does not state when he discovered this right or how this information could not have been obtained by the exercise of due diligence. *See Commonwealth v. Hart*, 199 A.3d 475 (Pa. Super. 2018).

As this Trial Court explained in both its initial Intent to Dismiss and revised Intent to Dismiss, as well as this Trial Court's final Opinion and Order, Petitioner did not state any

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[2] The 30-day period for allowance of appeal in the Pennsylvania Supreme Court expired on February 11, 2018, which was a Sunday.

[3] This Trial Court further notes for purposes of the governmental interference exception, "claims relating to ineffectiveness of counsel for failing to raise certain issues do not qualify under the government interference exception to the timeliness requirement of the Post Conviction Relief Act (PCRA) due to the specific PCRA provision which states the term "government officials" does not include defense counsel. *Commonwealth v. Abu-Jamal*, 833 A.2d 719, 724-25 (Pa. Super. 2003).

grounds upon which this Trial Court could consider his untimely PCRA Petition. Petitioner did not establish by a preponderance of the evidence either of the exceptions he asserted to an untimely PCRA petition, which deprived this Trial Court of jurisdiction to consider the merits of Petitioner's claims.

This same absence of jurisdiction is also present regarding the claims contained in Petitioner's Concise Statement of Matters Complained of on Appeal. Petitioner alleges various ineffective assistance of counsel claims and suggests a potential involuntary plea claim; however, just as this Trial Court could not consider the merits of the claims raised in the instant PCRA Petition, this Trial Court may not consider the merits of Petitioner's Concise Statement claims, either. They relate solely to Petitioner's issues with his trial counsel and this Trial Court's adjudication of Petitioner, and absent an exception to the timeliness requirement, may not be considered if filed in an untimely PCRA Petition. Since Petitioner's PCRA Petition was untimely, and Petitioner did not credibly allege any exception to the timeliness requirement, this Trial Court has no jurisdiction to evaluate the merits of any of Petitioner's PCRA claims.

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

IN RE: THE ADOPTION OF A.G.C.-M., APPEAL OF L.C., MOTHER

JUVENILE / TERMINATION OF PARENTAL RIGHTS

Termination of parental rights, pursuant to 23 Pa.C.S.A. § 2511, is a bifurcated process. *See In re K.R.*, 200 A.3d 969, 978-979 (Pa. Super. 2018); *In re B.J.Z.*, 207 A.3d 914, 921 (Pa. Super. 2019). First, it must be established by clear and convincing evidence that the conduct of the parents satisfies one of the statutory grounds for termination under § 2511(a). *See In re K.R.*, 200 A.3d at 978. Second, the Court must determine the "needs and welfare of the child under the standards of best interest of the child" pursuant to § 2511(b). *Id*. "Parental rights may be involuntarily terminated where any one subsection of Section 2511(a) is satisfied, along with consideration of the subsection 2511(b) provisions." *In re Z.P.*, 994 A.2d 1108, 1117 (Pa. Super. 2010).

JUVENILE / TERMINATION OF PARENTAL RIGHTS / INCARCERATION

When determining whether to involuntarily terminate parental rights, incarceration is "a factor the Court must consider in analyzing a parent's performance." *See In re E.A.P.*, 944 A.2d 79, 83 (Pa. Super. 2008). A parent's incarceration may be particularly relevant to a Court's § 2511(a) analysis when the incarceration "arises as a direct result of the parent's actions which were part of the original reasons for the removal of the child." *In re Z.P.*, 994 A.2d 1108, 1006 (Pa. Super. 2010).

*JUVENILE / TERMINATION OF PARENTAL RIGHTS /
INCARCERATION / PARENTAL DUTIES*

"Incarceration alone is not sufficient to support termination under any subsection, but incarceration will certainly impact a parent's capability of performing parental duties [under subsection (a)(1)], and **may** render a parent incapable of performing parental duties under subsection (a)(2)." *Interest of K.M.W.*, 238 A.3d 465, 474 (Pa. Super. 2020) (citing *In re E.A.P.*, 944 A.2d 79, 82-83 (Pa. Super. 2008) (emphasis in original)).

*JUVENILE / TERMINATION OF PARENTAL RIGHTS /
INCARCERATION / PARENTAL DUTIES*

Incarceration does not relieve a parent of the obligation to perform parental duties. Thus, when considering incarceration as a factor in analyzing a parent's performance, a Court must "inquire whether the parent has utilized those resources at his or her command while in prison in continuing a close relationship with the child." *In re Adoption of S.P.*, 47 A.3d 817, 828 (Pa. 2012).

*JUVENILE / TERMINATION OF PARENTAL RIGHTS /
INCARCERATION / INCAPACITY*

Pursuant to § 2511(a)(2), a court may terminate parental rights if "[t]he repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent ... " 23 Pa.C.S.A. § 2511(a)(2). "Incarceration, while not a litmus test for termination, can be determinative of the question of whether a parent is incapable of providing essential parental care, control, or subsistence." *Interest of K.M.W.*, 238 A.3d at 465, 474 (Pa. Super. 2020) (citing *In re Adoption of S.P.*, 47 A.3d 817, 830 (Pa. 2012). "[T]he length of the remaining confinement can be considered as highly relevant

to whether 'the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent,' sufficient to provide grounds for termination ... " *In re Adoption of S.P.*, 47 A.3d 817, 830 (Pa. 2012) (citing 23 Pa.C.S.A. § 2511(a)(2)).

JUVENILE / TERMINATION OF PARENTAL RIGHTS / PARENT-CHILD BOND

Pursuant to § 2511(b), "in terminating the rights of a parent [a court] shall give primary consideration to the developmental, physical and emotional needs and welfare of the child ... " 23 Pa.C.S.A. § 2511(b). "While a parent's emotional bond with his or her child is a major aspect of the subsection 2511(b) best-interest analysis, it is nonetheless only one of many factors to be considered by the court when determining what is in the best interest of the child." *In re Adoption of C.D.R.*, 111 A.3d 1212, 1219 (Pa. Super. 2015). "[I]n cases where there is no evidence of any bond between the parent and child, it is reasonable to infer that no bond exists." *In re K.Z.S.*, 946 A.2d 753, 762-763 (Pa. Super. 2008).

JUVENILE / TERMINATION OF PARENTAL RIGHTS / BEST INTERESTS

Further, pursuant to § 2511(b), when considering the best interests of the child a court "can equally emphasize the safety needs of the child, and should also consider the intangibles, such as the love, comfort, security, and stability the child might have with the foster parent ... [and] the importance of continuity of relationships and whether any existing parent-child bond can be severed without detrimental effects on the child." *In re Adoption of C.D.R.*, 111 A.3d 1212, 1219 (Pa. Super. 2015).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
ORPHANS COURT DIVISION
No. 60 in Adoption 2021

Appearances: Anthony Vendetti, Esquire, Solicitor for Erie County Office of Children and Youth
Patrick W. Kelley, Esquire, on behalf of L.C., Mother
Joseph E. Sinnott, Esquire, on behalf of A.G.C.-M., Minor Child

1925(a) OPINION

Trucilla, J., December 21, 2020

This matter is before the Court upon the appeal of Mother, L.C., (hereinafter Appellant), from the Order of October 27, 2020, terminating Appellant's parental rights to the minor child, A.G.C.-M. (date of birth December 27, 2017).[1]

Introduction

On July 23, 2020, nearly ten months after this Court made a formal adjudication of dependency,[2] the Erie County Office of Children and Youth (hereinafter "OCY"), filed a

[1] By separate Order on October 27, 2020, Father's (O.M.'s), parental rights to A.G.C.-M. were also terminated. However, Father has not appealed the involuntary termination of his parental rights, and therefore Appellant's claims are not dependent on Father. Further, Father was uninvolved in A.G.C.-M.'s life prior to the child's removal and did not participate at any point of the Dependency action herein. Therefore, the Court will not address Father's position any further in this Opinion.

[2] Although this case was formally opened with OCY by Emergency Protective Order filed October 3, 2019, this child has been subjected to an extensive "informal" history with OCY dating back to July of 2018, as discussed *infra*.

Petition for Involuntary Termination of Parental Rights pursuant to 23 Pa.C.S.A. §§ 2511(a)(1), (a)(2), (a)(5), and (b). A hearing on this Petition was held before this Court on October 27, 2020. Appellant appeared by video conference from the Erie County Prison.[3] Appellant was represented by counsel. Father was not present and was not represented by counsel. The child's guardian ad litem ("GAL"), Attorney Joseph Sinnott, was present.[4] Attorney Anthony Vendetti was present for OCY. The Court received testimony from Staci Evans, Parole Agent for the Commonwealth of Pennsylvania, Haley Schaef, OCY caseworker, and Appellant. The Court also received, reviewed, and admitted as evidence ten exhibits submitted by OCY and one exhibit submitted by Appellant.

At the conclusion of the hearing, the Court found OCY had established by clear and convincing evidence that Appellant's conduct satisfied the statutory grounds for termination as to § 2511(a)(1), (a)(2), and (a)(5). The Court further determined termination best served the needs and welfare of A.G.C.-M., pursuant to § 2511(b). Thereafter, the Court terminated Appellant's parental rights by Decree dated October 27, 2020.

On November 30, 2020, Appellant filed a Notice of Appeal based on the Court's Decree from October 27, 2020, and concurrently filed a Concise Statement of Matters on Appeal.[5] Pursuant to Pennsylvania Rules of Appellate Procedure Rule 1925(a), this Court files the within Opinion, requesting the instant appeal be dismissed for the reasons set forth below.

Prior Child Protection History

A review of the records and history of this case reveals that OCY initially became involved with the family on July 11, 2018, when A.G.C.-M. was approximately 6 months old. *See* Pre-Dispositional Summary, 10/15/2019; Court Summary, 1/14/2020 at 1, 6; and Court Summary, 7/14/2020 at 1, 6. At that time, Appellant was actively using drugs and her living situation was unstable. *Id*. Rather than removing the child from Appellant's custody, OCY allowed A.G.C.-M.'s maternal grandmother, P.C., and other family members, to provide "protective capacity" and care for the child. *Id*.

In January 2019, just six months following the above-cited incident and while the child was in Appellant's care, OCY again became involved when a family member found A.G.C.-M. playing with syringes used by Appellant to inject methamphetamine. *See* Emergency Protective Order Application, 10/3/2019; Shelter Care Application, 10/4/2019; Dependency Petition, 10/7/2019 at 3; Amended Order of Adjudication and Disposition, 10/15/2019; Court Summary, 1/14/2020 at 1, 6; and Court Summary, 7/14/2020 at 1, 6. Consequently,

[3] Appellant was transported from the State Correctional Institution — Muncy to the Erie County Prison. Due to the 14-day mandatory quarantine protocol at the Erie County Prison because of the COVID-19 virus, Appellant was unable to be transported to the Erie County Courthouse for the scheduled hearing. In order to proceed with the scheduled hearing, Appellant waived the right to appear in person and agreed to participate in the hearing via video conference.

[4] Regarding Attorney Sinnott serving as both attorney for the child's legal interests and GAL for the child's best interests, the Court conducted a review of the bilateral role and determined that no conflict existed due to the child's age and inability to express any discernable articulation of legal interest. *See infra* at 8-9.

[5] The Court notes the date of the Decree was October 27, 2020, thus Appellant's Notice of Appeal was due 30 days from the date of the Decree on Thursday, November 26, 2020. However, November 26, 2020 was Thanksgiving Day and the Erie County Courthouse remained closed on the day following Thanksgiving Day, November 27, 2020. (*see* Commonwealth of Pennsylvania Governor's Office, Administrative Circular No. 19-09, September 19, 2019, declaring November 27, 2020 a state holiday; *see also* Unified Judicial System of Pennsylvania court calendar). Therefore, pursuant to 1 Pa.C.S.A. § 1908, Appellant's deadline for filing the Notice of Appeal was Monday, November 30, 2020. Appellant's appeal is timely and the Court will proceed to address the merits of her claim.

based on these disturbing facts, on February 1, 2019, Appellant was found to be an indicated perpetrator of abuse for creating a reasonable likelihood of bodily injury to a child. *Id; see also*, 23 Pa.C.S.A. § 6303(b.1)(5). Appellant also affirmed this fact, as revealed in the transcript from the termination hearing on October 27, 2020. *See Involuntary Termination of Parental Rights Proceedings Transcript, 10/27/2020* (hereinafter "N.T.") at 61-62.

Thereafter, in response to OCY's involvement and to avoid A.G.C.-M. being removed from her care, Appellant agreed to voluntarily and privately place A.G.C.-M. with the maternal great-grandmother, J.W., and maternal grandmother, P.C. *Id*. Subsequently, once again, Appellant relinquished care of A.G.C.-M. to these women. *Id*. P.C. became A.G.C.-M.'s primary caregiver from approximately January 2019 through October 3, 2019.

Current Child Protection Factual and Procedural History

On October 3, 2019, OCY filed an Emergency Protective Order Application. *See* Emergency Protective Order Application, 10/3/2019. The basis for the Application was that maternal grandmother, P.C., the child's primary caregiver, was arrested on an outstanding criminal warrant, leaving the child with no appropriate caregiver. *See* Emergency Protective Order, 10/3/2019. Further, Appellant was homeless and in "active addiction." *Id*. Father was residing in Texas and had never participated in A.G.C.-M.'s life. *Id*. Consequently, an Emergency Protective Order was issued by the Honorable Joseph M. Walsh, III, on October 3, 2019, finding that removal of the minor child was necessary for the welfare and best interests of the child, and that, due to the emergency nature of the removal and safety considerations of the child, any lack of services to prevent removal were reasonable. *See* Emergency Protective Order, 10/3/2019. A.G.C.-M. was placed in the temporary protective physical and legal custody of OCY. *Id*.

The next day, on October 4, 2019, a Shelter Care Hearing pursuant to 42 Pa.C.S.A. § 6332 was held before the Juvenile Hearing Master, Carrie Munsee, Esq. *See* Master's Recommendation for Shelter Care and Order, 10/4/2019. The Master found sufficient evidence was presented to prove that the continuation or return of the child to the home of Appellant was not in the best interests of the child. *Id*. This Court signed an Order adopting the Master's Recommendation on October 14, 2019. *Id*.

On October 7, 2019, OCY filed a Dependency Petition, alleging the child was without proper parental care or control. The Petition set forth the following in support of an adjudication of dependency: Appellant's history of drug abuse and addiction (including drug tests from September 26, 2019 indicating Appellant was once again positive for methamphetamines and cocaine); Appellant's status as an indicated perpetrator of creating a reasonable likelihood of bodily injury to a child (premised on the January 2019 incident where the child was found playing with Appellant's drug syringes); Appellant was currently homeless with no income; Appellant's criminal history (records revealed convictions in three states — Texas, Louisiana, and Pennsylvania); Father's criminal history; Father's lack of involvement with or caregiving for the child; and no other appropriate caregiver available for the child. *See* Dependency Petition, 10/7/2019; *see also*, 23 Pa.C.S.A. § 2511(a)(1), (a)(2), (a)(5), and (b).

Thereby, an Adjudication Hearing was held on October 15, 2019, before Master Munsee. *See* Amended Order of Adjudication and Disposition, 10/15/2019. Father was not present at the hearing. *Id*. at 1. Appellant was present at the hearing and wished to represent herself

without the assistance of counsel. *Id*. Appellant stipulated to the amended allegations outlined in the Dependency Petition. *Id*. The GAL also supported the adjudication of dependency. *Id*. Thereafter, A.G.C.-M. was adjudicated dependent. *Id*. at 1-2.

The case then proceeded immediately to disposition before Master Munsee. *See* Amended Order of Adjudication and Disposition, 10/15/2019. A dispositional goal of return to parent was established. *Id*. at 2. Further, a permanency plan was set forth and provided to Appellant.[6] The permanency plan required Appellant to: participate in a drug and alcohol assessment and follow all treatment recommendations; participate in a mental health assessment and follow all recommendations; refrain from the use of drugs and alcohol and submit to random drug testing; demonstrate the ability to consistently maintain safe and stable housing; attend all medical and appointments for the child; participate in a parenting program; participate in the child's Early Intervention appointments; and abide by the conditions of her parole/probation. *Id*. at 3. The dispositional goal of return to parent and treatment plan (provided to Appellant and available to Father), were approved by this Court. *Id*. A three month Review Hearing was scheduled for January 2020 before this Court. *Id*. at 2-3.

The initial permanency review hearing was held on January 13, 2020, before the Court. *See* Permanency Review Order, 1/15/2020. Despite notice to Appellant, Appellant did not appear at the hearing. However, having applied for and being granted assigned counsel, Appellant's attorney, Patrick Kelley, Esq., was present. The Court found that during the review period, Appellant had been non-compliant with the permanency plan for A.G.C.-M. The Court found there had been no progress in alleviating the circumstances which necessitated the original placement of the child or the circumstances leading to the adjudication of dependency. *Id*.

Specifically, the Court found that despite making an intake appointment with Pyramid Healthcare for drug and alcohol treatment as ordered, Appellant failed to participate with any further follow-up. *See* Permanency Review Order, 1/15/2020; Court Summary, 1/14/2020. Out of 23 random urinalysis screens, Appellant had 22 no-show positive urinalysis screens and one positive/dilute for methamphetamines and amphetamines. *Id*. Regarding her goal to obtain and maintain stable housing, Appellant had reported three different residences during the review period. *Id*. Appellant also failed to keep in contact with OCY, as her last contact had been on November 27, 2019. *Id*. Appellant failed to attend all medical appointments for the child during the review period. *Id*. In fact, Appellant advised she would not be attending a December 9, 2019 appointment because she believed it to be a "set-up for her arrest." *See* Court Summary, 1/14/2020 at 12. Appellant was referring to the fact that she was under court supervision but absconded from supervision and was aware she was wanted on an active arrest warrant. Continuing, Appellant was unsuccessfully discharged from the JusticeWorks parenting program for lack of attendance and participation. *Id*. Appellant also did not participate in any Early Intervention appointments for the child. Finally, as referenced above, Appellant's whereabouts were unknown as she had absconded from Pennsylvania parole supervision. *Id*. at 5; *see also* testimony of Staci Evans, N.T. at 16-19. Appellant was being supervised by Pennsylvania pursuant to an interstate compact with Louisiana where Appellant had been sentenced on a criminal conviction. *Id*.

As a result of Appellant's non-compliance, the Court ordered that A.G.C.-M. remain in

[6] Father was not present at the Dispositional Hearing, nor has he ever participated in any of the other hearings involving the child and has never availed himself of the permanency treatment plan.

the foster home, which was safe, stable, and was meeting the child's needs. *Id*. at 2. The Court maintained the permanency plan and Appellant was ordered to continue to refrain from the use of drugs and alcohol and submit to random testing; participate in a drug and alcohol assessment and follow all treatment recommendations; participate in a mental health assessment and follow all recommendations; demonstrate the ability to consistently maintain safe and stable housing; attend all medical and appointments for the child; participate in a parenting program; participate in the child's Early Intervention appointments; and abide by the conditions of her parole/probation. *Id*. at 3. Based on the failure of Appellant to appear and her lack of compliance, and in the best interests of the child, the Court granted OCY's request to modify the permanency goal of return to parent, to return to parent concurrent with adoption. *Id*. A six month review hearing was scheduled for July 13, 2020. *Id*. at 2-3.

On June 11, 2020, OCY filed a Motion to Change Permanency Goal exclusively to adoption, averring that Appellant had not made progress in alleviating the circumstances which made placement of the child necessary. *See* Motion to Change Permanency Goal, 6/11/2020. Also, there had been no contact with Father. *Id*. OCY identified paternal uncle, S.M., as a kinship adoptive resource. *Id*. The change of permanency goal was to be heard at the next permanency review hearing. *Id*.

The second permanency review hearing was held on July 13, 2020. *See* Permanency Review Order, 1/15/2020. At the time of the hearing, Appellant appeared via video conference from the Erie County Prison because she had been arrested on a new set of drug charges. Appellant was again represented at the permanency review hearing by Attorney Patrick Kelley. The Court found that during the review period, Appellant had been non-compliant with the permanency plan for A.G.C.-M. and there had been no progress in alleviating the circumstances which necessitated the original placement of the child or the circumstances leading to the adjudication of dependency.

The Court specifically found that Appellant had failed to participate in any drug and alcohol treatment. *See* Permanency Review Order — Amended, 7/20/2020; Court Summary, 7/14/2020. Appellant had accumulated **24** no-show positive urinalysis screens during the review period. *Id*. Of significant concern was that Appellant was arrested in February 2020 on new drug charges (possession with intent to deliver methamphetamine and/or heroin and/or oxycodone and/or hydrochloride). *Id*. Appellant further failed to participate in any mental health treatment. *Id*. Regarding her goal to obtain and maintain stable housing, prior to February 21, 2020, Appellant had reported to OCY that she had been "staying with friends." *Id*. Appellant was, therefore, once again woefully non-compliant with the court-ordered permanency plan.

During this critical time period for the child's welfare and bonding with Appellant, Appellant had **no** visits with the child. *Id*. Appellant proclaimed for the very first time at the termination hearing, that she was "overwhelmed" by the requirements of her parole, probation, and treatment plan so she "just quit." *Id*.; *see also* testimony of Appellant, N.T. at 49-50. The record also reveals that Appellant did not participate in any Early Intervention appointments for the child or attend any medical appointments for the child. *See* Permanency Review Order — Amended, 7/20/2020; Court Summary, 7/14/2020. Notably, Appellant remained a fugitive until her arrest on February 21, 2020. *Id*. While incarcerated from February 21, 2020 to the second review hearing on July 13, 2020, Appellant had not undergone any of the many programs available to her in prison to further the return of the child to her care.

Based on Appellant's continued non-compliance, this Court granted OCY's request to change the permanent placement goal for the minor child to adoption. *Id*. at 2-3. This Court found the change of goal to adoption to be in the best interests and welfare of the child. Further, the Court ordered that A.G.C.-M. be placed in the S.M. kinship home with the paternal relatives and A.G.C.-M.'s 4-year old sibling. *Id*. The child's GAL was in agreement with the change of goal and placement. *Id*. A six month review hearing was scheduled for January 2021. *Id*. at 2-3.

On July 23, 2020, OCY filed the subject Petition for Involuntary Termination of Parental Rights pursuant to 23 Pa.C.S.A. §§ 2511(a)(1), (a)(2), (a)(5), and (b). The hearing on the Petition for Involuntary Termination of Parental Rights was held on October 27, 2020.

At the commencement of the hearing, in compliance with the recent directive set forth by the Supreme Court of Pennsylvania in *In re K.M.G.*, 219 A.3d 662, 670 (Pa. Super. 2019), *appeal granted in part*, 221 A.3d 649 (Pa. 2019), and affirmed No. 55 WAP 2019 (Pa. Nov. 10, 2020) (holding "[t]he orphans' court should first determine whether the GAL has spoken with the child about the child's preferences regarding the termination petition and whether such inquiry results in the GAL having a conflict."), the Court inquired whether Attorney Sinnott perceived a conflict of interest in his dual role as attorney and guardian ad litem for A.G.C.-M. *See* N.T. at 6. Attorney Sinnott expressed to the Court that he did not find a conflict serving as A.G.C.-M.'s attorney and guardian ad litem. N.T. at 6. Specifically, Attorney Sinnott stated: "Based on the child's age and her ability to understand these proceedings, I don't think that there can be a conflict for a child at that age." *Id*. Counsel for Appellant and OCY agreed with the assessment. The Court found that based on A.G.C.-M.'s age (3 years old) and the child's inability to express any discernable articulation of legal interest, there was no conflict and Attorney Sinnott could serve as both GAL and attorney for A.G.C.-M. *In re T.S.*, 192 A.3d 1080 (Pa. 2018) (holding that where there is no conflict of interest between a child's legal and best interests, a GAL may represent both); *see also, In re Adoption of L.B.M.*, 161 A.3d 172, 175, 180 (Pa. 2017) (plurality) (holding that pursuant to 23 Pa.C.S.A. § 2313(a), a child that is the subject of contested involuntary termination proceedings has a statutory right to counsel who discerns and advocates for the child's legal interests); and *In re K.M.G., supra.*

At the termination hearing, OCY presented the testimony of Staci Evans, Parole Agent for the Commonwealth of Pennsylvania and Haley Schaef, OCY caseworker. *See* N.T. 16-66. The only witness presented by Appellant was her own testimony. *Id*. The testimony of these witnesses is summarized as follows:

Staci Evans, Pennsylvania State Police Parole Agent

The Court first heard testimony from Parole Agent Staci Evans. *See* N.T. 16-21. Agent Evans testified she first came in contact with Appellant in September 2019. *Id*. at 17. Agent Evans confirmed that in September 2019, Appellant was on parole in Louisiana for possession of amphetamines and unauthorized use of a vehicle and the case had been transferred to Pennsylvania for supervision. *Id*. Pennsylvania, in an interstate compact with Louisiana, agreed to assume supervision of Appellant. *Id*. As part of her supervision, Appellant was drug-tested. *Id*. Agent Evans testified that on September 26, 2019, Appellant's urinalysis was positive for methamphetamine and cocaine. *Id*. at 18. Appellant was referred to a drug and alcohol treatment facility. *Id*. Agent Evans testified that initially, Appellant did participate in the treatment. *Id*.

However, the participation was short-lived and Appellant was unsuccessfully discharged from the treatment facility. *Id*. Agent Evans's testimony reveals that Appellant had only ever been involved with drug treatment for a little over a month (October to November 2019). *Id*. Agent Evans testified that Pennsylvania's supervision of Appellant ceased in mid-November 2019 when Appellant absconded from supervision. *Id*. At that time, Pennsylvania petitioned Louisiana to close their supervision of Appellant. *Id*. Agent Evans stated it was her understanding that Louisiana issued a warrant for Appellant's arrest. *Id*. at 18-19. Consequently, Appellant was and is wanted on an outstanding arrest warrant in Louisiana. *Id*.

Haley Schaef, OCY caseworker

Next, testimony was received from Haley Schaef, "advanced caseworker" for OCY. *See* N.T. 21-45. Under examination by OCY solicitor, Anthony Vendetti, Esq., Ms. Schaef testified that OCY initially became involved with Appellant in January 2019, when it was reported that A.G.C.-M. had been found playing with Appellant's drug paraphernalia (syringes). *Id*. at 22. Appellant was found to be an indicated perpetrator of child abuse for "creating a reasonable likelihood of injury or bodily harm" due to this incident. *Id. see also*, Agency's Exhibit 9; and 23 Pa.C.S.A. § 6303(b.1)(5). As a result, Appellant placed A.G.C.-M. with her maternal grandmother, P.C. *Id*. at 23.

Ms. Schaef testified that on October 3, 2019, OCY obtained an emergency protective order to remove A.G.C.-M. and place the child in foster care. *Id*. at 23-24. This was due to the fact that maternal grandmother, the assigned caregiver for A.G.C.-M., had been taken into custody on an arrest warrant. *Id*. Further, A.G.C.-M. could not safely be returned to Appellant. *Id*. Ms. Schaef testified that Appellant was not an appropriate caregiver at this time because Appellant was an indicated perpetrator of child abuse, she was homeless, unemployed, and had recently tested positive for methamphetamines. *Id*. Father was not a viable option, as he had never been a primary caregiver for A.G.C.-M., there were concerns about his criminal history, and there were questions regarding paternity. *Id*. at 25. Ms. Schaef noted that neither parent appeared for the shelter care hearing on October 4, 2019. *Id*. at 24. After the adjudication hearing on October 15, 2019, A.G.C.-M. was adjudicated dependent due to Appellant's substance abuse, extensive criminal history, homelessness, and status as an indicated perpetrator of abuse, as well as father's criminal history and lack of involvement in caregiving for A.G.C.-M. *Id*. at 24-25.

Ms. Schaef testified that Appellant has demonstrated an overall pattern of non-compliance from the onset of the dependency case. On October 23, 2019, Ms. Schaef made a home visit to Appellant to review the treatment plan and ensure Appellant understood what she was expected to do for reunification. *Id*. at 25. Ms. Schaef testified that subsequent to the meeting on October 23, 2019, Appellant's contact with the Agency was sporadic. *Id*. at 26. Every time Ms. Schaef attempted to contact Appellant via telephone, Appellant did not answer the call. *Id*. Ms. Schaef left Appellant voicemails but Appellant would not return the calls. *Id*. In fact, between November 2019 and January 2020, Appellant only contacted Ms. Schaef one time, on December 18, 2019. *Id*. During the phone call on December 18, 2019, Appellant advised Ms. Schaef she was aware of her arrest warrant from Louisiana and "didn't want to pursue anything [with OCY] because she was afraid of getting picked up." *Id*. Ms. Schaef noted that Appellant had also failed to appear for A.G.C.-M.'s doctor's appointment on December 9, 2019,

because she thought it was "a way to get her arrested" and OCY was "planning that." *Id*. at 26-27.

Prior to the first permanency review hearing scheduled on January 13, 2020, OCY requested a goal change to reunification with a concurrent goal of adoption based on Appellant and Father's total lack of compliance. Ms. Schaef testified this was an appropriate recommendation because Appellant's participation had been so sporadic and minimal. *Id*. at 28-29. Appellant had not complied with any of the goals on her treatment plan. *Id*. at 29. Appellant had been unsuccessfully discharged from JusticeWorks, a service provider that was intended to help Appellant with parenting skills, for her lack of participation. *See* Court Summary, 1/15/2020. Appellant had also been unsuccessfully discharged from Pyramid Healthcare, a drug and alcohol treatment provider, for failure to participate. *Id*. Further, Appellant had been mandated to participate in random urinalysis. Ms. Schaef testified that Appellant had no-showed for all but one scheduled urinalysis screen during the review period. N.T. at 30. The single urinalysis screen Appellant provided was a dilute positive for methamphetamines and amphetamines. *Id.; see also*, Court Summary, 1/15/2020 at 11. Importantly, Appellant had made it clear to Ms. Schaef that due to her active warrant, she did not want to pursue anything on her treatment plan. N.T. at 29. Ms. Schaef had advised Appellant that services would not be resumed until she had reported to her parole officer. *Id*. Subsequently, based on these facts and in the best interests of the child, the Court added a concurrent goal of adoption to the original goal of return to parent. *See* Permanency Review Order, 1/15/2020.

Ms. Schaef further testified that on February 12, 2020, Appellant met with her at the OCY office to review the existing treatment plan and again explain the Agency and Court's expectations. *Id*. 31-33. Ms. Schaef testified she explained to Appellant that the goal had been changed to a concurrent goal of reunification and adoption. *Id*. at 32-33. Ms. Schaef also explained what it could adding a concurrent goal of adoption could mean for Appellant's parental rights. *Id*. Ms. Schaef confirmed Appellant understood the ramifications of adding adoption to the goal of return to parent. *Id*. at 33. Ms. Schaef testified that Appellant understood what the permanency plan mandated and what was expected from her. *Id*. Ms. Schaef confirmed Appellant was not impaired or under the influence of drugs or alcohol and was appropriately responsive during the conversation. *Id*.

However, subsequent to the meeting, and despite understanding that her parental rights could be terminated for non-compliance, Appellant still did not comply with the treatment plan. *Id*. at 33. Importantly, Appellant did not turn herself in to her probation officer as she had promised to do. She was arrested and remained in jail until the next permanency review hearing on July 13, 2020. Ms. Schaef confirmed that on February 21, 2020, Appellant was arrested in Pennsylvania and was taken into custody on the active arrest warrant from Louisiana. *Id*. at 31; *see also*, Erie County Miscellaneous Docket No. CP-25-MD-123-2020. On February 24, 2020, Appellant was charged in Erie County, Pennsylvania, with possession with intent to deliver and possession of methamphetamine and/or heroin and/or oxycodone and/or hydrochloride. *Id*. at 30-31; *see also*, Erie County Criminal Docket No. CP-25-CR-855-2020. Due to the new charges, Appellant's active probation was revoked. *Id*. at 31; *see also*, Erie County Criminal Docket No. CP-25-CR-3093-2018. From Appellant's incarceration on February 21, 2020 to July 13, 2020, OCY had one contact with OCY regarding her child. *Id*. at 32; 34.

Ms. Schaef testified OCY requested a goal change to adoption for the second permanency review hearing scheduled on July 13, 2020. *Id*. at 34-35. Adoption was requested due to

Appellant's continued non-compliance with the treatment plan and her incapacity due to her incarceration in Pennsylvania and pending arrest warrant from Louisiana. *Id*. at 34-35. On cross-examination by Attorney Patrick Kelley, Ms. Schaef confirmed that Appellant had never raised "logistical problems" regarding compliance with the treatment plan. *Id*. at 42. In other words, Appellant had never stated to Ms. Schaef that she had any barriers or excuses not to comply, such as those offered by Appellant during her testimony at the termination hearing. *See, infra*.

Finally, Ms. Schaef testified regarding A.G.C.-M.'s adjustment to placement. *Id*. at 36-37. A.G.C.-M. was placed in the S.M. kinship home located in Texas in July 2020. *Id*. at 37. The child has been placed with her sister. *Id*. There are two other minor children, A.G.C.-M.'s cousins, in the home and A.G.C.-M. has bonded with the family. *Id*. Ms. Schaef testified that A.G.C.-M. is doing very well in the kinship home, which is also a preadoptive home. *Id*. Ms. Schaef reported that A.G.C.-M.'s emotional, behavior, and educational development is on target and all of her needs are being met in the home. *Id*. at 37-38.

Ms. Schaef testified that in her view, there was no indication that A.G.C.-M. has bonded with Appellant and there would be no detrimental impact if Appellant's parental rights were terminated. *Id*. Ms. Schaef stated that since the time of placement on October 3, 2019 through the date of the IVT hearing on October 27, 2020, Appellant has had **NO** physical visitation with A.G.C.-M. at the foster home or kinship home. *Id*. at 35-36. The only in-person contact Appellant had with A.G.C.-M. since October 3, 2019, occurred at a medical appointment on November 9, 2019. *Id*. at 36. Ms. Schaef testified that although Appellant did call A.G.C.-M. after she was incarcerated, A.G.C.-M. did not recognize Appellant. *Id*. at 38. Based on this testimony, it is fair to conclude A.G.C.-M. does not know Appellant.

Ms. Schaef stated that she believes Appellant does affectionately care for A.G.C.-M. *Id*. at 40. However, upon further questioning by the GAL and this Court regarding the totality of Appellant's conduct, Ms. Schaef stated the following:

> **ATTY SINNOTT:** Has [Appellant] consistently put her own needs ... in front of the needs and best interest of [A.G.C.-M.]?
>
> **MS. SCHAEF:** Yes. She has not been consistent with anything. Umm, I mean, we've had a lot of talks with her with regard to the treatment plan, and what she needed to do. Umm, but there was no motivation to do those things.
>
> **ATTY SINNOTT:** So, there's been no follow-through?
>
> **MS. SCHAEF:** Correct.
>
> **ATTY SINNOTT:** She's always expressed to you that she wanted her child back, and that she was willing to do the things necessary to do it. But has she ever done any of those things?
>
> **MS. SCHAEF:** She has not.

THE COURT: I think the more direct question is, has she ever placed the best interests of the child above her own, through action or deed?

MS. SCHAEF: No, she has not.

Id. at 41. Thereby, Ms. Schaef's testimony was emphatic that Appellant has **never** made A.G.C.-M. a priority in her own life.

L.C. - Appellant

Finally, Appellant testified on her own behalf, expressing to the Court that she would like an opportunity to work toward reunification. *Id*. at 47. Appellant acknowledged that on October 3, 2019, at the time of the Emergency Protective Order, she was homeless and temporarily living at the Thunderbird Motel, located in Erie, Pennsylvania. *Id*. She was unemployed and the Salvation Army was paying for the motel room. *Id*. Appellant was not caring for the child and had not for some time, as the child had been placed with P.C., Appellant's mother, in January 2019. *Id*. at 23; 61-62; *see also*, Emergency Protective Order, 10/3/2019; Dependency Petition, 10/7/2019 at 3-4. Also, Appellant was actively using drugs. *See* Dependency Petition, 10/7/2019 at 3. Appellant acknowledged all of this and stipulated to the Dependency Petition. N.T. at 48. Appellant confirmed she had understood what was expected of her in order to be reunified with A.G.C.-M. *Id*. Appellant agreed that there were no barriers to her ability to comply with the treatment plan. *Id*. Appellant stated that she did briefly comply (for approximately 5 weeks) with the treatment plan, however, she voluntarily stopped in mid-November. *Id*. at 48-49. Appellant explained she had quit treatment "... because I felt like no matter what I tried to do, everything seemed, like, against me. Umm, I know that's not the way to think when you — you know, my child is involved, and it involves, umm, getting her back." *Id*. at 49. Appellant testified she was "overwhelmed" with the requirements of probation, parole, and OCY's plan, so she "just quit." *Id*. at 49-50. When questioned by the Court whether she had ever expressed feeling "overwhelmed" to OCY or the Court, or anyone else, Appellant conceded that this was the first time. *Id*. Appellant also confirmed that she failed to appear for the first permanency hearing because she had absconded from supervision in mid-November 2019. *Id*. at 50-51. This illustrates that Appellant's testimony is not entirely truthful. Appellant didn't comply because she was "overwhelmed," she failed to comply because she was on the run to avoid arrest.

Appellant testified that, while still on the run, she went to meet with Ms. Schaef on February 12, 2020. *Id*. at 51. Appellant testified that Ms. Schaef informed Appellant that, based on her lack of compliance, she was on the verge of "losing" her parental rights to A.G.C.-M. *Id*. At that point, Appellant told Ms. Schaef she was willing to "turn herself in" to her probation officer. *Id*. However, Appellant admitted she did not "turn herself in" and never reported to her probation officer, contrary to what she told Ms. Schaef. *Id*. Appellant asserted that she never turned herself in because she was arrested nine days later, on February 21, 2020. *Id*. at 51-52. This defies common sense, and demonstrates to this Court that Appellant never credibly intended to "turn herself in." Consequently, this Court finds Appellant's statement disingenuous as she had ample opportunity to "turn herself in" but never did so, and again, never exhibited a desire to work the permanency plan to reunify with A.G.C.-M.

Regarding her criminal status, Appellant confirmed she had been on parole in Louisiana which was being supervised by Pennsylvania. *Id*. at 54. Appellant testified that a hearing was scheduled in Louisiana on November 5, 2020, to address her flight from supervision in Pennsylvania. *Id*. at 53-54. Appellant missed the hearing in Louisiana, which resulted in another warrant being issued for her arrest. *Id*. at 54. Appellant testified she had a video conference scheduled with the Louisiana courts on November 22, 2020, after which she "will know more." *Id*. at 54. Appellant stated that her Louisiana parole was supposed to end in March 2020, but because of her warrant she "wasn't sure how the hearing was going to go." *Id*. at 55. Appellant agreed that her current aggregate sentence in Pennsylvania is 17 months to 42 months of incarceration and 3 years of probation.[7] *Id*. at 55-56. Despite acknowledging this, Appellant indicated she believed she may be eligible for release after her hearing on November 22, 2020 with Louisiana.[8] *Id*. at 56-57. Appellant also conceded she could be revoked and resentenced for her charges in Louisiana, which carried an original sentence of three years. *Id*. at 55.

Appellant further acknowledged that in January 2019, she had been found to be an indicated perpetrator of creating a reasonable likelihood of bodily injury by the Pennsylvania Department of Human Services. *Id*. at 55. Appellant confirmed that the reason for the finding was because she was actively injecting methamphetamine and had left her syringes lying around the home and accessible to A.G.C.-M. *Id*. at 61. Appellant testified that due to the finding, she voluntarily placed A.G.C.-M. with the maternal great-grandmother, J.W. *Id*. at 61-62. Agency Exhibits demonstrate that P.C., maternal grandmother, was also approved as a caregiver. *See* Agency Exhibits 4-7. From January 2019 through June 2019, A.G.C.-M. was cared for by J.W. and P.C., the maternal grandmother. N.T. at 61-62. Appellant testified that in March 2019, she was again arrested for a probation violation regarding her Pennsylvania criminal charges. *Id*. at 62. As a result of this violation, Appellant testified she was released from jail on June 12, 2019. *Id*. Upon her release, she resumed partial care of A.G.C.-M. until the child was removed on October 3, 2019, due to Appellant's being homeless and actively using drugs again. *Id*. The child's primary caregiver, P.C., was arrested, leaving the child with no viable caregiver. *See* Emergency Protective Order, 10/3/2019.

Regarding drug and mental health concerns, Appellant confirmed her drug of choice is methamphetamine and that she suffers from depression. N.T. at 60. Appellant testified she was addicted to methamphetamine in January 2019, had "slipped" and used one time in October 2019, and began using again after A.G.C.-M. was removed. *Id*. at 65-66. This testimony is, however, belied by the testimony of PA Parole Agent Staci Evans, who testified without objection that Appellant had tested "positive for methamphetamine and

[7] The Court takes judicial notice of the following: At Erie County Criminal Docket No. CP-25-CR-591-2020, Appellant was sentenced to 3 years of supervision, consecutive to confinement at Docket No. CP-25-CR-855-2020. At Erie County Criminal Docket No. CP-25-CR-855-2020, Appellant was sentenced to a minimum of 15 months of incarceration to a maximum of 30 months of incarceration, consecutive to confinement at Docket No. CP-25-CR-3093 -2018. Due to the new charges at Docket Nos. CP-25-CR-855-2020 and CP-25-CR-591-2020, Appellant was revoked at Erie County Criminal Docket No. CP-25-CR-3093-2018 and resentenced to a minimum of 2 months of incarceration to a maximum of 12 months of incarceration. Finally, at Erie County Miscellaneous Docket No. CP-25-MD-123-2020, Appellant was charged with Arrest Prior to Requisition and is awaiting extradition to Louisiana.

[8] As of the date of the Opinion herein, a review of the Pennsylvania Department of Corrections database reveals Appellant is still incarcerated at SCI-Muncy. Further, there are no records of a release in the criminal dockets of Erie County, Pennsylvania.

cocaine" on September 26, 2019. *See* testimony of Staci Evans, N.T. at 18. Haley Schaef, OCY caseworker, testified that Appellant had tested "positive for methamphetamines and amphetamines" on October 16, 2019. *See* testimony of Haley Schaef, N.T. at 30; *see also*, Court Summary, 1/15/2020 at 11. This demonstrates that Appellant was again actively using illegal drugs throughout this time period.

When questioned regarding any drug or mental health treatment she had participated in during the pendency of this case, Appellant explained that she had not been taking medication for her mental illness prior to incarceration, but is doing so now. *Id.* at 61. Appellant also testified she "completed" a drug and alcohol program with Stairways, a treatment provider, while she was incarcerated. *Id.* at 57-58. To verify this statement, Appellant submitted a letter from Stairways in support. *Id.*; *see also*, Defendant's Exhibit A. However, a review of the letter from Stairways, dated July 2, 2020, indicated that Appellant had been assessed on May 27, 2020 and "agreed to attend the In-House D&A Treatment Program" and to complete the "five hours of treatment per week" and "twelve outpatient sessions" mandated for successful completion. *See* Defendant's Exhibit A. Further, the letter indicated that Appellant was recommended to participate in a partial outpatient treatment program for her dual diagnoses of drug addiction and mental illness. N.T. at 60; *see also*, Defendant's Exhibit A. However, other than her statement that she had completed the program but "left shortly after that and didn't get to send any of that home," Appellant offered no verification of completion of the partial outpatient treatment program. N.T. at 58-59. Regardless if Appellant has recently completed a drug and alcohol program while incarcerated, for all of the other reasons discussed *infra*, this fact alone would not demonstrate that Appellant could safely and permanently parent the child with the stability so desperately lacking in A.G.C.-M.'s young life.

Appellant also vaguely testified that during her current incarceration, she has participated in "religious groups," but that due to COVID-19, parenting programs have been suspended. *Id.* at 58-59. Appellant explained she planned to begin a program called "Living Safely for Women in Outpatient" upon her return to SCI-Muncy. *Id.* at 57.

Finally, when questioned about her plans upon release from prison, Appellant testified that she intended to move into her grandmother's home (J.W.). *Id.* at 59.

At the conclusion of the termination hearing, the Court found that OCY had established by clear and convincing evidence that Appellant's conduct satisfied the statutory grounds for termination as to § 2511(a)(1), (a)(2), and (a)(5). The Court further determined termination best served the needs and welfare of A.G.C.-M., pursuant to § 2511(b). Thereafter, the Court terminated Appellant's parental rights by Decree dated October 27, 2020.

ISSUES PRESENTED

On appeal Appellant raises the following issues:

> 1. Did the Trial Court err in weighing the effect of Appellant's incarceration as a ground for termination of her parental rights?
>
> 2. Did the Trial Court err in finding that sufficient evidence was presented to establish grounds for the termination of Appellant's parental rights?

3. Did the Trial Court err in finding that sufficient evidence was presented to establish that severing Appellant's parental rights was in the best interest of the child?

See Statement Pursuant to Pa.R.A.P. 1925.

STANDARD OF REVIEW

The standard of review from an order terminating parental rights:

> ... requires appellate courts to accept the findings of fact and credibility determinations of the trial court if they are supported by the record. If the factual findings are supported, appellate courts review to determine if the trial court made an error of law or abused its discretion. A decision may be reversed for an abuse of discretion only upon demonstration of manifest unreasonableness, partiality, prejudice, bias, or ill-will. The trial court's decision, however, should not be reversed merely because the record would support a different result.

In re J.W.B., 232 A.3d 689, 695 (Pa. 2020) (citing *In re T.S.M.*, 71 A.3d 251, 267 (Pa. 2013) (citations and quotation marks omitted)). This Court is also mindful that a reviewing Court allows deference to a trial court as recognized in *In re T.S.M., supra*, wherein the Supreme Court of Pennsylvania noted: "We have previously emphasized our deference to trial courts that often have first-hand observations of the parties spanning multiple hearings." *Id*. at 267. Further, a reviewing Court will "accept the findings of fact and credibility determinations of the trial court if they are supported by the record." *Id*.

DISCUSSION

Termination of parental rights is governed by section 2511 of the Adoption Act, 23 Pa.C.S.A. § 2511. In relevant part, Section 2511 provides:

> **(a) General rule.** — The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:
>
> (1) The parent by conduct continuing for a period of at least six months immediately preceding the filing of the petition either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties.
>
> (2) The repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent ...
>
> (5) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period

of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time and termination of the parental rights would best serve the needs and welfare of the child ...

(b) Other considerations. — The court in terminating the rights of a parent shall give primary consideration to the developmental, physical and emotional needs and welfare of the child ...

23 Pa.C.S.A. § 2511.

"Parental rights may be involuntarily terminated where any one subsection of Section 2511(a) is satisfied, along with consideration of the subsection 2511(b) provisions." *In re Z.P.*, 994 A.2d 1108, 1117 (Pa. Super. 2010) (emphasis added) (citing *In re Adoption of R.J.S.*, 901 A.2d 502, 508 n. 3 (Pa. Super. 2006). Thus, termination of parental rights requires the Court to engage in a bifurcated process:

> Initially, the focus is on the conduct of the parent. The party seeking termination must prove by clear and convincing evidence that the parent's conduct satisfies the statutory grounds for termination delineated in Section 2511(a). Only if the court determines that the parent's conduct warrants termination of his or her parental rights does the court engage in the second part of the analysis pursuant to Section 2511(b): determination of the needs and welfare of the child under the standards of the best interests of the child. One major aspect of the needs and welfare analysis concerns the nature and status of the emotional bond between parent and child, with close attention paid to the effect on the child of permanently severing any such bond.

In re K.R., 200 A.3d 969, 978-979 (Pa. Super. 2018) (citing *In re L.M.*, 923 A.2d 505, 511 (Pa. Super. 2007)).

In the case *sub judice*, the Court found that OCY had established grounds for involuntary termination of Appellant's parental rights at subsections 2511(a)(1), (a)(2), (a)(5), and (b), by clear and convincing evidence. Appellant raises issues regarding the Court's consideration of Appellant's incarceration, as well as the sufficiency of the evidence supporting termination of parental rights. These claims will now be addressed in *seriatim*.

1. Appellant's Incarceration as a Factor Supporting Termination

In her first claim, Appellant asserts the Court erred "in weighing the effect of Appellant's incarceration as a ground for termination of her parental rights." See Statement Pursuant to Pa.R.A.P. 1925 at ¶ 1.

In the case of an incarcerated parent, incarceration is a "factor the Court must consider in analyzing a parent's performance." *In re E.A.P.*, 944 A.2d 79, 83 (Pa. Super. 2008). "The cause of incarceration may be particularly relevant to the Section 2511(a) analysis, where imprisonment arises as a direct result of the parent's actions which were 'part of the original reasons for the removal' of the child." *In re Z.P.*, 994 A.2d at 1120 (citing) *In re C.L.G.*, 956 A.2d 999, 1006 (Pa. Super. 2008) (*en banc*). A court is required to "inquire whether the parent has utilized those

resources at his or her command while in prison in continuing a close relationship with the child." *In re Adoption of S.P.*, 47 A.3d 817, 828 (Pa. 2012) (citing *In re Adoption of McCray*, 331 A.2d 652 (Pa. 1975)). "[P]arental duty requires that the parent act affirmatively with good faith interest and effort, and not yield to every problem, in order to maintain the parent-child relationship to the best of his or her ability, even in difficult circumstances." *In re J.T.M.*, 193 A.3d 403, 409 (Pa. Super. 2018). "Where the parent does not exercise reasonable firmness in declining to yield to obstacles, his other rights may be forfeited." *In re Adoption of S.P.*, 47 A.3d at 828 (citing I*n re Adoption of McCray*, 331 A.2d at 655).

Here, Appellant's incarceration was a factor the Court was required to consider in determining whether to terminate parental rights. Certainly, Appellant's own actions (drug use) were a "part of the original reason for removal of the child." Thus, the vital question was whether Appellant, despite being incarcerated, acted affirmatively and utilized available resources to maintain a parent-child relationship with A.G.C.-M., or whether Appellant yielded to the obstacle created by her incarceration. *In re Adoption of S.P.*, 47 A.3d at 828; *In re Adoption of McCray*, 331 A.2d at 655; *In re J.T.M.*, 193 A.3d at 409. Consideration of Appellant's conduct during incarceration was critical to answering that question. The Court could also fairly consider Appellant's term and length of incarceration as it may be relevant to her incapacity to care for the child.

As discussed further *infra*, Appellant failed to act affirmatively to maintain a parent-child relationship with A.G.C.-M. Appellant was incarcerated on February 21, 2020. The Petition for Involuntary Termination of Parental Rights was filed on July 23, 2020.[9] In the five months while Appellant was incarcerated, there is no evidence that she made any effort to continue a genuine parent-child relationship with A.G.C.-M. Although Appellant made some phone calls to the foster home, it was reported that A.G.C.-M. was not familiar with Appellant. N.T. at 38. The list of actions Appellant failed to take while incarcerated is much longer, for example: her failure to remain in contact with OCY; her failure to take a parenting class; her failure to participate in drug and alcohol treatment; or her failure to participate in mental health treatment.

Appellant has also not demonstrated a firm commitment to treatment and reunification while incarcerated. Appellant testified that she was supposed to start the "Living Safely for Women in Outpatient" program at SCI-Muncy "next Monday," but because she was transported for the termination hearing it was "probably going to kick her start date back." *Id*. at 57. Appellant stated she had participated in some "religious groups" while incarcerated without providing further detail. *Id*. at 58-59. While the Court recognizes that Appellant may have put forth minimal effort to obtain some treatment, her conduct has fallen short of demonstrating she has "used resources her command while in prison" and has exercised "reasonable firmness in declining to yield to obstacles" in order to "maintain the parent-child relationship to the best of her ability." *See In re Adoption of S.P.*, 47 A.3d at 828; *In re Adoption of McCray*, 331 A.2d at 655; I*n re J.T.M.*, 193 A.3d at 409. This Court has difficultly in ascertaining how Appellant's unverified, undocumented, and minimal participation in

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[9] As provided in 23 Pa.C.S.A. § 2511(b): " ... [w]ith respect to any petition filed pursuant to subsection (a)(1), (6) or (8), the court shall not consider any efforts by the parent to remedy the conditions described therein which are first initiated subsequent to the giving of notice of the filing of the petition." Thereby, the relevant inquiry was Appellant's conduct from the time of incarceration until the filing of the Petition. However, the Court notes that the evidence demonstrated that Appellant did not make affirmative efforts to maintain the parent-child relationship subsequent to July 23, 2020.

these "programs" have in any way furthered the goals of the permanency and treatment plans and, ultimately, her reunification with A.G.C.-M.

Another factor the Court must consider regarding an incarcerated parent is "the length of the remaining confinement," which "can be considered as highly relevant to whether 'the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent,' sufficient to provide grounds for termination ... " *In re Adoption of S.P.*, 47 A.3d at 830 (citing 23 Pa.C.S.A. § 2511(a)(2)); *see also In re D.C.D.*,105 A.3d 662, 677 (Pa. 2014); *In re Adoption of A.C.*,162 A.3d 1123, 1132 (Pa. Super. 2017). Here, the certified criminal dockets, admitted at Agency Exhibit 10, indicate Appellant faces an aggregate 17 month minimum to a 42 month maximum sentence of incarceration, followed by a 3 year probation tail. N.T. at 55-56; *see* also, footnote 4, *supra*. Further, Appellant's potential exposure for additional incarceration in Louisiana is unknown. N.T. at 55-56. It is foreseeable that Appellant's parole supervision in Louisiana could be revoked, exposing her to additional incarceration. The Court was required to determine whether Appellant was capable of providing care for the child and whether she continued to be incapacitated in light of her remaining incarceration.

For the above reasons, Appellant's claim is meritless. No error occurred in when the Court considered the effect of Appellant's incarceration on the termination of her parental rights. Indeed, the Court was mandated to do so. This claim must be dismissed.

2. Sufficiency of the Evidence at 23 Pa.C.S.A. § 2511(a)

Appellant's second claim baldly asserts that the Court erred "in finding sufficient evidence to establish grounds for termination of Appellant's parental rights." *See* Statement Pursuant to Pa.R.A.P. 1925 at ¶ 2.

Appellant's challenge to the sufficiency of the evidence at ¶ 2 of his 1925(b) Statement is too vague for the Court to address and is therefore waived. Pursuant to the Pennsylvania Rules of Appellate Procedure, a 1925(b) "[s]tatement shall concisely identify each error that the appellant intends to assert with sufficient detail to identify the issue to be raised for the judge." Pa.R.A.P. Rule 1925(b)(ii). "[A] Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent to no Concise Statement at all." *Kanter v. Epstein*, 866 A.2d 394, 400 (Pa. Super. 2004) (citing *Commonwealth v. Dowling*, 778 A.2d 683, 686-687 (Pa. Super. 2001).

In the case *sub judice*, Appellant merely asserts the evidence was insufficient at section 2511(a). However, Appellant's parental rights were terminated at subsections 2511(a)(1), (a)(2), and (a)(5). As Appellant does not specify at which subsection the evidence was insufficient, Appellant's sufficiency of the evidence claim lacks specificity and is too vague to permit meaningful review. This claim is waived.

Assuming *arguendo* that Appellant's claim regarding the sufficiency of the evidence at section 2511(a) is not waived for vagueness, the Court will briefly analyze the evidence at each subsection to support its termination of parental rights, remaining cognizant that "[p]arental rights may be involuntarily terminated where any one subsection of Section 2511(a) is satisfied, along with consideration of the subsection 2511(b) provisions." *In re Z.P., supra*.

23 Pa.C.S.A. § 2511(a)(1)

A court may terminate parental rights if "[t]he parent by conduct continuing for a period of at least six months immediately preceding the filing of the petition either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties." 23 Pa.C.S.A. § 2511(a)(1). "The court should consider the entire background of the case and not simply 'mechanically apply the six-month statutory provision. The court must examine the individual circumstances of each case and consider all explanations offered by the parent facing termination of his ... parental rights, to determine if the evidence, in light of the totality of the circumstances, clearly warrants the involuntary termination'." *In re Adoption of A.C.*, 162 A.3d at 1129 (quoting *In re Z.P.*, 994 A.2d at 1117).

A parent's duty and obligation of care "is a positive duty which requires affirmative performance ... it requires continuing interest in the child and a genuine effort to maintain communication and association with the child." *In re Z.P.*, 994 A.2d at 1118-21. "[A] parent is required to make diligent efforts towards the reasonably prompt assumption of full parental responsibilities." *Interest of K.M.W.*, 238 A.3d 465, 474 (Pa. Super. 2020) (citing *In re A.L.D.*, 797 A.2d 326, 340 (Pa. Super. 2002).

The subject Petition was filed on July 23, 2020. This meant that Appellant's conduct since January 23, 2020 (at least six months immediately preceding the filing), was at issue. The totality of the evidence presented at trial established that Appellant's conduct between at least January 23, 2020 and July 23, 2020, evidenced Appellant's settled purpose of relinquishing parental claim to A.G.C.-M. *See* 23 Pa.C.S.A. § 2511(a)(1). Appellant had no physical contact with A.G.C.-M. since at least November 2019, when she attended a medical appointment. *Id*. at 36. Between November 2019 and February 2019, Appellant was on the run from law enforcement. *Id*. at 26-29. During this time, Appellant did not maintain contact with OCY or work on her treatment plan. *Id*. at 26-27. When Appellant did finally contact OCY on February 12, 2020, she failed to follow through with turning herself in to probation as she had promised. *Id*. at 51-52. Appellant had made it clear that she was more concerned with not facing the consequences of her outstanding warrants than she was in reunifying with A.G.C.-M. *Id*. at 26-29; 41. Ultimately, Appellant was arrested on the Louisiana warrant, she incurred new charges, and her probation was revoked. *Id*. at 31; *see also*, Erie County Criminal Docket No. CP-25-CR-3093 -2018. Due to the new charges and revocation, Appellant has been incarcerated since February 21, 2020. *Id*. at 31. During her incarceration, Appellant has again failed to make "a genuine effort to maintain communication and association with the child." *In re Z.P.*, 994 A.2d at 1118-21. This totality of conduct fortifies that Appellant did not maintain " ... continuing interest in the child and a genuine effort to maintain communication and association with the child." *In re Z.P.*, 994 A.2d at 1118-21. Appellant also failed to " ... make diligent efforts towards the reasonably prompt assumption of full parental responsibilities." *Interest of K.M.W.*, 238 A.3d at 474.

Appellant has refused or failed to perform parental duties. *See* 23 Pa.C.S.A. § 2511(a)(1). The vital question was whether Appellant was able to perform parental duties, provide parental care, control or subsistence, and remedy the conditions which led to the initial placement. The evidence demonstrated that Appellant is not capable of meeting the essential needs of a young child and will be unable to do so within a reasonable amount of time. OCY presented evidence that Appellant was unable to take custody of A.G.C.-M. as of the date of

the hearing, as she remained incarcerated on an indeterminate sentence. Although Appellant hoped she might be released sooner, she acknowledged that on paper her cumulative sentence was 17 months minimum to 42 months maximum, with a 3 year probation tail. N.T. at 55-56. Appellant also acknowledged that she was facing revocation in Louisiana and could incur further incarceration there. *Id*. Any early release and ability to assume custody of A.G.C.-M. in the near future is speculative at best.

Also critical to the Court's analysis as to whether Appellant "evidenced a settled purpose of relinquishing parental claim to the child," (23 Pa.C.S.A. § 2511(a)(1)), Appellant failed to keep in contact with OCY and to work her treatment plan during the pendency of the case. While the Court could graciously credit Appellant with approximately five weeks of compliance, from October to November 2019, she quickly gave up and absconded from her court-ordered supervision. Appellant explained her conduct, stating:

> **APPELLANT:** ... I actually did comply for, umm — I stopped everything, like, my meetings with ... Haley Schaef, and Justice Works. Umm, and my treatment was Pyramid. I stopped all of that around the exact same time.
>
> **THE COURT:** What time was that?
>
> **APPELLANT:** Umm, around mid-November.
>
> **THE COURT:** Well, it begs the question, why?
>
> **APPELLANT:** Well, because I felt like no matter what I tried to do, everything seemed, like, against me. Umm, I know that's not the way to think when you — you know, my child is involved, and it involves, umm, getting her back.

N.T. at 49. The Court reminded Appellant the first permanency hearing had not yet occurred by mid-November, and at the time the goal was still reunification. *Id*. Importantly, the Court had not even had the opportunity to assess Appellant's compliance with the treatment plan or consider a modification. *Id*. Appellant conceded these facts, continuing:

> **APPELLANT:** Right. I'm not — I'm talking about everything else.
>
> **THE COURT:** Okay.
>
> **APPELLANT:** Along with — like, I was on county probation, I had to do community service for them. I was on state parole. And I was doing, umm intensive outpatient through Pyramid. And then I was meeting with Haley [Schaef]. I met with her — I think it was at Justice Works, where we, umm, set up, like parenting, and stuff like that. Umm, on top of it I had to go to regular groups, and things like that. I had to report to county probation. I just — I got overwhelmed with all of that. On top of Louisiana at the last minute. I tried to — umm, they had a hearing for me scheduled December 5th. And I tried to reschedule that with my attorney down there. I couldn't

> get in touch with him. And because I couldn't make that hearing, I felt like everything else would fall. Like, as in, my probation, and things like that. And I did give up. And I shouldn't have, considering, like I said, my child. Umm, I got overwhelmed. And instead of me talking to someone about it, I didn't. I just quit.

Id. at 49-50. It is clear that Appellant's protestation of being "overwhelmed" is due to her own choices of drug use and criminal activity, leading to her incarceration and parole supervision. Appellant has failed to "exercise reasonable firmness in resisting the obstacles which limit ... her ability to maintain the parent/child relationship." *See In re J.T.M.*, 193 A.3d at 410-11. Appellant made minimal, if any, effort to overcome the obstacles of drug use and her criminal behavior which took her away from the child. Importantly, this was the first time Appellant had complained of being "overwhelmed" by the services outlined in the treatment plan and further eroded any remnant of credibility to this claim. Further supporting this Court's finding that OCY met its burden by clear and convincing evidence to terminate Appellant's parental rights pursuant to § 2511(a)(1) was the fact that Appellant had never had a visit with the child throughout the life of this dependency case. Appellant went to one medical appointment for A.G.C.-M. This reinforced that Appellant "refused or failed to perform parental duties." 23 Pa.C.S.A. § 2511(a)(1).

After a close examination of Appellant's "individual circumstances" and consideration of Appellant's explanations for her failure to perform her parental duties, the Court found the "totality of the circumstances" supported termination of Appellant's parental rights at subsection 2511(a)(1). *In re Adoption of A.C.*, 162 A.3d at 1129. Clearly, as demonstrated, there was sufficient and ample evidence to support this Court's finding that Appellant's conduct of complete non-compliance with court-ordered treatment and her virtual abandonment of the child through her flight from criminal consequences "evidenced a settled purpose of relinquishing parental claim to a child." 23 Pa.C.S.A. § 2511(a)(1).

<u>23 Pa.C.S.A. § 2511(a)(2)</u>

Continuing, a court may terminate parental rights if "[t]he repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent ... " 23 Pa.C.S.A. § 2511(a)(2).

"Incarceration alone is not sufficient to support termination under any subsection, but 'incarceration will certainly impact a parent's capability of performing parental duties, and may render a parent incapable of performing parental duties under subsection (a)(2)'." *Interest of K.M.W.*, 238 A.3d at 474 (citing *In re E.A.P.*, 944 A.2d 79, 82-83 (Pa. Super. 2008) (emphasis in original)). Relevant to the matter at hand, when terminating parental rights pursuant to subsection 2511(a)(2), "[i]ncarceration, while not a litmus test for termination, can be determinative of the question of whether a parent is incapable of providing essential parental care, control, or subsistence." *Interest of K.M.W.*, 238 A.3d at 474 (citing *In re Adoption of S.P.*, 47 A.3d at 830 (Pa. 2012). "[T]he length of the remaining confinement can be considered as highly relevant to whether 'the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent,' sufficient to provide

grounds for termination ... ” *In re Adoption of S.P.*, 47 A.3d at 830 (citing 23 Pa.C.S.A. § 2511(a)(2)).

In *Interest of K.M.W., supra*, the Pennsylvania Superior Court recently stated:

> Each case of an incarcerated parent facing termination must be analyzed on its own facts, keeping in mind ... that the child's need for consistent parental care and stability cannot be put aside or put on hold. Parental rights are not preserved by waiting for a more suitable or convenient time to perform one's parental responsibilities while others provide the child with his or her physical and emotional needs. Rather, a parent must utilize all available resources to preserve the parental relationship, and must exercise reasonable firmness in resisting obstacles placed in the path of maintaining the parent-child relationship ...

Id. at 474 (internal citation omitted).

The evidence presented at trial established that Appellant's repeated and continued incapacity, neglect, and/or refusal has caused A.G.C.-M. to be without essential parental care, control, or subsistence necessary for the child's physical or mental well-being, and that the conditions and causes of the incapacity, neglect and/or refusal cannot or will not be remedied by Appellant. *See* 23 Pa.C.S.A. § 2511(a)(2).

While the Court recognizes Appellant's incarceration alone is not sufficient to terminate her parental rights, the evidence undoubtedly established that the incarceration impacted Appellant's ability to provide the necessary and essential parental care, control, or subsistence for A.G.C.-M.'s well-being. Appellant's incarceration has also impacted Appellant's ability to remedy the conditions that led to initial placement. In the 22 months between January 2019 and the date of the hearing on October 27, 2020, Appellant has been incarcerated for 11 months. *See* N.T. at 62-63. This includes Appellant's incarceration from March 2019 through June 2019, as well as Appellant's current incarceration which commenced on February 21, 2020. *Id*. at 31. Also, neither Appellant nor the Court can predict her release date. It is reasonable to conclude that Appellant is facing further substantial incarceration in both Pennsylvania and Louisiana. This begs the question: How long is the child supposed to wait for Appellant?

The impact of Appellant's stints of incarceration on her ability to provide parental care for A.G.C.-M were addressed at the termination hearing:

> **THE COURT:** So, the history of this case should include that from January [2019] until June [2019], the child was not in your care for a period of six months, correct?
>
> **APPELLANT:** Yes.
>
> **THE COURT:** And then from October 3rd [2019] — so the beginning of October, November, and December [2019], the child was not in your care, correct?
>
> **APPELLANT:** Yes.

> **THE COURT:** So for nine months, or, even giving you the benefit, eight months out of twelve months of 2019, you did not care for your child, correct?
>
> **APPELLANT:** I mean, I guess technically, no ...

N.T. at 62-63.

Even without consideration of Appellant's incarceration, which arguably creates an incapacity for her to care for A.G.C.-M., Appellant has never demonstrated through action her desire to provide parental care for the child. The record is clear that for 3 more months, from November 2019 until her arrest in February 2020, Appellant was a fugitive and provided no parental care to A.G.C.-M. *Id*. at 26-29. During this time, her primary concern was not for A.G.C.-M.'s physical or mental well-being, but to avoid her own apprehension. *Id*. at 26-29; 41.

Between October 3, 2019 and the termination hearing on October 27, 2020, Appellant did not visit her child even once. *Id*. at 35-36. Appellant gave A.G.C.-M. one gift in more than a year. *Id*. at 40. Although Appellant has sporadically called A.G.C.-M. at the foster home, by all reports A.G.C.-M. does not know who Appellant is. *Id*. at 38. Appellant has simply never made A.G.C.-M. a priority. Appellant's conduct in putting her own needs above her child's, in essence, "waiting for a more suitable or convenient time to perform her parental responsibilities while others provide the child with his or her physical and emotional needs," justified termination of her parental rights. *Interest of K.M.W.*, 238 A.3d at 474.

Further, Appellant failed to accomplish any of the goals on her treatment plan in an attempt to remedy the circumstances that led to A.G.C.-M.'s placement. One of the major concerns was Appellant's drug use, which Appellant admitted has continued, to some extent, during the pendency of this case. Appellant's flight from apprehension also contributed to the circumstances leading to the placement, and the consequence of her flight continues to impact her ability to remedy the circumstances. There is no dispute that Appellant was aware of what was required of her in order to reunify with A.G.C.-M. Unfortunately, Appellant failed to "exercise reasonable firmness in resisting obstacles placed in her path" and instead succumbed to them. *Interest of K.M.W.*, 238 A.3d at 474.

After review of the specific facts and circumstances of this case, the Court found the totality of the circumstances supported termination of Appellant's parental rights at subsection 2511(a)(2). Appellant's lifestyle and immersion in crime have caused A.G.C.-M. to be "without essential parental care, control or subsistence necessary for his physical or mental well-being." 23 Pa.C.S.A. § 2511(a)(2). Further, Appellant's continued poor choices have resulted in the "incapacity ... neglect or refusal" that "will not be remedied" by Appellant. *Id*. Appellant's bald assertion regarding the sufficiency of the evidence at this subsection is without merit.

23 Pa.C.S.A. § 2511(a)(5)

Next, a court may terminate parental rights if:

> [t]he child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist,

> the parent cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time and termination of the parental rights would best serve the needs and welfare of the child ...

23 Pa.C.S.A. § 2511(a)(5). "[U]nlike Section 2511(a)(2), Section 2511(a)(5) evaluates the likelihood that services provided to a parent will remedy the conditions which led to the child's removal." *In re A.S.*, 2010 PA Super 164, 11 A.3d 473, 482-83 (Pa. 2010) (citing *In re Adoption of M.E.P.*, 825 A.2d 1266, 1273-74 (Pa. Super. 2003)). "The 'reasonable time' requirement [of § 2511(a)(5)] is intended to prevent children from growing up in an indefinite state of limbo, without parents capable of caring for them, and at the same time unavailable for adoption by loving and willing foster families ... " *In re N.C.*, 763 A.2d 913, 918 (Pa. Super. 2000).

The plain language of § 2511(a)(5) permits termination of parental rights on an accelerated basis. Thus, once a child has been removed from a parent's care for at least six months and the conditions that led to the removal are not or cannot be remedied, termination can be proper in the best interests of the child. In the case *sub judice*, A.G.C.-M. has been formally removed from Appellant's care for nearly ten months (though informally much longer, as discussed *supra*). Termination of Appellant's rights could have been pursued as early as March 2020, particularly when Appellant utterly failed to comply with the treatment plan. Appellant's non-compliance resulted in the persistence of the conditions that had led to A.G.C.-M.'s removal. Despite Appellant's failure to cooperate for the first six months after A.G.C.-M's removal, she was provided additional time to remedy the conditions and given the opportunity for services to assist in the return of her child. However, Appellant still failed to do so.

Specifically, the evidence presented at trial established that A.G.C.-M. was initially removed from Appellant's care by Emergency Protective Order of October 3, 20219, and has remained out of Appellant's care for at least six months. *See* 23 Pa.C.S.A. § 2511(a)(5). Further, the conditions which led to the removal — namely, Appellant's unstable home, drug use, mental health concerns, and prior history with the Agency – continue to exist. Appellant's conduct has consistently demonstrated she cannot or will not remedy these conditions within a reasonable period of time. *See* 23 Pa.C.S.A. § 2511(a)(5). Appellant is currently incarcerated due to a conviction for, *inter alia*, a drug offense. *See* Erie County Criminal Docket No. CP-25-CR-855-2020. Appellant testified that she planned to live with her grandmother in Erie County upon release, but she provided no further support that the plan was feasible or stable. N.T. at 59. Notably, Appellant made no indication of a plan to continue treatment for her drug addiction and mental health upon release. While she appears to be drug-free and treating her mental health while confined to prison, historically Appellant has not been amenable to treatment when she is not incarcerated. Whether she can maintain her status upon release is merely speculative at this point.

Finally, the termination of Appellant's rights best serve the needs and welfare of A.G.C.-M. *See* 23 Pa.C.S.A. § 2511(a)(5). The child is placed in a kinship home with her sister. The child has bonded to the kinship family and all of her needs are being met. A.G.C.-M., who has already been waiting over a year for permanency, cannot remain in limbo while Appellant

attempts to remedy her own circumstances, the chances of which are speculative at best.

Also critical to the Court's analysis at subsection (a)(5), the evidence presented at the termination hearing demonstrated there was no evidence of a bond between Appellant and A.G.C.-M. Specifically, Appellant has not physically visited with A.G.C.-M. in over a year. Although Appellant made occasional phone calls to the foster home, the child did not understand Appellant or her parental role. There is no evidence of a parent-child bond or any indication that termination would be detrimental to the child in this situation.

After careful consideration, the Court found OCY proved by clear and convincing evidence that termination of Appellant's parental rights at subsection 2511(a)(5) "would best serve the needs and welfare of the child." Appellant's claim regarding the sufficiency of the evidence at this subsection is without merit.

3. Sufficiency of the Evidence at 23 Pa.C.S.A. § 2511(b)

Finally, Appellant's third claim alleges that the Court erred when it found "sufficient evidence was presented to establish that severing Appellant's parental rights was in the best interest of the child." *See* Statement Pursuant to Pa.R.A.P. 1925 at ¶ 3. Upon a finding that grounds have been established pursuant to one of the subsections of 23 Pa.C.S.A. § 2511(a), the Court must consider § 2511(b), giving "primary consideration to the developmental, physical and emotional needs and welfare of the child ... " 23 Pa.C.S.A. § 2511(b). With respect to the "needs and welfare analysis" mandated by Section 2511(b):

> Section 2511(b) focuses on whether termination of parental rights would best serve the developmental, physical, and emotional needs and welfare of the child ... Section 2511(b) does not explicitly require a bonding analysis and the term 'bond' is not defined in the Adoption Act. Case law, however, provides that analysis of the emotional bond, if any, between parent and child is a factor to be considered as part of our analysis. While a parent's emotional bond with his or her child is a major aspect of the subsection 2511(b) best-interest analysis, it is nonetheless only one of many factors to be considered by the court when determining what is in the best interest of the child.
>
> [I]n addition to a bond examination, the trial court can equally emphasize the safety needs of the child, and should also consider the intangibles, such as the love, comfort, security, and stability the child might have with the foster parent. Additionally ... the trial court should consider the importance of continuity of relationships and whether any existing parent-child bond can be severed without detrimental effects on the child.

In re Adoption of C.D.R., 111 A.3d 1212, 1219 (Pa. Super. 2015) (quoting *In re N.A.M.*, 33 A.3d 95, 103 (Pa. Super. 2011)) (internal citations omitted). "[I]n cases where there is no evidence of any bond between the parent and child, it is reasonable to infer that no bond exists." *In re K.Z.S.*, 946 A.2d 753, 762-763 (Pa. Super. 2008) (internal citations omitted).

As discussed *supra*, OCY established by clear and convincing evidence that termination of parental rights would best serve A.G.C.-M.'s developmental, physical, and emotional needs and welfare pursuant to §2511(b).

In addition to considering the extensive evidence justifying termination of Appellant's parental rights at section 2511(a), this Court considered whether there was an existing emotional bond between Appellant and A.G.C.-M., and "whether any existing bond could be severed without detrimental emotional effects on the child." *In re Adoption of C.D.R.*, 111 A.3d at 1219. Indeed, no evidence was presented of an existing bond between Appellant and A.G.C.-M. The child was the tender age of two years old at the time of placement on October 3, 2019. However, in reality the child had been out of Appellant's primary care for the majority of time since at least July 2018, at only six months old. *See supra* at 2-3; 30.

Prior to the formal removal by OCY on October 3, 2019, the child had been in the primary custody of her maternal great-grandmother and maternal grandmother due to Appellant's active addiction, incarceration, and homelessness. Upon removal in October 2019, A.G.C.-M. saw Appellant one time — at a doctor's appointment. Appellant never had an in-person visit with the child throughout this matter. Appellant has made no efforts to exercise physical visitation in over a year. The only contact Appellant has had with A.G.C.-M. has been occasional telephone calls, wherein the child does not even recognize her as the mother. There is simply no evidence that Appellant has been able to provide A.G.C.-M. with the comfort, security, and stability necessary for A.G.C.-M's needs and welfare. Therefore, it is reasonable to conclude that no bond exists and it would not be detrimental to the child to sever the parent-child relationship. *See In re K.Z.S.*, 946 A.2d at 762-763.

Conversely, evidence was presented that A.G.C.-M. is doing well in the kinship home. The home is a preadoptive home. All of A.G.C.-M.'s needs are being met and the child has bonded with the family. A.G.C.-M. also has the benefit of being placed with her biological sister. A.G.C.-M. is receiving the love, comfort, security, and stability necessary for the child's welfare through the kinship home. Evidence demonstrated there is no detrimental impact to A.G.C.-M. if Appellant's parental rights are terminated in this matter.

A.G.C-M., as any three-year old child, is desperate for consistency and permanency in a loving, safe and stable home. Appellant has failed to demonstrate that she can provide this for A.G.C.-M. Perhaps this case is best summarized by the following brief exchange at the termination hearing between this Court and OCY caseworker, Haley Schaef:

> **THE COURT:** I think the more direct question is, has she ever placed the best interests of the child above her own, through action or deed?
>
> **MS. SCHAEF:** No, she has not.

Id. at 41.

Therefore, this Court, after carefully reviewing the circumstances of this case and giving "primary consideration to the developmental, physical and emotional needs and welfare of A.G.C.-M.," found the termination of Appellant's parental rights at subsection 2511(b) to be in A.G.C.-M's best interest. Appellant's claim regarding the sufficiency of the evidence at this subsection is without merit.

CONCLUSION

In conclusion, OCY proved by clear and convincing evidence that the termination of Appellant's parental rights served the best interests and welfare of A.G.C.-M. *See* discussion, *supra*. At no point in the previous ten months (and arguably the past 27 months), has Appellant demonstrated an ability to parent A.G.C.-M. Appellant has never accepted responsibility for her choices and decisions, and is quick to place the blame on others for causing her to be "overwhelmed," resulting in her "giving up." The record is clear Appellant never put the needs of the child above her own and never diligently or earnestly worked to have the child return to her care. Appellant acquiesced to her lifestyle and passively, yet willingly, allowed others to assume her parental responsibilities, to include her grandmother, mother, and now OCY. Any claim by Appellant regarding her desire to now reunify with the child rings hollow because of her personal choices and lack of effort to take the necessary steps to reunify with A.G.C.-M. Therefore, the best interests and welfare of A.G.C.-M. are best served by terminating Appellant's parental rights.

For the reasons set forth above, the issues raised by Appellant are without merit and this Court therefore respectfully requests that the instant appeal be dismissed.

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

IN RE: DARLENE M. LAY v. COUNTY OF ERIE TAX CLAIM BUREAU and DANIEL BOLLA, AS EXECUTOR OF THE ESTATE OF LAWRENCE C. BOLLA

REAL ESTATE TAXATION / TAX SALES

Pursuant to Section 602 of the Real Estate Tax Sale Law, prior to selling a property, a tax claim bureau is required to provide notice of the sale to the owners by mail, publication, and conspicuous posting of the notice on the property.

REAL ESTATE TAXATION / TAX SALES

A taxpayer's actual notice of a tax sale cures any defect in a tax claim bureau's failure to provide notice by mail under Section 602 of the Real Estate Tax Sale Law.

REAL ESTATE TAXATION / TAX SALES

Pursuant to Section 601(a)(3) of the Real Estate Tax Sale Law, prior to selling an owner-occupied property, a tax claim bureau is required to provide personal service of notice of the sale to the owner occupant or seek waiver of personal service for good cause shown from the court of common pleas.

STATUTES / CONSTRUCTION

Pursuant to the Statutory Construction Act, when analyzing particular words or phrases in a statute, courts must construe them according to rules of grammar and according to their common and approved usage.

STATUTES / CONSTRUCTION

Pursuant to the Statutory Construction Act, in interpreting a statute, a court must give effect to every word of a statute.

REAL ESTATE TAXATION / TAX SALES

To meet the definition of owner occupant, the owner must be an owner of a property with improvements constructed thereon, an owner must reside at the property, and the annual tax bill for the property must be mailed to the owner residing at the property; however, the annual tax bill need not be mailed to that owner at any particular address.

REAL ESTATE TAXATION / TAX SALES

A prior judge's *ex parte* determination that good cause existed for waiver of the personal service requirement under Section 601(a)(3) may be reexamined by a later judge who has the benefit of evaluating the evidence in the context of an adversarial proceeding, but a later judge may not make a determination as to whether good cause existed for waiver where no waiver was originally sought by the tax claim bureau prior to sale.

COURTS / JUDICIAL POWERS

Under principles of stare decisis, courts of common pleas have no authority to contravene established appellate court precedents.

REAL ESTATE TAXATION / TAX SALES

A taxpayer's actual notice of a tax sale does not cure a defect in a tax claim bureau's failure to provide personal service of notice to an owner occupant under Section 601(a)(3) of the Real Estate Tax Sale Law.

CIVIL PROCEDURE / PLEADINGS/GENERAL REQUIREMENTS

Failure to formally file amended pleadings asserting new claims related to the original action after being granted leave to do so, while constituting a technical defect, may be disregarded where the party included proposed amended pleadings in its motion highlighting

the changes, the opposing parties were aware of the amendments and had full opportunity to be heard on the new claims, and the court did not set a time certain for the filing of the amended pleadings in its order granting leave to amend.

REAL ESTATE TAXATION / TAX SALES

Prior to the sale of real property for unpaid taxes, a tax claim bureau must give an owner the opportunity to pay the unpaid taxes.

REAL ESTATE TAXATION / TAX SALES

Pursuant to Section 603 of the Real Estate Tax Sale Law, a tax claim bureau must inform the taxpayer of the possibility of entering into an installment agreement at the option of the tax claim bureau, which would have the effect of staying the sale; however, the tax claim bureau need only do so upon payment of 25% of the balance of all tax claims and tax judgments, and the interests and costs thereon.

REAL ESTATE TAXATION / TAX SALES

In determining whether a payment meets the 25% threshold of Section 603 of the Real Estate Tax Sale Law, a tax claim bureau need not make the calculation the moment the payment is tendered so long as the determination is made prior to sale.

REAL ESTATE TAXATION / TAX SALES

A taxpayer's actual notice of the possibility of a stay agreement cures any defect in a tax claim bureau's failure to inform the taxpayer under Section 603 of the Real Estate Tax Sale Law.

MUNICIPAL CORPORATIONS / POWERS AND FUNCTIONS

The policy or practice of the County of Erie Tax Claim Bureau to offer stay of sale agreements to senior citizens upon payment of 10%, rather than 25%, of the balance of all tax claims and tax judgments, and the interests and costs thereon, is not preempted by the Real Estate Tax Sale Law.

REAL ESTATE TAXATION / TAX SALES/AGENCY

Pursuant to Section 208 of the Real Estate Tax Sale Law, tax claim bureaus have the power to bind the taxing districts for whom they serve as agents even in the absence of express authority from those taxing districts.

COURTS / SUFFICIENCY OF THE EVIDENCE

A court may not enforce a law or policy for which the party claiming its protection has failed to produce sufficient evidence of its parameters such that the court may only guess as to what conduct it prohibits or permits.

REAL ESTATE TAXATION / TAX SALES

A taxpayer's actual notice of the possibility of a stay agreement cures any defect in the County of Erie Tax Claim Bureau's alleged failure to comply with a county ordinance providing that the Bureau publish and post conditions under which the Bureau will enter into a stay of sale agreement.

CONSTITUTIONAL LAW / COURTS

Courts should not reach constitutional questions where relief may be granted on non-constitutional grounds.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
TRIAL DIVISION – CIVIL
No. 12931 of 2019

Appearances: James P. Miller, Esq., for the Petitioner, Darlene Lay
Norman A. Stark, Esq., for the Petitioner, Darlene Lay
George Joseph, Esq., for Respondent, County of Erie Tax Claim Bureau
Lisa Smith Presta, Esq., for Respondent, Daniel Bolla, Executor of the Estate of Lawrence C. Bolla

OPINION OF THE COURT

Piccinini, J., May 12, 2021

Every year in late September, the County of Erie Tax Claim Bureau sells numerous properties at auction in an effort to recoup delinquent taxes. In 2019, one such property was 3827 Lake Front Drive, located in Millcreek Township, and situated upon the shores of Lake Erie (the Lakefront Property). Among other issues, this case concerns whether adequate notice of the impending sale of the Lakefront Property was provided to the owner under Pennsylvania's complex statutory scheme governing such sales. For the following reasons, and despite the owner's willful, persistent, and long-standing defiance of her local tax obligations, the Court holds that the Tax Claim Bureau failed to provide her the legally required notice as an occupant of the property, and consequently, the September 30, 2019, upset tax sale of the Lakefront Property must be set aside as a matter of law.

I. BACKGROUND

Petitioner, Darlene Lay, first acquired an ownership interest in the Lakefront Property on February 26, 1996, along with her husband, James P. Lay III, with right of survivorship. Erie County Land Records, Deed Book 435, Page 1200. At the time, the Lakefront Property was more of a weekend getaway, and the Lays primarily resided at 6165 Bridlewood Drive in Fairview, Pennsylvania. Evidentiary Hearing Transcript (Evid. Hr'g Tr.), Day 2, p. 73. Jim Lay died on August 27, 2010, vesting sole ownership of the Lakefront Property in Darlene. Evid. Hr'g Tr., Day 2, p. 73; Tax Claim Bureau Ex. 22. In the years following Jim's death, Darlene Lay's financial purse strings tightened and her tax liabilities soon turned into tax delinquencies. Evid. Hr'g Tr., Day 2, pp. 80-81. In order to maximize her short-term cash flow concerns, she (purportedly on the advice of her accountant) devised a scheme to defer payment on her local taxes for one to two years, making only minimum necessary payments so as to stave off any sale of her properties.[1] Evid. Hr'g Tr., Day 2, pp. 80-81, 86, 176-179. Lay eventually sold the Bridlewood Drive property on August 9, 2016, but critically, she failed to notify the Erie County Assessment Office that she no longer resided there. Evid. Hr'g Tr., Day 2, pp. 112-13.

[1] The Tax Claim Bureau must sell a property at an upset tax sale if, among other things, a tax claim becomes "absolute." 72 P.S. § 5860.601(a)(1)(i). A tax claim becomes absolute "[o]n the first day of January next following [notice], if the amount of the tax claim referred to in the notice has not been paid, or no exceptions thereto filed." 72 P.S. § 5860.311. Such notice must be provided not later than July 31 of the year in which the taxes become due and must state that "on July first of the year in which such notice is given a one (1) year period for discharge of tax claim shall commence or has commenced to run, and that if full payment of taxes is not made during that period as provided by this act, the property shall be advertised for and exposed to sale under this act[.]" 72 P.S. § 5860.308(a).

By the summer of 2019, Lay had not yet satisfied her 2017 or 2018 tax liability, potentially exposing the Lakefront Property to an upset tax sale in September. Evid. Hr'g Tr., Day 2, p. 178. The Tax Claim Bureau claims it made several attempts at notice to Lay of the upcoming sale by mail, by publication, and by posting a notice on the Lakefront Property. Evid. Hr'g Tr., Day 2, pp. 233-34. Lay asserts she never received any of these notices, but was reminded by benevolent neighbors to pay her taxes, or alternatively, realized she needed to pay upon overhearing someone on the phone talking about taxes while at an exercise class. Petition to Set Aside Tax Sale, ¶ 13; Evid. Hr'g Tr., Day 2, pp. 100-02, 136-37. Lay did turn up at the Erie County Tax Claim Bureau office on August 29, 2019, paying $5,000.00 towards her delinquent balance. Tax Claim Bureau Exs. 24, 26. Notably, the Tax Claim Bureau is required to notify a taxpayer of the possibility of entering into a stay of sale agreement upon the payment of 25% of the delinquent balance, including interests and costs. 72 P.S. § 5860.603. According to the Tax Claim Bureau's calculations, Lay's $5,000 was approximately $260 shy of that amount. Evid. Hr'g Tr., Day 1, p. 44. Lay claims the amount was intended to be $6,000.00, but her original check made out in that amount was rejected. Evid. Hr'g Tr., Day 2, pp. 199-201; Tax Claim Bureau Ex. 25. But no installment plan was offered, and roughly a month later, on September 30, 2019, the Tax Claim Bureau sold the Lakefront Property at the annual upset tax sale to Lawrence C. Bolla, who entered a winning bid of $76,000.00, well in excess of the upset sale price of $26,217.26.[2] TCB Ex. 14; Evid. Hr'g Tr., Day 1, pp. 34, 36.

On October 25, 2019, Lay initiated the present action in her Petition to Set Aside Tax Sale. The Tax Claim Bureau responded, as did Bolla. After attempts at settlement proved unfruitful, an evidentiary hearing was held over four days: November 12, 13, 17, and 19, 2020. At its close, the Court ordered post-trial briefing on certain issues and invited the parties to file proposed findings of facts and conclusions of law.[3] Those documents were filed on February 19, 2021. After careful consideration of the evidence and arguments offered by the parties in their filings and at the evidentiary hearing, the case is now ripe for resolution. Before turning to its analysis, the Court provides an overview of the law applicable to this dispute.

II. THE PENNSYLVANIA REAL ESTATE TAX SALE LAW

Tax sales in Erie County are governed by the Real Estate Tax Sale Law (RETSL), codified at 72 P.S. §§ 5860.101-5860.803.[4] The primary purpose of the RETSL "is to provide speedier and more efficient procedures for enforcing tax liens and to improve the quality of title of

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[2] Here, the overbid, that is, the excess of the upset tax sale price and any additional delinquent and current taxes and municipal liens and claims, would have gone to the owner, Darlene Lay. Evid. Hr'g Tr., Day 1, pp. 34-35.

[3] Respondent, Lawrence C. Bolla, passed away on December 11, 2020. Statement of Substitution of Successor Party, ¶ 3. His son, Daniel Bolla, in his capacity as executor of his father's estate, has been substituted as a party to this lawsuit. Order of Substitution, 2/17/2021.

[4] The RETSL governs tax sales in second class A through eighth class counties, while tax sales in counties of the first and second class (currently only Philadelphia and Allegheny counties) are governed by a different statute, the Municipal Claims and Tax Liens Act (MCTLA), 53 P.S. §§ 7101-7505. *Lohr v. Saratoga Partners, L.P.*, 238 A.3d 1198, 1200 (Pa. 2020). The MCTLA allows taxpayers "to redeem property sold at an upset tax sale by paying the delinquent taxes and other costs within nine months of the sale[.]" *Id*. The RETSL explicitly states that "[t]here shall be no redemption of any property after the actual sale thereof." 72 P.S. § 5860.501(c). On the other hand, the RETSL provides delinquent taxpayers a pre-sale remedy by allowing them to stay the sale of their property by paying twenty-five percent of the delinquent taxes prior to the date set for the upset sale and agreeing to an installment plan to pay the remaining taxes within the next twelve months. 72 P.S. § 5860.603. "The purchaser takes on greater risk in buying a property under the MCTLA, given the potential post-sale redemption, but likely pays a lower price to compensate for the higher risk." *Lohr*, 238 A.3d at 1212. The trade-off under the RETSL is that the Tax Claim Bureau "is provided twenty-five percent in advance and likely receives higher bids for those properties which go to sale, due to the lower risk given the prohibition on redemption in the RETSL." *Id*.

the property sold at a tax sale" and "not to strip away citizens' property rights." *Pacella v. Washington County Tax Claim Bureau*, 10 A.3d 422, 428 (Pa. Cmwlth. 2010); *Rice v. Compro Distributing, Inc.*, 901 A.2d 570, 575 (Pa. Cmwlth. 2006). "The tax claim bureau acts as the agent of the taxing district in collecting taxes and in managing and disposing of the property" and is required to sell certain properties in satisfaction of delinquent taxes. *Pacella*, 10 A.3d at 428 (citing 72 P.S. § 5860.208); 72 P.S. § 5860.601. Tax sales can take one of three forms: upset tax sales, judicial tax sales, and private sales. *In re Balaji Investments, LLC*, 148 A.3d 507, 510 (Pa. Cmwlth. 2016) (citing 72 P.S. §§ 5860.605; 5860.610; 5860.613). A tax claim bureau must first attempt an upset tax sale, where a listed property is offered for sale at a minimum sale price, known as an "upset sale price" and where the purchaser takes the property "subject to the lien of every recorded obligation, claim, lien, estate, mortgage, ground rent and Commonwealth tax lien not included in upset price." *Id.* (quoting 72 P.S. § 5860.605; 72 P.S. § 5860.609).[5]

Prior to an upset tax sale, a tax claim bureau is required to provide various forms of notice to owners and the public. Pursuant to Section 602 of the RETSL, a taxing authority is required to undertake three steps in an attempt to notify any property owner of an impending upset tax sale auction. *Horton v. Washington County Tax Claim Bureau*, 81 A.3d 883, 888 (Pa. 2013). First, at least thirty days prior to the upset tax sale, the Bureau must give notice by publication in two local newspapers and a legal journal. 72 P.S. § 5860.602(a). Whenever "any notification of a pending tax sale … is required to be mailed to any owner … and such mailed notification is either returned without the required receipted personal signature of the addressee" or where there is "significant doubt as to the actual receipt of such notification" the Tax Claim Bureau is required to "exercise reasonable efforts to discover the whereabouts of such person or entity and notify him." 72 P.S. § 5860.607a(a). These records include "a search of current telephone directories for the county and of the dockets and indices of the county tax assessment offices, recorder of deeds office and prothonotary's office, as well as contacts made to any apparent alternate address or telephone number which may have been written on or in the file pertinent to such property." *Id.*

Second, at least thirty days prior to the sale, the Bureau must give notice by "United States certified mail, restricted delivery, return receipt requested, postage prepaid, to each owner." 72 P.S. § 5860.602(e)(1). If the return receipt is not returned from the owner, the Bureau is required to attempt "similar notice … to each owner who failed to acknowledge the first notice by United States first class mail, proof of mailing, at his last known post office address by virtue of the knowledge and information possessed by the bureau, by the tax collector for the taxing district making the return and by the county office responsible for assessments and revisions of taxes." 72 P.S. § 5860.602(e)(2). Third, at least ten days prior to the sale, the property must be posted. 72 P.S. § 5860.602(e)(3). "If any of the three types of notice is defective, the tax sale is void." *Gladstone v. Federal National Mortgage Association*, 819 A.2d 171, 173 (Pa. Cmwlth. 2003).

Nevertheless, strict compliance with the mailing requirements of Section 602 is no longer required if the property owner has actual knowledge of the upset tax sale for these notice

[5] "When the upset price is not reached at the sale, the Bureau may petition the court of common pleas to sell the property free and clear of all tax and municipal claims, liens, mortgages, charges, and estates at a judicial tax sale." 777 *L.L.P. v. Luzerne County Tax Claim Bureau*, 111 A.3d 292, 296 (Pa. Cmwlth. 2015) (citing 72 P.S. § 5860.610).

requirements "are not an end in themselves, but are rather intended to ensure a property owner receives actual notice that his or her property is about to be sold due to a tax delinquency." *In re Consolidated Reports and Return by Tax Claim Bureau of Northumberland County (Appeal of Neff)*, 132 A.3d 637, 645 (Pa. Cmwlth. 2016) (en banc) (citing *Donofrio v. Northampton County Tax Claim Bureau*, 811 A.2d 1120, 1122 (Pa. Cmwlth. 2002). "Actual notice in the tax sale context encompasses both express actual notice and implied actual notice." *Id*. (quoting *Sabbeth v. Tax Claim Bureau of Fulton County*, 714 A.2d 514, 517 (Pa. Cmwlth. 1998)).

These statutory requirements stem from fundamental guarantees of due process enshrined in the federal and Pennsylvania constitutions. *Tracy v. County of Chester, Tax Claim Bureau*, 489 A.2d 1334, 1337-39 (Pa. 1985). Indeed, even a taxing authority's strict compliance with the requirements of the RETSL may not automatically satisfy the demands of due process. *Geier v. Tax Claim Bureau of Schuylkill County*, 588 A.2d 480, 483 (Pa. 1991). Rather, "[d]ue process requires that the practicalities and peculiarities of the case are considered and given their due regard." *Famageltto v. County of Erie Tax Claim Bureau*, 133 A.3d 337, 345 (Pa. Cmwlth. 2016) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

Still, there is an another provision of the RETSL specifically applicable to owner-occupied properties, extending the procedures for notice beyond the minimum required by due process. Added in 1980, Section 601(a)(3) states:

> No owner-occupied property may be sold unless the bureau has given the owner occupant written notice of such sale at least ten (10) days prior to the date of actual sale by personal service by the sheriff or his deputy or person deputized by the sheriff for this purpose unless the county commissioners, by resolution, appoint a person or persons to make all personal services required by this clause. The sheriff or his deputy shall make a return of service to the bureau, or the persons appointed by the county commissioners in lieu of the sheriff or his deputy shall file with the bureau written proof of service, setting forth the name of the person served, the date and time and place of service, and attach a copy of the notice which was served. If such personal notice cannot be served within twenty-five (25) days of the request by the bureau to make such personal service, the bureau may petition the court of common pleas to waive the requirement of personal notice for good cause shown. Personal service of notice on one of the owners shall be deemed personal service on all owners.

72 P.S. § 5860.601(a)(3). In short, Section 601(a)(3) requires that an owner occupant receive notice of a tax sale by personal service. "The requirements of Section 601(a)(3) are cumulative and apply in addition to the tax claim bureaus' obligations to provide notice through publications, posting, and mail." *Appeal of Neff*, 132 A.3d at 645.

Finally, although the RETSL expressly prohibits any post-sale redemption remedy, 72 P.S. § 5860.501(c), it does provide that a tax claim bureau must notify a taxpayer of the possibility of entering into a stay of sale agreement upon the payment of 25% of a delinquent balance, including interests and costs. 72 P.S. § 5860.603. Generally, by entering into the installment agreement, the taxpayer agrees to pay the remaining taxes within the next twelve months. 72 P.S. § 5860.603. The General Assembly also permits county commissioners to enact local legislation extending the period of discharge or deferment for residential real

estate owned and occupied solely by persons aged 65 or older. 72 P.S. § 5860.504. With these overarching principles in mind, the Court now turns to analysis, making findings of fact and conclusions of law as they become relevant.

III. ANALYSIS: SECTION 602 AND SECTION 607a

The Court begins with its analysis of the mailing, publication, and posting requirements of Section 602. According to the Tax Claim Bureau, it provided Lay notice of the upcoming sale by certified mail, publication, and the posting of a notice on the Lakefront Property as required by law. Evid. Hr'g Tr., Day 2, pp. 233-34. Lay responds that she did not receive any such notice in the mail at the Lakefront Property as there is no mailbox, and she did not see the publications since she does not read any newspaper or legal journals. Evid. Hr'g Tr., Day 2, pp. 90-91, 195-96; Reply to New Matter of Erie County Tax Claim Bureau, ¶ 47-48. She also suggests the posted notice may have come off the Lakefront Property while it was being power washed or perhaps was blown away by the tempestuous winds of Lake Erie. Evid. Hr'g Tr., Day 2, pp. 100-102, 106-07; Reply to New Matter of Erie County Tax Claim Bureau, ¶ 46.

At the evidentiary hearing, the Tax Claim Bureau offered into evidence the Notice of Public Tax Sale sent to both Darlene Lay and James Lay III on July 11, 2019, at the Bridlewood Drive address and accompanied by a certified mail return receipt. Tax Claim Bureau Ex. 6. The receipt indicates the Notice was returned to sender as not deliverable as addressed. Tax Claim Bureau Ex. 6. Steven Letzelter, supervisor for the Bureau of Revenue and Tax Claim, likewise, testified that the mailing was sent certified to the Bridlewood Drive address, restricted delivery, but was returned undeliverable. Evid. Hr'g Tr., Day One, pp. 18-21. Accordingly, the Court finds that the Tax Claim Bureau attempted to send Lay notice of the sale at the Bridlewood address by "United States certified mail, restricted delivery, return receipt requested, postage prepaid[.]" 72 P.S. § 5860.602(e)(1). This satisfied the requirements of Section 602(e)(1).

Of course, by this time, Lay no longer owned the property at Bridlewood Drive, and upon return of the Notice as undeliverable, the Tax Claim Bureau was required to undertake further "reasonable efforts to discover [her] whereabouts[.]" 72 P.S. § 5860.607a. It was also required to provide "at least ten (10) days before the date of the sale, similar notice of the sale" to Lay by first class mail "at [her] last known post office address by virtue of the knowledge and information possessed by the bureau." 72 P.S. § 5860.602(e)(2). The Tax Claim Bureau indicates that, upon further investigation, it discovered the Lakefront Property address as well as two other potential addresses for the Lays, namely 558 West Sixth Street, Erie, PA 16507 and 222 Severm Avenue, Suite 33, Annapolis, MD, 21403, the former being the old address of Jim Lay's law practice and the latter being the address of Jim Lay's son, with whom Darlene has not spoken in ten years. Evid. Hr'g Tr., Day 2, p. 194. Tax Claim Bureau Exhibit 8 indicates that notice of the upcoming tax sale was sent to the Lakefront Property, the West Sixth Street address, and the Annapolis, Maryland address on September 18, 2019, as well as a United States Postal Service firm book indicating the same. Tax Claim Bureau Ex. 8. Letzelter confirmed as much in his testimony. Evid. Hr'g Tr., Day 1, pp. 25-28.

However, Lay argues that the Tax Claim Bureau did not conduct the reasonable efforts required under Section 607a (sometimes referred to as Section 607.1) to notify Lay once the first certified notice was returned undeliverable, including finding her correct address

in the telephone book and discovering Lay's whereabouts though her realtor. Petition to Set Aside Tax Sale, ¶¶ 29-30. Lay further suggests that the Tax Claim Bureau could have easily discovered Lay's telephone number on the internet to notify her of the tax sale. Petition to Set Aside Tax Sale, ¶ 31. These arguments echo the criticism previously lodged against the County of Erie Tax Claim Bureau in *Maya v. County of Erie Tax Claim Bureau*, 59 A.3d 50 (Pa. Cmwlth. 2013). In *Maya*, the Commonwealth Court held the record was "devoid of evidence" that the Tax Claim Bureau took reasonable efforts to discover additional addresses largely because the Honorable Michael Dunlavey was within his discretion to reject the only evidence the Tax Claim Bureau attempted to offer of those efforts. *Id*. at 56-57.

To the contrary, this Court explicitly finds the evidence offered by the Tax Claim Bureau on this point to be reliable. While *Maya* did note that "the legislature has identified a telephone directory as a type of source to consult, but it did not foreclose other searches, such as an internet search[,]" Lay's argument misses the point that the non-exclusive list of reasonable efforts enumerated under Section 607(a) is intended to reveal the whereabouts of the owner in order to notify them. 72 P.S. § 5860.607a(a). Indeed, "Section 607.1 of the Law does not require the Bureau to undertake extraordinary efforts only reasonable efforts and it does not require the Bureau to surf the web for an owner's alternative address or phone number, particularly where the Bureau is satisfied through other efforts that it has the owner's correct address on file." *In re Tax Sale of Real Property Situated in Jefferson Township*, 828 A.2d 475, 480 (Pa. Cmwlth. 2003). "Reasonable efforts are thus determined, in part, by the facts of the particular case." *Fernandez v. Tax Claim Bureau of Northampton County*, 925 A.2d 207, 213 (Pa. Cmwlth. 2018).

While the Tax Claim Bureau may claim it did not know at the time that Lay resided at the Lakefront Property, it undoubtedly sent a notice to her there on September 18. *See Sobolewski v. Schuylkill County Tax Claim Bureau*, 2019 WL 3436516, *4 (Pa. Cmwlth. 2019) (unpublished) (noting "had the Bureau conducted additional notification efforts, it would not have found another address or means of notifying him."). Where, as here, the Bureau has actually succeeded in discovering the whereabouts of the taxpayer, requiring more would place an unreasonably onerous burden on the Bureau, a result that is incompatible with the language of the statute. Accordingly, the Court finds that further reasonable efforts were undertaken by the Tax Claim Bureau to determine the whereabouts of Lay and that sufficient notice was provided to those addresses in compliance with Section 602.

Next, the Tax Claim Bureau must show that it satisfied it obligation under to 602(a) to publish the notice of the sale "not less than once in two (2) newspapers of general circulation in the county, if so many are published therein, and once in the legal journal" at least 30 days prior to the sale. 72 P.S. § 5860.602(a). The Tax Claim Bureau's Exhibits 11 and 12 indicate that notice of the sale was published in the *Erie Times-News* on August 30, 2019, and in the *Erie County Legal Journal* on August 30, 2019. Tax Claim Bureau Exs. 11 and 12. Letzelter further confirmed this in his testimony. Evid. Hr'g Tr. pp. 31-32. The Court finds this to be the case. Thus, the publication requirement of Section 602(a) is easily satisfied.

Lastly, the Tax Claim Bureau must show it posted notice of the sale on the Lakefront Property at least ten days prior to the sale. 72 P.S. § 5860.602(e)(3). Tax Claim Bureau Exhibit 10 includes a field report from Palmetto Postings, duly appointed for such purposes by Erie County Executive Kathy Dahlkemper pursuant to the Erie County Home Rule

Charter. Tax Claim Bureau Exs. 9-10. The field report includes a picture of the posting on the beach house of the Lakefront Property and a posting completed time stamp of 9:35 a.m. on July 26, 2019. Tax Claim Bureau Ex. 10. Letzelter confirmed the posting as did the field agent for Palmetto Postings who actually posted the notice, Roger Petty. Evid. Hr'g Tr., Day 1, pp. 30; 209-215. The Court accepts this evidence as credible. Therefore, the posting requirement of Section 602(e)(3) is also satisfied.

Lay claims she never received or saw any of these notices. At least as far as the mailing requirement is concerned, whether or not Lay actually read the notices is irrelevant because "the tax claim bureau must only show that it sent all required notices to the property owner or owners, not that the owner or owners actually received the notice of tax sale." *FS Partners v. York County Tax Claim Bureau*, 132 A.3d 577, 581 (Pa. Cmwlth. 2016) (citing 72 P.S. § 5860.602(h)) (emphases in the original). As such, her claims ring hollow. But more fundamentally, the Court finds her testimony to be contradictory, self-serving, and completely incredible. Having observed Lay testify, she appeared evasive, antagonistic, and often histrionic. *See, e.g.*, Evid. Hr'g Tr., Day 2, pp. 75, 79, 88-90, 105, 112, 119, 124, 141, 172, 176, 179, 181, 195. Lay's testimony and the way she presented herself while on the stand was not believable.

Most telling is the fact that Lay subsequently appeared at the Tax Claim Bureau to pay on her delinquent balance on August 29. Lay claims contradictorily in a pleading that she was reminded to pay by her neighbors, Marlene and Homer Mosco (although not in connection to the upset tax sale), but she later testified that she was reminded after overhearing a conversation about taxes at an exercise class. Petition to Set Aside Tax Sale, ¶ 13; Evid. Hr'g Tr., Day 2, pp. 136-37. And 2019 was not the first year in which Lay claims she was serendipitously reminded to pay on her delinquent balance just in the nick of time. One month before the Lakefront Property was set to be sold in 2017, she claims she was told by a friend, Bonnie Baker, that "we better get down there and get this paid" at which point she arrived at the Tax Claim Bureau with $5,320.09, the precise amount necessary to remove the Lakefront Property from the upset tax sale list. Evid. Hr'g Tr., Day 2, pp. 87-88. The following year, in another fortuitous turn of events for Lay, a tall, thin man in a blue t-shirt walking a "blonde-colored" and thin-tailed dog, and who failed to mention his name, brought her the bright green posting that had mysteriously came off her property. Evid. Hr'g Tr., Day 2, pp. 91-94. But these implausible stories strain credulity. The Court does not credit Lay's far-fetched, unverifiable, and contradictory claims.

Specifically, as to the 2019 tax sale, Lay testified that she left the Lakefront Property between 9:00 a.m. and 9:15 a.m. on the morning of July 26 to get coffee and donuts for the day workers power washing the residence and returned about 11:30 a.m. Evid. Hr'g Tr., Day 2, pp. 187-89. As revealed by the field report, the court finds that Roger Petty posted the property at 9:35 a.m. Tax Claim Bureau Ex. 10. Petty testified he secured the posting using 3M painter's tape. Evid. Hr'g Tr., Day 1, p. 220. Lay testified she has no idea what happened to the posting, although she speculates it was washed off by the day workers. Evid. Hr'g Tr., Day 2, p. 107. She further speculates that the notice may have blown off by the wind, but Petty testified that July 26 was a calm day with no adverse weather conditions, and "zero" wind such that Lake Erie appeared "like a sheet of glass." Evid. Hr'g Tr., Day 1, pp. 214-15; Day 2, pp. 106-07. The Court finds Petty's description of the weather conditions

at the time of posting to be credible, and there is no evidence to suggest the weather conditions changed between 9:00 a.m. and 11:30 a.m. The Court further finds the method used by Palmetto Posting was sufficient to secure the posting to the Lakefront Property. *See Matter of Krzysiak*, 151 A.3d 292, 296 (Pa. Cmwlth. 2016) (affirming trial court opinion that "the notice was not unreasonably susceptible to being blown away or vulnerable to inclement weather because, although it extended approximately two inches past each edge of the sign, it was affixed using … 3M tape."). Had the day workers accidently washed off the brightly-colored notice, its remnants likely would have been visible on the ground outside the door near where it was posted. There is simply no credible explanation for the disappearance of the posting between 9:35 a.m. and 11:30 a.m., when she claims she returned. Rather, the Court finds that Lay received actual notice of the 2019 upset tax sale by virtue of the posting on the Lakefront Property on July 26.

But this was not Lay's only instance of actual notice. The Court further finds that Lay did receive actual notice of the tax sale by virtue of the ten-day notice. In particular, the Court finds that Lay received the ten-day notice at her PostNet post office box after it was forwarded from the Lakefront Property address. Evid. Hr'g Tr., Day 2, pp. 128, 195-198. Indeed, Lay readily admits that mail sent to the Lakefront Property address began to be forwarded to her PostNet post office box in Millcreek sometime in the summer of 2019, where she received any mail that would be in her name. Evid. Hr'g Tr., Day 2, pp. 128, 195. Furthermore, her bank statement indicates that she made a purchase at that same PostNet on August 28, 2019, at 8:02 p.m., the night before she happened to show up at the Bureau office to make the partial payment. Bolla Ex. 4. The Court finds this to be more than mere coincidence.

For reasons unexplained, the Tax Claim Bureau appears to assume that the first class mail was not forwarded to Lay's post office box. *See* Tax Claim Bureau Ex. 29, ¶ 8; Proposed Findings of Fact and Conclusions of Law Submitted on Behalf of the Respondent, County of Erie Tax Claim Bureau, ¶ 21. It notes that Lay "did not take steps to ensure that mail address [sic] to her at the Subject Property would be received at her P.O. Box 114 until November 2019." Proposed Findings of Fact and Conclusions of Law Submitted on Behalf of the Respondent, County of Erie Tax Claim Bureau, ¶ 21. For this proposed finding, it appears to rely on Assessment Notes, marked as Tax Claim Bureau Exhibit 21, and a letter from Darlene Lay received by the Assessment Office on November 8, 2019, informing the office of her post office box address, marked as Tax Claim Bureau Exhibit 22. Tax Claim Bureau Exs. 21-22. But nothing in Lay's letter indicates when she began forwarding mail addressed to the Lakefront Property to the post office box and the Assessment record merely indicates when the Assessment Office received Lay's correspondence.

At the evidentiary hearing, the Tax Claim Bureau attempted to shed light on this point in its questioning of Lay when it stated "I believe there may be two different things that are at play. So I want to ask you very specifically, did you ask for a change of address or did you ask for a forwarding of service address?" Evid. Hr'g Tr., Day 2, p. 196. After a series of obscure responses, the Court stepped in to clarify:

> THE COURT: Ma'am, when did you take steps to make sure that any mail that might go to 3827 was forwarded to the new post office box?
> DARLENE LAY: I did that some time during the summer or late summer of 2019.

Evid. Hr'g Tr., Day 2, pp. 196-97. When asked again whether the Millcreek post office box could receive "any mail that might go to 3827 Lake Front Drive[,]" Lay responded "[a]nything that would be in my name, yes." Evid. Hr'g Tr., Day 2, p. 198. August 28, 2019, is well within the range of time that, by Lay's own admission, she received forwarded mail addressed to the Lakefront Property at her PostNet post office box. The postal service firm book indicates the post office received the ten-day notice to be mailed to Lay and there is no evidence in the record to suggest that the first class mailing to the Lakefront Property address in Darlene Lay's name was ever returned to the Tax Claim Bureau. Evid. Hr'g Tr., Day 1, pp. 27-28; *see Pitts v. Delaware County Tax Claim Bureau*, 967 A.2d 1047, 1053, 1055 (Pa. Cmwlth. 2009) (en banc) (noting fact that ten-day notice sent by first class was not returned by the U.S. Postal Service as proof that mailing was sent to correct address). The Court thus rejects any suggestion that Lay was not able to receive first class mail addressed to the Lakefront Property during the relevant timeframe, and specifically finds that Lay did receive the ten-day notice addressed in her name to the Lakefront Property on the night of August 28, 2019, when she checked her mail at the Millcreek PostNet, which then caused her to appear at the Tax Claim Bureau office the next day.

Additionally, the Courts finds Lay again received actual notice from Tax Claim Bureau account clerk, Kathy Getchell, on August 29. Getchell testified that Lay appeared only once and presented a $5,000 check to her. Evid. Hr'g Tr., Day 2, pp. 11, 18. Although the check was made out to the Erie County Treasurer, checks addressed to the Erie County Treasurer are still acceptable since supervisor Letzelter acts as the Erie County Treasurer. Evid. Hr'g Tr., Day 1, p. 38; Evid. Hr'g Tr., Day 2, pp. 11-12. Getchell testified that she informed Lay of the upcoming tax sale and that the $5,000 would not be enough to prevent the sale. Evid. Hr'g Tr., Day 2, p. 16. Lay told her she would return the following Monday, to which Getchell replied that the following Monday the office would be closed due to a holiday. Evid. Hr'g Tr., Day 2, p. 17. Getchell testified that she even calculated and wrote down for Lay the interest for the month of September. Evid. Hr'g Tr., Day 2, p. 18. Getchell stressed to Lay that she should pay her delinquent balance by the Friday before the upset tax sale to ensure property would not be sold and Lay reassured Getchell that she would return. Evid. Hr'g Tr., Day 2, pp. 16, 19. Getchell had a particularly vivid recollection of her conversation with Lay, who commented on Getchell's ring, passed down to her by her late mother, of whom Lay reminded her. Evid. Hr'g Tr., Day 2, p. 18. The Court finds Getchell's testimony to be credible.

A bank check was no doubt made out on August 29 by Darlene Lay in the amount of $6,000 made payable to the Erie County Treasurer. Tax Claim Bureau Ex. 25. The Court does credit the testimony of Susan Peters, then-Bank Manager of the West 8th Street First National Bank who testified that Lay returned to the bank on August 29, claiming that the Tax Claim Bureau did not accept her check, and then called the Bureau to inquire as to how the check should be made out. Evid. Hr'g Tr., Day 4, pp. 48, 50, 52, 58. But Peters had no knowledge of whether Lay actually ever presented the $6,000 check to Getchell prior to returning to the bank, nor could she testify as to why or even if Lay requested the second check in an amount of $5,000 rather than $6,000. Evid. Hr'g Tr., Day 4, pp. 60-61, 65-66. As such, Peters' testimony is not in conflict with Getchell's credible testimony that she never saw nor ever rejected the $6,000 check from Lay. Evid. Hr'g Tr., Day 2, p. 19.

Rather, the Court finds that Lay did not present the $6,000 check to the Tax Claim Bureau

as she claims. This is in keeping with Lay's pattern of serial tax delinquency dating as far back as 2013. Tax Claim Bureau Ex. 17; Evid. Hr'g Tr., Day 2, p. 176. The Court finds her motivation for this last-minute change of heart to be her desire to keep a larger cash balance in her bank account, which was down to as low as $372.87 on the morning of August 29, 2019, according to her bank records. Bolla Ex. 4; Evid. Hr'g Tr., Day 2, pp. 132-35. Despite Lay's claim that her delinquency was not intentional, the Court finds that her delinquency was clearly strategic as she believed the delinquent taxes could accrue on the property for two years before the property would be at risk of sale, and as such, her delinquency was knowing, willful, and intentional, regardless of whether it was based upon the advice of her accountant. Evid. Hr'g Tr., Day 2, pp. 80-81.

The Court further finds that Lay actively avoided updating her address with the Assessment office in order to provide plausible deniability as to any adverse consequences of her delinquency. This is evinced by her failure to update her address with the Assessment Office, her decision to utilize a post office box rather than a mailbox on the Lakefront Property, her false claims that she did not see any of the bright green notices placed on the Lakefront Property year after year, and her fantastic explanations for how she would remember to pay down her delinquent balance just in time to prevent the Lakefront Property from being exposed to a sale. Evid. Hr'g Tr., Day 2, pp. 91-102, 128-29. On this basis, the Court finds Lay had actual knowledge of the 2019 upset tax sale of the Lakefront Property prior to her appearance at the Tax Claim Bureau office on August 29, 2019. It also finds she was a serial tax delinquent who did not innocently miss her tax payments, but played dangerously with the tax sale laws, exploiting them in an effort to postpone her local tax obligations and pay as little as possible in the short term. As such, she has "proven herself to be a willful, persistent, and long-standing tax delinquent." *In re Sale of Real Estate by Montgomery County Tax Claim Bureau for 1997 Delinquent Tax (Appeal of JUL Realty Corp)*, 836 A.2d 1037, 1042 (Pa. Cmwlth. 2003) (en banc). Her claims that she did not receive adequate notice of the upset tax sale pursuant to Section 602 is therefore denied.[6]

IV. ANALYSIS: SECTION 601(a)(3)

A. The Definition of Owner-Occupant Under Section 102

To be entitled to the benefit of the personal service requirement of Section 601(a)(3), a taxpayer must first meet the definition of owner occupant found in Section 102 of the RETSL. Section 102 defines an owner occupant as "the owner of a property which has improvements constructed thereon and for which the annual tax bill is mailed to an owner residing at the same address as that of the property." 72 P.S. § 5860.102. This definition, to put it mildly, is not a model of lucid legislative drafting. As a leading treatise observes:

> One reading of the statute could suggest that many properties considered to have owner-occupants in the general sense would not satisfy the definition. For example, if the real estate tax bill is mailed to a mortgage service company, a trustee, accountant, attorney, or agent for an owner who resides on the property, <u>or if the Bureau has the wrong</u>

[6] In her Petition, Lay also claims that the failure to properly serve her under Section 602 violated her constitutional right to notice and due process. Petition to Set Aside Tax Sale, ¶ 40. Because the Court finds that the Tax Claim Bureau complied with the requirements of Section 602, and because it finds she had actual notice of the sale, there is no question that she received adequate procedural due process protections in this regard.

address, one could argue he or she is not an "Owner Occupant" within the meaning of the statute and therefore not entitled to notice by personal service.

DARRELL M. ZASLOW, MONTGOMERY L. WILSON, & LEVI S. ZASLOW, *Pennsylvania Real Estate Tax Sales and Municipal Claims*, 4 ed., § 4.37 Personal Service of Notice on Owner of Owner-Occupied Residence, 254 (2020) (emphasis added). The Tax Claim Bureau and Bolla take up this interpretation. They argue because Lay never updated her address, and thus, the annual tax bill was sent to her former residence, she was not an owner occupant under the statutory definition. Post-Hearing Brief Submitted on Behalf of the County of Erie Tax Claim Bureau, p. 2; Post-Hearing Brief of Respondent Daniel Bolla, as Executor of the Estate of Lawrence C. Bolla, p. 5. Lay argues she is an owner occupant because she receives the annual tax bill in her name and resides at the property. Evid. Hr'g Tr., Day 2, p. 223.

The Court's interpretation of the definition of owner occupant in Section 102 is guided by the Statutory Construction Act, 1 Pa.C.S. §§ 1501-1991. "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa.C.S. § 1921(a). To that end, "[t]he first and best indication of legislative intent is the language used by the General Assembly in the statute." *Matter of Private Sale of Property by Millcreek Township School District*, 185 A.3d 282, 290-91 (Pa. 2018) (citing *Commonwealth v. Veon*, 150 A.3d 435, 444-45 (Pa. 2016)). "Words and phrases shall be construed according to rules of grammar and according to their common and approved usage[.]" 1 Pa.C.S. § 1903(a). "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b). "When the text of the statute is ambiguous, then — and only then — do we advance beyond its plain language and look to other considerations to discern the General Assembly's intent." *Woodford v. Commonwealth of Pennsylvania Insurance Department*, 243 A.3d 60, 73-74 (Pa. 2020) (citing *A.S. v. Pennsylvania State Police*, 143 A.3d 896, 903 (2016)). In any event, it is presumed that "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S. § 1922(1).

Accordingly, the Court begins with the text of the definition, applying traditional rules of grammar, and construing the language consistent with its common usage. 1 Pa.C.S. § 1903(a). Because that definition is somewhat cumbersome, it is helpful to deconstruct the definition into its constituent parts. An owner occupant is, unsurprisingly, "the owner of a property[.]" 72 P.S. § 5860.102. The remainder of the definition places two necessary conditions on the type of property the taxpayer must own in order to satisfy the definition. The first condition (not at issue here) states that the property must have "improvements constructed thereon[.]" *Id*. The second condition (very much at issue here) states that the property must be one "for which the annual tax bill is mailed to an owner residing at the same address as that of the property." *Id*.

The first part of the clause instructs that the annual tax must be mailed. It is written in the passive voice with the subject of the clause — here the Tax Claim Bureau — implied.[7] The direct object is the annual tax bill and the indirect object is "an owner[.]" *Id*. At this point in the definition, it is clear that an owner of the property must receive the annual tax bill. The

[7] If written in the active voice, the clause would read: the tax claim bureau mails the annual tax bill to an owner.

crux of the issue is whether the phrase constituting the second part of the clause ("residing at the same address as that of the property") modifies the verb "is mailed," or whether it modifies the indirect object "an owner." If the phrase modifies "is mailed," then the Tax Claim Bureau and Bolla are correct, for it describes where the annual tax bill must be mailed, *i.e.* the address where the taxpayer resides. And since Lay was not residing at the Bridlewood address where the annual tax bill was mailed, she would not be an owner occupant. On the other hand, if the phrase modifies "an owner," then Lay is correct for it merely describes the type of owner who must receive the annual tax bill. And since the annual tax bill was undoubtedly addressed to her, an owner residing at the property, she would be an owner occupant.

Traditional rules of grammar unequivocally lead to the conclusion that the phrase "residing at the same address as that of the property" modifies "an owner" not "is mailed." First, the proximity of the phrase is telling, as it directly follows the word "owner." Under the interpretative canon of the last antecedent, "a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 (April 1, 2021) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003); citing *Lockhart v. United States*, 577 U.S. 347, 351 (2016)). Admittedly, this canon, "[p]erhaps more than most … is highly sensitive to context." ANTONIN SCALIA & BRYAN GARNER, *Reading Law: The Interpretation of Legal Texts* 150 (2012); *see also Duguid*, 141 S. Ct. at 1175 (Alito, J., concurring in the judgment) ("To the extent that interpretive canons accurately describe how the English language is generally used, they are useful tools. But they are not inflexible rules.").

However, proximity is only the beginning; movement, and deletion are the key tests for determining whether a given phrase acts adverbially or adjectivally. ED NAGELHOUT, *Analyzing Grammar in Context, Section 5: Participle Phrases*, available at https://nagelhout.faculty.unlv.edu/AGiC/s5i.html (last viewed May 11, 2021). Here, deletion provides a clear answer. If the phrase modifies "is mailed" as the Tax Claim Bureau and Bolla argue, then the deletion of the prepositional phrase "to an owner" from the clause should not affect its logical flow. Yet, it obviously does as the clause "for which the annual tax bill is mailed residing at the same address as that of the property" makes no sense. This is so because the word "residing" can only properly modify a noun or pronoun, not a verb. Only a thing can be said to reside, not an action. And if "residing" cannot modify a verb, then a phrase beginning with the word "residing" cannot modify the compound verb "is mailed." Hence, the phrase describes the type of owner who must receive the annual tax bill. The definition in Section 102 says nothing about the location *where* the annual tax bill must be mailed, only the type of person to *whom* it must be addressed.

Interestingly enough, a prior version of the definition was ambiguous on this point. A definition of owner occupant was first added to the RETSL in 1980. *Matter of Tax Sales by Tax Claim Bureau of Dauphin County (Appeal of Goldstein)*, 651 A.2d 1157, 1159 n.3 (Pa. Cmwlth. 1994). At the time, it defined an owner occupant as "the owner of all property which has improvements constructed thereon and for which the annual tax bill is mailed to the owner at the same address as that of the property." 1980 Pa. Laws 417. In 1986 the General Assembly enacted "vast" revisions to the RETSL. *Horton*, 81 A.3d at 894 (Baer, J., dissenting). One such change was amending the definition of owner occupant to its current form: "the owner of ~~all~~ **a** property which has improvements constructed thereon and for which the annual tax

bill is mailed to ~~the~~ **an** owner **residing** at the same address as that of the property." 1986 Pa. Laws 352. Noticeably absent is the word "residing." Without that participle, the phrase at issue would have been a prepositional phrase, which reasonably could have modified either "is mailed" or "the owner." But whatever the intentions of the General Assembly may have been in 1986, this Court cannot ignore the syntactical effect of the word "residing" on the definition's plain meaning, and adopting the Tax Claim Bureau and Bolla's argument would effectively read it out of the statute. *See Commonwealth v. McClelland*, 233 A.3d 717, 734 (Pa. 2020) ("Some meaning must be ascribed to every word in a statute … and there is a presumption that disfavors interpreting language as mere surplusage."); S *& H Transport, Inc. v. City of York*, 140 A.3d 1, 7 (Pa. 2016) ("In construing the language within a statute, we must give effect to every word of the statute."); 1 Pa.C.S. § 1922(2) ("In ascertaining the intention of the General Assembly in the enactment of a statute," a court may presume that "the General Assembly intends the entire statute to be effective and certain").[8]

"It is axiomatic that, if the General Assembly defines words that are used in a statute, those definitions are binding." *Snyder Brothers, Inc. v. Pennsylvania Public Utilities Commission*, 198 A.3d 1056, 1071 (Pa. 2018) (quoting *Pennsylvania Public Utilities Commission v. Andrew Seder/The Times Leader*, 139 A.3d 165, 173 (Pa. 2016)) (internal quotation marks omitted). The Tax Claim Bureau and Bolla's interpretation would require the Court to add words to the definition enacted by the General Assembly. To have the effect they desire, the definition would read something like this: "the owner of a property which has improvements constructed thereon and for which the annual tax bill is mailed **to the same address as that of the property** [where an owner resides.]" Conversely, Lay's oversimplified interpretation, disregarding the reference to the annual tax bill, would require the Court to delete words from the statute: "the owner of a property which has improvements constructed thereon and ~~for which the annual tax bill is mailed to an owner~~ [who is] residing at the same address as that of the property." Neither construction is true to the language of the statute and adopting either would require the Court to usurp the powers of the legislative branch in rewriting the statute. *See Givelify, LLC v. Department of Banking and Securities*, 210 A.3d 393. 403 (Pa. Cmwlth. 2019) ("it is not the function or duty of this Court or any other court to add provisions to a statute not provided for by the legislature") (quoting *Lower Merion Fraternal Order of Police Lodge No. 28 v. Lower Merion Township*, 512 A.2d 612, 616 (Pa. 1986)); *In re Bah*, 215 A.3d 1029, 1036 (Pa. Cmwlth. 2019) ("[t]he Court may not rewrite a statute") (quoting *Bender v. Pennsylvania. Insurance Department*, 893 A.2d 161, 164 (Pa. Cmwlth. 2006). The Court declines the parties' invitation to do so here.

Few cases have directly confronted the RETSL's definition of owner occupant. DARRELL M. ZASLOW, MONTGOMERY L. WILSON, & LEVI S. ZASLOW, *Pennsylvania Real Estate Tax Sales and Municipal Claims*, 4 ed., § 4.37 Personal Service of Notice on Owner of Owner-Occupied Residence, 254 (2020). Significantly, in *In Re Petition to Set Aside Upset Tax Sale (Appeal of Hansford)*, 218 A.3d 995 (Pa. Cmwlth. 2019), the Commonwealth Court

[8] One may ask why the General Assembly chose to reference the annual tax bill at all if it did not intend to connect its mailing to the address of the property. But there are rational reasons for the legislature's choice. For instance, if the General Assembly had adopted a definition like the one suggested by the Tax Claim Bureau and Bolla, those owners choosing to use a post office box rather than a traditional mailbox, or to receive mail at a different property, would be at a disadvantage. In that case, such individuals could never qualify as owner occupants since the annual tax bill would never be mailed to same address as that of the residence.

considered whether an incarcerated individual could qualify as an owner occupant under the definition. The Lehigh County Tax Claim Bureau argued that the petitioner could not be an owner occupant because the annual tax bill was mailed to a post office box rather than the same address as that of the property. *Id*. at 999-1000, n.11. The Commonwealth Court rejected this argument. Relying heavily on legislative intent, the Court held "[b]ecause the General Assembly's reason for mandating personal service is concern over the divesting of the property wherein owner occupants reside, without the owner occupants first receiving notice, this Court cannot hold that Hansford is not an owner occupant based solely on the Bureau's lack of knowledge." *Id*. at 999. The Court went on to conclude:

> [T]he Bureau is misconstruing the definition of owner occupant by focusing on the "address ... of the property," rather than the requirement that the tax bill be mailed to "an owner residing at ... the property." 72 P.S. § 5860.102. Recognizing the General Assembly's concern that owner occupants not be displaced, this Court cannot determine whether Hansford is an owner occupant based solely on the address listed on the Bureau's records in this case.

Id. at 1000. While this Court would not place so much emphasis on legislative intent absent an ambiguity in the plain meaning of the text, the result is consistent with the plain meaning of the definition. *See A.S.*, 143 A.3d at 903 ("it is only when statutory text is determined to be ambiguous that we may go beyond the text and look to other considerations to discern legislative intent.") (citing 1 Pa.C.S. § 1921(c)).

Here, as in *Appeal of Hansford*, the Tax Claim Bureau and Bolla overlook the fact that the annual tax bill need only be mailed to an owner residing at the same address as that of the property, not necessarily to the same address as that of the property. The facts of this case are arguably one step removed from *Appeal of Hansford* since Lay's annual tax bill was not sent to her post office box, but to a former address, and the Tax Claim Bureau had no reasonable means of obtaining her current one. But *Appeal of Hansford* does not mince words. It states unequivocally that "the burden is not on the taxpayer to prove that [s]he is an owner occupant, but for the Bureau to prove that it satisfied the notice requirements under circumstances wherein the General Assembly included heightened protection for the owner occupant." *Appeal of Hansford*, 218 A.3d at 1001 n.12. Even if it were so inclined, the Court cannot disregard such categorical language as a matter of stare decisis. *See Commonwealth v. Randolph*, 718 A.2d 1242, 1245 (Pa. 1998) ("It is a fundamental precept of our judicial system that a lower tribunal may not disregard the standards articulated by a higher court.").

The Tax Claim Bureau argues that *Appeal of Hansford* is distinguishable because the bureau there did not seek waiver and did not argue that waiver could be granted by a court post-sale; it also argues that the holding of *Appeal of Hansford* should be limited to the issue of whether an incarcerated individual qualifies as an owner occupant, a scenario clearly not applicable here. Post-Hearing Brief Submitted on Behalf of the County of Erie Tax Claim Bureau, p. 15. Bolla similarly argues that *Appeal of Hansford* "went far afield in its analysis, contorting the plain language of the statute and rules of logic in reaching its decision." Post-Hearing Brief of Respondent Daniel Bolla, as Executor of the Estate of Lawrence C. Bolla, p. 13. Bolla asserts that *Appeal of Hansford* "cast aside mandatory rules of statutory

interpretation," citing to 1 Pa. C.S. § 1921(b) for the proposition that when the words of a statute are free of any ambiguity, the letter of the law is not to disregarded under the pretext of pursuing the spirit of the law. Post-Hearing Brief of Respondent Daniel Bolla, as Executor of the Estate of Lawrence C. Bolla, p. 15.

The Court agrees that much of the analysis in *Appeal of Hansford* relies on extra-textual considerations. However, as the Court has taken great pains to explain, the only truly grammatical reading of the definition of owner occupant supports Lay's reading. Furthermore, Bolla fails to explain how a properly conducted analysis of the rules of statutory interpretation would lead to a different result under the Statutory Construction Act. In the end, *Appeal of Hansford* was ultimately correct in its holding that the focus of the definition is on the owner, not the address of the owner, even putting aside any extra-textual considerations. 218 A.3d at 1000. That *Appeal of Hansford* did not concern the separate issue of waiver is irrelevant for purposes of its analysis of the definition of owner occupant and its stare decisis effect on this case. That it also dealt with the issue of incarceration does not render its discussion of the definition of owner occupant *dicta* as that issue would have been mooted had the Court accepted the argument of the bureau that annual tax bill must be sent to a particular address. It was thus necessary to the result in that case, and its analysis remains binding on this Court.

Bolla further argues that *Appeal of Hansford*'s holding is in conflict with that of *Appeal of Neff*, a case decided by the Commonwealth Court sitting *en banc*. Bolla correctly notes that under Pa.R.A.P. 3103(b), an opinion of the court en banc is binding on subsequent panels, and as such, *Appeal of Hansford* should be "limited to its unique facts." Post-Hearing Brief of Respondent Daniel Bolla, as Executor of the Estate of Lawrence C. Bolla, p. 15. However, Bolla fails to explain how *Appeal of Neff* is in any way inconsistent with *Appeal of Hansford*. In the context of Section 601(a)(3), *Appeal of Neff* held that the common pleas court did not abuse its discretion by granting waiver of the personal service requirement, and did not consider whether the appellant actually met the definition of owner occupant in Section 102. *Appeal of Neff*, 132 A.3d at 651. In fact, the definition of owner occupant appears nowhere in the opinion.

Even if there were some conflict between the cases, any prior published panel decision of an appellate court is binding on a subsequent panel regardless of whether the decision is en banc or not. Pa.R.A.P. 3103(b) merely codifies the idea that a party seeking to overrule a previous decision of an intermediate appellate court must request en banc consideration to do so; it does not imbue an en banc decision with any greater precedential weight on a court of common pleas than a published panel decision. Precisely because a panel of one intermediate appellate cannot overturn a panel of that same court, courts of common pleas are required to attempt to reconcile seemingly conflicting precedents of an intermediate appellate court. *Commonwealth v. Karash*, 175 A.3d 306, 307-10 (Pa. Super. 2017); *see also DeGrossi v. Commonwealth, Department of Transportation, Bureau of Driver Licensing*, 174 A.3d 1187, 1191 (Pa. Cmwlth. 2017) (noting "this Court, sitting as three-judge panel, is bound to follow and apply the outcome of [a prior three-judge panel]."); *Williams v. Aguirre*, 965 F.3d 1147, 1163 (11th Cir. 2020) (courts are "obligated, if at all possible, to distill from apparently conflicting prior panel decisions a basis of reconciliation and to apply that reconciled rule.") (internal quotation omitted); *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 2015 WL 6243526, *86 (S.D. N.Y. 2015) ("[w]hile we suppose that

one could reduce these two cases — or any case — to their particular facts, we continue to believe that a district court has a duty to synthesize holdings into a coherent doctrine."). Sometimes, perhaps, appellate courts ignore prior precedent, and no reasonable reconciliation can be made. *See Morrison Informatics, Inc. v. Members 1st Federal Credit Union*, 139 A.3d 1241, 1250 (Wecht, J., concurring) ("Lawyers and judges might read today's decision as forcing them to strive mightily in an attempt to reconcile disparate precedents, including this one. They need not do so. No principled reconciliation is available."). In such cases "controlling precedent is to be discerned from developmental accretions in the decisional law, attributing due and substantial weight to pronouncements made in the most recent decision." *Hammons v. Ethicon, Inc.*, 240 A.3d 537, 564 (Pa. 2020) (Saylor, C.J., dissenting); *see also D'Alessandro v. Berk*, 46 Pa. D. & C. 588, 601 (Phila. Co. 1943) ("Being thus confronted by apparently conflicting decisions by our appellate courts, we have no choice but to follow that which is both last in time and supreme in point of ultimate authority."). Here, that is clearly *Appeal of Hansford*.

Bolla also asserts that *Appeal of Hansford* has "not been cited in another appellate decision since and should be disregarded by this Court[.]" Post-Hearing Brief of Respondent Daniel Bolla, as Executor of the Estate of Lawrence C. Bolla, p. 16. However, just prior to the filing of Bolla's brief, in *Marshall v. East Township Board of Supervisors*, — A.3d —, 2021 WL 608273, *6 (Pa. Cmwlth. 2021), the Commonwealth Court cited the case for the proposition that an incarcerated individual can be an owner occupant for purposes of the RETSL, albeit in the context of an unrelated zoning issue. While not directly relevant to the case at bar, *Marshall* at least indicates that *Appeal of Hansford* is not some disfavored decision whose continuing validity should be called into question. Accordingly, the Tax Claim Bureau and Bolla's attempts at distinguishing *Appeal of Hansford* are unpersuasive, and this Court would independently come to the same conclusion about the meaning of the definition of owner occupant in Section 102 absent any appellate case law on the subject.

In sum, the definition of owner occupant contains four necessary elements: (1) an owner occupant must be an owner of the property; (2) the property must have improvements constructed thereon; (3) the annual tax bill for that property must be mailed to an owner; and (4) such owner referenced in prong three must reside at the property. Having determined the meaning of the definition, the analysis is rather straightforward.

During the relevant timeframe, Lay was the owner of the Lakefront Property. The Lakefront Property had improvements constructed thereon. The annual tax bill was mailed to Lay, an owner. The only issue of any substance is whether Lay resided at the Lakefront Property. At the evidentiary hearing, Richard McCray, a carpenter who has done work for Lay, testified that the Lakefront Property was Lay's "home." Evid. Hr'g Tr., Day 3, pp. 42, 47. Richard Seidel, a friend of Lay, testified she lived at the Lakefront Property, and that he was a frequent visitor there. Evid. Hr'g Tr., Day 3, pp. 103-04. David Briggs, a former classmate and longtime acquaintance of Lay, testified that she appeared to live at the Lakefront Porperty and that he visited her there ten times between July and September of 2019. Evid. Hr'g Tr., Day 3, pp. 122-25. Brian Johnson, a realtor, testified that Lay informed him she resided at Lakefront Property during a walk through and that it appeared to be lived in. Evid. Hr'g Tr., Day 4, pp. 24-26. He also indicated that during the period of July and August of 2019, the Lakefront Property was "her primary residence" and that [s]he was busy there cleaning up the beach,

plating flowers, organizing her garage. She had a lot of things in the home." Evid. Hr'g Tr., Day 4, p. 31. Even the exhibits of the opposing parties indicate the existence of potted plants and patio furniture, further suggesting the Lakefront Property was lived in throughout the year. Evid. Hr'g Tr., Day 2, pp. 85-86; Bolla Ex. 2; Tax Claim Bureau Ex. 10.

Based upon this evidence, the Court finds that Lay did indeed reside at the Lakefront Property. She therefore satisfied all the necessary conditions of the definition of owner occupant under Section 102 and the Court holds she was an owner occupant under the RETSL as a matter of law. Accordingly, the Court must next consider whether the Tax Claim Bureau met its obligations under Section 601(a)(3) to personally serve her with notice of the upset tax sale, or alternatively, to seek waiver of the personal service requirement from the court of common pleas.

B. Personal Service under Section 601(a)(3)

Absent waiver, the Tax Claim Bureau must show an owner occupant was given "written notice of [the] sale at least ten (10) days prior to the date of actual sale by personal service[.]" 72 P.S. § 5860.601(a)(3). The 2019 Posting Protocol in Tax Claim Bureau Exhibit 19 indicates that three attempts at personal service should be made. Tax Claim Bureau Ex. 19. The Protocol in Tax Claim Bureau Exhibit 19, also introduced as evidence as Petitioner's Exhibit B, states that "[i]f the 'Mail Address' and the 'Property Address' do not match Personal Service attempts are not required. This will be denoted in the record as 'Personal Service Not Required' and 'Not Owner Occupied.'" Tax Claim Bureau Ex 19; Petitioner's Ex. B. However, "[i]f the 'Mailing Address' and the 'Property Address' match Personal Service attempts are required according to the county's protocol." Tax Claim Bureau Ex 19; Petitioner's Ex. B. "If the 'Mail Address' is a PO Box it is to be treated as a matching address." Tax Claim Ex. 19; Petitioner's Ex. B.

When asked whether personal service was obtained on the Lakefront Property, Steven Letzelter answered "I knew after the fact that it was not[.]" Evid. Hr'g Tr., Day 1, p. 32. He further testified to the steps the Tax Claim Bureau takes in order to determine whether a property is owner occupied. First, they look to records maintained by the Office of Assessment to ascertain whether a home is covered by the Homestead Exclusion Act because only owner occupied properties can qualify for a homestead exclusion. Evid. Hr'g Tr., Day 1, p. 32. Second, they allow field agents, when posting the property to "look at the physical address versus the mailing address. And if they do not find anybody when they first knock — when they knock on the door to put the posting on, then they will list it as not owner occupied and then there is no — again, no reason to go back a second and third time." Evid. Hr'g Tr., Day 1, p. 33. He later reiterated that "[t]hey [Palmetto Postings] attempt once while they're there. But then they do not have to go back for the second or third additional attempts if it's not owner occupied." Evid. Hr'g Tr., Day 1, p. 87.

The field report in Tax Claim Bureau Exhibit 10 indicates that personal service was attempted once at 9:35 a.m. on July 26, 2019. Tax Claim Bureau Ex. 10. There is no indication that any further attempts at personal service were made. The field report in Tax Claim Bureau Exhibit 10 also describes the Lakefront Property in the comment section as "Not Owner Occupied" and in the disposition section as "Personal Service Not Required." Tax Claim Bureau Ex. 10. This is consistent with Letzelter's testimony that field agents would not make any further attempt at personal service because the address of the Lakefront

Property did not correspond with her address of record on Bridlewood Drive.

Accordingly, the Court finds that an attempt at personal service was made on July 26, 2019, by Palmetto Postings field agent Roger Petty, but that no further attempts at personal service were made because, pursuant to the Tax Claim Bureau's own procedure for determining whether a property was owner occupied, it determined that the Lakefront Property was not. Although three attempts at personal service are required when a property is deemed to be owner occupied per the 2019 Protocol, the Protocol also assumes a property is not owner occupied if the assessment records do not indicate a Homestead exemption on the property and the mailing address on record for the property does not match the actual address of the property, in which case only one attempt at personal service is attempted at the time of posting. That is precisely what happened here. Because Palmetto Posting and the Tax Claim Bureau assumed, per its protocol, that the Lakefront Property was not owner occupied, only one attempt at personal service was made on July 26, 2019, which proved unsuccessful. Thus, Lay never received personal service of the upset tax sale notice.

C. Waiver of Personal Service

This does not necessarily mean that the Tax Claim Bureau did not meet its statutory obligation under Section 601(a)(3). That provision further provides that "[i]f such personal notice cannot be served within twenty-five (25) days of the request by the bureau to make such personal service, the bureau may petition the court of common pleas to waive the requirement of personal notice for good cause shown." 72 P.S. § 5860.601(a)(3). In anticipation of the 2019 upset tax sale, the Tax Claim Bureau did file a Petition to Waive Personal Service for numerous properties on September 12, 2019, at docket number 12440-2019. Petitioner's Ex. C-1. Those properties for which the Tax Claim Bureau sought waiver are listed in an attachment labeled as Exhibit A. Petitioner's Ex. C-1. That same day, the Honorable Stephanie Domitrovich signed an Order waiving the personal service requirements for any of "the properties identified in Exhibit A[.]" Petitioner's Ex. C-1. Notably absent from Exhibit A is a description of the Lakefront Property.[9]

The Lakefront Property is described in a separate attachment to the Waiver Petition, a compact disc labeled as Exhibit B, which includes the field report previously referenced in Tax Claim Bureau Exhibit 10. Bolla Ex. 3. Paragraph 9 to the Waiver Petition describes Exhibit B as being 5,716 pages and containing "all of the information on posting of the various properties to be exposed at the 2019 Upset Tax Sale by Palmetto Postings." Petitioner's Ex.

[9] In the Tax Claim Bureau's Answer and New Matter, as well as their Amended Answer and New Matter, containing a notice to plead, it asserts that the Lakefront Property "was included in the [Waiver] Petition" and "the waiver was granted with regard to the Petitioner as owner of the Subject Property." Amended Answer and New Matter of Respondent, the County of Erie Tax Claim Bureau, ¶ 52. In her Reply to New Matter, Lay mistakenly admits that fact. *See* Reply to New Matter of Erie County Tax Claim Bureau, ¶ 52. "Generally, statements made by a party in the pleadings … are treated as judicial admission[s]." *Duquesne Light Co. v. Woodland Hills School District*, 700 A.2d 1038, 1054 (Pa. Cmwlth. 1997). "Judicial admissions … are formal concessions in the pleadings in the case … that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Thus, the judicial admission, unless allowed by the court to be withdrawn, is conclusive in the case[.]" *Bartholomew v. State Ethics Commission*, 795 A.2d 1073, 1078 (Pa. Cmwlth. 2002); *see also Tops Apparel Manufacturing Co. v. Rothman*, 244 A.2d 436, 438 (Pa. 1968) ("Admissions … contained in pleadings, stipulations, and the like, are usually termed 'judicial admissions' and as such cannot later be contradicted by the party who has made them."). However, at trial both counsel for the Tax Claim Bureau and Bolla waived any reliance on this clearly erroneous admission. Evid. Hr'g Tr., Day 3, p. 8. In any event, because the mistaken admission was made as a result of a misrepresentation by the Tax Claim Bureau that waiver was in fact obtained (attaching Judge Domitrovich's Order in support), this Court also explicitly grants the withdrawal of that admission for good cause.

C-1. It continues "[t]his file also documents the three attempts at personal service, including the date and time of each of the three attempts to obtain personal service." Petitioner's Ex. C-1. But as the Court has already found, only one attempt at personal service was made at the time of posting and no further attempts were made because Palmetto Postings and the Tax Claim Bureau believed the property was not owner occupied per its own protocol. Paragraph 9 of the Waiver Petition clarifies that Exhibit B was only provided for the purpose of showing that three attempts at personal service were made per the protocol for those properties listed in Exhibit A. As the prayer for relief in the Waiver Petition and Judge Domitrovich's Order make clear, however, the waiver only applied to those properties listed in Exhibit A. Simply put, the Lakefront Property's inclusion in Exhibit B did not achieve waiver of personal service on that property. In order to be waived, the property would have had to be included in Exhibit A, and it was not included in Exhibit A because the Tax Claim Bureau did not believe it was an owner occupied residence for which personal service was required. As such, the Court finds the September 12, 2019, Order did not waive the personal service requirement pursuant to Section 601(a)(3) as to the Lakefront Property.

Bolla and the Tax Claim Bureau argue that this Court may now, after-the-fact, waive personal service for good cause shown. For their position, the Tax Claim Bureau and Bolla rely heavily on *Famageltto v. County of Erie Tax Claim Bureau*, 133 A.3d 337 (Pa. Cmwlth. 2016) (en banc). In *Famageltto*, the Honorable William Cunningham waived the personal service requirement for the subject property. *Id*. at 342. Subsequently, the subject property was sold at an upset tax sale, and the owners brought suit challenging the validity of the sale. *Id*. at 338. An evidentiary hearing was held before the Honorable Ernest DiSantis, Jr. *Id*. at 340. The owners argued that the waiver petition signed by Judge Cunningham did not satisfy the good cause requirement for waiver under Section 601(a)(3). *Id*. at 346. Judge DiSantis ruled that it was not his "role to second guess or overrule Judge Cunningham's ruling as it [was] binding on [the] Court under the coordinate jurisdiction doctrine." *Id*. at 347 (quoting Trial Court Opinion at p. 5) (changes in original).

On appeal, the Commonwealth Court disagreed. It noted that "[u]pon receiving the Waiver Petition, Judge Cunningham made an initial determination of good cause to waive personal service of notice based on the averments in the Waiver Petition and the attachments thereto, which are clothed in a presumption of regularity that attaches to all official acts." *Id*. at 348 (citing *Hughes v. Chaplin*, 132 A.2d 200, 202 (Pa. 1957)). Based on the limited information Judge Cunningham had available when he signed such a petition, the Court could not say that the waiver was facially defective or that Judge Cunningham in any way abused his discretion, particularly since the proceeding "was necessarily one-sided." *Id*. "It was only later in the statutory tax sale process that [the owners] could become involved" by filing exceptions. *Id*. (citing Section 607(b)). In turn, the filing of exceptions "rebuts the presumption of regularity of the Bureau's activities" and Judge DiSantis was not later precluded from later reviewing the good cause determination in an adversarial proceeding where the "evidence can be presented and tested … at the same time all the other notice requirements are tested." *Id*. "Because this second judge can be presented with additional and different evidence from both parties regarding the tax claim bureau's efforts to comply with the Law's personal service of notice requirement, the second judge is not deciding the same questions as the first judge and the coordinate jurisdiction doctrine should not apply." *Id*. at 349.

What distinguishes this case from *Famageltto*, however, is that a waiver of the personal service requirement was simply never granted for the Lakefront Property in the first place. Had it been, then Lay would have been entitled to challenge the presumption of regularity and the Tax Claim Bureau and Bolla would have been permitted to counter this claim with evidence of their own that good cause existed for the waiver. But waiver was never sought, so whether good cause may have existed for such a waiver is ultimately a hypothetical question. This Court has no power under the RETSL to grant its imprimatur on a waiver that never occurred. To do so would not be to review in an adversarial context a prior determination which had previously been cloaked in a presumption of regularity, but to grant waiver post-hoc where the Tax Claim Bureau failed to seek it prior to the sale.

Such post-sale waiver of the personal service requirement is not contemplated by the RETSL, and would permit a tax claim bureau to avoid seeking a pre-sale waiver so long as it was willing to risk litigating the good cause requirement at a later hearing. This would turn the waiver provision of Section 601(a)(3) on its head. If the General Assembly had intended such a result, it could have merely permitted the Tax Claim Bureau to forego personal service for good cause without the need for filing a petition for waiver with the court of common pleas, allowing the parties to litigate whether such good cause existed at a later hearing. To adopt the Tax Claim Bureau and Bolla's position would be to read the requirement that a tax claim bureau file a petition with the common pleas court out of the statute and in contravention of the Statutory Construction Act. *See* 1 Pa.C.S. § 1922(2) ("In ascertaining the intention of the General Assembly in the enactment of a statute," a court may presume that "the General Assembly intends the entire statute to be effective and certain"); *see also Commonwealth by Shapiro v. Golden Gate National Senior Care LLC*, 194 A.3d 1010, 1034 (Pa. 2018) ("When interpreting a statute, courts must presume that the legislature did not intend any statutory language to exist as mere surplusage; consequently, courts must construe a statute so as to give effect to every word."). Accordingly, the Court holds that it has no authority under Section 601(a)(3) to determine post-sale whether good cause existed to waive the personal service requirement where no waiver was originally granted prior to the sale.

Furthermore, because the Court finds as a factual matter that the Tax Claim Bureau did not consider the Lakefront Property to be owner occupied, it emphatically rejects its assertion that "the Petition to Waive Personal Service was intended to include the Subject Property." Post-Hearing Brief Submitted on Behalf of the County of Erie Tax Claim Bureau, p. 8. To the contrary, the Court finds that the Tax Claim Bureau intended to waive personal service for those properties which it assumed were owner occupied pursuant to its 2019 Protocol, which in turn, were those properties listed in Exhibit A. The Tax Claim Bureau's mere desire to waive personal service for any number of properties it cannot know are owner occupied cannot excuse it of its statutory obligations. Section 601(a)(3) does not permit blanket waiver of any and all properties which may or may not conceivably be owner occupied. Such an interpretation would simply allow a bureau to file a *pro forma* waiver of any such property without any reference to a specific parcel number. In that case, a court would not be in a position to determine whether good cause existed as to the property, even under the inherently deferential standard applicable to an *ex parte* petition.

Ultimately, the Tax Claim Bureau's frustration lies with the difficulty in designing a protocol that will capture every owner occupied property, particularly where, as here, the

owner takes willful steps to evade service. Post-Hearing Brief Submitted on Behalf of the County of Erie Tax Claim Bureau, p. 8. The Tax Claim Bureau would put the onus on the taxpayer to either change their tax billing address with the Assessment Office or apply for a homestead exclusion, but such an obligation on the taxpayer appears nowhere in the RETSL. The text of Section 601(a)(3) ostensibly places the duty on the Tax Claim Bureau to correctly determine whether a property is owner occupied, thus requiring waiver, or if owner occupancy status cannot be ascertained, to continue to attempt personal service prior to conducting an upset tax sale. In other words, the plain language of the statute places the risk of loss upon the Tax Claim Bureau, not the taxpayer.

The case law interpreting the RETSL appears to confirm that the burden is on the Tax Claim Bureau to personally serve an owner occupant or seek a waiver without exception. *See Appeal of Hansford*, 218 A.3d at 1001 n.12 ("the burden is not on the taxpayer to prove that he is an owner occupant, but for the Bureau to prove that it satisfied the notice requirements under circumstances wherein the General Assembly included heightened protection for the owner occupant."). This system certainly places the Tax Claim Bureau at a disadvantage, but in difficult cases such as this, one of the parties — either the owner or the Tax Claim Bureau — must bear the risk of loss. The text of the statute and prior precedential cases interpreting it all point to the Tax Claim Bureau. *See Smith v. Tax Claim Bureau of Pike County*, 834 A.2d 1247, 1251 (Pa. Cmwlth. 2003) ("The Law, however, imposes duties not upon owners but upon the agencies responsible for real estate tax sales.").

Although not necessary to the Court's holding in this regard, the legislative history of Section 601(a)(3) confirms this result. It appears the impetus for Section 601(a)(3), part of the changes to the RETSL enacted in 1980, was public outcry over the sale of certain properties in Bucks County, some being the homes of senior citizens claiming they were never given notice of the sale, and which, although valued between $50,000 and $70,000, were sold for between $12 and $500. *House Legislative Journal*, 163rd Session of the General Assembly, Vol 1. No. 74, p. 2067, Remarks of Representative Burns and Representative Gallagher (October 17, 1979). The original version of Senate Bill 316 included in Section 602, in addition to the publication notice, a requirement that notice be given "by United States certified mail, personal addressee only, return receipt requested, postage prepaid, to *each owner* as defined by this act and by posting on the property" just as the RETSL does today. Senate Bill 316, Printer's No. 320, p. 5, lines 4-17 (emphasis added). However, the bill went on to provide that:

> If no return receipt is received pursuant to the provisions of clause (1), then, at least thirty (30) days before the date of the sale, similar notice of the sale shall be served by the sheriff of the county in person to the owner of such property and by posting a similar notice on the property. If the sheriff is unable to affect personalized service after the expiration of twenty (20) days, the bureau shall petition the court of common pleas to waive the personalized service requirement.

Senate Bill 316, Printer's No. 320, p. 5, lines 18-26. Thus, the bill would have required personal service, or waiver thereof, on the owner of any property, whether owner occupied or not, whose return receipt was not received by the bureau. The bill also would have required

personal service of the post-sale notice under Section 607. Senate Bill 316, Printer's No. 320, p. 7, lines 16-22.

Several county tax claim bureaus expressed concerns with the bill. *Senate Legislative Journal*, 163rd Session of the General Assembly, Vol. 1, No. 26, p. 446, Remarks of Senator Kury (May 21, 1979). By September of 1979, the House had removed the pre-sale personal service requirement language in Section 602 from the draft bill and replaced it with a second attempt at "similar" notice by certified mail. Senate Bill 316, Printer's No. 1079, p. 7, lines 21-30. The post-sale personal service requirement of Section 607 remained, but appears to have been the subject of much debate. One legislator raised concerns over the ability of sheriff departments in rural counties to "have the manpower to go out and find these individuals." *House Legislative Journal*, 163rd Session of the General Assembly, Vol 1. No. 82, p. 2294, Remarks of Representative Brandt (November 27, 1979). Another responded that "it is only fair, when a person is about to lose his home, that he ought to at least know that he is about to lose it." (although he later made a point to clarify for the Chamber they were "not trying to protect the deadbeats.") *House Legislative Journal*, 163rd Session of the General Assembly, Vol 1. No. 82, p. 2294-95, Remarks of Representative Burns (November 27, 1979).

Senate Bill 316 underwent several amendments and was eventually sent to a conference committee; a conference report was adopted, but controversy still enveloped it. *House Legislative Journal*, 164th Session of the General Assembly, No. 30, p. 1006, Remarks of Representative Brandt (April 30, 1980). The House overwhelmingly rejected the recommendations made in the conference report by a vote of 110-69. *House Legislative Journal*, 164th Session of the General Assembly, No. 30, p. 1007-08, (April 30, 1980). One legislator noted "[i]n the legislature as in the courts, hard cases will often make bad law. This legislation is the product of some, perhaps, harsh cases." *House Legislative Journal*, 164th Session of the General Assembly, No. 30, p. 1006, Remarks of Representative W.D. Hutchinson (April 30, 1980).

The General Assembly went back to the drawing board. Eventually, a new conference committee report was adopted which would subsequently be enacted into law. The post-sale personal service requirement in Section 607 was dropped, as was the requirement that the second attempt at "similar" service in Section 602 be by certified mail; instead, the drafters added the now familiar personal service requirement and waiver provision to the new Section 601(a)(3), which only applied to owners who were owner occupants of the property. Senate Bill 316, Printer's No. 1890. The bill was passed by the Senate on June 10, 1980, by a vote of 48-0, passed in the House on June 30, 1980, by a vote of 170-8, and was signed into law by Governor Thornburgh on July 10, 1980. 1980 Pa. Laws 423; Pennsylvania General Assembly, Bill Information — History, Senate Bill 316, Regular Session, 1979-1980, available at https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=1979&sind=0&body=S&type=B&bn=316 (last viewed May 11, 2021).

This final version of the bill represents a careful balance between the benefits of a personal service requirement on the one hand, and on the other, the cost it exacts on a tax claim bureau. In adopting the personal service requirement of Section 601(a)(3), the General Assembly was well aware of the "harsh" results it might permit in hard cases, but it chose to cabin the costs of such an approach by limiting this requirement to owner occupants only and by requiring personal service only in the context of pre-sale notice to such individuals. In light of the

careful calibration and compromise undertaken by the General Assembly, the Court cannot say this statutory scheme is absurd or unreasonable. 1 Pa.C.S. § 1922(1). Nor can this Court second-guess the policy choices of the General Assembly. *In re Adoption of L.B.M.*, 161 A.3d 172, 180 (Pa. 2017) ("It is not our role to second-guess the policy choice made and expressed by the General Assembly."); *Insurance Federation of Pennsylvania, Inc. v. Commonwealth of Pennsylvania, Insurance Department*, 970 A.2d 1108, 1122 n.15 (Pa. 2009) (plurality) ("Our role is distinctly not to second-guess the policy choices of the General Assembly.").

Moreover, it is not entirely clear to the Court that the duty of due diligence imposed on the Tax Claim Bureau is quite as burdensome as it claims. At the Evidentiary Hearing the Tax Claim Bureau noted "I think what she would want us to do in this case is sit outside of every residence in Erie County and note when they sell the property. We can't do that. We have a staff of seven people and a supervisor that are conducting the tax sale. We rely on deeds. We rely on changes of address. We rely on the tax bill address." Evid. Hr'g Tr., Day 2, pp. 235-36. However, the Tax Claim Bureau outsources its posting and notice responsibilities to Palmetto Postings. There is no reason why the Protocol cannot be changed to allow the field agents to make an assessment of whether those properties appear to be owner occupied residences. Indeed, all the pictures of the Lakefront Property entered into evidence, including the pictures from the July 26 field report included in Tax Claim Bureau Exhibit 10, show a property that appears to be lived-in, with cared-for plants and shrubbery. Tax Claim Bureau Ex.10. As Lay points out in her Reply to New Matter, that photograph appears to show a garden hose on the property. Reply to New Matter of Erie County Tax Claim Bureau, ¶ 46; Evid. Hr'g Tr., Day 1, p. 221.

When questioned about this at the Evidentiary Hearing, the Tax Claim Bureau responded "the fact that the property is maintained or has plants outside it is evidence that somebody may attend or appear there. But that doesn't say necessarily that they're living there … and I know some of these properties down by this beach front are weekend venues." Evid. Hr'g Tr., Day 2, pp. 237-38. Fair enough, but as the Tax Claim Bureau has also noted to the Court during these proceedings, a property such as this is rarely subject to a tax sale to begin with. If the 2019 Protocol had required the field agent to note those properties which appeared to be lived in, and required a full three attempts at personal service on those properties, the Tax Claim Bureau would have had to do little more than add those properties where personal service by Palmetto Postings was unsuccessful to the list in the Waiver Petition's Exhibit A. Any additional labor in making two more attempts at personal service would have been borne by the field agents at Palmetto Postings, not the seven employees of the Tax Claim Bureau, and the Tax Claim Bureau has failed to show that the additional add-ons to Exhibit A would be so voluminous as to seriously inconvenience its staff. And even assuming the Tax Claim Bureau would incur additional costs in adding these properties to the list, pleas of administrative inconvenience never justify departure from a statute's clear meaning. *Niz-Chavez v. Garland*, 593 U.S. ___ (slip op., at 13), 2021 WL1676619, *8 (April 29, 2021) (quoting *Pereira v. Sessions*, 138 S. Ct. 2105, 2118 (2018)).

In sum, the Court holds that under Section 601(a)(3), in the absence of personal service on Lay, the Tax Claim Bureau was required to obtain waiver of the personal service requirement on the Lakefront Property for good cause shown prior to the sale. It did not do that. Bolla and the Tax Claim Bureau's novel argument for this Court's post-sale determination of good cause stretches the plain meaning of Section 601(a)(3) beyond its breaking point and is unmoored

from precedent. The Tax Claim Bureau's appeal to inconvenience is likewise unpersuasive.

Finally, the Court is compelled to address one further issue related to waiver. It does not sit well with the Court that in response to Lay's Petition, the Tax Claim Bureau affirmatively claimed that waiver of personal service for this property was effectuated. Although counsel for Lay bears some blame in failing to exercise due diligence before originally admitting to this fact in the answer, ultimate responsibility rests with the Tax Claim Bureau who first made the misrepresentation to the Court and to opposing counsel. Further adding to the court's concern, is the fact that the Tax Claim Bureau knew that the Order approving waiver of personal service, which it exhibited in its Answer and New Matter as Exhibit F, only applied to the properties identified in the Waiver Petition's Exhibit A (a fact it knew or reasonably should have known since it drafted the Petition). This error was further aggravated by the fact that the Tax Claim Bureau neglected to include the Waiver Petition's Exhibit A as an exhibit to this Court, attaching only a copy of Judge Domitrovich's one-sentence Order. This tactic could easily have misled this Court, and indeed, did mislead opposing counsel to believe that waiver had been obtained. Had a valid waiver been obtained, the outcome of this case would have been quite different.[10]

D. Actual Notice as a Defense to Lack of Personal Service under Section 601(a)(3)

Notwithstanding its failure to provide personal service to Lay, the Tax Claim Bureau asserts that Lay had actual notice of the Tax Sale. Post-Hearing Brief Submitted on Behalf of the County of Erie Tax Claim Bureau, pp. 6-7. The Court has already found that Lay did, in fact, receive actual notice of the sale by virtue of the posting on her property; the ten-day notice addressed to the Lakefront Property, but forwarded to her Millcreek post office box; and her conversation with Kathy Getchell at the Tax Claim Bureau office. The Tax Claim Bureau argues such notice is a defense to lack of personal service under Section 601(a)(3), and as a result, this Court should excuse any defect in the personal service requirement or waiver. Post-Hearing Brief Submitted on Behalf of the County of Erie Tax Claim Bureau, p. 4.

It has long been recognized by the courts of this Commonwealth that strict compliance with notice provisions of the RETSL is mandatory because the statute "is for the collection of taxes and is not intended to create investment opportunities for others, or to strip taxpayers of their properties." *Brodhead Creek Associates, LLC v. County of Monroe*, 231 A.3d 69, 74 (Pa. Cmwlth. 2020) (citing *Jenkins v. Fayette County Tax Claim Bureau*, 176 A.3d 1038, 1043 (Pa. Cmwlth. 2018)); *Willard v. Delaware County Tax Claim Bureau*, 921 A.2d 1273, 1279 (Pa. Cmwlth. 2007); *Tracy v. County of Chester, Tax Claim Bureau*, 489 A.2d 1334, 1339 (Pa. 1985); *Hess v. Westerwick*, 76 A.2d 745, 748 (Pa. 1950).

In *Tracy* our Supreme Court noted "due process, as we have stated here, requires at a minimum that an owner of land be actually notified by government, if reasonably possible, before his land is forfeited by the state." *Tracy*, 489 A.2d at 1339. To that end, it found that in order to satisfy due process, a Tax Claim Bureau must at least "notify the record owner of property by personal service or certified mail, *and where the mailed notice has not been*

[10] The Court is willing to accept this neglect as an oversight today, but the Tax Claim Bureau is placed on notice that in future advocacy before the Court, should it assert valid waiver of the personal service requirement, it shall: (1) ensure waiver actually applied to the subject property; and (2) include in its pleading not only the order granting waiver, but the petition requesting waiver and any attachment thereto giving rise to the order, highlighting where in such attachment the subject property is listed, in order to firmly establish that waiver applied to the subject property. This approach will avoid even inadvertent misrepresentations.

delivered because of an inaccurate address, the authority must make a reasonable effort to ascertain the identity and whereabouts of the owner(s).” *Id.* at 1338-39 (emphases in original). Here, the Tax Claim Bureau arguably satisfied these minimum efforts: it sent out notice to Lay’s address of record by certified mail, return receipt requested, and when it was returned undeliverable, it conducted a search of all known addresses of her and her late husband, sending out notices to those addresses as well. But by inserting a personal service requirement for owner occupants into the RETSL in 1980, the General Assembly went above and beyond this minimum floor required by the state and federal constitutions. *Robinson v. Government of the District of Columbia*, 234 F.Supp.3d 14, 24 (D.D.C. 2017) (“In terms of procedural due process, the Constitution sets a floor, not a ceiling: the legislature must craft laws that are sufficiently clear to provide fair notice of what is prohibited and prevent arbitrary and discriminatory enforcement.”).

Shortly after *Tracy* was decided, the Commonwealth Court considered whether due process requires strict adherence to the notice requirements of the RETSL where an owner has received actual notice in *In Re Tax Claim Bureau of Lehigh County 1981 Upset Tax Sale (Appeal of Hass)*, 507 A.2d 1294 (Pa. Cmwlth. 1986). In *Appeal of Hass*, the tax claim bureau successfully obtained waiver of the personal service requirement under Section 601(a)(3) prior to the upset tax sale. *Id.* at 1295. Hass later challenged the sale, but the trial court found that, although she received no certified notice of the sale pursuant to Section 602, and despite not having received personal service (because personal service had been waived), she undoubtedly had actual notice since she had hired a lawyer to represent her at the sale. *Id.* at 1296. She subsequently appealed, challenging the validity of the sale, *inter alia*, on procedural due process grounds. *Id.* In its analysis of the procedural due process issue, the Commonwealth Court explained:

> The deprivation of a property right by adjudication must be preceded by notice and an opportunity to be heard. Otherwise it is a deprivation of property without due process of law. It is the notice which is indispensable to due process. Whatever mechanism is used, it must be reasonably calculated to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections. This is why strict compliance is required.

Id. at 1296 (citations omitted). However, the Court continued “[b]ut to require strict compliance where, as here, owner had notice, in fact is to exalt form over substance, and ignores the purposes of the requirement.” *Id.* Thus, *Appeal of Hass* stands for the proposition that actual notice cures any procedural due process concerns with a lack of formal service of notice.

The Commonwealth Court has since extended this rationale to the statutory mailing and publication requirements of Section 602. In *Appeal of Neff*, it reiterated that “[n]otwithstanding our mandate to strictly construe the notice provisions of the law, the notice requirements of Section 602 of the [RETSL] are not an end in themselves, but are rather intended to ensure a property owner receives actual notice that his or her property is about to be sold due to a tax delinquency.” *Appeal of Neff*, 132 A.3d at 645 (citing *Donofrio*, 811 A.2d at 1122). As such, “strict compliance with the notice requirements of Section 602 is not required when the Bureau proves that a property owner received actual notice of a

pending tax sale." *Id*. (citing *Sabbeth*, 714 A.2d at 517).

In the context of both upset and judicial tax sales, the Commonwealth Court has held that actual notice "does not necessarily cure a defect in the posting [requirement] because the purpose of the posting [requirement] is to notify the public at large as well as the record owner." *In re Tax Sale of Real Property Situate in Paint Township, Somerset County (Appeal of Baumgardner)*, 865 A.2d 1009, 1017 (Pa. Cmwlth. 2005) (citing *In re Tax Sale of 2003 Upset (Appeal of Gerholt)*, 860 A.2d 1184, 1190 (Pa. Cmwlth. 2004). Conspicuous posting not only tends "to make the sale well-attended by bidders, but also … informs many people who may be concerned for the welfare of the owners." *Wells Fargo Bank of Minnesota NA v. Tax Claim Bureau of Monroe County*, 817 A.2d 1196, 1199 (Pa. Cmwlth. 2003) (quotation and internal quotation marks omitted) (holding Section 602 not satisfied where published notices and posting of the property did not list correct owners of the property).

Most recently, the Commonwealth Court has considered whether actual notice cures a defect in the personal service requirement of Section 601(a)(3). In *McKelvey v. Westmoreland County Tax Claim Bureau*, 983 A.2d 1271 (Pa. Cmwlth. 2009) the Court held that actual notice is not a defense to lack of personal service under Section 601. *Id*. at 1274. The Court noted the "plain language of section 601(a)(3) unequivocally commands that 'no owner occupied property may be sold' unless the owner occupant has received personal service of notice[,]" creating only one exception for failure to personally serve an owner occupant: waiver for good cause shown. *Id*. It reasoned "[t]he distinction between section 601, requiring personal service of notice to owner occupiers, and section 602, requiring notice by certified mail to all property owners, indicates that the legislature recognized a distinction between an owner who stands to lose his property and one who stands to lose his home as well." *Id*. As such, "[b]y enacting section 601, the legislature expressed a desire to provide a qualitatively different type of notice to an owner occupant and afford such owner increased protection by way of additional notice." *Id*.

The Tax Claim Bureau relies on several cases for its argument that Lay's actual notice can cure any defect in personal service, including *Appeal of Hass*, *Sabbeth*, *Casady v. Clearfield County Tax Claim Bureau*, 627 A.2d 257 (Pa. Cmwlth. 1993), and *Appeal of Gerholt*. Post-Hearing Brief Submitted on Behalf of the County of Erie Tax Claim Bureau, pp. 4-5. As previously noted, *Appeal of Hass* concerned a procedural due process challenge, not a statutory one, where the Tax Claim Bureau had obtained waiver under Section 601(a)(3) prior to the upset sale. Thus, it has no bearing on the question of whether actual notice cures any defect in the statutory notice requirements of Section 601(a)(3) where waiver has not been obtained. *Sabbeth* and *Appeal of Gerholt* both concerned challenges to actual notice under Section 602 and there is no indication from those cases the properties were owner occupied. *Sabbeth*, 714 A.2d 516 n.2; *Appeal of Gerholt*, 860 A.2d at 1191. Likewise, *Casady* considered challenges to actual notice under both Section 602 and due process, but did not contemplate whether actual notice cures defect in service under Section 601. *Casady*, 627 A.2d at 258-60.

Bolla, while conceding that actual notice is not a defense to personal service under Section 601(a)(3), suggests *McKelvey* represented a departure from the prior case law. *See* Post-Hearing Brief of Respondent, Daniel Bolla, Executor of the Estate of Lawrence C. Bolla, p. 6 n.4. Bolla cites to two cases for this assertion. The first, *Appeal of Hass*, this court has already explained, could not have considered actual notice in the context of Section 601

since personal service had been waived. The second, however, *In re Return and Report of an Upset Tax Sale (Appeal of Black)*, 2009 WL9101156 (Pa. Cmwlth. 2009) (unpublished) is the only case that any party has cited to accurately reflect the view that actual notice can cure a defect in personal service under Section 601(a)(3).

In *Appeal of Black*, a non-precedential case, the Court relied on *Appeal of Hass* and *In re Sale of Real Estate Northampton County Tax Claim Bureau (Appeal of Beneficial Consumer Discount Company)*, 874 A.2d 697 (Pa. Cmwlth. 2005) for the proposition that "actual notice of the tax sale can cure any defect in personal service." *Appeal of Black*, 2009 WL9101156 at *4. It reasoned that "the purpose of personal service is to make sure that actual notice is received by the landowner. Where the interested party actually receives notice of the sale, the purpose underlying the personal service requirement is accomplished, and so the court may excuse the defect." *Id*. (citations omitted). In doing so it relied on *Appeal of Beneficial Consumer Discount Company*, a case concerning a judicial tax sale, for the notion that "[t]he purpose of personal service or mailed notice is specifically to notify an interested party." *Appeal of Beneficial Consumer Discount Company*, 874 A.2d at 701. But *Appeal of Beneficial Consumer Discount Company* dealt with a publication requirement, not personal service, and so its discussion of the effect of actual notice on personal service is *dicta*. And whatever persuasive appeal *Appeal of Black* may hold, it remains an unpublished decision, and so, cannot overcome the clear precedential holding of *McKelvey*. *DeGrossi*, 174 A.3d at 1191 ("It is well-settled that unpublished decisions from this Court are not binding … and neither is *dicta*.") (citing *Duke Energy Fayette II, LLC v. Fayette County Board of Assessment Appeals*, 116 A.3d 1176, 1182 (Pa. Cmwlth. 2015); *Rendell v. Pennsylvania State Ethics Commission*, 983 A.2d 708, 714 (Pa. 2009)).

Contrary to the Tax Claim Bureau's position, it appears the rule announced in *McKelvey* is settled precedent. Since the decision, the Commonwealth Court has cited to the rule approvingly in *Montgomery County Tax Claim Bureau v. Queenan*, 108 A.3d 947, 953 (Pa. Cmwlth. 2015). The Court sitting *en banc* subsequently cited to the rule approvingly in *Appeal of Neff*, 132 A.3d at 646. Most recently, in *Harris v. County of Lycoming Tax Claim Bureau*, 2021 WL 56409 (Pa. Cmwlth. 2021) (unpublished), the Court again reaffirmed the rule. There the purchaser relied on *Cruder v. Westmoreland County Tax Claim Bureau*, 861 A.2d 411 (Pa. Cmwlth. 2004) for its argument that actual knowledge of a tax sale waives any defect in personal service, but the Court distinguished that case on the grounds that "the personal service requirement in Section 601(a)(3) of the RETSL was not at issue in Cruder." *Harris*, 2021 WL 56409, at *7. Instead, it noted "Section 601(a)(3) of the RETSL requires this Court to focus on the Bureau's actions (rather than Harris's) relative to the *impending* Tax Sale of the Property" and invalidated the sale as "the record evidence is clear that the Bureau did not personally serve [notice.]" *Id*. at *8.

The Tax Claim Bureau argues that *McKelvey* has not been cited significantly, Post-Hearing Brief Submitted on Behalf of the County of Erie Tax Claim Bureau, p. 6, but that there is not a plethora of cases citing *McKelvey* may reflect that fact that there is not an abundance of failure-to-obtain-or-waive-personal-service cases in the first place. As this Court has shown, those that have considered the issue cite approvingly to *McKelvey*, and the Court is aware of no case since *McKelvey* to reject it. The Tax Claim Bureau invokes *Appeal of Neff*, noting its language that the "practicalities and peculiarities of the case" be given their "due

regard" and imploring the Court to factor in its extensive efforts to notify Lay as well as Lay's actual notice of the sale. Post-Hearing Brief Submitted on Behalf of the County of Erie Tax Claim Bureau, p. 12 (citing *Appeal of Neff*, 132 A.3d at 644). But the language quoted by the Tax Claim Bureau from *Appeal of Neff* is taken out of context as the full sentence states "[d]ue process requires that the 'practicalities and peculiarities of the case' are considered and given their 'due regard.'" *Appeal of Neff*, 132 A.3d at 644 (quoting *Mullane*, 339 U.S. at 314. Clearly this language refers to the more flexible constitutional requirements of due process, not the strict statutory requirements of Section 601(a)(3).

Lastly, the Tax Claim Bureau essentially asks the Court to disregard *McKelvey* because its reasoning "exalts form over substance." Post-Hearing Brief Submitted on Behalf of the County of Erie Tax Claim Bureau, p. 6. The Court, admittedly, has reservations that *McKelvey* is correct as an original matter. And it cannot be denied that *McKelvey*'s holding quite literally exalts form over substance. The only question for courts to consider, however, is whether that is what the General Assembly intended. 1 Pa. C.S. § 1921(a). *McKelvey* looked to the plain meaning of Section 601(a)(3), which states "[n]o owner-occupied property may be sold unless" personal service is provided to an owner or the tax claim bureau obtains waiver. 72 P.S. § 5860.601(a)(3). This language on its face appears to suggest that no exceptions will be made for formal personal service other than the waiver exception explicitly set forth in the provision. And under the canon of *expressio unius est exclusio alterius*, where the General Assembly enumerates specific exceptions into a statute, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent. *Sivick v. State Ethics Commission*, 238 A.3d 1250, 1264 (Pa. 2020) (citation omitted); *Harrisburg Area Community College v. Pennsylvania Human Relations Commission*, 245 A.3d 283, 292 (Pa. Cmwlth. 2020) ("Under the principle of *expressio unius est exclusio alterius*, the express mention of a specific matter in a statute implies the exclusion of others not mentioned.") (quotation and bracket omitted); *Commonwealth v. Scattone*, 672 A.2d 345, 347 n.3 (Pa. Super. 1996) ("Under such a maxim, if a statute specifies one exception to a general rule … other exceptions … are excluded.") (citation omitted).

Yet, Section 602(e) speaks in similarly unequivocal terms when it states "similar notice of the sale shall also be given by the bureau[.]" 72 P.S. § 5860.602(e). And courts typically presume the word "shall" to indicate a mandatory requirement, although its ultimate meaning is always dependent on context. *Chanceford Aviation Properties, L.L.P. v. Chanceford Township Board of Supervisors*, 923 A.2d 1099, (Pa. 2007) ("The word 'shall' by definition is mandatory, and it is generally applied as such … [h]owever, the context in which 'shall' is used may leave its precise meaning in doubt.") (citations omitted); *see also In re Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 General Election*, 241 A.3d 1058, 1071 (Pa. 2020) (plurality) ("It has long been part of the jurisprudence of this Commonwealth that the use of "shall" in a statute is not always indicative of a mandatory directive; in some instances, it is to be interpreted as merely directory."). It seems odd then, at first blush, that the rule of actual notice would differ from each section.

However, *McKelvey* did not merely rely on the text of the statute, but also gleaned the General Assembly's intent from its decision to include a personal service requirement in Section 601(a)(3), but not Section 602(e), which found demonstrated a legislative "desire to provide a qualitatively different type of notice to an owner occupant[.]" *McKelvey*,

982 A.2d 1274. The confusion brought about by the inconsistent application of the actual notice defense is likely sufficient to permit a court to resort to principles beyond plain meaning in answering this question pursuant to the Statutory Construction Act. *See King v. Burwell*, 576 U.S. 473, 486 (2015) (noting "oftentimes the meaning — or ambiguity — of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme. Our duty, after all, is to construe statutes, not isolated provisions.") (internal quotation marks and citations omitted).

In this regard, *Appeal of Goldstein* is also instructive. That decision held "where an owner occupant is served with notice pursuant to Section 601(a)(3), the fact that the secondary notice provided for in Section 602(e)(2) is not given, will not vitiate the sale." 651 A.2d at 1160. In doing so, it came to a similar conclusion on legislative intent, noting:

> Under Section 601, personal service, properly affected, assures notice to the owner occupant of the crucial aspects of the tax sale. Service by certified or first class mail as required by Section 602 does not. It would appear that such a distinction was made because of the legislature's heightened concern for owner occupants being divested of the very property in which they are residing.

Appeal of Goldstein, 651 A.2d at 1159. This is evident from the fact that, unlike Section 601, under Section 602 "whether mail notice of the tax sale has been or has not been received by the owner is not material to the validity of the tax sale." *Id.* at 1160. The Court further explained that the Section 601 and 602 must be read in *pari materia*, meaning they "apply to the same persons or things or the same class of persons or things … and, as such, should be read together where reasonably possible." *Id.* at 1159; *DeForte v. Borough of Worthington*, 212 A.3d 1018, 1022 (Pa. 2019); *see also* 1 Pa.C.S. § 1932(b) ("Statutes in *pari materia* shall be construed together, if possible, as one statute"). Thus, although confronting a different issue, *Appeal of Goldstein* ultimately came to a similar conclusion as to the heightened concern for owner occupants under Section 601(a)(3).

This Court agrees that the two provisions should be read in *pari materia* pursuant to the Statutory Construction Act. It also agrees generally with the proposition that the General Assembly intended heightened protections for owner occupants under Section 601 than it did for all other owners, to which only the requirements of 602 apply. But it is not at all clear from the text, context, or legislative history of the RETSL that the General Assembly intended to require formal personal service even where the taxpayer already has actual knowledge of the sale. The General Assembly certainly intended for one added layer of protection for owner occupants: personal service of the notice of sale. And it required personal service precisely because it meant to ensure that owner occupants had actual knowledge of the sale prior to its commencement. But once actual notice has been provided, those concerns are apparently assuaged. Furthermore, it has long been held that courts "hold no brief, and … have consistently given short shrift" to "wilful [sic], persistent, [and] long standing delinquents[.]" *In re Return of Sale of Tax Claim Bureau*, 76 A.2d 749, 753 (Pa. 1950). Those taxpayers who have actual notice of an upcoming tax sale cannot innocently claim surprise when the tax sale occurs, and it is doubtful the legislature intended to protect this

group of individuals when it enacted Section 601(a)(3). These considerations make the Tax Claim Bureau's appeal to form over substance a persuasive argument.

Nevertheless, there is one aspect of Section 601(a)(3) that no court appears to have mentioned, and which may lend some credence to the rationales in *McKelvey* and *Appeal of Goldstein*. Section 601(a)(3) expressly requires that "[t]he sheriff or his deputy shall make a return of service to the bureau, or the persons appointed by the county commissioners in lieu of the sheriff or his deputy shall file with the bureau written proof of service, setting forth the name of the person served, the date and time and place of service, and attach a copy of the notice which was served." 72 P.S. § 5860.601(a)(3). This, in fact, suggests the General Assembly was concerned with requiring that "written proof of service" be provided in order that there be definitive evidence that actual notice occurred, rather than relying on courts to make post-hoc credibility determinations whether a taxpayer had prior actual knowledge of a sale. Indeed, the draft version of what would become Section 601(a)(3), and originally placed in Section 602, merely required that "similar notice of the sale shall be served by the sheriff of the county in person to the owner of such property[.]" Senate Bill 316, Printer's No. 320, p. 5, lines 20-22. Thus, at some point, the drafters of Section 601(a)(3), specifically added the written proof of service requirement, evincing a heightened concern not merely of implied actual knowledge, but proof of actual knowledge in the form of formal service.

This Court must give effect to the General Assembly's explicit inclusion of the written proof of service language. *S & H Transport*, 140 A.3d at 7; 1 Pa.C.S. § 1922(2). The written proof of service requirement is also markedly different from Section 602(e), which does not concern itself with "whether mail notice of the tax sale has been or has not been received by the owner." *Appeal of Goldstein*, 651 A.2d at 1160. This reading further comports with prior case law emphasizing the significance of the affidavit of personal service. *Appeal of JUL Realty Corp.*, 836 A.2d at 1041 ("The affidavit of personal service for the residential property states, 'Would not come to door, left as refused.' On its face, the affidavit does not demonstrate that the deputy sheriff effected personal service[.]"). On this basis, the Court must reject the Tax Claim Bureau's form-over-substance argument as the text and legislative history of Section 601(a)(3) make clear it was the intent of the General Assembly to require that written proof of formal service be obtained by the Tax Claim Bureau in order to satisfy the provision, not simply that the taxpayer have actual knowledge of the sale.

Even if this Court were to agree with the Tax Claim Bureau on this point, it would be bound to follow the Commonwealth Court's holding in *McKelvey*. Whether this Court agrees with a decision of a Pennsylvania appellate court or not, it is bound as a matter of *stare decisis* to apply its precedential decisions. *Walnut Street Associates, Inc. v. Brokerage Concepts, Inc.*, 20 A.3d 468, 480 (Pa. 2011) (holding a lower court is "duty-bound" to effectuate law from a higher court); Pennsylvania Association of *Milk Dealers v. Pennsylvania Milk Marketing Board*, 685 A.2d 643, 647 (Pa. Cmwlth. 1996) ("The rule of *stare decisis* declares that for the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different."); *Lowery v. Pittsburgh Coal Co.*, 268 A.2d 212, 215 (Pa. Super. 1970) (holding courts of common pleas are not authorized to contradict established appellate court rulings).

Lastly, it has often been repeated that the law curries no favor with "willful, persistent, and long-standing tax delinquent[s]." *Appeal of JUL Realty Corp.*, 836 A.2d at 1042. The Court

finds Lay to be such an individual, and providing her the benefit of the RETSL personal service provision, a system she intentionally set out to game, arguably runs counter to the intent of the General Assembly. While prior court pronouncements of an analytical canon (such as a no-special-solicitude-for-tax-delinquents canon) may be relevant to discerning the meaning of ambiguous provisions in the RETSL, the best indicator is the language of the RETSL itself, and where the General Assembly has not seen fit to explicitly include a serial delinquent exception in the RETSL, this Court is hesitant to impute one based on its supposed intentions. *See In re Canvass of Absentee and Mail-in Ballots* of Nov. 3, 2020 General Election, 241 A.3d 1058, 1073 (Pa. 2020) (Wecht, J., concurring and dissenting) (noting his "increasing discomfort with this Court's willingness to peer behind the curtain of mandatory statutory language in search of some unspoken directory intent").

It is true the precise contours of the Section 601(a)(3) actual notice requirement have yet to be completely defined. *See Harris*, 2021 56409 at *8 ("[Purchaser argues] this Court has not considered whether the RETSL requires strict compliance for a continued sale, or as in this case, two continued sales, of which the property owner had been properly noticed, but where the owner had strategically and intentionally acted to stay the previous sale. While that may be true, the instant matter is not the test case for this Court to decide that issue.") (internal quotation marks and brackets omitted). However, no such an exception is not explicit in the statute, and given the unequivocal language of *McKelvey*, if such an exception is to be recognized, the pronouncement must come from the Commonwealth Court sitting *en banc*, our Supreme Court, or better yet, the General Assembly. Accordingly, the Court holds that Lay's actual knowledge of the upset tax sale does not cure the Tax Claim Bureau's failure to personally serve her with notice of the sale as an owner occupant of the Lakefront Property. The September 30, 2019, sale of the Lakefront Property to Lawrence Bolla is therefore invalid.

V. ADDITIONAL STATUTORY CLAIMS: ANALYSIS

That alone is enough to decide this case. Nevertheless, the Court will briefly consider the additional claims raised by Lay in these proceedings related to stay of sale agreements under Section 603 of the RETSL. Before delving deeper into these issue though, the Court must first address whether these claims are even properly before it.

A. Failure to File Amended Petition to Set Aside Tax Sale

Lay's claims as to the Tax Claim Bureau's failure to offer her a stay of sale agreement do not appear in her original Petition; they were developed at trial, and counsel for Lay made a motion for leave to file an amended complaint. Evid. Hr'g Tr., Day 2, pp. 224-29; Evid. Hr'g Tr., Day 3, pp. 7-10; Evid. Hr'g Tr., Day 4, pp. 96-97. Lay subsequently filed a post-trial motion for leave to file an amended petition as well as a memorandum of law in support thereof as requested by the Court. See Motion for Leave to File an Amended Petition for Additional Grounds for Relief, 12/7/202; Petitioner's Post-Trial Memorandum of Law in Support of its Motion for Leave to File an Amended Petition for Additional Grounds for Relief, 12/7/2020. Those filings contained a proposed amended petition and a proposed amended reply to new matter with the changes from the originals underlined. The Court granted the Motion for leave to file on December 11, 2020. *See* Order, 12/11/2020. Although granted leave to file, no such separate amended pleadings were ever filed. Bolla now objects at Lay's efforts to raise these new issues, arguing Lay failed to properly file

the amended pleadings. Post-Hearing Brief of Respondent Daniel Bolla, as Executor of the Estate of Lawrence C. Bolla, p. 1.[11]

Most of the case law dealing with delay in filing an amended pleading appears to arise in the preliminary objection context, where parties served with preliminary objections have twenty days to file an amended pleading as of right. *New Foundations, Inc. v. Commonwealth, Department of General Services*, 893 A.2d 826, 828 (Pa. Cmwlth. 2005) (citing Pa. R.C.P. No. 1028(c)(1)). Generally, "every pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading" if endorsed with a notice to plead, but this does not appear to apply to filings in response to court orders. Pa.R.C.P. 1026(a). Unfortunately, the Court did not state a time period in which Lay must file her amended pleadings as part of its December 11, 2020, order granting leave to file.

Rule 126 of the Pennsylvania Rule of Civil Procedure states "[t]he rules shall be liberally construed … [and t]he court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties." Pa.R.C.P. 126. In some cases, the failure to file an amended pleading will clearly not constitute a technical defect. For instance, in *Burger v. Borough of Ingram*, 697 A.2d 1037 (Pa. Cmwlth. 1997), the plaintiff was granted leave to file an amended complaint, but failed to file an amended complaint with the prothonotary to add new defendants, and the Court held the trial court did not err in excluding those defendants from the cause of action as neither they nor their attorneys had ever accepted service of process on their behalf. *Id*. at 1041.

In *City of Philadelphia v. White*, 727 A.2d 627 (Pa. Cmwlth. 1997), a municipal demolishment action, the plaintiff similarly failed to file an amended complaint as to new properties after being granted leave to amend as to new causes of action for properties unrelated to the original complaint. *Id*. at 630. Moreover, "[t]he City's petition to amend the complaint did not have attached to it any document entitled "amended complaint." *Id*. at 628 n.1. The court held that, although the trial court had personal jurisdiction over the defendant, it could not allow additional causes of action to be brought against the defendant without filing a new action with the prothonotary because "[t]o do so deprives that defendant of an opportunity to prepare and file preliminary objections or an answer in defense of his property." *Id*.

These cases are distinguishable. No new respondents have been added and there is no question the Court has jurisdiction. Critically, Lay did file proposed amended filings (although she did not caption them as such) with all changes from the original noted. *See Holmes v. City of Allentown*, 2018 WL 3763534 at *4 (Pa. Cmwlth. 2018) (unpublished) ("Holmes actually attached his proposed amended complaint to the Petition to Amend. As against the County, therefore, the trial court should have treated the Petition to Amend as an amended complaint[.]"). The Court also ordered extensive briefing on many of the issues raised in the amended pleadings, and there can be no question that Bolla and the Tax Claim Bureau were given ample opportunity to respond to these claims both at the evidentiary hearing and in their post-trial briefs, which were filed after service of the proposed amended pleadings. The Court's failure to state a specific time in which Lay had to file new pleadings likely

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[11] However, Bolla cannot object to the admission made in Lay's Reply to New Matter at ¶ 52, related to waiver of personal service, as Bolla and the Tax Claim Bureau had previously waived any reliance on this previous admission at the evidentiary hearing. Evid. Hr'g Tr., Day 3, p. 8. Moreover, as previously indicated in Footnote 9, the Court authorizes the withdrawal of that admission for good cause based upon the Tax Claim Bureau's misrepresentation.

also added to the confusion. As such, the failure of Lay to file new amended pleadings after this Court's December 11, 2020, Order granting leave to file, constituted a technical error or defect of procedure, and the Court treats the proposed amended pleadings attached to Lay's December 7, 2020, filings as an Amended Petition to Set Aside Tax Sale and an Amended Reply to New Matter pursuant to Pa.R.C.P. 126.

B. The Tax Claim Bureau's Failure to Offer a Stay of Sale Agreement under Section 603 of the RETSL

"Prior to sale of real property for unpaid taxes, a tax claim bureau must give a taxpayer notice and opportunity to cure the unpaid taxes." *Jenkins*, 176 A.3d at 1044 (emphasis in original). The RETSL accomplishes this statutorily through Section 603, which permits "at the option of the bureau" any owner to enter into a written stay of sale agreement, wherein they agree to pay "the balance of said claims and judgments and the interest and costs thereon in not more than three (3) instalments all within one (1) year of the date of said agreement" once they pay "25% of "the amount due on all tax claims and tax judgments filed or entered against such property and the interest and costs on the taxes returned to date[.]" 72 P.S. § 5860.603. "So long as said agreement is being fully complied with by the taxpayer, the sale of the property covered by the agreement shall be stayed." 72 P.S. § 5860.603. "[W]here an owner has paid at least 25% of the taxes due, the tax authority is required to inform the owner of the option to enter into an installment agreement and that a failure to do so is a violation of the owner's due process rights." *Moore v. Keller*, 98 A.3d 1, 5 (Pa. Cmwlth. 2014).

"A long line of [Commonwealth Court] precedent holds that a taxing authority has a duty to notify a taxpayer of the availability of an installment payment plan under section 603 of the Tax Sale Law only when the taxpayer pays at least 25% of the taxes due." *In re Consolidated Return of Tax Claim Bureau of Indiana County from September 16, 2019 Upset Tax Sale (Appeal of Burba)*, — A.3d —, 2021 WL 865358, *4 (Pa. Cmwlth. 2021) (emphasis added). However, because the agreement may only be entered at the option of the Bureau "the Bureau is not under any affirmative duty to enter into an installment agreement, but is only required to notify [t]axpayers of the possibility after 25% of the delinquent tax liability is paid." *Matter of Tax Sale 2018-Upset, 227 A.3d 957, 961 (Appeal of Kemmler)* (Pa. Cmwlth. 2020).

At various times during the evidentiary hearing, Lay suggested the interest on her delinquent balance had not been correctly calculated such that her $5,000 payment on August 29 amounted to more than 25% of her delinquent tax liability. *See* Evid. Hr'g Tr., Day 4, pp. 4-23. Letzelter testified that "after the fact" he determined that Lay's payment of $5,000 was approximately $260 short of the 25% necessary to trigger notification of the possibility of a stay of sale agreement. Evid. Hr'g Tr., Day 1, p. 44. Getchell could not herself recall whether the $5,000 was below the 25% threshold, Evid. Hr'g Tr., Day 2, p. 43. Lay attempted to offer an expert to opine on the interest calculations, but the Court did not permit that witness to take the stand due to a lack of proper notice to the other side about the interest calculation issue. Evid. Hr'g Tr., Day 4, pp. 22-23. And while Lay includes a chart of interest calculations in her Amended Petition, in her post trial brief, she appears to concede the point, stating "[t]he 25% of the delinquent taxes calculated by Steve Letzelter was $5,262.27. Petitioner had paid 23.754% of her delinquent taxes owed ($5,000/$21,094.08)." Amended Petition, ¶ 61; Petitioner's Post-Trial Briefs, p. 13. In the end, the Court finds there to be insufficient evidence that the Tax Claim Bureau failed to properly calculate the interest, and it further

finds Letzelter's testimony to be credible that he accurately calculated the delinquent balance as required by the RETSL.[12] The Court thus finds that Lay did not tender at least "25% of "the amount due on all tax claims and tax judgments filed or entered against [the Lakefront Property] and the interest and costs on the taxes returned to date[.]" 72 P.S. § 5860.603.

Next, Lay argues the fact that her payment was close to the 25% threshold should have triggered the obligation to notify her of the possibility of an installment agreement under Section 603. Petitioner's Post-Trial Briefs, pp. 10-11. But as the Tax Claim Bureau correctly notes, only the payment of 25% triggers the requirement under Section 603. *See In re Upset Sale Tax Claim Bureau of Wayne County Held September 12, 1994 (Appeal of Pitti)*, 672 A.2d 846 (Pa. Cmwlth. 1996) (exchange of letters and telephone conversation between taxpayer and tax claim bureau not sufficient to trigger Section 603 where payment was not received by mail by tax claim bureau until three days after tax sale). And the fact that another Tax Claim Bureau employee, Jennifer Turner, suggested that she might have or could have notified Lay of the possibility of a stay, does not change the fact that the Bureau is only required as a matter of law to notify the taxpayer upon the payment of 25%. Evid. Hr'g Tr., Day 3, p. 14.

Lay further argues that a tax claim bureau has an affirmative obligation to calculate whether 25% is due in order to determine whether it must inform the taxpayer of the possibility of entering into an installment agreement, relying on the *Jenkins* decision, and that the Tax Claim Bureau failed to do so here. Petitioner's Post-Trial Briefs, p. 10. Indeed, in *Appeal of Kemmler*, the Court noted of *Jenkins*:

> We concluded that where a taxpayer made a payment toward a delinquent tax liability and the tax claim bureau did not determine whether the taxpayer paid 25% of the delinquent liability, the tax claim bureau violated its duty under Section 603. Thus, *Jenkins* establishes that the bureau *must determine if a payment meets the 25% threshold*, and if so, the taxpayer must be notified of the possibility to enter into an installment agreement.

Appeal of Kemmler, 227 A.3d at 962 (citation omitted). Here, Getchell testified she never made the calculation. Evid. Hr'g Tr., Day 2, pp. 40, 56. But *Jenkins* does not specify when the calculation must be made. It merely states a determination must be made whether the amount offered by the taxpayer meets that threshold, and if it does, the taxpayer must be informed of the possibility of a stay agreement or the tax sale is invalid. This rule logically follows from Section 603 since, if no determination was ever made whether a payment meets the 25% threshold, then a tax claim bureau would never know if an obligation to inform arose in close cases such as this where the calculation cannot be easily computed. In such a

[12] Getchell also testified that Letzelter informed her at a later date, likely on September 10, that Lay "could have had a stay agreement." Evid. Hr'g Tr., Day 2, pp. 42-43. There was some uncertainty whether Getchell meant they should have offered Lay a stay agreement because she met either the 25% or the 10% senior citizen discount threshold, but the Court interprets Getchell's testimony to mean it was in the Bureau's discretion to offer her an agreement, and that Letzelter felt the balance of equities favored notifying her of the option. Indeed, as a matter of law, the Court finds that the Bureau did have such discretion. *In re Public Sale of Properties (Appeal of Tappenden)*, 841 A.2d 619, 622 (Pa. Cmwlth. 2004) (citing 72 P.S. § 5860.208). As such, the Court rejects Letzelter's understanding that he has "extremely little" discretion to deviate below the 25% threshold, which he only exercises in nominal amounts of approximately $100 below the total balance due for that year subject to the tax sale. Evid. Hr'g Tr., Day 1, pp. 60-61, 118-19. But if the Bureau had discretion to notify her of the possibility of a stay of sale agreement, despite Lay not having tendered 25%, it naturally follows that the Bureau also had discretion not to notify her of the possibility of a stay agreement at that time since she did not, in fact, pay the required amount.

scenario, a bureau could too easily evade its statutory obligation to inform through plausible deniability of the fact that the threshold payment was made.

Here, Getchell chose not to make a determination as to whether the $5,000 payment met the 25% threshold since Lay told her she would be back the following week to make another payment. Evid. Hr'g Tr., Day 2, p. 21.[13] A determination was eventually made by Letzelter on September 10 that the $5,000 did not meet the 25% percent threshold. If it had, then Letzelter would have been required under Section 603 to offer Lay an installment agreement or remove the Lakefront Property from the sale list. As it happened, it did not, and Getchell's failure to determine whether Lay was entitled to a stay the moment she tendered the $5,000 check was not a violation of the RETSL or contrary to the Jenkins decision.

Additionally, the Court finds that the Tax Claim Bureau did notify Lay of the possibility of a stay of sale upon payment of 25% by virtue of the ten-day notice sent to the Lakefront Property. That notice states:

> The sale of the below described real property may be stayed by payment in full of taxes which have been paid absolute and of all charges and interest due on those taxes or by entering into a stay of sale agreement and paying at least 25% of the amount due on all tax claim and tax judgments filed or entered and the interest and costs on the taxes returned to date pursuant to the Act.

Tax Claim Bureau Ex. 8. Given the Court's prior finding that Lay received actual notice of the sale via the same ten-day notice on August 28, the night before she turned up at the Bureau office, she cannot now claim foul that the Tax Claim Bureau did not do so again the following day. Similar to the mailed notice under Section 602, the duty to inform a taxpayer of the possibility of a tax sale under Section 603 is not an end in itself. *Appeal of Neff*, 132 A.3d at 645. Requiring strict compliance with the Section 603 requirement where a taxpayer has actual notice of the possibility of a stay agreement would make even less sense than in the Section 602 context since the ultimate decision of whether to allow a taxpayer to enter into an installment contract still rests solely with the Tax Claim Bureau. Consequently, Lay's Section 603 claim must fail.

C. The Tax Claim Bureau's Failure to Offer a Stay of Sale Agreement at 10% under Erie County's Senior Citizen Policy.

Lay argues that, Section 603 notwithstanding, it is the practice or policy of the Erie County Tax Claim Bureau to offer a stay of sale to senior citizens upon payment of 10% of the total amount due. Petitioner's Post-Trial Briefs, p. 11. There is no doubt that the $5,000 tendered by Lay was well in excess of 10%. Evid. Hr'g Tr., Day 2, p. 55-56. Letzelter testified that "I believe this was from county council who approved this decades ago, that a senior citizen can get 10% down. But that's not statutory, that's a — more of a home rule thing, as far as I know." Evid. Hr'g Tr., Day 1, p. 63. He further testified that it applied to those "65 and older." Evid. Hr'g Tr., Day 1, p. 64. That such a policy exists, at least in practice, was confirmed by both Getchell and Turner. Evid. Hr'g Tr., Day 2, p. 41; Evid. Hr'g Tr., Day 3, pp. 14-15, 18. However, Letzelter noted there is "not a written policy on that." Evid. Hr'g Tr., Day 1, p. 97.

[13] The Court finds this maneuver to be yet another tactic by Lay to game the tax system by lulling the Tax Claim Bureau into believing she would be back in the hopes they would delay the impending sale.

Neither Lay nor the Tax Claim Bureau have been able to locate the text of any such ordinance.

Section 504 of the RETSL permits local governments to enact legislation to extend the period of discharge or deferment of tax claims for owner occupants age 65 and older. 72 P.S. § 5860.504(a). But there is no express provision in the RETSL permitting local bodies to lower the payment threshold under Section 603 for when an elderly taxpayer must be informed of the possibility of a stay. Be that as it may, another provision of the RETSL, Section 208, vests a tax claim bureau with considerable discretion over the collection of taxes. It states in relevant part:

> The bureau and the director thereof shall, in the administration of this act, be the agent of the taxing districts whose tax claims are returned to the bureau for collection and prosecution under the provisions of this act, and in the management and disposition of property in accordance with the provisions of this act.

72 P.S. § 5860.208. The Commonwealth Court interpreted this provision in *In re Public Sale of Properties (Appeal of Tappenden)*, 841 A.2d 619, 622 (Pa. Cmwlth. 2004). In *Appeal of Tappenden*, the would-be purchaser of a property removed from the judicial tax sale list after the taxing authority entered into an agreement with the owner to pay the delinquent taxes argued that the taxing districts did not have the authority to remove a property from the tax sale list. *Id*. at 622. The Court disagreed, holding that "Section 208 … gives a tax claim bureau broad authority for the management and disposition of property … Logically, management and disposition includes the ability to remove a property from a scheduled judicial tax sale when to do so will advance the collection of delinquent taxes." *Id*. (citation and internal quotation marks omitted). The Court concluded that Section 208 grants local taxing authorities and their agents, the tax claim bureaus, "broad authority" over properties subject to tax sales. *Id*.

Bolla argues that the 10% senior citizen discount is not legally enforceable because it contravenes the 25% threshold of the RETSL, relying heavily on the Commonwealth Court's non-precedential decision in *Sobolewski v. Schuylkill County Tax Claim Bureau*, 2019 WL 3436516 (Pa. Cmwlth. 2019) (unpublished). Post-Hearing Brief of Respondent Daniel Bolla, as Executor of the Estate of Lawrence C. Bolla, pp. 18-19. In that case, a taxpayer claimed she spoke on the phone with a tax claim bureau representative who told her she could enter into a monthly payment plan with minimum payments of $100 per month, and she subsequently made two payments for $100 and $150 before the property was sold. *Sobolewski*, 2019 WL 3436516 at *2. She claimed she had entered into a stay of sale agreement with the bureau and that the property should not have been sold. In dismissing her claim, the Court noted "[u]nfortunately, we are constrained by the plain language of Section 603 … [stating] a payment plan does not stay a sale without tendering a 25% payment on the delinquent taxes. Here, Mrs. Sobolewski's payments represent only 13% of the taxes, which by statute was insufficient to stay the sale." *Id*. at *6.

However, Bolla's reliance on *Sobolewski* for the proposition that the Tax Claim Bureau has no authority to deviate from the 25% threshold is misplaced for two reasons. First, the Court relied on the lack of proof of an agreement, noting "there is no evidence of a written agreement between the Bureau and Mrs. Sobolewski or documentation of Mrs. Sobolewski's alleged phone call to the Bureau. The Bureau's evidence tended to refute that such a phone

call occurred, and the trial court referred to the Bureau's evidence in its opinion." *Id*. Thus, Bolla's characterization of *Sobolewski*'s holding that "a sale cannot be overturned on the basis of an *actual agreement* to an alternate installment plan requiring a less than 25% payment" misses the mark as the Court actually found there was no evidence of an actual agreement in the first place. Post-Hearing Brief of Respondent Daniel Bolla, as Executor of the Estate of Lawrence C. Bolla, p. 19 (emphasis in original).[14] Second, *Sobolewski* did not concern a separate local ordinance, but a straightforward application of Section 603. The 13% was "by statute … insufficient to stay the sale." *Id*. at *6. *Sobolewski* had no occasion to consider the very different question of whether taxing authorities or tax claim bureaus have the discretion to offer stays of sale at a lower threshold than 25%. As such, *Sobolewski* is inapposite here.

In asserting that County Council had no authority to pass such an ordinance, Bolla essentially argues preemption. Generally, Pennsylvania courts recognize three types of situations where state law will supplant local law:

> (1) express or explicit preemption, where the statute includes a preemption clause, the language of which specifically bars local authorities from acting on a particular subject matter; (2) conflict preemption, where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute; and (3) field preemption, where analysis of the entire statute reveals the General Assembly's implicit intent to occupy the field completely and to permit no local enactments.

Hoffman Mining Co., Inc, v. Zoning Hearing Board of Adams Township, Cambria County, 32 A.3d 587, 593-94 (Pa. 2011). In the absence of "a clear statement of legislative intent to preempt, state legislation will not generally preempt local legislation on the same issue" and "the mere fact that the General Assembly has enacted legislation in a field does not lead to the presumption that the state has precluded all local enactments in that field[.]" *Mars Emergency Medical Services, Inc. v. Township of Adams*, 740 A.2d 193, 196 (Pa. 1999); *Hoffman*, 32 A.3d at 593 (quoting *Council of Middletown Township v. Benham*, 523 A.2d 311, 313 (Pa. 1987)). There is no provision in the RETSL explicitly preempting local tax sale laws, and as Sections 208 and 504 show, if anything, the RETSL condones it. These provisions also shatter any illusions that the General Assembly intended to preempt the entire field of tax sale regulation.

That leaves conflict preemption. "Where an ordinance conflicts with a statute, the will of the municipality as expressed through an ordinance will be respected unless the conflict between the statute and the ordinance is irreconcilable." *Hoffman*, 32 A.3d at 594-95 (quotation omitted). To that end, "a municipal corporation with subordinate power to act in the matter may make such additional regulations in aid and furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality and which are not in themselves unreasonable." *Id*. at 595 (quotation omitted). Here, although Section 603 and the local ordinance allegedly state two different thresholds for a stay, they are not irreconcilable. Section 603 states a statutory minimum amount, at which point a tax claim bureau is obligated to inform the taxpayer of the possibility of a stay agreement. Nothing in Section 603 suggests the General Assembly intended for the 25% threshold to be an exclusive percentage. By setting

[14] To the extent that *Sobolewski* could be read as precluding a tax claim bureau from exercising any discretion over stays of tax sales, that proposition was firmly rejected in *Appeal of Tappenden*. 841 A.2d at 624.

a lower threshold for senior citizens, a category of persons who are likely to be particularly susceptible to good faith mix-ups over tax payments, local government would be acting in aid and furtherance of the purpose of the RETSL to ensure the collection of taxes, not that taxpayers are stripped of their homes. *Appeal of Tappenden*, 841 A.2d 625-26 (citations omitted); *see also Appeal of JUL Realty Corp.*, 836 A.2d at 1040 (invalidating tax sale where elderly taxpayer with poor eyesight misread faintly printed date on sale notice, and as a result, showed up two days late at the tax claim bureau to pay her delinquent taxes, the day she genuinely believed to be the date of the sale). Accordingly, any suggestion of preemption must be denied.

For its part, the Tax Claim Bureau "agrees that local governments may establish different payment thresholds required for installment payment arrangements to avoid a tax sale[,]" citing to *Appeal of Tappenden* and Section 208. Post-Hearing Brief Submitted on Behalf of the County of Erie Tax Claim Bureau, p. 21. It does argue that Section 208 and *Appeal of Tappenden* make clear that tax claim bureaus act as agents of the taxing authorities, and as there is no evidence that Millcreek Township or Millcreek School District authorized a 10% discounted threshold rate, the 10% rule cannot be applied to the portion of Lay's delinquent tax balance accountable to those entities. Post-Hearing Brief Submitted on Behalf of the County of Erie Tax Claim Bureau, p. 21. Section 208 unequivocally states that "[t]he Bureau ... shall, in the administration of this act, be the agent of the taxing districts whose tax claims are returned to the bureau for collection" and *Appeal of Tappenden* likewise confirms that "the Tax Claim Bureau acted in this matter as the agent of the Taxing Districts." 72 P.S. § 5860.208; *Appeal of Tappenden*, 841 A.2d at 622. As such, this Court may properly look to principles of agency law to determine the scope of the Bureau's authority. It is true that agents may act on behalf of more than one principal. *See* RESTATEMENT (THIRD) OF AGENCY § 3.14 cmt. b (2006) ("A person with relationships of agency with more than one principal may, in any particular matter, act as an agent on behalf of only one principal."). It is also generally true that "[s]everal principals may be bound by the acts and representations of a common agent, but it must appear that authority was given by all the alleged principals, and an agent cannot bind one principal in the separate business of another." *First National Bank of Omaha v. Acceptance Insurance Companies, Inc.*, 675 N.W.2d 689, 702 (Neb. App. 2004) (quoting 2A C.J.S. Agency § 245 at 953).

However, the Tax Claim Bureau's argument fails to consider the breadth of agency relationships as well as the unique circumstances created by Section 208. The Tax Claim Bureau relies on express authority[15] for its proposition that Millcreek taxing authorities did not authorize the 10% senior citizen stay threshold, but it fails to discuss whether those Millcreek taxing authorities could alternatively be bound by apparent authority.[16] Moreover, the agency relationship between taxing authorities and tax claim bureaus are created by Section 208 rather than by any independent act of the taxing authorities. Thus, the scope of a tax claim bureau's authority is likewise informed by Section 208. That authority includes

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[15] "Express authority exists where the principal deliberately and specifically grants authority to the agent as to certain matters." *Walton v. Johnson*, 66 A.3d 782, 786 (Pa. Super. 2013).

[16] "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the [principal's] manifestations to third persons." *Commonwealth v. One 1991 Cadillac Seville*, 853 A.2d 1093, 1096 (Pa. Cmwlth. 2004) (citation and internal quotation marks omitted) "Apparent authority may result when a principal permits an agent to occupy a position which, according to the ordinary experience and habits of mankind, it is usual for that occupant to have authority of a particular kind." *In re McGlynn*, 974 A.2d 525, 534 n.9 (Pa. Cmwlth. 2009) (citation and internal quotation marks omitted).

the power to manage and dispose of property as it sees fit within the statutory parameters of the RETSL. *Appeal of Tappenden*, 841 A.3d at 624 ("A taxpayer who follows the Section 603 procedure, including an installment plan, may remove a property from sale; however, this does not mean that the taxing authorities cannot agree to another payment plan."); *In Re Sale of Real Estate by Lackawanna County Tax Claim Bureau*, 22 A.3d 308, 315 n.7 (Pa. Cmwlth. 2011) (noting "[o]ur decision in [*Appeal of Tappenden*] presumes some discretionary authority on the part of tax claim bureau[.]"); *Swinka Realty Investments, LLC v. Lackawanna County Tax Claim Bureau*, 2016 WL 3618399, *3 (M.D. Pa. 2016) (affirmed on appeal, 688 Fed. App'x 146 (3d Cir. 2017) (unpublished). As such, whether viewed in terms of express or apparent authority, the Tax Claim Bureau appears to have the power to bind all of the taxing districts which it serves to further the "collection and prosecution" of delinquent tax claims as well as to manage and dispose of property in accordance with the RETSL, the purpose of which is to collect taxes, not strip taxpayers of their homes. 72 P.S. § 5860.208; *Brodhead Creek*, 231 A.3d at 74. This includes the power to implement a county-wide policy to inform of the possibility or offer stay of sale agreements to senior citizens upon payment of 10% of their delinquent balance.[17]

Ultimately, however, the problem with Lay's argument is more rudimentary. Without the text of the purported county ordinance to review, the Court cannot be sure what the law requires or even if it actually exists. The testimony provided at the evidentiary hearing suggests that the Tax Claim Bureau exercises considerable discretion in its enforcement and may only offer a stay at the discounted rate if the taxpayer affirmatively inquiries about the discount. Letzelter testified that "[s]enior citizens can get a discounted rate, but again, *they have to ask for it*." Evid. Hr'g Tr., Day 1, p. 63 (emphasis added). When asked how a senior citizen would know that they could possibly pay only 10% and be offered an installment plan, Letzelter answered "I believe that if they were asking about a stay or they were interested in a stay, we ask if they have proof of Social Security or disability, and that would generate the down payment." Evid. Hr'g Tr., Day 1, p. 64 (emphasis added). If this is the case, then the ordinance operates quite differently than Section 603 of the RETSL, which requires the Tax Claim Bureau to mention the possibility of an installment agreement upon the tendering of the threshold amount, whether or not the taxpayer mentions it. It also could be that the alleged ordinance mirrors Section 603, but over time, the Bureau has misinterpreted and misapplied the law. It could be that no such law is on the books or that Erie County enacted an extension for discharge pursuant to Section 504, which has over time become conflated with a non-enforceable internal policy of the Bureau to offer a 10% discount to senior citizens. But this is all conjecture and any application of this alleged law would involve a significant amount of guesswork.

As the proponent of this claim, Lay has failed to offer sufficient evidence that the policy is an enforceable, codified county ordinance and precisely what the parameters of that ordinance are. In the due process context, courts have explained "[i]t is well settled that legislation can be so vague as to deny due process in its enforcement when it limits the ability of those to

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[17] The Court also finds unpersuasive, the Bureau's argument that Lay "presented as a well-dressed woman which gave no indication of her age." Post-hearing Brief Submitted on Behalf of the County of Erie Tax Claim Bureau, p. 23. When asked whether Lay appeared to be over 65, Getchell testified "Possibly. I try to be very respectful of people." Evid. Hr'g Tr., Day 2, p. 40. But she also testified that Lay reminded her of her late mother. The Court thus finds factually that Lay appeared to be over the age of 65 when she came to the Bureau office on August 29, 2019, sufficient to have put the Tax Claim Bureau on notice that the 10% practice applied to her.

whom the statute is directed to understand that which is prohibited or mandated." *Pennsylvania Medical Providers Association v. Foster*, 582 A.2d 888, 892-92 (Pa. Cmwlth. 1990) (en banc) (quoting *Singer v. Sheppard*, 381 A.2d 1007, 1010 (Pa. Cmwlth. 1978) (internal quotation marks omitted)). "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). These principles of vagueness derived from due process translate well into this evidentiary context. Lay has failed to prove essential facts necessary to the Court's understanding of the law or policy in order for it to make an informed decision as to its application to the facts of this case. As such, her claim is denied.

D. Failure to Comply with Erie County Administrative Code § 14(H)

Finally, Lay claims that the sale should be set aside because the Tax Claim Bureau failed to publish and post the conditions under which the Tax Claim Bureau would enter into a stay of sale agreement in dereliction of the Erie County Administrative Code. Article IV of the Erie County Administrative Code concerns the Financial Procedures of the County, Section 14 of which is entitled "Procedure for Tax Sales." Subsection H, entitled Stay of Sale Agreements, states:

> The Director of the Tax Claim Bureau, in conjunction with the Director of Finance, shall from time to time, but no later than July 1st of each year, publish and post conditions under which the Bureau will enter an agreement to stay the tax sale of a property pursuant to Section 605 of the Real Estate Tax Sale Law. These conditions shall be posted in the office of the Bureau for the benefit of the public, and a copy of the conditions shall be delivered to the County Executive and County Council.

Erie County Admin. Code, Art. IV, § 14(H). Unlike the prior issue, the Court here has before it the actual language of the provision. However, this claim also suffers from a lack of evidence. Little was offered at trial to show that the publication and posting requirements of Section 14(H) were not satisfied. Jennifer Turner testified she did not know whether the stay policies were posted. Evid. Hr'g Tr., Day 3, pp. 21-22. The only testimony arguably supportive of Lay's claim is Getchell's, who was asked "[t]here wasn't anything hanging up in your office about a stay agreement? There was no way for her to know that, unless you would have told her or unless she already knew it coming in?" to which Getchell answered "[t]hat's correct." Evid. Hr'g Tr., Day 2, p. 41. But corroboration is a "potent factor" to consider when assessing the weight and credibility of testimony. *Commonwealth v. Vicens-Rodriguez*, 911 A.2d 116, 118 (Pa. Super. 2006). Lay presented no further proof, such as her own testimony or photographic evidence of the Tax Claim Bureau office, to show that Article IV, Section 14(H) of the County Code was violated. Her claim thus fails for lack of evidence.

Moreover, even if Lay had presented sufficient evidence, the Court would be constrained to hold that Lay's actual notice of the stay conditions via the ten-day notice cures the violation of the publication and posting requirements of the County Administrative Code. The clear intent of the county publication and posting provision is to provide actual notice of the stay conditions, which Lay had already received. Unlike Section 601(a)(3), which requires a

written return of service to prove that an owner occupant was formally and personally served, there is no indication that Erie County Council intended to elevate form over substance to this degree. The County Code provision is also distinguishable from the posting requirement of the RETSL's Section 602, for which actual notice is not a defense, since the purpose of the posting requirement "is to notify the public at large as well as the record owner." *Appeal of Baumgardner*, 865 A.2d at 1017. Lay stresses that the county provision is likewise "for the benefit of the public" as stated in its text. Petitioner's Post Trial Briefs, p. 13. But unlike posting under Section 602, the county's concern with publishing and posting stay procedures is not directed toward neighbors or friends of a taxpayer who may be concerned with their welfare. *Wells Fargo*, 817 A.2d at 1199. Rather, it is specifically concerned with members of the public who may benefit from a stay, *i.e.* delinquent taxpayers themselves. The County's publication and posting requirement is not an end in itself. *See Appeal of Neff*, 132 A.3d at 645. The only member of the public who may have benefited from a stay of sale here was Lay, and she already received actual notice of the possibility of a stay the night before she entered the Bureau office. Her claim under Section 14(H) of the Erie County Administrative Code is consequently rejected.

VI. CONSTITUTIONAL CLAIMS

Lay argues that the Tax Claim Bureau's failure to offer her a stay of sale agreement after she paid more than 10% of her delinquent tax balance constituted an arbitrary policy or practice in violation of principles of equal protection and due process enshrined in the Fourteenth Amendment to the Constitution of the United States and Sections 1 and 26 of Article I of the Constitution of the Commonwealth of Pennsylvania. Amended Petition to Set Aside Tax Sale, ¶¶ 58-59; Evid. Hr'g Tr., Day 2, pp. 229-232. The constitutional guarantee of equal protection requires that similarly situated individuals receive similar treatment. *Lohr v. Saratoga Partners, L.P.*, 238 A.3d 1198, 1209-10 (Pa. 2020). Where, as here, a plaintiff does not allege membership in a protected class, she may assert an equal protection claim under the "class of one" theory. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam); *Uniontown Newspapers, Inc. v. Roberts*, 839 A.2d 185, 197-98 (Pa. 2003). A plaintiff alleging a "class of one" claim must demonstrate that (1) the defendant treated her differently from others similarly situated; (2) the defendant did so intentionally; and (3) any differential treatment was without rational basis. *Cornell Narberth, LLC v. Borough of Narberth*, 167 A.3d 228, 243 (Pa. Cmwlth. 2017) (citing *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006)). A due process challenge implicates similar concerns for "[t]he Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles." *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

A "class of one" claim, like any evaluated under rational basis review, cannot succeed "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Cornell Narberth*, 167 A.3d at 243 (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)). In reviewing a government action, "courts are free to hypothesize" a rational basis for the decision. *Commonwealth v. Albert*, 758 A.2d 1149, 1153 (Pa. 2000). Moreover, there exist some forms of state action "which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases [principles of equal protection and due process] are not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the

discretion granted." *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 603 (2008).

However, given that this case can be resolved in Lay's favor on statutory grounds, the Court declines the invitation to delve into these constitutional waters. It is well-settled that courts should avoid reaching constitutional issues when a case may be decided solely on statutory grounds. *Interest of D.R.*, 232 A.3d 547, 559 n.14 (Pa. 2020); *Commonwealth v. Morales*, 80 A.3d 1177, 1179 (Pa. 2013) (noting "[b]ecause the trial court found non-constitutional grounds for relief, it should not have resolved the case on a constitutional basis[.]"); *Mt. Lebanon v. County. Board of Elections of Allegheny County*, 368 A.2d 648, 650 (Pa. 1977) ("[W]e should not decide a constitutional question unless absolutely required to do so."). Accordingly, the Court does not reach the constitutional issues presented here.

VII. CONCLUSION

Under Section 601(a)(3) of the RETSL, the Tax Claim Bureau is required to personally serve notice of a tax sale on owner occupants, like Darlene Lay, or seek waiver of the personal service requirement for good cause shown from the court of common pleas prior to an upset tax sale of that property. The Tax Claim Bureau did neither. As a result, the September 30, 2019, upset tax sale of the Lakefront Property to Lawrence Bolla, through no fault of his own, was legally invalid. In her hubris, Lay evaded her local tax obligations for years by gaming the system; however, she was entitled to the law's benefit nonetheless.

The Tax Claim Bureau raises a persuasive policy argument as to why it should not be held responsible for its lack of knowledge that the Lakefront Property was owner occupied as Lay failed to notify the Assessment Office of her change of address, but the RETSL itself places no such burden on a taxpayer to do so and prior case law makes clear that "the burden is not on the taxpayer to prove that [she] is an owner occupant, but for the Bureau to prove that it satisfied the notice requirements under circumstances wherein the General Assembly included heightened protection for the owner occupant." *Appeal of Hansford*, 218 A.3d at 1001 n.12. Although the Court finds that Lay ultimately had actual notice of the upcoming sale, it holds that such notice did not cure the defect in personal service under the plain terms of Section 601(a)(3), requiring written proof of personal service, and in accordance with appellate precedent that is binding on this Court. *McKelvey*, 983 A.2d at 1274. As a result, the September 30, 2019, upset tax sale of the Lakefront Property must be, and now is, set aside.

It is so ordered.

BY THE COURT
/s/ **Marshall J. Piccinini, Judge**

RONALD J. KIMMY, II v. HYTECH TOOL & DESIGN CO., INC.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

On summary judgment a court must view all facts of record and reasonable inferences therefrom in the light most favorable to the non-moving party.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

A record that supports summary judgment will either show the material facts of the case are undisputed or contain insufficient evidence of facts to make out a nonmoving party's *prima facie* cause of action or defense.

LABOR AND EMPLOYMENT / EMPLOYMENT AT WILL / WRONGFUL DISCHARGE

The Americans with Disabilities Act and the Pennsylvania Human Relations Act create statutory exceptions to the general rule that an employee may be terminated by an employer for any or no reason.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE / MOTION FOR SUMMARY JUDGMENT

Pennsylvania courts apply the *McDonnell Douglas* tripartite framework to determine whether summary judgment is appropriate in employment discrimination cases according to which a plaintiff must first establish sufficient evidence of a *prima facie* case of discrimination; the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action; the burden then shifts back to the plaintiff to provide sufficient evidence that the articulated reasons were a mere pretext for discrimination.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

In order to establish a *prima facie* case of disability discrimination under the Americans with Disabilities Act a plaintiff must demonstrate: (1) that he or she is a disabled person within the meaning of the Act; (2) that he or she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) that he or she has suffered an otherwise adverse employment decision as a result of discrimination.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

To qualify as disabled under the Americans with Disabilities Act, a plaintiff must satisfy the conditions for having either (1) an actual impairment; (2) a record of such an impairment; or (3) being regarded as having such an impairment.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

Pursuant to the ADA Amendments Act of 2008, a plaintiff alleging qualification under the "regarded as" category of disability need no longer show that an impairment substantially limits one or more major life activities.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

When the Third Circuit has spoken on a federal issue, the ultimate answer to which has not yet been provided by the United States Supreme Court, it is appropriate for Pennsylvania courts to follow Third Circuit precedent in preference to that of other jurisdictions, and if the Third Circuit has not ruled on a specific question, Pennsylvania courts may seek guidance from the pronouncements of the other federal circuits, as well as the district courts, in the same spirit in which the Third Circuit itself considers such decisions.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

In light of the changes to the Americans with Disabilities Act made by Congress in the ADA Amendments Act of 2008, an employer's mere knowledge of an impairment is sufficient to create an inference of perception under a "regarded as" claim for disability, abrogating Third Circuit pre-ADA Amendments Act case law to the contrary.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

To qualify under the "regard as" category of disability the plaintiff's impairment cannot be one that is transitory and minor, although the employer bears the burden of proving the impairment is objectively both transitory and minor.

STATUTES / AMENDMENT

The disability discrimination standards of the Americans with Disabilities Act and the Pennsylvania Human Relations Act remain coterminous despite the fact that the Pennsylvania General Assembly has not updated the Pennsylvania Human Relations Act since Congress enacted the ADA Amendments Act of 2008.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

As part of its *prima facie* case under *McDonnell Douglas*, a plaintiff must provide evidence that supports a logical inference of causation between the alleged disability and the adverse employment action.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

Because the Americans with Disabilities Act incorporates a but-for causation standard, an employer's concern over an employee's medical expenses stemming from a disability is sufficient to support a logical inference of causation so long as the employer's economic concern is inextricably bound up with the employee's disability.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE/EVIDENCE

The Stray Remarks Doctrine does not apply to comments made by a decisionmaker with the authority to discharge.

EVIDENCE / HEARSAY / EXCEPTIONS

For a statement to qualify under the party opponent exception to the hearsay rule found at Pa.R.E. 803(25)(D), relating to statements made by an opposing party's agent or employee, the proponent of the statement must establish that the declarant was an agent or employee of a party opponent, the declarant made the statement while employed by the party opponent, and the statement concerned a matter within the scope of agency or employment.

LABOR AND EMPLOYMENT / WRONGFUL DISCHARGE

The pretext inquiry under the third stage of *McDonnell Douglas* is distinct from the causation inquiry under stage one; however, the evidence relevant to each may be coextensive.

LABOR AND EMPLOYMENT/ WRONGFUL DISCHARGE

Suspicion or disbelief of the legitimate reasons for termination put forward by the employer, together with the elements of the plaintiff's *prima facie* case, may suffice to show pretext under the third stage of *McDonnell Douglas*.

CIVIL PROCEDURE/MOTION FOR SUMMARY JUDGMENT/EVIDENCE

Under the rule established in *Nanty-Glo v. American Surety Co.*, 163 A. 523 (Pa. 1932), a party moving for summary judgment cannot rely on oral testimony alone, either through testimonial affidavits or depositions, even if uncontradicted, to establish the absence of a genuine issue of material fact.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

Summary judgment is inappropriate where the veracity of certain claims remain in dispute as weight and credibility determinations are inherently the province of the factfinder at trial to resolve.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
TRIAL DIVISION – CIVIL
No. 12107 of 2019

Appearances: Timothy D. McNair, Esq., on behalf of Plaintiff, Ronald J. Kimmy, II
Gery T. Nietupski, Esq., on behalf of Defendant, Hytech Tool& Design Co., Inc.

OPINION OF THE COURT

Piccinini, J., April 9, 2021

In Pennsylvania, an employment relationship may be terminated for any or no reason, absent a statutory or contractual provision to the contrary. *Weaver v. Harpster*, 975 A.2d 555, 562 (Pa. 2009). The Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., and the Pennsylvania Human Relations Act, 43 P.S. § 951 et seq. create statutory exceptions to at-will employment for the discharge of an employee on the basis of physical or mental disability. The Plaintiff in this case was terminated from his employment and argues that he was fired because of a physical disability stemming from a heart attack. The Defendant, his former employer, claims he was fired for a nondiscriminatory reason, namely, poor job performance.

The question presently before the Court on Defendant's Motion for Summary Judgment is whether the Plaintiff has developed sufficient evidence to submit that factual question to a jury or whether this case should be dismissed without the need for trial. Because the Plaintiff has produced adequate evidence from which a reasonable jury could deliver a favorable verdict at trial, and because genuine issues of material fact remain to be resolved, the Court holds that summary judgment is inappropriate.

I. BACKGROUND

Plaintiff, Ronald J. Kimmy II, was employed by Defendant, Hytech Tool & Design Co., Inc., as a CNC machine programmer and operator of a Doosan CNC Lathe from February 2016 until he was discharged from his employment on September 7, 2017. He claims that termination was unlawful under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., and the Pennsylvania Human Relations Act, 43 P.S. § 951 et seq.

On March 5, 2017, Kimmy suffered a heart attack and underwent open heart surgery. Upon recommendation from his doctor, Kimmy returned to work approximately six months later on Tuesday, September 5, 2017. Kimmy was fired two days later on Thursday, September 7, 2017. The parties dispute the intervening events that precipitated his termination.

Hytech claims that when Kimmy arrived to work on Tuesday he simply gave his medical work release documents to the receptionist without seeking any direction from management. Brief in Support of Defendant's Motion for Summary Judgment (Br. in Supp. of Def's Mot. for Summ. J.), p. 2. Rather than working on the Lathe, Kimmy was observed perusing his phone. Br. in Supp. of Def's Mot. for Summ. J., p. 2. Although Hytech admits there was a software glitch with the Lathe, which initially prohibited Kimmy from working, it claims

the issue was fixed by noon on the day of his return. Hytech further claims that Kimmy did not complete any work on Tuesday, Wednesday, or Thursday, telling Hytech's President and co-owner, David Reiser, that he was still "acclimating himself." Br. in Supp. of Def's Mot. for Summ. J., p. 8. On Thursday, when Kimmy failed to begin working after nearly two hours on the job, Reiser fired Kimmy due to his poor job performance. Br. in Supp. of Def's Mot. for Summ. J., pp. 8-9.

Kimmy recalls events differently. He claims that when he returned to work on Tuesday he found his work area in disarray and spent time cleaning the mess. Brief in Opposition to Defendant's Motion for Summary Judgment (Br. in Opp. to Def.'s Mot. for Summ. J.), p. 3. He then checked in with his immediate supervisor, Jim Jankowiak, who instructed him to make a certain part for a flashlight, but he was unable to program the machine because the software was unavailable. Br. in Opp. to Def.'s Mot. for Summ. J., pp. 3-4. Although Kimmy admits to being on his phone at times, he claims it was solely for the purpose of searching for codes to program the machine. Br. in Opp. to Def.'s Mot. for Summ. J., pp. 9-10. Kimmy also claims the software did not become available until Thursday, the day he was terminated. Br. in Opp. to Def.'s Mot. for Summ. J., p. 11.

Kimmy filed a Complaint with the Equal Employment Opportunity Commission (EEOC), claiming he was terminated on the basis of disability, cross-filing his Complaint with the Pennsylvania Human Relations Commission. The EEOC ultimately issued a Notice of Right to Sue. The present lawsuit was commenced on August 6, 2019. Hytech filed this motion for summary judgment on November 13, 2020, and Kimmy responded on December 15, 2020. Oral argument on the Motion was held on February 9, 2021. The Court now resolves that Motion.

II. APPLICABLE LAW

A. General Principles of Summary Judgment

Summary judgment serves a gatekeeping function. Its purpose is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for a trial." *Garzella v. Borough of Dunmore*, 62 A.3d 486, 497 (Pa. Cmwlth. 2013) (quoting *Ertel v. Patriot-News Co.*, 674 A.2d 1038, 1042 (Pa. 1996)). "Summary judgment is appropriate where the record clearly demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. (citations omitted). *Estate of Agnew v. Ross*, 152 A.3d 247, 259 (Pa. 2017). A court may only grant summary judgment "where the right to such judgment is clear and free from all doubt." *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010) (quoting *Toy v. Metropolitan Life Ins. Co.*, 928 A.2d 186, 195 (Pa. 2007)).

Our Supreme Court has stressed "that it is not [a] court's function upon summary judgment to decide issues of fact, but only to decide whether there is an issue of fact to be tried." *Fine v. Checcio*, 870 A.2d 850, 862 (Pa. 2005). The focus is not on weight and credibility; but rather, "whether the proffered evidence, *if credited by a jury*, would be sufficient to prevail at trial." *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899, 906 (Pa. 2007) (emphasis in original). Of paramount concern at this preliminary stage, "the trial court must take all facts of record and reasonable inferences therefrom in a light most favorable to the non-moving party." *Estate of Agnew*, 152 A.3d at 259.

"Our standard for summary judgment is twofold." *Pilchesky v. Gatelli*, 12 A.3d 430, 443 (Pa. Super 2011). These dual bases for summary judgment are codified at Pennsylvania Rule of

Civil Procedure 1035.2, governing a moving party's motion for summary judgment. It states:

> 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, or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. No. 1035.2. Thus, "a record that supports summary judgment will either (1) show the material facts are undisputed or (2) contain insufficient evidence of facts to make out a *prima facie* cause of action or defense and, therefore, there is no issue to be submitted to the jury." *American Southern Insurance Co., Inc. v. Halbert*, 203 A.3d 223, 226 (Pa. Super. 2019) (quoting *Cigna Corp. v. Executive Risk Indemnity., Inc.*, 111 A.3d 204, 210-11 (Pa. Super. 2015)). Because these inquiries are distinct, it is often helpful to separate the analysis according to the following methodology:

> Initially, it must be determined whether the plaintiff has alleged facts sufficient to establish a *prima facie* case. If so, the second step is to determine whether there is any discrepancy as to any facts material to the case. Finally, it must be determined whether, in granting summary judgment, the trial court has usurped improperly the role of the [fact-finder] by resolving any material issues of fact.

Dudley v. USX Corp., 606 A.2d 916, 920 (Pa. Super. 1992); *see also Ack v. Carroll Township Authority*, 661 A.2d 514, 516-17 (Pa. Cmwlth. 1995) (citing *Dudley*, 606 A.2d at 916).

Pennsylvania Rule of Civil Procedure 1035.3 governs a non-moving party's response to a motion for summary judgment. Essentially, the rule provides that "[i]n response to a summary judgment motion, the nonmoving party cannot rest upon the pleadings, but rather must set forth specific facts demonstrating a genuine issue of material fact" or "evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced." *Bank of America, N.A. v. Gibson*, 102 A.3d 462, 464 (Pa. Super. 2014); Pa.R.C.P. No 1035.3(a)(2). "Supporting affidavits in response to a motion for summary judgment are acceptable as proof of facts" and a non-moving party may "respond to a motion for summary judgment by relying solely on a proper affidavit to create a genuine issue of material fact, i.e., a credibility question for the jury." *Kardos v. Armstrong Pumps, Inc.*, 222 A.3d 393, 401 (Pa. Super. 2019) (citations omitted).

"[A] motion for summary judgment cannot be supported or defeated by statements that include inadmissible hearsay evidence" *Bezjak v. Diamond*, 135 A.3d 623, 631 (Pa. Super. 2016) (citations omitted). Additionally, "evidence adduced by the non-moving party must

be of such a quality that a jury could return a favorable verdict to the non-moving party on the issue or issues challenged by a summary judgment request." *InfoSAGE Inc. v. Mellon Ventures, L.P.*, 896 A.2d 616, 625 (Pa. Super. 2006) (citing *McCarthy v. Dan Lepore & Sons Co., Inc.*, 724 A.2d 938, 940 (Pa. Super. 1998)).

Although the function of summary judgment is to avoid useless trials, it must not be used to provide for trial by affidavits or depositions. *DeArmitt v. New York Life Insurance Co.*, 73 A.3d 578, 595 (Pa. Super. 2013). To that end, under the rule established in *Nanty-Glo v. American Surety Co.*, 163 A. 523 (Pa. 1932), a party moving for summary judgment cannot rely on oral testimony alone, either through testimonial affidavits or depositions, even if uncontradicted, to establish the absence of a genuine issue of material fact. *Woodford v. Insurance Departmen*t, 243 A.3d 60, 69 (Pa. 2020) (citing Pa.R.C.P. 1035.2 Note). The *Nanty-Glo* rule is "premised on the notion that credibility determinations must be left to the finder of fact." *Id*. (citing *Bailets v. Pennsylvania Turnpike Commission*, 123 A.3d 300, 304 (Pa. 2015); *Penn Center House, Inc. v. Hoffman*, 553 A.2d 900 (Pa. 1989); J. PALMER LOCKHARD, *Summary Judgment in Pennsylvania: Time for Another Look At Credibility Issues*, 35 DUQ. L. REV. 625, 629 (1997)). Because *Nanty-Glo* applies only to evidence offered by a moving party on summary judgment, it necessarily comes into play only under the third step of the *Dudley* framework. *Dudley*, 606 A.2d at 920.

These overarching principles guide the Court's analysis. Before turning to that analysis, however, the Court pauses to provide an overview of the substantive law in this area, derived from two landmark statutes.

B. The Americans with Disabilities Act & The Pennsylvania Human Relations Act

The Americans with Disabilities Act of 1990 (ADA) was enacted in order "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). It directs that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to ... [the] discharge of employees ... and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Similarly, the Pennsylvania Human Relations Act (PHRA) declares it to be the public policy of this Commonwealth "to foster the employment of all individuals in accordance with their fullest capacities regardless [*inter alia*] of their handicap or disability." 43 P.S. § 952(b). To that end, it states that "[i]t shall be an unlawful discriminatory practice ... [f]or any employer because of ... non-job related handicap or disability ... to discharge from employment such individual." 43 P.S. § 955(a).

Generally, the ADA and PHRA "are interpreted in a co-extensive manner because both laws deal with similar subject matter and are grounded on similar legislative goals[,]" and courts of this Commonwealth may look to federal court decisions when interpreting either statute, even though those decisions are not binding on state courts. *Harrisburg Area Community College v. Pennsylvania Human Relations Commission*, 245 A.3d 283, 293 n.10 (Pa. Cmwlth. 2020) (citing *Imler v. Hollidaysburg American Legion Ambulance Service*, 731 A.2d 169, 173-74 (Pa. Super. 1999)); *see also Stultz v. Reese Bros., Inc.*, 835 A.2d 754, 759 (Pa. Super. 2003).

Moreover, "[w]hen the Third Circuit has spoken on a federal issue, the ultimate answer to which has not yet been provided by the United States Supreme Court, it is appropriate for [Pennsylvania courts] to follow Third Circuit precedent in preference to that of other

jurisdictions." *Werner v. Plater-Zyberk*, 799 A.2d 776, 782 (Pa. Super. 2002) (citation omitted). This practice discourages "litigants from 'crossing the street' to obtain a different result in federal court than they would in Pennsylvania court." *Graziani v. Randolph*, 856 A.2d 1212, 1218 (Pa. Super. 2004). "[I]f the Third Circuit has not ruled on a specific question, [Pennsylvania courts] may seek guidance from the pronouncements of the other federal circuits, as well as the district courts, in the same spirit in which the Third Circuit itself considers such decisions. *NASDAQ OMX PHLX, Inc. v. PennMont Securities*, 52 A.3d 296, 303 (Pa. Super. 2012) (quoting *Werner*, 799 A.2d at 782).

As both parties agree, in the absence of direct proof of discrimination, Pennsylvania courts apply the analytical model established by the United States Supreme Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802 (1973) to determine whether summary judgment is appropriate in employment discrimination cases. *Leibensperger v. Carpenter Technologies, Inc.*, 152 A.3d 1066, 1073 (Pa. Cmwlth. 2016); *Canteen Corp. v. Pennsylvania Human Rights Commission*, 814 A.2d 805, 811 (Pa. Cmwlth. 2003) ("Although we have never addressed whether [the *McDonnell Douglas* test] is the proper test applicable to an analysis under the [PHRA], we agree that it is the proper one."). Under the *McDonnell Douglas* framework: "a plaintiff must first establish a prima facie case of discrimination. If the plaintiff succeeds, the defendant must articulate a legitimate, nondiscriminatory reason for the adverse employment action. The burden then shifts back to the plaintiff to prove ... that the articulated reason was a mere pretext for discrimination." *Capps v. Mondelez Global, LLC*, 847 F.3d 144, 152 (3d Cir. 2017) (quoting *Ross v. Gilhuly*, 755 F.3d 185, 193 (3d Cir. 2014)); *Garner v. Pennsylvania Human Relations Commission*, 16 A.3d 1189, 1198 & n.5 (Pa. Cmwlth. 2011) (noting "[o]ur Supreme Court adopted the *McDonnell Douglas* model in *General Electric Corp. v. Pennsylvania Human Relations Commission*, 365 A.2d 649 (1976)"). While "*McDonnell Douglas* was a refusal to hire case ... the shifting burden of proof approach applies in any claim of employment discrimination, whether it involves an employee's discharge, compensation or terms of employment." *Garner*, 16 A.3d at 1198 n.5.

In order to establish a *prima facie* case of disability discrimination under the first stage of *McDonnell Douglas*, a plaintiff must demonstrate "(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination." *Stultz*, 835 A.2d at 760 (quoting *Gaul v. Lucent Technologies*, 134 F.3d 576, 580 (3d Cir.1998)).[1] The ADA defines a disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1).

After the passage of the ADA, courts generally took a restrictive view of its definition of "disability." *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-89 (1999) (holding that mitigating measures, such as medication and prosthetic devices, should be taken

[1] Some courts separate the *prima facie* case into four, rather than three, elements. *See Leibensperger,* 152 A.3d at 1072-73 (noting that "[u]nder *McDonnell Douglas*: 'the complainant bears the burden of establishing a [prima facie] case by showing that: (i) he is in a protected class; (ii) he is qualified for the position; (iii) he suffered an adverse employment action; and (iv) he was discharged under circumstances that gave rise to an inference of discrimination.'") (quoting S*panish Council of York, Inc. v. Pennsylvania Human Relations Commission*, 879 A.2d 391, 397 (Pa. Cmwlth. 2005)). The Court addresses this discrepancy more fully in footnote 8, p. 25, *infra*.

into account in determining whether a person is disabled for purposes of the ADA, and further, that a plaintiff does not meet the criteria for being "regarded as disabled" unless the employer perceives the plaintiff's impairment as one that would substantially limit a major life activity); *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 192-97 (2002) (holding the terms "substantially limits" and "major life activity" must "be interpreted strictly to create a demanding standard for qualifying as disabled").

In response, Congress passed, and President George W. Bush signed, the ADA Amendments Act of 2008 (ADAAA). In doing so "Congress expressly rejected the strict standards imposed on the definition of 'disability' by the Supreme Court and the EEOC ... amending the relevant provisions of the ADA to include clarifying details, rules of construction, and examples that underscore the broad applicability of the statute." *Mancini v. City of Providence by and through Lombardi*, 909 F.3d 32, 40 (1st Cir. 2018). The ADAAA mandates that "[t]he definition of disability ... shall be construed in favor of broad coverage of individuals ... [and] to the maximum extent permitted by the terms of this chapter." 42 U.S.C. § 12102(4)(A). The EEOC has also promulgated new regulations to that effect. *See* 29 C.F.R. § 1630.2. Of particular significance, now, "under the ADAAA, a plaintiff who is proceeding under the 'regarded as' prong to establish a disability no longer needs to show that his impairment substantially limits a major life activity." *Rubano v. Farrell Area School District*, 991 F. Supp. 2d 678, 691 (W.D. Pa. 2014) (citing 29 C.F.R. § 1630.2(j)); *see also Equal Employment Opportunity Commission v. BNSF Railway Co.*, 902 F.3d 916, 922 (9th Cir. 2018); *Mercado v. Puerto Rico*, 814 F.3d 581, 588 (1st Cir. 2016). These changes "ushered in a brave new world for disability discrimination claims." *Mancini*, 909 F.3d at 40.

III. ANALYSIS: SUFFICIENCY OF THE EVIDENCE UNDER RULE 1035.2(2)

Hytech asserts summary judgment is appropriate because "there are no issues of material fact" left to be resolved. Defendant's Motion for Summary Judgment, p. 1. This implicates the basis for summary judgment under Rule 1035.2(1). However, implicit in Hytech's argument is also the second species of summary judgment found at Rule 1035.2(2). *See* Def.'s Br. in Supp. of Summ. J., p. 3 (stating "in order to defeat a Motion for Summary Judgment, Plaintiff must show sufficient evidence on any issue essential to his case in which he bears the burden of proof such that a jury could return a verdict in his favor.") (citing *Ertel*, 674 A.2d at 1042). These two independent bases for summary judgment under Rule 1035.2 are often intertwined such that resolution of one may significantly bear on the resolution of the other. As is often the case, however, it is helpful to bifurcate the analysis. Utilizing the *Dudley* framework, the Court first addresses whether Kimmy has offered sufficient evidence to make out its cause of action pursuant to Rule 1035.2(2). At this stage, the Court looks only to the evidence produced by Kimmy. *Dudley*, 606 A.2d at 920.

Once again, to survive summary judgment under Rule 1035.2(2), Kimmy must provide sufficient evidence from which a reasonable jury could return a favorable verdict, which requires Kimmy to provide adequate evidence as to each stage of *McDonnell Douglas* for which he carries the burden of production. The first stage (confusingly enough) considers whether Kimmy has made out a *prima facie* case of disability discrimination under the ADA and PHRA. The Court begins it analysis here.

A. Kimmy's Prima Facie Case of Disability Discrimination

As previously noted, a *prima facie* case of disability discrimination is satisfied by a showing

that (1) the plaintiff is a disabled person within the meaning of the ADA or the PHRA; (2) the plaintiff is otherwise qualified to perform the essential functions of the job; and (3) the plaintiff has suffered an adverse employment decision as a result of discrimination. *Stultz*, 835 A.2d at 760. Hytech does not contest that Kimmy was qualified for his position, satisfying the second element. Hytech does dispute whether Kimmy offers sufficient evidence from which a reasonable jury could infer he was disabled within the meaning of the ADA and PHRA and whether he offers sufficient evidence that he suffered an adverse employment decision because of his alleged disability. The Court addresses each of these arguments in turn.

1. Evidence of disability under the ADA and PHRA

The ADA defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))." 42 U.S.C. § 12102(1). Thus, to satisfy any definition of disability under the ADA, one must first offer evidence of an impairment. EEOC regulations define "impairment" broadly to include "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine[.]" 29 C.F.R. § 1630.2(h)(1).[2]

Kimmy undoubtedly suffered a heart attack, and that alone is arguably sufficient to support an inference of a cardiovascular impairment at the summary judgment stage. *See Mancini*, 909 F.3d at 41-42 (citing *Katz v. City Metal Co., Inc.*, 87 F.ed 26, 31 (1st Cir. 1996) ("Especially given that City Metal has never disputed that Katz had a heart attack, we have no doubt that a rational jury could conclude, even without expert medical testimony, that Katz had a condition affecting the cardiovascular system and therefore that he had a physical impairment under the ADA."); *Marinelli v. City of Erie*, 216 F.3d 354, 361 (3d Cir. 2000) ("failure to present medical evidence of his impairment" was not fatal because arm and neck pain are "among those ailments that are the least technical in nature and are the most amenable to comprehension by a lay jury.")).

For further support, Kimmy points to a medical report labeled as Defendant's Exhibit A, which denotes an EKG diagnosis of "S/P CABG" — short for Status Post Coronary Artery Bypass Graft — as evidence of such a cardiovascular condition. "Coronary artery bypass graft surgery (CABG) is a procedure used to treat coronary artery disease." John Hopkins Medicine, *Coronary Artery Bypass Graft*, available at https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/coronary-artery-bypass-graft-surgery (last viewed April 6, 2021). Viewing this medical report in the light most favorable to Kimmy, a jury could easily conclude he suffered from a cardiovascular disorder or condition, namely coronary artery disease, a form of heart disease. *See* Centers for Disease Control and Prevention, *Coronary Artery Disease (CAD)*, available at https://www.cdc.gov/heartdisease/coronary_ad.htm#:~:text=Coronary%20 artery%20disease%20(CAD)%20is,reduce%20your%20risk%20for%20CAD (last viewed

[2] In this regard, EEOC regulations carry the force of law. *See* 42 U.S.C. § 12205a ("The authority to issue regulations granted to the [EEOC] ... under this chapter includes the authority to issue regulations implementing the definitions of disability in section 12102 of this title (including rules of construction) and the definitions in section 12103 of this title, consistent with the ADA Amendments Act of 2008.").

April 6, 2021). Consequently, a jury could reasonably conclude Kimmy's heart disease satisfied the definition of impairment as set forth in the EEOC regulation.

However, not all impairments rise to the level of disability. To qualify as disabled under the statute, the individual must satisfy the conditions for having either: (1) an actual impairment; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(1). The first two categories require that the impairment "substantially limits one or more major life activities of such individual." *Id*. On the other hand, "[w]here an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the 'actual disability' or 'record of' prongs[,]" and rather, "the evaluation of coverage can be made solely under the 'regarded as' prong of the definition of disability[.]" 29 C.F.R. § 1630.2(g)(3). "An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A) (emphasis added). To that end, Kimmy need not show his heart disease substantially limited a major activity or even that Hytech perceived his heart disease to substantially limit a major life activity. 29 C.F.R. § 1630.2(l)(1). Instead, Kimmy need only offer evidence that Hytech perceived him to suffer from the cardiovascular condition.

Although perception of a disability is the hallmark of a "regarded as" claim, it remains an open question in the Third Circuit whether mere knowledge of an impairment is sufficient to create an inference of perception on the part of the employer. In the absence of precedential guidance from the Third Circuit, some federal district courts continue to follow, on the basis of *stare decisis*, pre-ADAAA case law holding "the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that the perception caused the adverse employment action." *Kelly v. Drexel University*, 94 F.3d 102, 109 (3d Cir. 1996); *see Baughman v. Cheung Enterprises, LLC*, 2014 WL 4437545, at *12 (M.D. Pa. 2014). In a non-precedential opinion, a panel of the Third Circuit appeared to agree, finding that although the plaintiff's "supervisor and some co-workers were aware of her medical condition" she "did not provide any evidence that they regarded her as disabled." *Cunningham v. Nordisk*, 615 F. App'x. 97, 100 (3d Cir. 2015). Other federal district courts have held that the ADAAA impliedly overruled *Kelly* in this regard. *See Jakomas v. City of Pittsburgh*, 342 F. Supp. 3d 632, 647-48 (W.D. Pa. 2018); *Rubano*, 991 F. Supp. 2d at 692-93 (noting "all that an ADA plaintiff must show to raise a genuine issue of material fact for the 'regarded as' prong is that a supervisor knew of the purported disability.") (citing *Mengel v. Reading Eagle Co.*, 2013 WL 1285477, at *4 (E.D. Pa. 2013); *Estate of Murray v. UHS of Fairmount, Inc.*, 2011 WL 5449364, at *9 (E.D. Pa. 2011)).

First, upon closer reading of *Kelly*, it is not entirely clear the case stands for such a rule. *Jakomas*, 342 F. Supp. 3d at 648. *Kelly* held "the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse action." *Id*. (quoting *Kelly*, 94 F.3d at 109 (emphasis in *Jakomas*)). Prior to the enactment of the ADAAA, plaintiffs claiming a disability under the "regarded as" prong were required to prove that the impairment substantially limited one or more major life activities. *Kelly*, 94 F.3d at 105. As a result,

knowledge of an impairment, alone, would not have been sufficient to prove a "regarded as" disability, as that term was defined in 1996, since mere awareness would not have provided any indication of whether the plaintiff was substantially limited as to a major life activity. Under this reading, *Kelly* merely stands for the proposition that awareness/perception of an impairment is inadequate to prove substantial limitation of a major life activity, something Kimmy is not required to prove here.

Even to the extent that *Kelly* does stand for the rule it is cited for in cases like *Baughman*, its rationale is no longer tenable in light of the ADAAA. This Court is not bound by the decisions of the Third Circuit as a matter of stare decisis, and so the concern over *Kelly*'s precedential value is somewhat academic. Be that as it may, to the extent that *Kelly* represents persuasive authority to which this court should defer in interpreting a federal statute, the Court agrees with the reasoning of Judge Lenihan in *Rubano* and now-Chief Judge Hornak in *Jakomas* that the ADAAA abrogated this portion of Kelly.

"Congress, through enacting the ADAAA, intended to alter the existing judicial interpretations of 'regarded as' claims under the ADA." *Jakomas*, 342 F. Supp. 3d at 648. And "[w]hen Congress amends legislation, courts must presume it intends [the change] to have real and substantial effect." *Hayes v. Harvey*, 903 F.3d 32 (3d Cir. 2018) (citing *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016)). "The amended 'regarded as' provision reflects the view that unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are just as disabling as actual impairments." *Cannon v. Jacobs Field Services North America, Inc.*, 813 F.3d 586, 591 (5th Cir. 2016) (internal quotation marks and citations omitted). Under this straightforward application of "regarded as" disability the plaintiff need only show that "the employer was aware of and therefore perceived the impairment at the time of the alleged discriminatory action." *Adair v. City of Muskogee*, 823 F.3d 1297, 1306 (10th Cir. 2016) (emphasis added). "Congress did not expect or intend that this would be a difficult standard to meet." *Eshleman v. Patrick Industries Inc.*, 961 F.3d 242, 248 (3d Cir. 2020) (citing H.R. Rep. No. 110–730 pt. 2, at 17 (2008)). Most telling, the rules of construction set forth in the text of the statute itself, instruct that "[t]he definition of disability ... shall be construed in favor of broad coverage of individuals ... [and] to the maximum extent permitted by the terms of this chapter." 42 U.S.C. § 12102(4)(A).

The additional rationale offered by the *Kelly* court is unpersuasive. *Kelly* noted "[i]f we held otherwise, then by a parity of reasoning, a person in a group protected from adverse employment actions *i.e.*, anyone, could establish a *prima facie* discrimination case merely by demonstrating some adverse action against the individual and that the employer was aware that the employee's characteristic placed him or her in the group[.]" *Kelly*, 94 F.3d at 109. But as the Court explains more fully at pp. 24-26, *infra*, causation is a necessary element of a plaintiff's *prima facie* case of disability discrimination, so even under the existing framework, "[e]mployer awareness of an employee's impairment alone, coupled only with the fact of an adverse employment action, is insufficient to survive summary judgment" *Jakomas*, 342 F. Supp. 3d at 649.

Likewise, the concern expressed in *Baughman* that "[a]llowing [knowledge of an impairment] to establish a prima facie case for 'regarded as' disability would permit any employee to become protected by the ADA by simply announcing to his or her supervisor that he or she has an impairment" is misplaced. Satisfying the definition of disability is

merely one element of a plaintiff's *prima facie* case under the ADA, and an employer can still raise the defense that an impairment is transitory and minor to a "regarded as" claim, an inquiry which involves an objective analysis. 29 C.F.R. § 1630.15(f). In any event, a concern over possible policy ramifications of a duly enacted statute cannot overcome its plain meaning. *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 314 (3d Cir. 2010) (stating the plain meaning of a statute can only be rebutted "in the rare cases where the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.") (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)) (internal quotation and alteration omitted). Congress intended the definition of "regarded as" disability to be a relatively undemanding standard to satisfy, and not surprisingly, drafted a statute to that effect. *Eshleman*, 961 F.3d at 248. For these reasons, *Kelly*'s purported rule that mere knowledge of an impairment is insufficient to create an inference of perception under the ADAAA must be rejected.

Here, without question, Hytech knew of Kimmy's alleged cardiovascular impairment as he had been on medical leave for nearly six months prior to his return. This alone is sufficient evidence from which a jury could reasonably conclude that Hytech perceived Kimmy to suffer from a cardiovascular impairment at the time of his termination, only two days after his return to work.[3]

The only question remaining is whether Kimmy's perceived impairment fell within the transitory and minor exception to "regarded as" disabilities. 42 U.S.C. § 12102(3)(B) (stating "[the regarded as category of disability] shall not apply to impairments that are transitory and minor."). Hytech vigorously asserts that it does. The ADAAA defines a transitory impairment as one "with an actual or expected duration of 6 months or less." 42 U.S.C. § 12102(3)(B). Hytech notes that the actual date of Kimmy's heart attack was Sunday, March 5, 2017, and that Kimmy was cleared to return to work as of September 4, 2017, a period, it argues, that falls just shy of six months. Def.'s Br. in Supp. of Mot. for Summ. J., p. 6.

Even assuming, for the sake of argument, that Kimmy's impairment was transitory, he can still make out a *prima facie* case for disability so long as he can offer adequate evidence that his perceived impairment was not minor. In other words, as the Third Circuit recently held in *Eshleman*, to fall within the transitory and minor exception, the impairment must be both transitory and minor. *Eshleman*, 961 F.3d at 247-48; *see also Silk v. Board of Trustees, Moraine Valley Community College, District No. 524*, 795 F.3d 698, 706 (7th Cir. 2015) ("In raising this argument, the College bears the burden of establishing that the impairment was *both* transitory and minor.") (emphasis added).

This construction aligns with the plain meaning of the statutory text. The word "and" is a coordinating conjunction whose job is to link independent ideas. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011); *see also United States v. Andrews*, 480 F.Supp.3d 669, 683 (E.D. Pa. 2020) ("When Congress chooses to speak in the conjunctive, it intends that each element of the conjunction be satisfied separately and individually."). If Congress had intended that either category serve as an independent basis for the exception, it would have utilized the

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[3] Consistent with decisions both before and after the enactment of the ADAAA, "the relevant determination is whether plaintiff was disabled at the time of the adverse employment decision." *Rocco v. Gordon Food Service*, 998 F. Supp. 2d 422, 426 (W.D. Pa. 2014) (emphasis added); *see also Mancini*, 909 F.3d at 46 (citing *Bruzzese v. Sessions*, 725 F. App'x. 68, 71 (2d Cir. 2018)).

disjunctive "or" instead of the conjunctive "and" to connect the terms. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018).

This reading is also consistent with the intent of Congress in creating the exception. "[T]he transitory and minor exception was intended to weed out only claims at the lowest end of the spectrum of severity, such as common ailments like the cold or flu, and that the exception should be construed narrowly." *Eshleman*, 961 F.3d at 248 (citing H.R. Rep. No. 110-730 pt. 2, at 18 (2008) (internal quotation marks omitted)). This interpretation is further confirmed by the EEOC regulations. *See* 29 C.F.R. § 1630.15(f).

Although Section 12102(3)(B) defines the term "transitory" it does not define the term "minor." Rather, in determining whether an injury is minor, courts should consider "such factors as the symptoms and severity of the impairment, the type of treatment required, the risk involved, and whether any kind of surgical intervention is anticipated or necessary — as well as the nature and scope of any post-operative care." *Eshleman*, 961 F.3d at 249. "Whether the impairment at issue is or would be 'transitory and minor' is to be determined objectively." 29 C.F.R. § 1630.15(f).

In this case, viewing the evidence in the light most favorable to Kimmy, he offers sufficient evidence such that a reasonable jury could find that his perceived cardiovascular impairment was not minor. The neuropsychological report labeled as Defendant's Exhibit B indicates that Kimmy suffered a "serious cardiac event" and underwent six rounds of defibrillation after his heart attack on March 5, 2017. Def.'s Ex. B, p. 4. He was hospitalized in Pittsburgh where he was noted to exhibit symptoms of confusion, impulsivity, and agitation, suggesting a possible anoxic brain injury. Def.'s Ex. B, p. 4. There is evidence which, if credited by a jury, further suggests that these cognitive deficits have lingered even after his discharge from Hytech. Def.'s Ex. B, p. 2. Moreover, the nature of a coronary artery bypass graft procedure itself would permit a jury to draw a conclusion that the impairment was not minor:

> One way to treat the blocked or narrowed arteries is to bypass the blocked portion of the coronary artery with a piece of a healthy blood vessel from elsewhere in your body. Blood vessels, or grafts, used for the bypass procedure may be pieces of a vein from your leg or an artery in your chest. An artery from your wrist may also be used. Your doctor attaches one end of the graft above the blockage and the other end below the blockage. Blood bypasses the blockage by going through the new graft to reach the heart muscle ... Traditionally, to bypass the blocked coronary artery, your doctor makes a large incision in the chest and temporarily stops the heart. To open the chest, your doctor cuts the breastbone (sternum) in half lengthwise and spreads it apart. Once the heart is exposed, your doctor inserts tubes into the heart so that the blood can be pumped through the body by a heart-lung bypass machine.

John Hopkins Medicine, Coronary Artery Bypass Graft, available at https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/coronary-artery-bypass-graft-surgery (last viewed April 6, 2021). The severity of Kimmy's condition is of a different ilk than those injuries which courts have found to be minor for purposes of Section 12102(3)(B). *See, e.g., Budhun v. Reading Hospital and Medical Center*, 765 F.3d 245 (3rd Cir. 2014) (holding a broken bone in a hand constituted a minor impairment); *see also Eshleman*, 961

F.3d at 249 (noting that in *Budhun* "the temporary nature of a broken pinky finger served as a proxy for the lack of severity" but "[b]ecause even minimally invasive lung surgery is still thoracic surgery, more than likely requiring inpatient care, it is plausible that Eshleman's lung surgery was non-minor.").

At oral argument, Hytech contested the notion that Kimmy's impairment could be anything other than minor, noting Kimmy was ultimately able to return to work with no limitations whatsoever.[4] It further lamented the parade of horribles that would follow by setting such a precedent, fearing that any patient giving birth in a hospital would subsequently be able assert a viable claim for disability under the ADA. Hytech's concerns are overstated. As prior cases make clear, rather than formulating a broad definition of what constitutes a minor impairment, "courts have approached the issue on a case-by-case basis." *Eshleman*, 961 F.3d at 249. Under certain circumstances, giving birth may lead to non-minor impairment or perceived impairment, particularly where complications arise. But in most cases, hospitalization alone will not give rise to an inference of non-minor impairment, particularly when taken as a preventative, rather than a responsive, measure.

The record reveals that Kimmy was not only admitted to the hospital, but underwent open heart surgery and required a prolonged recovery to recuperate from the physical and cognitive repercussions of his heart attack. This set of facts is far more analogous to *Eshleman* than it is *Budhun*. All in all, the evidence of record, including evidence regarding the severity of the heart attack, the invasive nature of the surgery required to treat it, the prolonged period of recovery, and the potential for ongoing side effects possibly stemming from the cardiac event would reasonably permit a finding that Kimmy's perceived cardiovascular condition was not minor, and therefore, did not qualify under the transitory and minor exception to Section 12102(3)(B). As a result, Kimmy has made out a *prima facie* showing of disability under the ADA, the first element of his *prima facie* case of disability discrimination.[5]

The Court must address one final wrinkle before moving on. Since the enactment of the ADAAA in 2008, the Pennsylvania General Assembly has not updated or otherwise amended the PHRA to indicate whether federal and state law remain coterminous or whether pre-ADAAA case law applies to claims made under the PHRA.[6] In the wake of the ADAAA, some federal courts took the General Assembly's legislative inaction to mean that the revisions of the ADAAA do not apply in a cause of action alleged under the PHRA. *See Canfield v. Movie Tavern, Inc.*, 2013 WL 6506320, at *5 (E.D. Pa. 2013) ("[T]he PHRA does not follow the same standards and analysis as the ADAAA."); *Szarawara v. County of Montgomery*, 2013 WL 3230691, at *2 (E.D. Pa. 2013) ("The ADAAA relaxed the ADA's standard for disability[,] ... but the PHRA has not been similarly amended, necessitating separate analysis of Plaintiff's ADA and PHRA claims."). Other federal district courts have assumed that the two statutes remain coextensive. *See Morgenfruh v. Larson Design Group, Inc.*, 2019 WL 4511711, *2, n.37 (M.D. Pa. 2019).

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[4] This conflicting characterization over the severity of the impairment is more properly addressed in Section IV, *infra*, pp. 38-39, discussing whether genuine issues of material fact remain.

[5] Because the Court holds that Kimmy has offered sufficient evidence to make out a *prima facie* case of disability under the "regarded as" prong of disability, it need not decide whether Kimmy has also offered sufficient evidence to make out a *prima facie* case under either the "actual" or "record of" prongs.

[6] The answer to this question impacts Kimmy's PHRA claim because, under pre-ADAAA precedent, he would be required to provide evidence that his impairment substantially limited one or more major life activities at the time of his discharge.

Although the Pennsylvania Supreme Court has not opined on the issue, the Commonwealth Court has since, albeit in an unpublished opinion, held that the revisions of the ADAAA are incorporated into the PHRA. *See Lazer Spot, Inc. v. Pennsylvania Human Relations Commission*, 2018 WL 670621, at *4 (Pa. Cmwlth. 2018). In so holding, the Commonwealth Court panel found relevant the fact that "Section 44.2(b) of the PHRC's Regulations expressly provides: 'This chapter will be construed consistently with other relevant [f]ederal and [s]tate laws and regulations except where the construction would operate in derogation of the purposes of the [PHRA] and this chapter.'" 16 Pa. Code § 44.2(b)." *Id*. (changes in original). Although the non-precedential decision in *Lazer Spot* is not binding, the Court finds its approach persuasive.

Interpreting the state statute as more restrictive than its federal counterpart would run counter to the overall aim of the General Assembly in enacting the PHRA "to foster the employment of all individuals in accordance with their fullest capacities regardless [*inter alia*] of their handicap or disability." 43 P.S. § 952(b). This is especially so where, as here, the plaintiff is able to make a factually identical and legally viable claim under federal law. Denying such a claim to proceed under state law while allowing the same claim to proceed in state court under federal law would frustrate, rather than serve, the purposes of the PHRA and would potentially create an absurd result. *See* 1 Pa. C.S. § 1922(1) (stating that "the General Assembly does not intend a result that is absurd."). Accordingly, the Court holds that the PHRA incorporates the amendments of the ADAAA, and as a result, Kimmy's separate claims under federal and state law may be analyzed coextensively. For purposes of this section, this means that Kimmy is not required to show that his impairment substantially limited a major life activity to make out a *prima facie* case of disability under the PHRA, and the Court will proceed to analyze Kimmy's federal and state claims as one cause of action for the remainder of this Opinion.

2. Evidence of an adverse employment decision taken as a result of disability.

It is undisputed that Kimmy was involuntarily terminated from his position from Hytech. Further, termination doubtless qualifies as an adverse employment decision as a matter of law. *See Mascioli v. Arby's Restaurant Group, Inc.*, 610 F. Supp. 2d 419, 434 (W.D. Pa. 2009) (citing *Metzler v. Federal Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006)). Kimmy would end the analysis there. But the formulation of the third element of a plaintiff's *prima facie* case for disability discrimination speaks of an adverse employment decision taken *as a result of* discrimination, or as other cases put it, a plaintiff must show "a causal connection between the employee's protected activity and the employer's adverse action." *Equal Employment Opportunity Commission. v. Allstate Insurance Co.*, 778 F.3d 444, 449 (3d Cir. 2015). The but-for causation standard is the "undisputed" test under *McDonnell Douglas*. *Comcast Corp. v. National Association of African American-Owned Media*, 140 S. Ct. 1009, 1019 (2020). Kimmy argues that requiring evidence of such causation at this first stage of *McDonnell Douglas* would render superfluous the need to show evidence of pretext under the third step of the framework. The Court cannot agree.

McDonnell Douglas itself did not expressly mention causation in its formulation of the *prima facie* elements, although taken together, a causal element may be implied.[7] Not long

[7] The *prima facie* elements in *McDonnell Douglas*, a failure to hire case alleging racial discrimination, included "(i) that [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, 411 U.S., at 802.

thereafter, the Supreme Court in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978) explained:

> A prima facie case under *McDonnell Douglas* raises an *inference of discrimination* only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.

Id. at 577 (citation omitted) (emphasis added). Later, in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), the Court noted "[t]he burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected *under circumstances which give rise to an inference of unlawful discrimination*." (emphasis added). Although *Furnco* speaks of a presumption of impermissible factors, as *Burdine* clarifies, that presumption only arises when circumstances permit an inference of discrimination, that is, where there is some evidence that the adverse employment action was taken because of an employee's protected trait. Put another way, "[t]o establish a presumption is to say that a finding of the predicate fact (here, the prima facie case) produces a required conclusion in the absence of explanation." *St. Mary's Honor Center. v. Hicks*, 509 U.S. 502, 506 (1993) (quoting 1 D. LOUISELL & C. MUELLER, *Federal Evidence* § 67, p. 536 (1977)) (internal quotation marks omitted). That required conclusion could only give rise to liability (in the absence of an explanation) if some form of causation had already been established.

Some lower courts, including the Pennsylvania Commonwealth Court, have removed all doubt by explicitly dividing a plaintiff's *prima face* case into four elements. *See Leibensperger*, 152 A.3d at 1072-73 (noting that "[u]nder *McDonnell Douglas*: 'the complainant bears the burden of establishing a [prima facie] case by showing that: (i) he is in a protected class; (ii) he is qualified for the position; (iii) he suffered an adverse employment action; and (iv) he was discharged under circumstances that gave rise to an inference of discrimination.'") (quoting *Spanish Council of York, Inc. v. Pennsylvania Human Relations Commission*, 879 A.2d 391, 397 (Pa. Cmwlth. 2005)).[8] These cases clearly confirm that an inference of discrimination — *i.e.* causation — is an essential element of a plaintiff's *prima facie* case.

Thus, "even when a plaintiff is 'regarded as' disabled, the plaintiff 'must provide evidence that supports a logical inference of causation between the alleged disability and the adverse employment action.'" *Jakomas*, 342 F. Supp. 3d at 649 (quoting *Rubano*, 991 F. Supp. 2d at 700). To do so, a plaintiff must introduce evidence concerning the scope and nature of the conduct and circumstances, relying on a broad array of evidence to demonstrate a link between the protected activity and the adverse action taken, such as a close temporal

[8] This alternate formulation merely separates the causation requirement from the requirement that an adverse employment action take place, but does not alter the substance of a *prima facie* case of discrimination in any meaningful way. A hyper-focus on this distinction would be misplaced as the *McDonnell Douglass* framework "was never intended to be rigid, mechanized, or ritualistic…. [but] merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco*, 438 U.S. at 577.

proximity between the adverse action and the protected activity or evidence of intervening antagonism, retaliatory animus, or inconsistencies in an employer's articulated reasons for terminating an employee. *Young v. City of Philadelphia Police Department*, 651 Fed. Appx. 90, 95-96 (3rd Cir. 2016) (unpublished) (citing *Marra v. Philadelphia Housing Authority*, 497 F.3d 286 (3rd Cir. 2007); *LeBoon v. Lancaster Jewish Community Center Association*, 503 F.3d 217 (3d Cir. 2007); *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271 (3rd Cir. 2000)).

Kimmy relies heavily on testimony he gave at an unemployment compensation hearing held November 16, 2017. In that proceeding the following exchanged occurred:

> MR. KIMMY: Uh yeah that was probably when Dave [Reiser] came up and we had a conversation and uh he said that he had uh thought about our situation long and hard, really hard overnight and I am going to have to let you go. We're uh the company is going to go in a different direction and uh I'm just gonna have to let you go.
>
> COUNSEL FOR MR. KIMMY: And did he tell you it was because of this lack of productivity in the last two days?
>
> MR. KIMMY: No
>
> COUNSEL FOR MR. KIMMY: Okay and did he say anything else in terms of explanations for terminating you?
>
> MR. KIMMY: Yeah we had a conversation that went on for probably fifteen-twenty minutes. In that conversation, sometime in the conversation, there was a uh it was brought up about not having work. Uh Mr. Reiser at that point said something about "Well, that's another reason but I should let you off since we don't have work. We are slow; we don't have work for the machine."
>
> COUNSEL FOR MR. KIMMY: Okay
>
> MR. KIMMY: Uh.
>
> COUNSEL FOR MR. KIMMY: Did he say anything about Mr. Jankowiak taking over operation of the machine?
>
> MR. KIMMY: That's what my question was if the company is going to go in a different direction, what does that exactly mean and that's uh I believe Mr. Reiser at that point said "Well, Jim's got things going pretty good back here. I think we're [sic] continue in that direction uh let him program and set it up and have somebody, an operator come over and just operate the machine.
>
> COUNSEL FOR KIMMY: And did he give you any other reason for your termination?
>
> MR. KIMMY: Uh other than the uh you know I guess one more reason I should let you

off for lack of work uh towards the end of conversation, he had made the statement that the [sic] his company was done paying my medical bills.

Unemployment Compensation Hearing Transcript (Unemploy. Comp. Hr'g Tr.), pp. 17-18. Here, Reiser's alleged comments to Kimmy that "his company was done paying [Kimmy's] medical bills" is sufficient to create a logical inference from which a jury could find that Kimmy was fired because of Kimmy's perceived disability, that is, because Hytech no longer wished to pay for Kimmy's medical expenses resulting from his heart attack.

Hytech argues, at most, this suggests Kimmy was terminated because of its concern over employee healthcare costs, not Kimmy's heart condition *per se*, and so is insufficient evidence to establish a causal connection that it discriminated against him because of disability. Most courts faced with this argument appear to reject it. *See Fratturo v. Gartner, Inc.*, 2013 WL 160375, *12 (D. Conn. 2013) (stating a reasonable jury could infer "anti-disability animus was a motivating factor in the decision to terminate" the plaintiff where the employer had an "admitted desire to reduce health insurance costs arising from chronic illnesses"); *Bideau v. Beachner Grain, Inc.*, 2011 WL 4048961 (D. Kan. 2011) (denying summary judgment because the circumstantial evidence supported a conclusion that the defendant's decision to terminate the plaintiff was motivated by its knowledge of increased health care costs); *Trujillo v. PacifiCorp*, 524 F.3d 1149, 1160 (10th Cir. 2008) ("In this record, there was considerable evidence of concern about healthcare costs and facts that demonstrated that the company was aware high dollar claims like Charlie's could only increase those costs ... the evidence provides a reasonable inference that the Trujillos were costing the company time and money and considered it better to terminate them than to incur the costs of Charlie's illness."); *DeWitt v. Proctor Hospital*, 517 F.3d 944, 949 (7th Cir. 2008) ("the timing of Dewitt's termination suggests that the financial albatross of Anthony's continued cancer treatment was an important factor in Proctor's decision").

Some courts have observed that concern over healthcare costs alone, absent a showing that the plaintiff is disabled under the ADA, is not sufficient to confer liability on a defendant. *See South v. NMC Homecare, Inc.*, 943 F. Supp. 1336, 1341 (D. Kan. 1996) ("Discharging an employee merely because his physical infirmities (which do not amount to 'disabilities') impact company insurance premiums, although perhaps giving rise to state common law claims, does not implicate the ADA."). Others have opined that there can be no showing disability discrimination "if the disability plays no role in the employer's decision." *DeWitt*, 517 F.3d at 953 (Posner, J., concurring) (citing *Christian v. St. Anthony Medical Center, Inc.*, 117 F.3d 1051, 1052-53 (7th Cir. 1997) ("By the plaintiff's own account, however, the defendant's motive in firing her had nothing to do with any disability resulting directly or indirectly from her high cholesterol.")). Many have not had the opportunity to consider the issue directly. *See Giles v. Transit Employees Federal Credit Union*, 794 F.3d 1, 14 (D.C. Cir. 2015) (assuming, without deciding, that "discrimination based on the costs associated with insuring a person with a disability is discrimination on the basis of the disability.").

On this point, however, the Court finds instructive the recent decision of the United States Supreme Court in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), where the Court considered whether an employer discriminates on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 when it fires an employee because of their sexual

orientation or gender identity. The Court held that it does for "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex" and as such "[s]ex plays a necessary and undisguisable role in the decision." *Id*. at 1737.

Writing for the majority, Justice Gorsuch explained that Title VII forbids employers from taking certain actions "because of" sex, incorporating the traditional but-for causation standard familiar in tort law. *Id*. at 1739 (citing *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 350 (2013); *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009)). But-for causation, he noted, "can be a sweeping standard" since "[o]ften, events have multiple but-for causes." *Id*. As a result, "[i]f the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee — put differently, if changing the employee's sex would have yielded a different choice by the employer — a statutory violation has occurred." *Id*. at 1741. Under this standard, "the plaintiff's [protected trait] need not be the sole or primary cause of the employer's adverse action." *Id*. at 1744. That other legally permissible factors may have contributed to the decision is of no consequence and the ultimate intent of the employer is not controlling. *Id*. at 1742. This can be illustrated through the following hypothetical:

> Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based *in part* on that individual's sex.

Id. (emphasis added).

This reasoning applies with equal force to the ADA. *See Woodson v. Scott Paper Co.*, 109 F.3d 913, 934 n.25 (3d Cir. 1997) (en banc) (noting that Congress intended for the ADA to be interpreted "in a manner consistent with Title VII"). For purposes of this case, that means, even assuming Hytech's primary concern (indeed, even if its only concern) was the higher cost of Kimmy's healthcare, Kimmy's disability would still be a but-for cause of his termination as Kimmy's medical expenses would not have been at risk of increasing if it were not for his heart attack.[9] *Bostock* thus confirms what had already been apparent to

[9] Hytech argues that the cost of insuring Kimmy would remain the same regardless of what medical issues he faced because Kimmy's medical bill "were never the direct responsibility of the Defendant." Br. in Supp. of Def.'s Mot. for Summ. J., p. 11. This may be probative circumstantial evidence to call the credibility of Kimmy's testimony into doubt at trial, but on summary judgment, this argument actually works against Hytech. At this stage, the Court must assume a jury would credit Kimmy's version of the conversation that occurred between himself and Reiser. Assuming this, if Hytech did not have anything to gain financially from removing Kimmy from its healthcare plan, then Reiser was lying when he said Kimmy was fired, in part, because of his medical expenses. And if he was lying, then a factfinder could conclude his reference to medical bills was a pretext for something more disquieting, such as straightforward animus towards Kimmy because of his disability. Reiser's reference to medical bills would also permit a reasonable factfinder to infer that Hytech was aware of Kimmy's heart disease, and so, also permit the factfinder to infer that Kimmy' heart disease was the actual reason — perhaps even the sole reason — for his termination.

many lower federal courts to consider causation in the context of the ADA: liability can still attach so long as disability is "inextricably bound up with" the employer's concern over medical expenses. *Bostock*, 140 S. Ct. at 1742.

Of course, evidence which suggests only that an employee was terminated because of an employer's desire to reduce the cost of medical expenses is not indicative of a violation of the ADA.[10] For instance, an across-the-board termination of employees based on seniority in an effort to reduce healthcare costs would not ultimately impose that employer to liability under the ADA even if some of those employees happened to be disabled. And that would be so because disability would not have been a but-for cause of the termination; an individual in this scenario would be discharged based on seniority whether they were disabled or not. But Hytech has offered no evidence to suggest that other employees were discharged as part of an overall plan to reduce employee healthcare costs.[11] Rather, Hytech's frustration appears to be directed towards the but-for causation standard itself; yet, as Justice Gorsuch put it, "[y]ou can call the statute's but-for causation test what you will — expansive, legalistic ... wooden or literal. But it is the law." *Id*. at 1745.[12]

Additionally, Hytech argues that Reiser's alleged comments fall within the orbit of the so-called "stray remarks doctrine" Br. in Supp. of Def.'s Mot. for Sum. J. p. 11. "Ironically, the 'stray remarks' doctrine itself grew out of a stray remark in a concurring opinion by Justice O'Connor in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring in the judgment)." *Mason v. Southeastern Pennsylvania Transportation Authority*, 134 F. Supp. 3d 868, 875 (E.D. Pa. 2015) (citation altered). In her concurring opinion, Justice O'Connor opined that "statements by non-decision-makers, or statements by decision-makers unrelated to the decisional process itself," would be insufficient to provide "direct evidence" of discrimination. 490 U.S. at 277 (O'Connor, J. concurring in the judgment).

However, this case involves not direct, but rather, indirect evidence of discrimination, as Hytech presumably agrees, given its acquiescence to *McDonnell Douglas* as the governing framework. *See Comcast*, 140 S. Ct at 1019. (stating *McDonnell Douglas* supplies "a tool for assessing claims [of discrimination], typically at summary judgment, when the plaintiff relies on *indirect* proof of discrimination."). Nevertheless, relying on Justice O'Connor's opinion, several jurisdictions have expanded the reach of the doctrine beyond direct claims of discrimination to those governed by *McDonnell Douglas*. *Diaz v. Jiten Hotel Management, Inc.*, 762 F. Supp. 2d 319, 335 (D. Mass. 2011). The Pennsylvania Superior

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[10] It may be indicative, however, of a violation of the Employee Retirement Income Security Act of 1974 (ERISA). Section 510 of ERISA makes it illegal for an employer to terminate any person "for the purpose of interfering with the attainment of any right to which such [person] may become entitled to under [an employee benefit plan]." 29 U.S.C. § 1140. Under that law, federal district courts within the Third Circuit have held that a defendant violates Section 510 when it interferes with the attainment of rights to which an employee becomes entitled under an ERISA plan when it does not want to incur additional costs related to the recurrence of some medical condition. *Stabile v. Allegheny Ludlum, LLC*, 2012 WL 3877611, *10 (W.D. Pa. 2012) (citing in *Chalfont v. U.S. Electrodes*, 2010 WL 5341846, *10 (E.D. Pa. 2010).

[11] Even if it had, such evidence would only be relevant to the Court's analysis under Rule 1035.2(1), concerning whether genuine issues of material fact exist, not whether the nonmoving party has shown sufficient evidence to survive Rule 1035.2(2).

[12] At least one Third Circuit case suggests that plaintiffs need only prove some lower threshold of causation as part of its *prima facie* case, perhaps something akin to the motivating factor standard, with a showing of but-for causation only necessary at the third stage of *McDonnell Douglas*. *See Young*, 651 Fed. App'x. at 96. In any event, the Court need not address the issue as evidence sufficient to satisfy but-for causation will necessarily satisfy any lower standard.

Court, in an unpublished opinion, incorporating the memorandum opinion below of then-Court of Common Pleas Judge Horan, recognized the stray remarks doctrine, noting "[o]ur cases distinguish between discriminatory comments made by individuals within and those by individuals outside the chain of decisionmakers who have the authority to discharge." *Knappenberger v. NexTier Bank*, 2015 WL 7185558, *7 (Pa. Super. 2015) (quoting *Walden v. Georgia-Pac. Corp.*, 126 F.3d 506 (3d Cir. 1997)).

In this case, the stray remarks doctrine is not implicated as Reiser was undoubtedly a decisionmaker with "the authority to discharge[,]" a discretion he exercised when he fired Kimmy. *Knappenberger*, 2015 WL 7185558, at *7. As such, his remarks are highly relevant to a determination or whether Hytech discriminated against Kimmy on the basis of disability, and the stray remarks doctrine has no application here.

Finally, Hytech argues that Reiser's alleged statement is inadmissible hearsay and should not be considered for purposes of summary judgment. Hytech is correct that, "summary judgment cannot be ... defeated by statements that include inadmissible hearsay evidence" *Bezjak*, at 631. "Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement." *Commonwealth v. Kuder*, 62 A.3d 1038, 1055 (Pa. Super. 2013); Pa.R.E. 801(c). Kimmy's recollection of his conversation with Reiser (assuming Reiser would not testify to the same) would be an out-of-court statement and, to the extent that it would be offered to show that Hytech's concern over Kimmy's medical bills was the reason for his termination, would be offered to prove the truth of the matter asserted therein. This satisfies the definition of hearsay.

However, such testimony would, nonetheless, be admissible under the party opponent exception to the hearsay rule. *See* Pa.R.E. 803(25)(D) (concerning a statement offered against an opposing party and which was made by the party's agent or employee on a matter within the scope of that relationship while it existed). "For an admission of a party opponent to be admissible under Rule 803(25)(D), the proponent of the statement must establish three elements: (1) the declarant was an agent or employee of a party opponent; (2) the declarant made the statement while employed by the party opponent; and (3) the statement concerned a matter within the scope of agency or employment." *Harris v. Toys "R" Us-Penn, Inc.*, 880 A.2d 1270, 1275 (Pa. Super. 2005) (citing *Sehl v. Vista Linen Rental Serv. Inc.*, 763 A.2d 858, 862 (Pa. Super. 2000)). Here, Reiser was undoubtedly an agent or employee of Hytech, his statement was made while he was employed by Hytech, and the statement concerned a matter within the scope of his agency or employment, *i.e.*, his decision to terminate Kimmy, his subordinate. As such, Kimmy's testimony would be admissible at trial, and thus, can be offered by Kimmy now to defeat Hytech's Motion for Summary Judgment.

All things considered, Kimmy has offered sufficient evidence to make out a *prima facie* case of disability discrimination pursuant to the first stage of *McDonnell Douglas*. Having done so, the burden now shifts to Hytech to offer a legitimate, nondiscriminatory reason for Kimmy's termination.[13]

B. Hytech's Legitimate, Nondiscriminatory Reason for the Termination.

Under the second stage of *McDonnell Douglas* "the burden of production (but not the

[13] Although Rule 1035.2(2) concerns the burden of the non-moving party in a summary judgment motion to provide *prima facie* evidence (here Kimmy), the Court now addresses Hytech's burden of production under the second stage of *McDonnell Douglas* for the sake of clarity.

burden of persuasion) shifts to the defendant, who must then offer evidence that is sufficient, if believed, to support a finding that the defendant had a legitimate, nondiscriminatory reason for the adverse employment decision." *Howell v. Millersville University of Pennsylvania*, 283 F. Supp. 3d 309, 323 (M.D. Pa. 2017) (quoting *Kautz v. Met-Pro Corp.*, 412 F.3d 463, 465 (3d Cir. 2005)) (internal quotation marks omitted). Because only the burden of production, but not the burden of persuasion, shifts to an employer at this point it "need not prove, however, that the proffered reasons actually motivated the employment decision." *Id*. Hytech's offered reason for Kimmy's termination is his poor job performance. Br. in Supp. of Def.'s Mot. for Summ. J., pp. 7-10.

Hytech cites to evidence in the record to support this claim. *See* Br. in Supp. of Def.'s Mot. for Summ. J., p. 7 (citing depositional testimony of David Reiser); Br. in Supp. of Def.'s Mot. for Summ. J., pp. 9-10 (citing a neuropsychological examination of Dr. Neal, listed as Def.'s Ex. B, p. 2. wherein Kimmy allegedly indicated to Dr. Neal that he was terminated for poor job performance.). This clearly satisfies Hytech's burden of production under stage two. The Court now turns to the final step of *McDonnell Douglas* to determine whether Kimmy can survive summary judgment under Rule 1035.2(2).

C. Evidence that Hytech's Stated Reason for Termination Was Pretextual

Once an employer offers a legitimate, nondiscriminatory reason for the adverse employment decision, it is incumbent on a plaintiff to "point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not [the] ... determinative cause of the employer's action." *Burton v. Teleflex Inc.*, 707 F.3d 417, 427 (3d Cir. 2013) (quoting *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)).[14, 15] Although the inquiry is distinct from the question of causation raised in the first stage of *McDonnell Douglas*, the evidence relevant to each stage may be coextensive. As the Third Circuit has explained:

> We recognize that by acknowledging that evidence in the causal chain can include more than demonstrative acts of antagonism or acts actually reflecting animus, we may possibly conflate the test for causation under the prima facie case with that for pretext. But perhaps that is inherent in the nature of the two questions being asked — which are quite similar. The question: "Did her firing result from her rejection of his advance?" is not easily distinguishable from the question: "Was the explanation given for her firing the real reason?" Both should permit permissible inferences to be drawn in order to be answered. As our cases have recognized, almost in passing, evidence supporting the prima facie case is often helpful in the pretext stage and nothing about the *McDonnell Douglas* formula requires us to ration the evidence between one stage or the other. It

[14] "The first prong involves an indirect showing of pretext, while the second prong involves a direct showing." *Proudfoot v. Arnold Logistics, LLC*, 629 Fed. App'x. 303, 307 n.4 (3d Cir. 2015) (unpublished) (citing *Josey v. Hollingsworth Corp.*, 996 F.2d 632, 638 (3d Cir. 1993)).

[15] Under Supreme Court precedent, both prongs must arguably be met to establish pretext. As Justice Scalia noted in *Hicks*, "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Hicks*, 509 U.S. at 515 (emphasis in original). The Third Circuit addressed this discrepancy in *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3d Cir. 1996) (en banc), rejecting any notion of inconsistency, explaining *Hicks* had also held "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination" *Sheridan*, 100 F.3d at 1068 (quoting *Hicks*, 509 U.S. at 511). Because the Court finds that Kimmy has shown evidence of pretext under either the standard, the Court need not directly address the issue.

> is enough to note that we will not limit the kinds of evidence that can be probative of a causal link any more than the courts have limited the type of evidence that can be used to demonstrate pretext.

Farrell, 206 F.3d at 286 (citations omitted); *see also Jalil v. Avdel Corp.*, 873 F.2d 701, 709 n. 6 (3rd Cir. 1989) ("Although this fact is important in establishing plaintiff's prima facie case, there is nothing preventing it from also being used to rebut the defendant's proffered explanation. As we have observed before, the *McDonnell Douglas* formula does not compartmentalize the evidence so as to limits its use to only one phase of the case.") (internal quotation omitted). Moreover, "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Hicks*, 509 U.S. at 511.

At the unemployment compensation hearing, Kimmy testified that Reiser never mentioned poor job performance as a reason for his discharge. Unemploy. Comp. Hr'g Tr., p. 17. Instead, according to Kimmy, he gave various other vague reasons for the termination, including that Hytech was going in a different direction, that Hytech was "slow" and did not have work for the machine he operated, and that they were done paying his medical bills. Unemploy. Comp. Hr'g Tr., pp. 17-18. At trial, a jury would be free to draw the conclusion that all, one, or some of these factors were the real reasons for Kimmy's termination. It would also be free to draw a negative inference that poor job performance was not the true motivation for Kimmy's discharge based on its noticeable absence from Reiser's purported explanation.

In Kimmy's case, the mere fact that Reiser provided multiple reasons for the discharge, alone, would not be enough to create an inference of pretext. After all, multiple legitimate and nondiscriminatory but-for causes may factor into an employer's decision to discharge an employee. Neither can minor discrepancies between proffered reasons supply the necessary showing that an employer's reasons are false. *See Hardy v. S.F. Phosphates Ltd. Co.*, 185 F.3d 1076, 1081 (10th Cir. 1999). ("Any discrepancy [in the reasons given for termination] is simply too minor to give rise to an inference of pretext."). But here, Kimmy testified that Hytech never mentioned his lack of productivity as one of the considerations that led to his firing. Umemploy. Comp. Hr'g Tr., p. 17. And according to Kimmy, the reasons it did offer were suspiciously obscure and never fully explained. In particular, Kimmy was perplexed by Reiser's comment that the company was going in a different direction. Umemploy. Comp. Hr'g Tr., pp. 17-18. Additionally, Jankowiak's continued work on the Lathe machine could be viewed as refuting Resier's characterization that work was slowing down at Hytech. Umemploy. Comp. Hr'g Tr., pp. 17-18.

Still, there is other evidence on this record which could also reasonably create a "suspicion of mendacity" in the minds of reasonable jurors as to Hytech's proffered reason for termination. *Hicks*, 509 U.S. at 511. Several inconsistencies are apparent between Kimmy's and Hytech's version of events, including, for instance, whether Kimmy was actually working to clean and organize his work area after his six-month medical leave; whether Kimmy was using his phone for a permissible, work-related reason; and whether the software issue with the Lathe machine was fixed prior to his termination. If those factual questions were to be resolved in Kimmy's favor, then the jury could also draw the conclusion that the true motivation for

Hytech's dishonesty was to obfuscate its concern over Kimmy's disability.[16] *See, e.g., Quillen v. Touchstone Medical Imaging*, 15 F. Supp.3d 774, 782 (M.D. Tenn. 2014) ("The evidence reasonably could be construed as showing that Rice wanted to create a better record to conceal his true motivation: to avoid paying additional medical bills accrued by Quillen.").

Therefore, based on this record, there is sufficient evidence from which a jury could conclude that Hytech's stated reason for the termination is false and that Hytech's desire to reduce its medical costs on account of Kimmy's heart condition was the determinative cause of his termination. *See Bielich v. Johnson & Johnson, Inc.*, 6 F. Supp.3d 589, 605 n.2 (W.D. Pa. 2014) (noting "[t]he determinative factor, or but for, test applies to Bielich's disability claims.") (internal quotation marks omitted). In other words, a jury could conclude based on this record that Hytech's claim that Kimmy was fired for poor job performance is pretextual.

Hytech argues that Kimmy's version of events is not "worthy of credence." Br. in Supp. of Def.'s Mot. for Summ. J., p. 11. It is true that courts in the Third Circuit have held that "[t]o discredit the employer's proffered reason ... the plaintiff cannot simply show that the employer's decision was wrong or mistaken ... [r]ather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.'" *Fuentes*, 32 F.3d at 765 (quoting *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 531 (3d Cir. 1992) (other citations omitted) (emphasis in original). But here, Kimmy's testimony evinces the very "weaknesses" and "incoherencies" that would allow a jury to find Hytech's reason for termination "unworthy of credence." Hytech's argument, thus, confuses which party's evidence must be "unworthy of credence" at this stage, and its invocation of the "unworthy of credence" doctrine is inapposite here.

In sum, Kimmy offers sufficient evidence to survive the third and final stage of *McDonnell Douglas*. Accordingly, Hytech is not entitled to summary judgment under Rule 1035.2(2).

IV. ANALYSIS: GENUINE ISSUES OF MATERIAL FACT UNDER RULE 1035.2(1)

Having determined that Kimmy has offered sufficient evidence necessary to prove essential facts of disability discrimination from which a reasonable jury could deliver a verdict in its favor, there is really little to be said about Hytech's claim that no genuine issue of any material fact remains to be heard by a jury. Hytech does argue certain factual questions should be resolved in its favor. *See* Def.'s Br. in Supp., p. 11 ("Reiser testified he never made statements referencing 'medical expenses' or 'training.'"); Def.'s Br. in Supp., p. 12 (noting Reiser and Jankowiak's deposition testimony indicate that "Kimmy did nothing productive at work for more than two (2) days and sixteen (16) plus hours upon his return.").

However, there are two problems with Hytech's use of such evidence as a basis for supporting summary judgment. First, such evidence constitutes oral deposition testimony, which, even if uncontradicted, would fail to establish a genuine issue of material fact under *Nanty-Glo*. *Woodford*, 243 A.3d at 69. But even putting *Nanty-Glo* aside, precisely because Kimmy offers evidence sufficient to prove all essential elements of its cause of action, Hytech's evidence to the contrary is plainly contradicted.

Each parties' evidence casts doubt on the veracity of the other's claims, including whether

[16] These inconsistencies not only call into question the possible pretext of Hytech's reason for the discharge, they also form the basis of genuine issues of material fact in Section IV, *infra*.

Kimmy met the definition of disability at the time of his termination, whether Hytech discriminated against Kimmy because of disability when it terminated his employment, and whether the legitimate and nondiscriminatory reason for the termination proffered by Hytech is pretextual. Those genuine issues of material fact, and many other material factual issues implicating each of these questions, remain very much in dispute. To resolve those questions would require the Court to wade into questions of weight and credibility about the evidence offered by Kimmy and Hytech to support their claims. This, the Court cannot do on summary judgment. Rather, such weight and credibility determinations are inherently the province of a jury to decide after hearing all admissible evidence at trial. *Lancaster Newspapers*, 926 A.2d at 906; *Ack*, 661 A.2d at 517. Because these genuine issues of material fact remain as to necessary elements of Kimmy's cause of action, Hytech is not entitled to summary judgment under Rule 1035.2(1).

V. CONCLUSION

The Court cannot say on this record that Hytech's right to summary judgment is "clear and free from all doubt." *Summers*, 997 A.2d at 1159. Kimmy has offered sufficient evidence from which a jury could deliver a favorable verdict at trial were it to find such evidence credible. Hytech offers evidence to the contrary, but this at most creates genuine issues of material fact as to the essential elements of Kimmy's cause of action, and so, a trial cannot be avoided on this record. Therefore, this Court has no choice but to deny Hytech's Motion for Summary Judgment.

It is so ordered.

BY THE COURT
/s/ **Marshall J. Piccinini, Judge**

SHYTAYA BARNES, Administratrix of the Estate of Charles Barnes, deceased; WAINE BYRD, Administrator of the Estate of Willie M. Byrd, deceased; and YVETTE JOHNSON, Administratrix of the Estate of Oscar R. Johnson, deceased

v.

HYUNDAI MOTOR COMPANY; HYUNDAI MOTOR AMERICA, INC.; HYUNDAI MOTOR MANUFACTURING ALABAMA, LLC; HYUNDAI AMERICA TECHNICAL CENTER, INC.; DELPHI AUTOMOTIVE SYSTEMS, LLC; DELPHI POWERTRAIN SYSTEMS LLC; DELPHI AUTOMOTIVE, PLC; DELPHI TECHNOLOGIES, PLC; DELPHI POWERTRAIN SYSTEMS KOREA, LTD; DAVE HALLMAN CHEVROLET, INC.; and DAVE HALLMAN HYUNDAI, INC.

CONSTITUTIONAL LAW / DUE PROCESS

Elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

CONSTITUTIONAL LAW / DUE PROCESS / NOTICE

In determining whether the requirements of due process have been satisfied, courts ask whether the state acted reasonably in selecting means likely to inform persons affected, not whether each property owner actually received notice.

BANKRUPTCY / PROCEDURE / NOTICE

If a debtor reveals in bankruptcy the claims against it and provides potential claimants with notice consistent with due process of law, then the Bankruptcy Code affords vast protections, including "free and clear" sale provisions that act as liability shield, but if the debtor does not reveal claims that it is aware of, then bankruptcy law cannot protect it.

ANTITRUST AND TRADE REGULATION / STATUTES AND REGULATIONS

Federal law requires that automakers keep records of the first owners of their vehicles, so as to facilitate recalls and other consequences of the consumer-automaker relationship.

CONSTITUTIONAL LAW / DUE PROCESS

Debtor's reckless disregard of the facts is sufficient to satisfy the requirement of knowledge, that is, that debtor knew or should have known about a claim, as required for due process to entitle potential claimants to actual notice of the bankruptcy proceedings.

CORPORATIONS / MERGERS AND ACQUISITIONS / SUCCESSOR LIABILITY

General rule is that when one company sells or transfers all of its assets to a successor company, the successor does not acquire liabilities of transferor corporation merely because of its succession to transferor's assets; however, exceptions to this rule exist when the purchaser expressly or impliedly agrees to assume such obligations, when the transaction amounts to a consolidation or merger, when purchasing corporation is merely a continuation of selling corporation, when the transaction is fraudulently entered into to escape liability, or when the transfer was without adequate consideration and provisions were not made for creditors of the transferor.

CORPORATIONS / MERGERS AND ACQUISITIONS / SUCCESSOR LIABILITY / CONTINUATION

Continuation of the enterprise is defined as existing when there is continuity of the selling

corporation's enterprise (management, personnel, physical location, assets, etc.), and when, after the transaction, the selling corporation ceases its ordinary business operations, while the successor corporation continues those operations.

CORPORATIONS / MERGERS AND ACQUISITIONS / SUCCESSOR LIABILITY / PRODUCT LINE EXCEPTION

A Court should consider the following three factors for determining strict liability under the product line exception: (1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading rule, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being employed by the successor in the continued operation of the business.

CORPORATIONS / MERGERS AND ACQUISITIONS / SUCCESSOR LIABILITY / PRODUCT LINE EXCEPTION

Where one corporation acquires all or substantially all the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor.

CORPORATIONS / MERGER AND ACQUISITIONS / SUCCESSOR LIABILITY / PRODUCT LINE EXCEPTION

Various factors will always be pertinent for example, whether the successor corporation advertised itself as an ongoing enterprise; or whether it maintained the same product, name, personnel, property, and clients; or whether it acquired the predecessor corporation's name and good will, and required the predecessor to dissolve.

CIVIL PROCEDURE / PRETRIAL PROCEDURE / PRELIMINARY OBJECTIONS

Preliminary objections challenging personal jurisdiction should be sustained only in cases which are clear and free from doubt.

CIVIL PROCEDURE / PRETRIAL PROCEDURE / PRELIMINARY OBJECTIONS

The plaintiff must sustain its burden of proof in establishing jurisdictional facts through sworn affidavits or other competent evidence.

CIVIL PROCEDURE / PRETRIAL PROCEDURE / PRELIMINARY OBJECTIONS

Pennsylvania courts have repeatedly opined in addressing a defendant's challenge to personal jurisdiction that the burden is first on the defendant, as the moving party, to object to jurisdiction. Once raised by a defendant, the burden of establishing personal jurisdiction under Pennsylvania's long arm statute is placed on the plaintiff asserting jurisdiction. Then in turn, defendant can respond by demonstrating that the imposition of jurisdiction would be unfair.

CONSTITUTIONAL LAW / DUE PROCESS

The due process clause limits the authority of a state to exercise in personam jurisdiction over nonresident defendants.

CONSTITUTIONAL LAW / DUE PROCESS

The extent to which the due process clause proscribes jurisdiction over a nonresident defendant depends on the nature and quality of the defendant's contacts with the forum state.

CONSTITUTIONAL LAW / DUE PROCESS

Where a defendant has established no meaningful contacts, ties or relations with the forum state, the due process clause prohibits the exercise of personal jurisdiction; however, where a defendant has purposefully directed his activities at the residents of the forum state, he is presumed to have fair warning that it may be called to suit there.

CIVIL PROCEDURE / PERSONAL JURISDICTION

A nonresident defendant's activities in the forum state may give rise to either specific or general jurisdiction. Personal jurisdiction can either be in the form of general (i.e. all-purpose) personal jurisdiction or specific (i.e. case-linked) personal jurisdiction.

CONSTITUTIONAL LAW / DUE PROCESS / JURISDICTION

Given that Pennsylvania's long-arm statute provides for jurisdiction based on most minimum contact with state allowed under United States Constitution, in determining whether personal jurisdiction exists under that statute, court asks whether, under Due Process Clause, defendant has certain minimum contacts with Pennsylvania such that maintenance of action does not offend traditional notions of fair play and substantial justice.

CONSTITUTIONAL LAW / DUE PROCESS / JURISDICTION

Requiring minimum contacts for specific personal jurisdiction satisfies due process by ensuring that the defendant may reasonably anticipate where it may be "haled" into court based upon which forums it has purposefully availed itself of the privilege of conducting activities. This requirement ensures that a defendant will not be subject to jurisdiction solely as a result of random, fortuitous, or attenuated contacts.

CIVIL PROCEDURE / PERSONAL JURISDICTION / SPECIFIC PERSONAL JURISDICTION

To determine whether a court has specific personal jurisdiction over a non-resident defendant, the Court should examine the following three-part test: (1) Did the plaintiff's cause of action arise out of or relate to the out-of-state defendant's forum-related contacts? (2) Did the defendant purposely direct its activities, particularly as they relate to the plaintiff's cause of action, toward the forum state or did the defendant purposely avail itself of the privilege of conducting activities therein? (3) Would the exercise of personal jurisdiction over the nonresident defendant in the forum state satisfy the requirement that it be reasonable and fair?

CIVIL PROCEDURE / PERSONAL JURISDICTION / SPECIFIC PERSONAL JURISDICTION

Specific personal jurisdiction is not as straightforward as general personal jurisdiction and requires consideration of the factual nuances of jurisdictional connections in each case.

CIVIL PROCEDURE / PERSONAL JURISDICTION / SPECIFIC PERSONAL JURISDICTION

Specific jurisdiction analysis focuses on the relationship among the defendant, the forum, and the litigation.

CIVIL PROCEDURE / PERSONAL JURISDICTION / SPECIFIC PERSONAL JURISDICTION

Specific jurisdiction involves a more limited form of submission to a State's authority, elaborating that when a defendant purposefully avails itself of the privilege of conducting activities within the forum state, it submits to the judicial power of an otherwise foreign

sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 11780 – 2019

Appearances: William J. Conway, Esq. and Erin W. Grewe, Esq., for Defendant Delphi Powertrain Systems, LLC
David L. Hunter, Esq., James W. Murray, Esq., and Thomas J. Murray, Esq. for Plaintiffs
Gerard Cedrone, Esq. and Brian P. Crosby, Esq. Defendants Hyundai Motor America, Inc., Hyundai America Technical Center, Inc., and Hyundai Motor Manufacturing Alabama, LLC;
Alex Lonnett, Esq. appeared on behalf of Defendants Dave Hallman Chevrolet, Inc. and Dave Hallman Hyundai, Inc.

OPINION AND ORDER

Domitrovich, J., June 23, 2021

Representatives of three deceased Pennsylvania residents filed this case following fatal injuries allegedly caused by Defendant DPS, LLC's component parts installed in the subject 2009 Hyundai Santa Fe vehicle sold and resold in Pennsylvania. Plaintiffs' counsel allege Defendant DPS, LLC "did business in Pennsylvania by designing, manufacturing, testing, marketing, distributing and selling component parts of the subject vehicle at issue in this case" and performed Failure Modes Effects Analyses (FMEA) on the Delphi labeled Electronic Throttle Control (Delphi ETC) System componentry in the subject 2009 Hyundai Santa Fe.[1] Plaintiffs' counsel allege, "the subject Powertrain Control Module (PCM) was supplied by Defendant Delphi Automotive Systems."[2] In December of 2017, the powertrain portion of Delphi Automotive Systems, LLC, including the PCM business, was "spun off" into Defendant DPS, LLC, a U.S. operating entity.[3]

Defendant Delphi Powertrain Systems, LLC's [hereinafter Defendant DPS, LLC] filed Preliminary Objections to Plaintiffs' First Amended Complaint [hereinafter Preliminary Objections][4] raising the threshold issue of specific personal jurisdiction and other matters.[5]

[1] Plaintiffs' First Amended Complaint at ¶ 10 on p. 7.
[2] *Id*. at ¶ 9 on p. 6.
[3] Defendant DPS, LLC's Preliminary Objections at ¶ 60; *See also* Ex. C, Declaration of Michele Compton at ¶ 11.
[4] Counsel for Defendant DPS, LLC raises four (4) Preliminary Objections pursuant to Pa.R.C.P. 1028(A)(3), 1028(A)(4) and 1019, as to lack of personal jurisdiction; legal insufficiency; expired statute of limitations; and request to dismiss punitive damages with prejudice.
[5] On August 31, 2020, Defendant DPS, LLC also filed Preliminary Objections to Defendant Dave Hallman Chevrolet [hereinafter DHC], Inc.'s "New Matter Cross Claim" with Memorandum of Law in Support. Defendant DPS, LLC's counsel argue, "[Defendant DHC, Inc.]'s Cross-Claim against Moving Defendant is derivative of those claims asserted by Plaintiffs because it is conditional upon a finding that Moving Defendant is liable to Plaintiffs." *See* Preliminary Objections to Defendant DHC, Inc.'s New Matter Cross-Claim at p. 8. Defendant DPS, LLC's counsel argue, "[i]f direct liability between Plaintiffs and Moving Defendant is eliminated ... then there is no right to contribution and/or indemnity between Moving Defendant and [Defendant DHC, Inc.]. *Id*. On October 1, 2020, Defendant DHC, Inc's counsel filed its "Brief in Opposition to Defendant [DPS, LLC]'s Preliminary Objections to

Defendant DPS, LLC raises a challenge to the exercise of specific personal jurisdiction in Pennsylvania over Defendant DPS, LLC as a Delaware corporation with offices in the states of Michigan and Indiana.

A summary of the instant case is as follows: This case concerns a triple fatality resulting from a collision occurring in Erie, Pennsylvania on July 7, 2017. Four days earlier, on or around July 3, 2017, Plaintiff Driver Oscar R. Johnson of Erie, Pennsylvania had purchased a 2009 Hyundai Santa Fe from Hallman Defendants in Erie, Pennsylvania. His two Passengers, Plaintiff Charles Barnes and Plaintiff Willie M. Byrd, were also residents of Erie, Pennsylvania.

Plaintiffs' counsel allege a "runaway throttle" defect in the subject 2009 Hyundai Santa Fe vehicle's component called the Delphi Electronic Throttle Control (Delphi ETC) System, also known as "drive-by-wire," that operates like a hard drive for a computer. When a runaway throttle condition occurs, "the central computer believes it is being commanded to generate a wide-open throttle (WOT) acceleration."[6] As the accelerator pedal is pressed, electronic signals respond through the Powertrain Control Module (Delphi PCM) or engine control unit commanding the vehicle's throttle to either open or close.[7] The Delphi ETC System is the "brains" within this Hyundai vehicle working in tandem with the Delphi PCM as a partnership.[8] The Delphi ETC System communicates with the Delphi PCM to control the acceleration of the vehicle.[9]

On July 7, 2017, Plaintiff Driver was driving his 2009 Hyundai Santa Fe with his two Plaintiff Passengers a few blocks south from his residence when they suddenly experienced a wide-open acceleration over ninety (90) miles per hour for more than thirty (30) seconds. Plaintiff Driver had "to exert significantly more force to the brake pedal to retard the vehicle's speed."[10] He managed to avoid hitting stopped vehicles but then crossed into the path of a moving semi-tractor trailer going north on Cherry Street on a green light. The semi-tractor trailer tore off the roof of the 2009 Hyundai Santa Fe, which "came to rest several hundred feet from the crash site."[11] All three Plaintiffs sustained severe bodily injuries resulting in their demise.

I. RELEVANT PROCEDURAL BACKGROUND

Plaintiffs' counsel filed a Civil Action Complaint on July 1, 2019 in Erie County Pennsylvania. On January 27, 2020, Plaintiffs' counsel filed the First Amended Complaint.[12] On March 17, 2020, Defendant DPS, LLC filed Preliminary Objections with Memorandum of

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[5 continued] Defendant [DHC, Inc.]'s New Matter Cross-Claim." Defendant DHC, Inc.'s counsel argue, "[w]hile there would be no claim for contribution or indemnification by the other Defendants if [Defendant DPS, LLC] is not found liable on the Plaintiffs' claims, dismissal of [Defendant DHC, Inc.]'s Crossclaim is currently premature because the Court has not decided [Defendant DPS, LLC]'s Preliminary Objections to the Plaintiffs' Amended Complaint." *See* Brief in Opposition to Defendant [DPS, LLC]'s Preliminary Objections to Defendant [DHC, Inc.]'s New Matter Cross-Claim at p. 4. Defendant DHC, Inc.'s counsel argue, "Indeed, if the Court overrules [Defendant DPS, LLC]'s Preliminary Objections to the Plaintiffs' Amended Complaint, then [Defendant DHC, Inc.]'s Crossclaim would be proper." *Id*. at pp. 4-5.

[6] Plaintiffs' First Amended Complaint at ¶ 22 on p. 12.

[7] N.T.: *Defendant DPS, LLC's Preliminary Objections*, July 9, 2020, 20:15-19; *See also* Plaintiffs' First Amended Complaint at ¶ 21-22 on p. 12.

[8] N.T.: *Defendant DPS, LLC's Preliminary Objections*, July 9, 2020, 41:2-4.

[9] Exhibit 6, filed under seal per this Trial Court's Protective Order.

[10] Plaintiffs' First Amended Complaint at ¶ 24 on p. 11.

[11] *Id*. at ¶ 19 on p. 11.

[12] As a result of Preliminary Objections filed by counsel for various Defendants, Plaintiffs' counsel agreed to file an Amended Complaint.

Law. On June 3, 2020, Argument/Hearing on Defendant DPS, LLC's Preliminary Objection was scheduled for July 9, 2020. On June 26, 2020, Plaintiffs' counsel filed Plaintiffs' Answer to Preliminary Objections with Memorandum of Law. On July 2, 2020, Defendant DPS, LLC filed its Reply in Support of Their Preliminary Objections.

After extensive argument on July 9, 2020, this Trial Court agreed to continue argument on Defendant DPS, LLC's Preliminary Objections for ninety (90) days, to the new re-argument date of October 7, 2020. Plaintiffs' counsel agree to work with Defendant DPS, LLC's counsel to obtain additional discovery information to ascertain the correct identity of the manufacturer, designer, supplier, tester, and/or possible quality control party of the ETC System and PCM system. On July 15, 2020, counsel signed a Confidentiality Stipulation, and this Trial Court signed a Protective Order as to "all confidential documents" and corresponding information.

On October 7, 2020, this Trial Court heard argument. Plaintiffs' counsel requested an additional ninety (90) day discovery period to locate other necessary information to ascertain the correct identity of the manufacturer, designer, supplier, tester, and/or the entity responsible for quality control regarding the ETC System and PCM System. The agreed upon new re-argument date was December 9, 2020. Counsel for Plaintiffs and Defendant DPS, LLC agreed to file Supplemental Memoranda addressing Jurisdictional Discovery.

On November 20, 2020, Plaintiffs' counsel filed Supplemental Memorandum of Law. On December 2, 2020, Defendant DPS, LLC filed Supplemental Brief. On December 9, 2020, this Trial Court heard argument. Counsel agreed Defendant DPS, LLC is not subject to general personal jurisdiction under Pennsylvania law. Counsel agreed the issue in the instant case is specific personal jurisdiction, not general personal jurisdiction. At the request of counsel, this Trial Court continued argument to the new date of January 19, 2021.

On January 14, 2021, Defendant DPS, LLC filed its Supplemental Brief based on Lack of Personal Jurisdiction. On January 19, 2021, this Trial Court heard argument from counsel. With consent of counsel, this Trial Court held in abeyance Defendant DPS, LLC's Preliminary Objections pending decision by the U.S. Supreme Court in the consolidated appeals of *Ford Motor Co. v. Bandemer and Ford Motor Co. v. Montana Eighth Judicial District Court*, 592 U.S. ___, 141 S. Ct. 1017 (2021). This Trial Court scheduled a Status Conference for April 12, 2021.

This Trial Court held a Status Conference on April 12, 2021, to discuss the status of the consolidated *Ford* case, which was decided on March 25, 2021. Counsel agreed to submit to this Trial Court Supplemental Briefs regarding specific personal jurisdiction. Defendant DPS, LLC's counsel agreed to submit Supplemental Brief by April 15, 2021. Plaintiffs' counsel agreed to submit Supplemental Response Brief by April 22, 2021. This Trial Court scheduled argument for April 26, 2021.

On April 15, 2021, Defendant DPS, LLC filed Second Supplemental Brief based on Lack of Specific Personal Jurisdiction. On April 22, 2021, Plaintiffs' counsel filed Second Supplemental Memorandum of Law. On April 26, 2021, this Trial Court heard argument from counsel.

II. FACTS ADDUCED IN JURISDICTIONAL DISCOVERY

On November 20, 2020, Plaintiffs' counsel filed a Supplemental Memorandum of Law in Opposition to Preliminary Objections, with an extensive Exhibits List. Plaintiffs' counsel assert, "Although the Plaintiffs submitted thorough, targeted jurisdictional discovery, the

Delphi Defendants did not produce any documents in response thereto."[13] Plaintiffs' counsel indicate Defendant DPS, LLC "objected to most requests."[14]

1. Plaintiffs' counsel state:
   a. "Delphi repeatedly admits that 'Old Delphi' designed the hardware and software for the subject PCM and validated the PCM, pursuant to the specifications of Hyundai, at Old Delphi's facility in Kokomo, Indiana."[15]
   b. "It is undisputed that a Delphi entity, or entities, supplied and/or manufactured the [ETC System] componentry and the powertrain system for the subject vehicle."[16] The photographs below of stickers in the instant case on Plaintiff Johnson's engine control unit/PCM, clearly state "Delphi" in addition to the Hyundai and Kia company logos.[17]

[13] Plaintiffs' Supplemental Memorandum of Law at p. 2.
[14] *Id.*
[15] *Id.* at p. 5; *See also* Ex. 2, *Defendant DPS, LLC's Answers to Interrogatories* at No. 24 on pp. 22-25.
[16] Plaintiffs' Supplemental Memorandum of Law at p. 4; *See also* Ex. 1, *Defendant DPS, LLC's Answers and Objections* pp. 1-2 under "Prefatory Statement"; *See also* Ex.5 Figure 1 and Ex. 6, both filed under seal per this Trial Court's Protective Order.
[17] Plaintiffs' Supplemental Memorandum of Law at pp. 3-4.

c. "Plaintiffs have uncovered evidence that indicates specific issues, problems, and potential defects with this 'Delphi' componentry."[18] As an example, Plaintiffs' counsel indicate, "Hyundai Defendants' Technical Service Bulletin (TSB) specifically references ETC System Malfunction."[19] "Delphi Defendants designed and produced the relevant throttle position sensor (TPS) in addition to the ECM referenced in this TSB and equipped in the subject vehicle."[20]

d. "Further evidence of Delphi's involvement in the subject ETC system regarding the identity of the manufacturer, designer, supplier, tester, [and] the entity responsible for quality control of the Electronic Control Throttle (ETC) System is found in documents provided in discovery by the Hyundai Defendants that prominently contain the 'Delphi' name."[21]

e. Defendant HMC produced documentation that Delphi: "conducted the Failure Mode Effects Analysis (FMEA) on Lambda ETC; produced the calibration guideline for the ETC integrated Cruise Control System; [and] produced and supplied numerous components for the subject Hyundai Lambda engine system. This diagram specifically highlights the [PCM], [ETC System], throttle body and throttle position sensor(s) in blue — indicating they are Delphi Components."[22]

f. Plaintiffs provided evidence Defendant DPS, LLC, continue to have facilities at Brighton and Troy, Michigan; Rochester, Michigan; and Kokomo, Indiana at the time of the subject incident and in some circumstances until the present date.[23]

g. "The Hyundai original equipment manufacturer (OEM) and Hyundai's tier one component supplier, the Delphi Defendants, recognize that the market for their products, including the Subject Vehicle and other vehicles like it, is global.[24] In its State of Nevada Tax Abatement form, Delphi Automotive Systems, LLC as a wholly-owned subsidiary of Aptiv PLC "described itself as a company that designs and manufactures products **'worldwide'**":

> Delphi Automotive Systems, LLC is an Adtiv PLC Company. Aptiv PLC is a global technology company that develops safer, greener, and more connected solutions, which enable the future of mobility and provides leading automated driving solutions. The company designs, engineers and manufacturers a comprehensive line of high-quality and innovative connectors and connection systems for various industries and product segments. The company is headquartered in Gillingham, Kent, UK. With offices worldwide, Aptiv PLC operates manufacturing sites, 14 technical centers, and customer centers across

[18] *Id*. at p. 5.
[19] *Id*.; *See also* Ex. 3, *Hyundai Defendants' Technical Service Bulletin (TSB 10-FL-010) related to "TPS Replacement & ECM Update" and ETC System Malfunction*. [hereinafter Hyundai Defendants' TSB]
[20] Plaintiffs' Supplemental Memorandum of Law at p. 5.
[21] *Id*.
[22] *Id*. at p. 5-6; *See also* Ex. 4-6, filed under seal per this Trial Court's Protective Order.
[23] Plaintiffs' Supplemental Memorandum of Law at p. 6.
[24] *Id*. at p. 9; *See also* Plaintiffs' Memorandum of Law at p. 21; *See also Ex. 3, Hyundai Defendants' TSB*.

> 45 countries. **Delphi Automotive Systems, LLC provides products and services worldwide.** The company designs and engineers a variety of automotive systems and components including **fuel cells, entertainment systems, sensors, powertrain systems, driver interfaces, and security devices.**[25]

h. "Even though [Defendant] DPS, LLC admits its predecessor 'Old Delphi' supplied the at issue PCM for this vehicle, and the PCM was equipped in numerous other Santa Fe vehicles sold in Pennsylvania, it nevertheless provided neither any data in response to questions concerning the number of vehicles containing this PCM that were sold in Pennsylvania nor any documentation of the same."[26]

III. COUNSEL'S ARGUMENTS

Defendant DPS, LLC's counsel argue and state the following: Defendant DPS, LLC is incorporated under Delaware laws, not Pennsylvania laws, and Defendant DPS, LLC is not registered to do business within Pennsylvania. Defendant DPS, LLC does not own or lease property in Pennsylvania; does not maintain a place of business or any real property in Pennsylvania; does not maintain a mailing address or phone number in Pennsylvania; and has never held a bank account in Pennsylvania.[27] Defendant DPS, LLC does not advertise or sell Delphi PCM or Delphi ETC modules "for Hyundai vehicles or any other original equipment manufacturer vehicles in Pennsylvania."[28] The subject "PCM was supplied by Defendant Delphi Automotive Systems LLC (no comma) (hereinafter 'Old Delphi')" — "a separate and distinct entity from Moving Defendant."[29] "The subject ETC was manufactured and supplied by Delphi Powertrain ... Systems Korea LLC."[30]

Counsel for Defendant DPS, LLC indicates that on October 8, 2005 and on October 24, 2005, "Delphi Corporation and most of its U.S.-based affiliates, including Old Delphi, filed for Chapter 11 bankruptcy."[31] On July 30, 2009, Bankruptcy Court entered an Order known as the "Modification Approval Order" that approved Debtor's First Amended Joint Plan of Reorganization known as the "Modified Plan." The effective date of the Modified Plan was October 6, 2009, which is after the subject 2009 Hyundai Santa Fe was manufactured. Debtor's assets, including the estate of Old Delphi, were sold under a Master Disposition Agreement ("MDA") to an affiliate of General Motors Company and a newly formed company owned primarily by Debtors' debtor-in-possession lenders. "Because the 'Delphi' name was one of the assets sold by the Debtors under the MDA to the newly formed company, the Debtors effectuated a series of name changes in connection with the closing of the transactions under the Modified Plan and MDA."[32] "It is clear from the Modification Approval Order and MDA that the purchase of Old Delphi's assets was made 'free and

[25] Plaintiffs' Memorandum of Law at p. 21; *See also* Ex. 3, *Delphi Automotive Systems, LLC Board Summary*.
[26] Plaintiffs' Supplemental Memorandum of Law at pp. 9-10.
[27] Defendant DPS, LLC's Preliminary Objections at ¶¶ 18, 22; *See also* Ex. C, *Declaration of Michele Compton* at ¶¶ 14, 16.
[28] Defendant DPS, LLC's Preliminary Objections at ¶ 24; *See also* Ex. C, *Declaration of Michele Compton* at ¶ 18.
[29] Ex. C, *Declaration of Michele Compton* at ¶ 5; *See also* Defendant DPS, LLC's Preliminary Objections at ¶ 39.
[30] Defendant DPS, LLC's Preliminary Objections at ¶ 40; *See also* Ex. C, *Declaration of Michele Compton* at ¶ 20.
[31] Defendant DPS, LLC's Preliminary Objections at ¶ 54; *See also* Ex. C, *Declaration of Michele Compton* at ¶ 6.
[32] Defendant DPS, LLC's Preliminary Objections at ¶ 56; *See also* Ex. C, *Declaration of Michele Compton* at ¶ 8.

clear of all liens, claims, encumbrances, and other interests,' 'including, but not limited to, claims otherwise arising under doctrines of successor liability and related theories; any product liability or similar Claims' for products manufactured or designed on or before October 9, 2009."[33] The assets of Old Delphi were transferred to Delphi Automotive Systems, LLC. Then, in December 2017, the powertrain portion of Delphi Automotive Systems, LLC (includes the PCM business) was "spun off" into Defendant DPS, LLC as a newly, separate U.S. entity.[34] "Thus, Moving Defendant, took over the operation of the powertrain systems segment of the former business."[35]

To the contrary, Plaintiffs' counsel argue and state, "The Court should reject Delphi's attempt to invoke the bankruptcy bar because Plaintiffs had no notice of the bankruptcy proceedings and, therefore, are not bound by it."[36] Liability of Old Delphi for injuries caused by its defective products passed to New Delphi under Pennsylvania successor liability. In 2009, Bankruptcy Court approved the sale of assets of Old Delphi to New Delphi as to free and clear of property interests, but only **"if various conditions are met."**[37] (emphasis added) The Order further provides New Delphi shall have no successor or vicarious liability with respect to the obligations of the Old Delphi **"arising prior to the Closing."**[38] Therefore, Plaintiffs' counsel argue Defendant DPS, LLC's attempt to invoke the bankruptcy bar should be rejected because the Bankruptcy Court Order "applies only to liability arising prior to the Closing."[39] Undisputedly the accident in the instant case occurred on July 7, 2017, approximately eight (8) years after the Bankruptcy Closing.[40] Plaintiffs' counsel argue, "courts have held that the bar of bankruptcy effected both by discharge and by 'free and clear' sales of assets applies only to 'claims' that exist as of the date of the filing of the bankruptcy petition."[41] Plaintiffs' counsel point to *In re Grossman's Inc.* which states, the term claim should be given the broadest available definition and discharge does not apply to all potential future tort claimants without proper due process notice according to the Fourteenth Amendment.[42]

Further, Plaintiffs' counsel argue the product-line exception applies where the successor corporation, Defendant DPS, LLC, acquires all or substantially all the manufacturing assets of the selling corporation, Old Delphi, with essentially the same manufacturing operation as the selling corporation.[43] Therefore, the successor corporation, Defendant DPS, LLC, is strictly liable for injuries caused by defects in units of the same product line, Delphi ETC and Delphi PCM, even if the product line was previously manufactured and distributed by the selling corporation, Old Delphi.[44] Plaintiffs' cause of action occurred in 2017; therefore, Plaintiffs

[33] Defendant DPS, LLC's Preliminary Objections at ¶ 58; *See also* Ex. D, *Modified Approval Order* at p. 18-19; *See also* Ex. C, *Declaration of Michele Compton* at ¶ 10.
[34] Defendant DPS, LLC's Preliminary Objections at ¶ 60; *See also* Ex. C, *Declaration of Michele Compton* at ¶ 11.
[35] Defendant DPS, LLC's Preliminary Objections at ¶ 61; *See also* Ex. C, *Declaration of Michele Compton* at ¶ 12.
[36] Plaintiffs' Memorandum of Law at p. 9.
[37] *Id*.
[38] *Id*. at p. 10; *see also In re Delphi Corp.*, No. 05-44481 (RDD), 2009 Bankr. LEXIS 4663 at *70.
[39] Plaintiffs' Memorandum of Law at p. 10.
[40] Defendant DPS, LLC's Supplemental Brief at p. 5.
[41] *Id*.
[42] *Id*. at p. 10-11; *see also Jeld-Wen, Inc. v. Van Brunt (In re Grossman's Inc.)*, 607 F.3d 114, 121 (3d. Cir. 2010).
[43] Plaintiffs' Memorandum of Law at p. 12.
[44] *Id*. at p. 13, citing *Schmidt v. Boardman Co.*, 11 A.3d 924 at 929; *Keselyak v. Reach All, Inc.*, 660 A. 2d 1350, 1353 (Pa Super. 1995) (quoting *Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 431 A.2d 811, 825 (N.J. 1981); *Dawejko v. Jorgensen Steel Co.*, 434 A.2d 106, 109 (Pa. Super 1981).

had no notice of the bankruptcy proceedings.[45] Since the Bankruptcy Court's approval of the sale of assets by Old Delphi to New Delphi did not extinguish Plaintiffs' claims, Defendant DPS, LLC is liable under Pennsylvania's product-line successor liability rule.[46]

Furthermore, Plaintiffs' counsel argue specific personal jurisdiction exists over Defendant DPS, LLC since the entity "is now carrying on the business of the powertrain systems segment in the United States."[47] Due to Defendant DPS, LLC manufacturing powertrains for purchase in every state in the union, including Pennsylvania, Defendant DPS, LLC "has purposely availed itself of the privilege of doing business in Pennsylvania."[48]

In Reply, counsel for Defendant DPS, LLC argue Plaintiffs' counsel has not established Defendant DPS, LLC's "specific requisite contacts with Pennsylvania regarding the subject products at issue."[49] Further, "merely placing a part into the stream of commerce, even with knowledge that the part could end up in Pennsylvania, is insufficient to confer personal jurisdiction."[50] Pennsylvania law should not apply to the issue of successor non-liability because Defendant DPS, LLC "formed and existing under the laws of Delaware" and Old Delphi "filed for Chapter 11 bankruptcy in a federal bankruptcy court in the state of New York."[51] Further, "the Modified Plan is governed by the laws of the State of New York" under the choice of law provision.[52]

IV. ANALYSIS

A. Bankruptcy and Products Liability

Assuming New York Law applies, this Trial Court finds the recent decision by the Second Circuit of the U.S. Court of Appeals in the case of *In Matter of Motors Liquidation Co.* is pertinent. *In Matter of Motors Liquidation Co.* involves vehicle owners' claims of defective ignition switches against a successor corporation that bought seller's assets in Bankruptcy Court. Successor corporation moved to enforce "free and clear" language as to liens while vehicle owner claimants objected to enforcement due to lack of due process.

Said bankruptcy filed in June of 2009 involved the largest U.S. automobile manufacturer, General Motors (GM). Second Circuit Court Judge Chin of the U.S. Court of Appeals in New York, New York, on behalf of a three-judge panel writes, "Beginning in February 2014, New GM began recalling cars due to a defect in their ignition switches. The defect was potentially lethal: while in motion, a car's ignition could accidentally turn off, shutting down the engine, disabling power steering and braking, and deactivating the airbags."[53] Judge Chin indicates, "Many of the cars in question were built years before the GM bankruptcy, but individuals claiming harm from the ignition switch defect faced a potential barrier created by the bankruptcy process. In bankruptcy, Old GM had used 11 U.S.C. § 363 of the Bankruptcy Code (the 'Code') to sell its assets to New GM 'free and clear.' In plain terms, where individuals might have had claims against Old GM, a 'free and clear' provision in

[45] Plaintiffs' Memorandum of Law at p. 9.
[46] *Id*. at p. 13.
[47] *Id*. at p. 14; *See also* Ex. C, *Declaration of Michele Compton* at ¶ 11.
[48] Plaintiffs' Memorandum of Law at p. 14.
[49] Defendant DPS, LLC's Reply at p. 2.
[50] *Id*.
[51] *Id*. at p. 7.
[52] *Id*.
[53] *In Matter of Motors Liquidation Co.,* 829 F.3d 135, 143 (2d Cir. 2016).

the bankruptcy court's sale order (the 'Sale Order') barred those same claims from being brought against New GM as the successor corporation."[54]

The claimants in the case of *In Matter of Motors Liquidation Co.* began class action lawsuits against New GM, initiating claims of "successor liability" for damages resulting from ignition switch defects and other defects. Undisputedly, the Bankruptcy Court found claimants did not receive the required notice under the Due Process Clause of the Fifth Amendment. However, counsel for New GM asserted the "free and clear" provision in the Bankruptcy Court's Sale Order to prevent claimants from bringing their lawsuits against New GM.

Judge Chin further explains, "'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"[55] "Courts ask 'whether the state acted reasonably in selecting means likely to inform persons affected, not whether each property owner actually received notice.'"[56]

Judge Chin further elaborates, "If a debtor reveals in bankruptcy the claims against it and provides potential claimants notice consistent with due process of law, then the Code affords vast protections. Both § 1141(c) and § 363(f) permit 'free and clear' provisions that act as a shield against liability. These provisions provide enormous incentives for a struggling company to be forthright. But if a debtor does not reveal claims that it is aware of, then bankruptcy law cannot protect it. Courts must 'limit the opportunity for a completely unencumbered new beginning to the honest but unfortunate debtor.'"[57] Thus, where Old GM knew or reasonably should have known about the ignition switch defect and provided no due process or notice to the vehicle owners, purchasers of the New GM became at risk for successor liability claims by vehicle owners.

Judge Chin further explains that federal law requires automakers to maintain records of the first vehicle owners for recalls as per the consumer-automaker relationship. Therefore, Judge Chin states, "Thus, to the extent that Old GM knew of defects in its cars, it would also necessarily know the identity of a significant number of affected owners."[58] However, Judge Chin opines, "The facts paint a picture that Old GM did nothing, even as it knew that the ignition switch defect impacted consumers. From its development in 1997, the ignition switch never passed Old GM's own technical specifications. Old GM knew that the switch was defective, but it approved the switch for millions of cars anyway."[59]

Moreover, Judge Chin states, "Even assuming the bankruptcy court erred in concluding that Old GM knew, Old GM — if reasonably diligent — surely should have known about the defect. Old GM engineers should have followed up when they learned their ignition switch did not initially pass certain technical specifications. Old GM lawyers should have followed up when they heard disturbing reports about airbag non-deployments or moving

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[54] *Id.*
[55] *Id.* at 158 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).
[56] *In Matter of Motors Liquidation Co.,* 829 F.3d at 158 (quoting *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988)).
[57] *In Matter of Motors Liquidation Co.*, 829 F.3d at 159 (quoting *Grogan v. Garner*, 498 U.S. 279, 286-287 (1991); *See also Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).
[58] *In Matters of Motors Liquidation Co.,* 829 F.3d at 159.
[59] *Id.*

stalls. Old GM product safety teams should have followed up when they were able to recreate the ignition switch defect with ease after being approached by NHTSA. If any of these leads had been diligently pursued in the seven years between 2002 and 2009, Old GM likely would have learned that the ignition switch defect posed a hazard for vehicle owners."[60] "Such 'reckless disregard of the facts [is] sufficient to satisfy the requirement of knowledge.'"[61]

Judge Chin remarks, "[this] GM bankruptcy was extraordinary because a quick § 363 sale was required to preserve the value of the company and to save it from liquidation. *See* New GM Br. 34 ('Time was of the essence, and costs were a significant factor.'). Forty days was indeed quick for bankruptcy and previously unthinkable for one of this scale. While the desire to move through bankruptcy as expeditiously as possible was laudable, Old GM's precarious situation and the need for speed did not obviate basic constitutional principles. Due process applies even in a company's moment of crisis."[62]

In the instant case, as in the Second Circuit Court of Appeals case of *In Matter of Motors Liquidation Co.*, a selling corporation known as "Old Delphi" manufactured and supplied the subject PCM and ETC prior to filing for Chapter 11 Bankruptcy in 2009.[63] Plaintiffs' counsel provided evidence indicating "specific issues, problems, and potential defects" with the Delphi PCM and Delphi ETC.[64] Just as in *In Matter of Motors Liquidation Co.*, the subject 2009 Hyundai Santa Fe vehicle was manufactured prior to Old Delphi's bankruptcy proceedings as admitted by counsel for Defendant DPS, LLC.[65]

Further, Old Delphi's assets were sold "free and clear" of claims "arising prior to the Closing" of the bankruptcy action, "[e]xcept where expressly prohibited under applicable law."[66] This Trial Court recognizes vast protections exist by law for a successor corporation if a selling corporation reveals to the Bankruptcy Court any present or future claims that could be brought against the successor corporation by providing notice to potential claimants of the bankruptcy proceedings. However, if the selling corporation does not provide such information to the bankruptcy court and claimants do not receive proper notice of the bankruptcy proceedings, then the "free and clear provisions" cannot protect the successor corporation from claims that the selling corporation knew or should have known could be brought against the successor corporation.

Old Delphi as the selling corporation should have provided notice of the bankruptcy proceedings to the first owners of the Hyundai vehicles wherein the Delphi PCM and Delphi ETC had been installed. However, in the instant case, "Plaintiffs had no notice of the bankruptcy proceedings."[67] If Old Delphi had provided such notice, then New Delphi, Defendant DPS, LLC, would have been protected as the successor corporation from liability. Old Delphi, the selling corporation, knew or reasonably should have known about the Delphi ETC and Delphi PCM defects but provided no due process or notice to the owners of these

[60] *Id.* at 160.
[61] *Id.* (quoting *McGinty v. State*, 193 F.3d 64, 70 (2d. Cir. 1999)).
[62] *In Matter of Motors Liquidation Co.*, 829 F.3d at 161 (citing *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934)).
[63] Defendant DPS, LLC's Preliminary Objections at ¶¶ 39-40, 52; *See also* Ex. C, *Declaration of Michele Compton* at ¶¶ 5, 20.
[64] Plaintiffs' Supplemental Memorandum of Law at p. 5; *See also* Ex. 3, *Hyundai Defendants' TSB*.
[65] Defendant DPS, LLC's Preliminary Objections at ¶ 55.
[66] *Id.* at ¶ 58; *See also* Plaintiffs' Memorandum of Law at p. 10; *See also* Ex. 2, *Master Disposition Agreement* p. 107.
[67] Plaintiffs' Memorandum of Law at p. 9.

vehicles. Therefore, the successor corporation of Old Delphi, that is, Defendant DPS, LLC, became at risk for liability to the Plaintiffs. Defendant DPS, LLC cannot avail itself as a shield against successor liability to avoid potential claims of Plaintiffs where Plaintiffs received no notice of Old Delphi's bankruptcy proceedings.

In the alternative, this Trial Court will now address the applicability of the Federal District Court case from the Southern District of New York, *In re Grumman Olson Indus., Inc.* as cited and argued by Plaintiffs' counsel.[68] The Honorable J. Paul Oetken states, "This case ultimately turns on the potential reach of a Section 363 'free and clear' sale order to extinguish a claim against a purchaser that is based on pre-bankruptcy conduct of the debtor that did not cause any harm to an identifiable claimant until after the bankruptcy closed."[69] Judge Oetken points to the Second Circuit's explanation of the breadth of the term claim: "'Congress unquestionably expected this definition to have wide scope' so that 'all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.'"[70] Judge Oetken emphasizes that in the context of § 363 sales, "[n]otice is the cornerstone underpinning Bankruptcy Code procedure.'"[71]

Judge Oetken describes how claimants' "due process rights would be violated because not only did they not receive notice of the bankruptcy, but there was no future claims representative or any provisions made for future claimants."[72] However, Judge Oetken reasons, "Either way, the fact remains that there was not a future claims representative in this case, or any provisions made for unrepresented future claimants"[73] Accordingly, Judge Oetken opines claimants as well as other future claimants in their position "were not afforded either the notice and opportunity to participate in the proceedings or representation in the proceedings that due process would require in order for them to be bound by the Bankruptcy Court's orders."[74]

In the instant case, since Plaintiffs' claims occurred after the Bankruptcy Court's confirmation of Old Delphi's Modification Plan and Bankruptcy Closing, Plaintiffs can be viewed as future tort claimants. While the term claim is given the broadest available definition, liability to all potential future tort claimants cannot be discharged without proper notice under the Fourteenth Amendment. The Bankruptcy bar under Old Delphi's Modification Plan applies only to liability "arising prior to the Closing." The collision on July 7, 2017 involving the subject Hyundai vehicle did not occur until long after the Bankruptcy Closing. Therefore, since Plaintiffs did not receive proper notice of the Bankruptcy proceedings and also were not represented in the proceedings as future tort claimants, Plaintiffs' claims are not barred or bound by the "free and clear" provisions of the Bankruptcy Closing.

Assuming Pennsylvania law applies, this Trial Court will now address the applicability of

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[68] In the underlying bankruptcy case of *In re Grumman Olson Indus., Inc.*, the Bankruptcy Court discusses two categories of future tort claims. The first category encompasses individuals "who had pre-petition physical contact with or exposure to the debtor's product but have not yet manifested symptoms or discovered their injury." The second category are individuals "injured after consummation of an asset sale or confirmation of a plan as a result of a defective product manufactured and sold by the debtor prior to the bankruptcy." *In re Grumman Olson Indus., Inc.*, 445 B.R. 243, 251 (Bank. S.D.N.Y. 2011).

[69] *In re Grumman Olson Indus., Inc.*, 467 B.R. 694, 703 (S.D.N.Y. 2012).

[70] *Id.* at 704 (quoting *In re Chateaugay Corp.*, 944 F.2d 997, 1003 (2d Cir.1991); *See also* H.R. Rep No. 595, 95th Cong., 2d Sess. 309 (1978)).

[71] *In re Grumman Indus., Inc.*, 467 B.R. at 706 (quoting *In re Savage Indus., Inc.*, 43 F.3d 714, 720 (1st Cir.1994)).

[72] *In re Grumman Indus., Inc.*, 467 B.R. at 710.

[73] *Id.*

[74] *Id.*

Pennsylvania case law as in *Dawejko v. Jorgenson Steel Co.* Generally, Pennsylvania law recognizes that when the selling corporation sells or transfers all of its assets to a successor corporation, that successor corporation does not acquire liabilities of the selling corporation simply due to acquiring the selling corporation's assets.[75] Exceptions to this general rule exist when one of the following is shown: "(1) the purchaser expressly or impliedly agrees to assume such obligation; (2) the transaction amounts to a consolidation or merger; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is fraudulently entered into to escape liability."[76]

Applying third exception, the product line exception, to the instant case, this Trial Court must assess whether the successor corporation, Defendant DPS, LLC, is a mere continuation of the selling corporation, Old Delphi. Continuation of the enterprise is defined as "existing when there is continuity of the [selling] corporation's enterprise (management, personnel, physical location, assets, etc.), and when, after the transaction, the [selling] corporation ceases its ordinary business operations, while the successor corporation continues those operations."[77] Under the product line exception, "the successor corporation remains strictly liable in tort for the defective products of [the selling corporation]."[78] In 1981, the Pennsylvania Superior Court in *Dawejko* stated the successor corporation is strictly liable for injuries caused by products in the same product line that are defective where the successor corporation acquires the assets of the selling corporation and undertakes the same manufacturing operation.[79] The Court in *Dawejko* cited to the *Ray v. Alad Corp.* three-part test for determining strict liability under the product line exception:

> (1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading rule, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being employed by the successor in the continued operation of the business.[80]

Additionally, a court is to consider:

> Where one corporation acquires all or substantially all the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor.[81]

[75] *Dawejko v. Jorgenson Steel Co.*, 434 A.2d 106, 107 (Pa. Super. 1981).
[76] *Id.* (citing *Granthum v. Textile Machine Works*, 326 A.2d 449 (Pa. Super. 1974)).
[77] *Dawejko*, 434 A.2d at 108-109.
[78] *Berg Chilling Systems, Inc. v. Hull Corp.*, 435 F.3d 455, 465 (3d Cir. 2006).
[79] *Dawejko*, 434 A.2d at 110 (citing *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332, 358 (1981)).
[80] *Dawejko*, 434 A.2d at 109 (quoting *Ray v. Alad Corp.*, 19 Cal. 3d 22, 30-31 (1977)).
[81] *Dawejko*, 434 A.2d at 110 (quoting *Ramirez*, 86 N.J. at 358).

Further the Court in *Dawejko* took note of various sets of relevant factors developed in the courts of other jurisdictions as pertinent to the imposition of liability on the successor corporation:

> [F]or example, whether the successor corporation advertised itself as an ongoing enterprise, [ ]; or whether it maintained the same product, name, personnel, property, and clients, [ ]; or whether it acquired the predecessor corporation's name and good will, and required the predecessor to dissolve, [ ].[82]

In 2011, the Supreme Court of Pennsylvania in *Schmidt v. Boardman Co.* recognized the above *Ray* three-part test as stated in *Dawejko* as "non-mandatory" in the product line exception application. Further, the Supreme Court of Pennsylvania verified the validity of the "operative *Dawejko* language, and the various factors identified in *Dawejko* were identified as criteria which are 'also used' in the product-line assessment."[83]

By applying the product line exception in the instant case, Plaintiffs' remedies would be virtually destroyed by Defendant DPS, LLC's acquisition of the business and operation of Old Delphi. Defendant DPS, LLC accepted responsibility of Old Delphi's future tort claims by assuming Old Delphi's "risk-spreading rule" when Defendant DPS, LLC became a successor corporation to Old Delphi. Defendant DPS, LLC accepted the responsibility and liability for defective products, such as Delphi PCM and Delphi ETC, which necessarily attached to Old Delphi's good will. Therefore, it is fair to conclude that by continuing the business and operation of Old Delphi, Defendant DPS, LLC would be liable under Pennsylvania's product-line successor liability rule. The Bankruptcy Court's approval of the sale of assets by Old Delphi to Defendant DPS, LLC did not extinguish Plaintiffs' claims and the product line exception applies.

Moreover, in the instant case, Defendant DPS, LLC continues to carry on the business of the powertrain systems segment in the U.S. When Defendant DPS, LLC, in 2017, acquired the operation of the powertrain systems segment of Old Delphi, Defendant DPS, LLC accepted the responsibility of the operations of the powertrain systems segment of Old Delphi in the U.S. as per its counsel, Michele Compton, in her Declaration. The liability of Old Delphi for injuries caused by its defective products were the continued responsibility of Defendant DPS, LLC under Pennsylvania successor liability. As the successor corporation, Defendant DPS, LLC, therefore, can be held strictly liable in tort for the defective Delphi ETC and defective Delphi PCM of the selling corporation, Old Delphi.

B. Specific Personal Jurisdiction

Under Pennsylvania Rule of Civil Procedure 1028, "(a) Preliminary objections may be filed by any party to any pleading and are limited to the following grounds: (1) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint ... ." Case law clearly indicates, "when deciding a motion to dismiss for lack of personal jurisdiction, the court must consider the

[82] *Dawejko, 434 A.2d at 111.*
[83] *Schmidt v. Boardman Co.*, 608 Pa. 327, 361 (2011).

evidence in the light most favorable to the non-moving party."[84] "Preliminary objections challenging personal jurisdiction 'should be sustained only in cases which are clear and free from doubt.'"[85] As aptly stated under federal law, "the plaintiff must sustain its burden of proof in establishing jurisdictional facts through sworn affidavits or other competent evidence."[86]

Hammons v. Ethicon is the leading Pennsylvania Supreme Court case involving specific personal jurisdiction. In *Hammons*, our Pennsylvania Supreme Court states, "Pennsylvania courts have repeatedly opined in addressing a defendant's challenge to personal jurisdiction that the burden is first on the defendant, as the moving party, to object to jurisdiction."[87] Furthermore, "once raised by a defendant, the burden of establishing personal jurisdiction under Pennsylvania's long arm statute is placed on the plaintiff asserting jurisdiction."[88] Then in turn, "defendant can respond by demonstrating that the imposition of jurisdiction would be unfair."[89] The Supreme Court in Hammons acknowledges, "this practice is consistent with federal jurisprudence" and cites to 4 Federal Practice & Procedure Civil § 1069, which provides "[T]he plaintiff initially bears the burden of showing that the defendant purposefully directed its activities at residents of the forum state, and that the claim arises out of or relates to those activities. The defendant then bears the burden of showing that, in light of other factors, the assertion of jurisdiction would be unreasonable or unfair."[90]

The Pennsylvania Superior Court in the relevant case of *Fulano v. Fanjul Corp.* explains: "The Due Process Clause of the Fourteenth Amendment to the United States Constitution limits the authority of a state to exercise in personam jurisdiction over nonresident defendants."[91] "The extent to which the Due Process Clause proscribes jurisdiction depends on the nature and quality of the defendant's contacts with the forum state."[92] "Where a defendant 'has established no meaningful contacts, ties or relations' with the forum, the Due Process Clause prohibits the exercise of personal jurisdiction."[93] "'A defendant's activities in the forum [s]tate may give rise to either specific or general jurisdiction.'"[94]

Personal jurisdiction can either be in the form of general (i.e. all-purpose) personal jurisdiction or specific (i.e. case-linked) personal jurisdiction.[95] "A state court may exercise general jurisdiction only when a defendant is 'essentially at home' in the State."[96] "General jurisdiction, as its name implies, extends to 'any and all claims' brought against a defendant.[97]

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[84] *Calabro v. Socolofsky*, 206 A.3d 501, 505 (Pa. Super. 2019) (quoting *Sulkava v, Glaston Finland OY*, 54 A.3d 884, 889 (Pa. Super. 2012)).
[85] *D & S Auto Sales, Inc. v. Commercial Sales & Marketing, Inc.*, 2021 WL 683483 at *2 (Pa. Com. Pl.) (quoting *Schiavone v. Aveta*, 41 A.3d 861, 865 (Pa. Super. 2012)).
[86] *Time Share Vacation Club v. Atl. Resorts, Ltd.*, 735 F.2d 61, Footnote n.9 (3d Cir. 1984).
[87] *Hammons v. Ethicon*, 240 A.3d 537, 561 (Pa. 2020).
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Fulano v. Fanjul Corp.*, 236 A.3d 1, 12 (Pa. Super. Ct. 2020) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985)).
[92] *Fulano*, 236 A.3d at 12-13 (citing *Burger King* 471 U.S. at 474-76; *See also Kubik v. Letteri*, 532 Pa 10, 17 (1992)).
[93] *Fulano*, 236 A.3d at 13 (quoting *Burger King* 471 U.S. at 472).
[94] *Fulano*, 236 A.3d at 13 (quoting *Mendel v. Williams*, 53 A.3d 810, 817 (Pa. Super. 2012)).
[95] *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 U.S. ___, 137 S. Ct. 1773, 1780 (2017) (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).
[96] *Ford Motor Co. v. Montana Eighth Judicial Dist. Court, 592 U.S. _____,* 141 S. Ct. 1017, 1024 (2021) (quoting *Goodyear*, 564 U.S. at 919).
[97] *Ford*, 141 S. Ct. at 1024 (quoting *Goodyear*, 564 U.S. at 919).

"Those claims need not relate to the forum State or the defendant's activity there; they may concern events and conduct anywhere in the world. But that breadth imposes a correlative limit: Only a select 'set of affiliations with a forum' will expose a defendant to such sweeping jurisdiction."[98] "[F]orums for a corporation are its place of incorporation and principal place of business."[99] "General Jurisdiction ... is established over a nonresident corporation when it: '(1) is incorporated under or qualified as a foreign corporation under the laws of this Commonwealth; (2) consents, to the extent authorized by the consent; or (3) carries on a continuous and systematic part of its general business within this Commonwealth.'"[100]

In the instant case, counsel agree Defendant DPS, LLC is not amenable to general personal jurisdiction, and, therefore, only specific personal jurisdiction is currently at issue.[101] When determining if the defendant is subject to specific personal jurisdiction within the forum State, a court first looks to the State's long-arm statute. Pennsylvania's long-arm statute allows courts to assert personal jurisdiction over non-resident defendants "to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States."[102] This Trial Court must determine "whether, under the Due Process Clause, the defendant has 'certain minimum contacts with ... [Pennsylvania] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'"[103]

Recently, the Pennsylvania Supreme Court in Hammons confirmed "specific personal jurisdiction continues to be whether the defendant has sufficient 'minimum contacts with [the state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'"[104] Moreover, "[r]equiring minimum contacts satisfies due process by ensuring that the defendant may 'reasonably anticipate' where it may be 'haled into court' based upon which forums it has 'purposefully availed itself of the privilege of conducting activities.'"[105] "The High Court has opined that this requirement ensures that a defendant will not be subject to jurisdiction 'solely as a result of random, fortuitous, or attenuated contacts.'"[106]

Pennsylvania Supreme Court Justice Baer, now Chief Justice Baer, writing for the Majority in *Hammons*, implemented a three-part test to determine whether specific jurisdiction is appropriate in the forum state. He referred to U.S. Supreme Court Justice Sotomayor's

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[98] *Ford*, 141 S. Ct. at 1024 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014)).
[99] *Ford*, 141 S. Ct. at 1024.
[100] *Fulano*, 236 A.3d at 13 (quoting *Seeley v. Caesars Entertainment Corporation*, 206 A.3d 1129, 1133 (Pa. Super. 2019)).
[101] *T*he U.S. Supreme Court in *Ford* states, "Specific jurisdiction covers defendants less intimately connected with a State, but only as to a narrower class of claims. To be subject to that kind of jurisdiction, the defendant must take 'some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State.'" *Ford*, 141 S. Ct. at 1019 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). "[T]he plaintiff's claims 'must arise out of or relate to the defendant's contacts' with the forum." *Ford*, 141 S. Ct. at 1019 (quoting *Bristol-Myers*, 137 S. Ct. at 1786). "[T]he Court has 'never framed the specific jurisdiction inquiry as always requiring proof of causation — i.e., proof that the plaintiff's claim came about because of the defendant's in-state conduct.'" *Lewis v. Mercedes-Benz USA, LLC*, 2021 WL 1216897 at *35 (S.D. Fla. Mar. 30, 2021) (quoting *Ford*, 141 S. Ct. at 1026). "Because the prong is separated by an 'or,' specific jurisdiction may also exist where a claim 'relates to the defendant's contacts with the forum.'" *Lewis*, 2021 WL 1216897 at *35.
[102] 42 Pa. Cons. Stat. § 5322(b).
[103] *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 316-317 (3d Cir. 2007) (quoting *Int'l Shoe*, 326 U.S. at 316).
[104] *Hammons*, 240 A.3d at 556 (quoting *Int'l Shoe*, 326 U.S. at 316).
[105] *Hammons*, 240 A.3d at 556 (quoting *Burger King*, 471 U.S. at 474).
[106] *Hammons*, 240 A.3d at 556 (quoting *Burger King*, 471 U.S. at 475).

Dissenting Opinion in the *Bristol-Myers Squibb* case, wherein she cites "a more manageable three-part test" as stated in *Federal Practice and Procedure*:

> (1) Did the plaintiff's cause of action arise out of or relate to the out-of-state defendant's forum-related contacts?
> (2) Did the defendant purposely direct its activities, particularly as they relate to the plaintiff's cause of action, toward the forum state or did the defendant purposely avail itself of the privilege of conducting activities therein?
> (3) Would the exercise of personal jurisdiction over the nonresident defendant in the forum state satisfy the requirement that it be reasonable and fair?[107]

Specific personal jurisdiction "requires consideration of the factual nuances of jurisdictional connections in each case."[108] Specific jurisdiction analysis focuses "on the relationship among the defendant, the forum, and the litigation."[109] "Specific jurisdiction involves 'a more limited form of submission to a State's authority,' elaborating that when a defendant 'purposefully avails itself of the privilege of conducting activities within the forum state, [110] ... it submits

[107] *Hammons*, 240 A.3d at 556; *See also* 4 Fed. Prac. & Proc. Civ. § 1067.2 Minimum Contacts, Fair Play, and Substantial Justice (4th ed.).
[108] *Hammons*, 240 A.3d at 556.
[109] *Id.* at 559 (quoting *Walden v. Fiore*, 571 U.S. 277, 284, 134 S. Ct. 1115 (2014)).
[110] Plaintiffs' counsel raise the stream of commerce issue as to Defendant DPS, LLC's purposeful availment in the Commonwealth of Pennsylvania. *See* Plaintiffs' Memorandum of Law at pp. 16-17. Under "stream-of-commerce," specific jurisdiction would exist over a non-resident defendant who placed goods into the stream of commerce with the knowledge the goods could end up in the forum State. The U.S. Supreme Court in *Ford* explains a corporation cultivates a market within the forum state when it undertakes activities such as advertising and marketing a product within the forum state. *Ford*, 141 S. Ct. at 1019. The courts are split as to whether component part manufacturers purposefully avail themselves of specific personal jurisdiction within a forum state through the stream of commerce. The Third Circuit in *Shuker v. Smith & Nephew, PLC* recently declined to adopt the stream of commerce theory to exercise specific personal jurisdiction over the non-resident parent company of a manufacturer, explaining "[a] plurality of Supreme Court Justices has twice rejected [it] ... " *Shuker v. Smith & Newphew, PLC*, 885 F.3d 760, 780 (3d Cir. 2018). "In 'stream of commerce' jurisdictions, on the other hand, the analysis focuses on whether the manufacturer reasonably expected, at the time it placed its product into the stream of commerce, that the part would make it into the forum state. Jurisdictions such as the Fifth and Eighth Circuits (and again several states) subscribe to this view. From a policy standpoint, advocates of this approach rely on the notion that a defendant who placed parts into the stream of commerce benefits from the retail sale of a final product in the forum state. As such, 'the possibility of a lawsuit there cannot come as a surprise,' and the litigation will not 'present a burden for which there is no corresponding benefit.'" Kathleen Ingram Carrington and Derek Rajavuori, *Navigating the Stream of Commerce: "Purposeful Availment" in the Wake of Ford*, JDSupra (April 28, 2021), https://www.jdsupra.com/legalnews/ navigating-the-stream-of-commerce-9958431/#_ednref17.

Where a corporation does not come into direct contact with the forum state, specific jurisdiction may lie where the corporation "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980). While the Circuit Courts are split as to the application of stream of commerce on component part manufacturers, *Fulano v. Fanjul Corp.*, which is still valid law in Pennsylvania, allows a court to exercise personal jurisdiction over a defendant through stream of commerce where a relationship exists between the defendant's contact with the forum and the plaintiff's injury and claim within the forum. The Pennsylvania Superior Court aptly states in *Fulano*, "'Stream of commerce cases typically involve an injury allegedly caused by a product or part manufactured by a nonresident defendant and placed into the stream of commerce without knowledge of its eventual destination.'" *Fulano*, 236 A.3d at 14 (quoting *Zeger v. Joseph Rhodes, Ltd.*, 775 F. Supp. 817, 820 (M.D. Pa. 1991)). "Because Plaintiffs do not allege that they were injured in Pennsylvania by a product produced by *Fanjul*, their effort to invoke 'stream of commerce' for specific personal jurisdiction is unavailing." *Fulano*, 236 A.3d at 14-15. "If these 'purposeful

to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State.'"[111]

In the instant case, this Trial Court is required to consider the evidence in the light most favorable to the nonmoving parties in order to sustain Defendant DPS, LLC's Preliminary Objections on lack of specific personal jurisdiction.[112] Defendant DPS as a successor corporation to Old Delphi accepted the responsibility of any risk in the manufacture of the Delphi ETC System and the Delphi PCM system, which were installed as integral component parts of the 2009 Hyundai Santa Fe. The Delphi ETC System as the "brains" within this vehicle works in tandem with the Delphi PCM as a partnership to make this 2009 Hyundai Santa Fe vehicle function for transportation purposes.[113] In sync with the "essence" or "brains" known as the Delphi ETC System, the Delphi PCM communicates with the Delphi ETC System to control the acceleration of the instant vehicle.[114] As an integral, inseparable and necessary component of the subject vehicle, both the Delphi ETC System and Delphi PCM controlled the acceleration of this 2009 Hyundai Santa Fe, and thereby became inseparable from the function of the instant vehicle. Plaintiffs' counsel allege the Delphi ETC System and Delphi PCM were defective as a result of the known actions or behaviors of this vehicle on July 7, 2017. Therefore, Defendant DPS, LLC purposefully availed itself of Pennsylvania law when the 2009 Hyundai Santa Fe was distributed, sold, and resold in Erie County, Pennsylvania.

Moreover, due to the connection between Plaintiffs' claims and Defendant DPS, LLC's Delphi ETC System as well as the Delphi PCM integral components, a relationship among Defendant DPS, LLC, the State of Pennsylvania, and this litigation was and is created. This relationship is more than sufficient to support specific personal jurisdiction in Pennsylvania. Pennsylvania indeed has a "manifest interest" in providing its residents, the Plaintiffs, with a convenient forum for redressing injuries inflicted by out-of-state actors. Defendant DPS, LLC's business falls within Section (a)(1)(iii) of Pennsylvania's long-arm statute as to

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[110 continued] availment' and 'relationship' requirements are met, a court may exercise personal jurisdiction over a defendant so long as the exercise of that jurisdiction 'comport[s] with fair play and substantial justice.'" *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 97 (3d. Cir. 2004) (quoting *Burger King*, 471 U.S. at 476). In addressing the "fairness question," a trial court may consider "'the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering substantive social policies.'" *Miller Yacht*, 384 F.3d at 97.

Assuming arguendo that the stream of commerce is applicable, Defendant DPS, LLC's counsel argues his client did not advertise or sell Delphi PCM or Delphi ETC in Pennsylvania nor had any sales agents to market said component parts in Pennsylvania. However, this Trial Court finds a component part manufacturer, such as Defendant DPS, LLC, would not advertise the component parts, the Delphi PCM and Delphi ETC known as the "brains" of the subject vehicle, that are integrally and inseparably installed into an end product, the subject vehicle, prior to final sale. The entry of the Defendant DPS, LLC's product or parts into the forum is an aspect of a consistent pattern of multistate business so that it is reasonable for Defendant DPS, LLC to foresee the potential dispersion of its products at the time they are sold, particularly when accompanied by their conduct demonstrating Defendant DPS, LLC intended to take advantage of the local Erie, Pennsylvania marketplace by installing their essential parts into the subject vehicle. Unlike the facts in *Fulano*, Plaintiffs in instant case allege they were injured in Pennsylvania by the integral and essential Delphi PCM and Delphi ETC sold by Defendant DPS, LLC to Hyundai Defendants and installed as essential and inseparable from the subject vehicle. Therefore, where the end product, the subject 2009 Hyundai Santa Fe, was delivered into the stream of commerce with the expectation that a consumer would purchase said vehicle in Pennsylvania, Defendant DPS, LLC purposefully availed itself of the laws of Pennsylvania through the stream of commerce and Pennsylvania's exercise of specific personal jurisdiction over Defendant DPS, LLC comports with fair play and substantial justice.

[111] *Hammons*, 240 A.3d at 556. (quoting *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011)).

[112] *Calabro*, 206 A.3d at 505.

[113] N.T.: *Defendant DPS, LLC's Preliminary Objections*, July 9, 2020, 41:2-4.

[114] Exhibit 6, filed under seal, as per this Trial Court's Protective Order.

"shipping of merchandise ... indirectly into or through this Commonwealth."[115] Defendant DPS, LLC has and continues to have more than minimum contacts with the Commonwealth of Pennsylvania in that maintenance of this lawsuit "does not offend traditional notions of fair play and substantial justice."[116] Therefore, Pennsylvania's assertion of specific personal jurisdiction over Defendant DPS, LLC does not cause an unreasonable exercise of Pennsylvania's long-arm statute over Defendant DPS, LLC.

As to part one of the Hammons three-part test, specifically and undisputedly, the subject 2009 Hyundai Santa Fe vehicle was originally sold in Erie County, Pennsylvania and later resold to Erie County, Pennsylvania residents.[117] Defendant DPS, LLC has repeatedly admitted Old Delphi designed the hardware and software for the subject PCM and also validated the PCM, according to Hyundai's specifications, at Old Delphi's facility in Kokomo, Indiana.[118] Further, Plaintiffs provided photographs, see page 11, of the sticker on the PCM, as well as, the clear display of "Delphi" on the subject ETC body.[119] In Exhibit 5, filed under seal, Figure 1 shows a diagram of the Delphi PCM within the Cruise Control System, and Exhibit 6, also filed under seal, displays the components for the Hyundai Lambda engine system, which prominently indicates the Delphi PCM at the center of the engine system.[120] Defendant DPS, LLC admitted the subject vehicle was sold in Pennsylvania "with the incorporated PCM and ETC [System] componentry" at issue in this case.[121] Therefore, Defendant DPS, LLC as the successor corporation of Old Delphi supplied and manufactured the Delphi PCM and the Delphi ETC for the subject vehicle.[122]

Moreover, the cause of action in the instant case arose out of Defendant DPS, LLC's contacts with Pennsylvania as a component part manufacturer that placed integral parts inside this 2009 Hyundai Santa Fe vehicle. The evidence in the instant case derived by Plaintiffs' counsel from Jurisdictional Discovery does relate to Defendant DPS, LLC's forum-related contacts. A component part manufacturer "cultivate(s) the market" differently than auto manufacturers. Component part manufacturers do not advertise to the public and do not persuade citizens of a forum state to choose their products. Because component part manufacturers do not engage in the same kinds of activities as manufactures of completed products, the minimum contacts standard under *Int'l Shoe* applies in the instant case.

In the instant case, Defendant DPS, LLC engages in a global market. Plaintiffs' counsel aptly points out: "Delphi Automotive Systems, LLC manufactures products — including electronic throttle controls — that it knows are being placed in cars sold in Pennsylvania."[123] "Automobiles that are designed for the U.S. market are marketed and sold in **every state**."[124] Defendant DPS, LLC as the successor corporation of Old Delphi accepted the responsibility as manufacturer and supplier of the Delphi ETC and Delphi PCM to design these component parts in a manner that is free from safety hazards. Defendant DPS, LLC

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[115] 42 Pa.C.S. § 5322.
[116] *Int'l Shoe*, 326 U.S. at 316.
[117] N.T.: *Defendant [DPS, LLC]'s Preliminary Objections*, April 26, 2021, 9:14-17.
[118] Ex. 2, *Defendant DPS, LLC's Answers to Interrogatories* No. 24 on pp. 22-25.
[119] Plaintiffs' Supplemental Memorandum of Law at p. 3-4.
[120] Ex. 5 and 6 filed under seal per this Trial Court's Protective Order.
[121] Defendant DPS, LLC's Supplemental Brief at p. 4.
[122] Plaintiffs' Supplemental Memorandum of Law at p. 4.
[123] Plaintiffs' Memorandum of Law at p. 21.
[124] *Id.*

as the successor corporation has accepted the duty to warn consumers of potential injuries that could result due to defects in the Delphi ETC and Delphi PCM. Furthermore, as aptly stated by Plaintiffs' counsel, "[e]ven though [Defendant] DPS, LLC admits its predecessor 'Old Delphi' supplied the at issue PCM for this vehicle, and the PCM was equipped in numerous other Santa Fe vehicles sold in Pennsylvania, it nevertheless provided neither any data in response to questions concerning the number of vehicles containing this PCM that were sold in Pennsylvania nor any documentation of the same."[125] Therefore, part one of the *Hammons* three-part test has been established. For this Trial court to hold otherwise, a component part manufacturer could "hide behind the shield of manufacturers" and not be held accountable where potential injuries arise.

As to part two of the *Hammons* three-part test, discovery in the instant case produced documents that evidence Defendant DPS, LLC's involvement in the subject Delphi ETC System regarding the identity of the manufacturer, designer, supplier, tester, and entity responsible for quality control of the Delphi ETC System. These documents provided by Hyundai Defendants clearly contain the 'Delphi' name. Defendant DPS, LLC as the successor corporation is the designer and manufacturer of products "worldwide" which includes each state within the U.S.126 At the time of the subject incident, Defendant DPS, LLC, as successor corporation continued, and still presently continues, to have facilities in Brighton and Troy, Michigan; Rochester, Michigan; and Kokomo, Indiana.

Moreover, Plaintiffs' counsel stated that Discovery evidence was "uncovered" indicating specific issues, problems, and potential defects with this 'Delphi' componentry."[127] Hyundai Defendants' Technical Service Bulletin specifically references Delphi ETC System Malfunction.[128] "Delphi Defendants designed and produced the relevant throttle position sensor (TPS) in addition to the engine control module (ECM) referenced in this TSB and equipped in the subject vehicle."[129] Defendant HMC produced documentation that Delphi: "conducted the FMEA on Lambda ETC; produced the calibration guideline for the ETC integrated Cruise Control System; [and] produced and supplied numerous components for the subject Hyundai Lambda engine system. This diagram specifically highlights the PCM, ETC System, throttle body and throttle position sensor(s) in blue — indicating they are Delphi Components."[130]

In the instant case, Defendant DPS, LLC admits "it was generally 'foreseeable' to some Delphi entity that a 'Delphi' product might end up in Pennsylvania ... . "[131] Further, "[i]t is undisputed that a Delphi entity, or entities, supplied and/or manufactured the [ETC] componentry and [PCM] system for the subject vehicle."[132] Therefore, Defendant DPS, LLC as the successor corporation to Old Delphi could have reasonably foreseen that consumers such as Plaintiffs would buy this vehicle with the Delphi ETC and Delphi PCM being installed to operate electronic signals commanding its throttle to either open or close. Defendant DPS,

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[125] Plaintiffs' Supplemental Memorandum of Law at pp. 9-10.
[126] *Id*. at p. 9.
[127] Plaintiffs' Supplemental Memorandum of Law at p. 5.
[128] Ex. 3, *Hyundai Defendants' TSB*.
[129] Plaintiffs' Supplemental Memorandum of Law at p. 5.
[130] *Id*. at p. 5-6.
[131] Defendant DPS, LLC's Supplemental Brief based on Lack of Personal Jurisdiction at p. 6.
[132] Plaintiffs' Supplemental Memorandum of Law at p. 4.

LLC knew a possible malfunction of its components within this 2009 Hyundai Santa Fe could cause Defendant DPS, LLC to litigate in Pennsylvania over injuries to Pennsylvania consumers and residents. This foreseeability and action by Defendant DPS, LLC connects and has connected Defendant DPS, LLC to the forum state of Pennsylvania. Therefore, under part two of the *Hammons* three-part test, this Trial Court concludes Defendant DPS, LLC purposefully availed itself of the privilege of conducting activities in the Commonwealth of Pennsylvania.

As to part three of the *Hammons* three-part test, this collision and the resulting deaths occurred in Pennsylvania where the deceased Plaintiffs had resided. Defendant DPS, LLC is a U.S. corporation incorporated under the laws of Delaware with its principal place of business in Michigan and Defendant DPS, LLC is located geographically close in proximity to Pennsylvania. Delaware borders on the southern portion of Pennsylvania. The city of Erie, Pennsylvania is located on Lake Erie, which is contiguous with Michigan on its western shore. The Commonwealth of Pennsylvania's exercise of specific personal jurisdiction over Defendant DPS, LLC would not cause an unreasonable exercise of the long-arm statute to "hale" Defendant DPS, LLC into Erie, Pennsylvania. The connection between Plaintiffs' claims and Delphi ETC System or the "brains" component within this 2009 Hyundai Santa Fe vehicle creates a sufficient relationship among Defendant DPS, LLC, the Commonwealth of Pennsylvania, and this litigation, to support specific personal jurisdiction with Pennsylvania, in particular, Erie, Pennsylvania. Indeed, Pennsylvania "has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors."[133]

Further, an important nexus in this case is that this 2009 Hyundai Santa Fe vehicle contained the Delphi ETC System, known as the "brains" of this subject vehicle. The subject vehicle containing the installed Delphi ETC and Delphi PCM was originally sold and resold in Erie County, Pennsylvania to a resident of Erie County, Pennsylvania. This Delphi ETC System as the main component is the essence of this subject vehicle, and, therefore, Defendant DPS, LLC purposefully availed itself of the laws of Pennsylvania. Therefore, as to part three of the *Hammons*' three-part test, the exercise of specific personal jurisdiction by the forum state of Pennsylvania in Erie County over nonresident Defendant DPS, LLC meets the requirement of "reasonable and fair."

In conclusion, Defendant DPS, LLC's Preliminary Objections can only be sustained where the record is clear and free from doubt. Moreover, this Trial Court is required to consider all matters indicated above in the light most favorable to the non-moving parties. This Trial Court finds and concludes Defendant DPS, LLC's Preliminary Objections are overruled as the record is not free and clear from doubt and for the reasons as set forth above. This Trial Court hereby enters the following attached Order:

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[133] *Burger King*, 471 U.S. at 473.

ORDER

AND NOW, to-wit, on this 23rd day of June, 2021, as per the Opinion attached, it is hereby **ORDERED, ADJUDGED, and DECREED** Defendant Delphi Powertrain Systems, LLC's Preliminary Objections are **OVERRULED**. Defendant Delphi Powertrain Systems, LLC's Preliminary Objections to Defendant Dave Hallman Chevrolet, Inc.'s "New Matter Cross-Claim" are **OVERRULED**. Defendant Delphi Powertrain Systems, LLC's counsel has twenty-four (24) days to Answer both Plaintiffs' First Amended Complaint and Defendant Dave Hallman Chevrolet, Inc.'s "New Matter Cross-Claim."

Plaintiffs' counsel did not correctly number Paragraphs 18, 19, 20, 21, 22, 23, and 24; therefore, Plaintiffs' counsel are **DIRECTED** to re-number their First Amended Complaint's Paragraphs **immediately**. Plaintiffs' counsel will provide ASAP a copy to all Defendants as well as this Trial Court of the "Corrected Plaintiffs' First Amended Complaint" as well as file said pleading with the Prothonotary of Erie County, Pennsylvania.

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

MARC VALENTINE and JOANNE VALENTINE
v.
WALDAMEER PARK AND WATER WORLD, and WALDAMEER PARK, INC. t/d/b/a WALDAMEER PARK AND WATER WORLD, and WALDAMEER PARK, INC. and PAUL T. NELSON

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

After the relevant pleadings are closed, but within such time as not to delay unreasonably the trial, any party may move for summary judgment in whole or in part as a matter of law if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to the jury.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

In a Motion for Summary Judgment, the adverse party bears the burden of proof and must provide sufficient evidence on the issue in that a jury could return a verdict for the adverse party.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

A trial court must view the entire record in the light most favorable to the adverse party and resolve all doubts to the existence of a triable issue against the party moving for summary judgment.

CIVIL PROCEDURE / MOTION FOR SUMMARY JUDGMENT

If an adverse party fails to produce sufficient evidence of the issue which it bears the burden of proof, the party moving for summary judgment is entitled to judgment as a matter of law.

TORTS / NEGLIGENCE

Generally in a negligence cause of action, Plaintiffs must plead four necessary elements: duty of care, breach of said duty of care, causal connection between a defendant's conduct and the injury that results, and damages.

TORTS / NEGLIGENCE / DUTY

Whether Plaintiffs can prove a duty exists by Defendants is a question of law for a court to decide.

TORTS / NEGLIGENCE / DUTY

An operator of a place of amusement is not an insurer of the operator's patrons. Operators of places of amusement are only liable for injuries caused to patrons where the operator fails to use reasonable care in the construction, maintenance, and management of the facility.

TORTS / NEGLIGENCE / DUTY

The no-duty rule is based on the sound policy judgment that it is undesirable to hold individuals liable for failing to warn against or protect others from obvious risks. Defendants have no duty of care to warn, protect, or insure against risk which are common, frequent, and expected and inherent in an activity. If the no-duty rule applies to a claim for negligence, plaintiff is unable to set forth a prima facie case for liability under a theory of negligence.

TORTS / NEGLIGENCE / DUTY

If plaintiffs introduce adequate evidence that the amusement facility or operator deviated in some relevant respect from established custom then the no-duty rule does not apply and the

case will proceed to the jury. Plaintiffs cannot baldly assert customs or duties exist without the presentations of evidence in support.

TORTS / NEGLIGENCE / DUTY

No Pennsylvania statute imposes a duty as alleged by Appellants making lifeguards or amusement park establishments liable for not assisting patrons onto and off of inner tubes.

CIVIL PROCEDURE / PLEADINGS / GENERAL REQUIREMENTS

The material facts on which a cause of action or defense is based shall be stated in a concise and summary form. The purpose is to have the pleader disclose sufficient facts to notify the adverse party of the claims to which the adverse party will be required to defend against.

CIVIL PROCEDURE / PLEADINGS / GENERAL REQUIREMENTS

Plaintiffs must satisfy two conditions: the pleadings must adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense and the pleadings must be sufficient to convince the court that the averments are not merely subterfuge.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
NO. 12135-2018
45 WDA 2020

Appearances: Jon A. Barkman, Esq. on behalf of Plaintiffs/Appellants
Patrick M. Carney, Esq. and G. Michael Garcia, II, Esq., on behalf of Defendants/ Appellees

1925(a) OPINION

Domitrovich, J., March 9, 2020

Marc and Joanne Valentine [hereinafter Appellant M.V. and Appellant J.V. respectively] are appealing this Trial Court's Order dated December 9, 2019, in which Appellees Waldameer Park and Water World and Waldameer Park, Inc. t/d/b/a Waldameer Park and Water World, and Waldameer Park, Inc., and Paul T. Nelson's [hereinafter Appellees] were granted Summary Judgment. Appellants enumerate eighteen (18) issues in their Concise Statement of which this Trial Court has consolidated into four (4) issues as follows:

(1) Whether this Trial Court erred in granting Summary Judgment for Appellees under the no-duty rule where a patron's "fall-back" on an inner tube on an amusement park water ride is a risk encountered by a patron that is common, frequent, inherent, or expected in the activity?

(2) Whether this Trial Court erred in granting Appellees' Motion for Summary Judgment where Appellants have no statutorily imposed duty of lifeguards and where no evidence indicated Appellees deviated from an established custom?

(3) Under Pa.R.C.P. 1019, whether this Trial Court erred in granting Summary Judgment for Appellees where Appellants' Complaint did not state clearly allegations of premises liability?

(4) Whether Appellants waived the issue regarding Comparative Negligence by failing to preserve properly the issue of the Comparative Negligence Act's applicability to this case?

Appellants alleged in their Complaint: On August 23, 2016, Appellant M.V. attempted to board an inner tube on the Endless River attraction at Appellees' amusement park and was unsuccessful. In doing so, Appellants state Appellant M.V. struck his head on the bottom of the Endless River attraction and suffered injuries as a result. Appellants claim employees "negligently failed to assist and/or help the [Appellant], Marc Valentine, enter onto the inner tube." (Appellants' Complaint, ¶20). By failing to assist Appellant M.V. onto an inner tube, Appellants alleged Appellees' employees caused injuries to Appellant M.V.

Appellees alleged in their Motion for Summary Judgment: Appellees in their capacity as operators of an amusement park cited to the "no-duty" rule which indicates Appellees owed no duty to Appellants to protect them from common, inherent, expected, or frequent risks. Appellees also argued Appellants failed to set forth statutory or case law imposing a duty of care on Appellees' employees. Appellees argued Appellants cannot satisfy the exception to the no-duty rule in that Appellants cannot prove Appellees' employees deviated from an established custom or duty. Appellees also asserted that Appellants' claims for premises liability are beyond the statute of limitations and further allege Appellants are unable to present sufficient evidence that a cause of action for premises liability exists.

The pertinent **Pennsylvania Rule of Civil Procedure 1035.2** states that after the relevant pleadings are closed, but within such time as not to delay unreasonably the trial, any party may move for summary judgment in whole or in part as a matter of law: " ... (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to the jury. *See* Pa R. Civ. P. 1035.2.

In a Motion for Summary Judgment, the adverse party bears the burden of proof and must provide sufficient evidence on the issue in that a jury could return a verdict for the adverse party. *McCarthy v. Dan Lepore & Sons Co., Inc.*, 724 A.2d 938, 940 (Pa. Super. 1998). A trial court must view the entire record in the "light most favorable to the [adverse] party" and resolve all doubts to the existence of a triable issue against the party moving for summary judgment. *Id*. If an adverse party fails to produce sufficient evidence of the issue which it bears the burden of proof, the party moving for summary judgment is entitled to judgment as a matter of law. *Id*.

Appellants' first issue as to the "no-duty" rule: Generally in a negligence cause of action, Plaintiffs must plead four necessary elements: duty of care, breach of said duty of care, causal connection between a defendant's conduct and the injury that results, and damages. *Zeidman v. Fisher*, 980 A.2d 637, 639 (Pa. Super. 2009). Whether Plaintiffs can prove a duty exists by Defendants is a question of law for a court to decide. *Charlie v. Erie Ins. Exchange*, 100 A.3d 244, 250 (Pa. Super. 2014).

Moreover, an operator of a place of amusement is not an insurer of the operator's patrons. *Jones v. Three Rivers Management Corp.*, 394 A.2d 546, 549 (Pa. 1978). Operators of places of amusement are only liable for injuries caused to patrons where the operator fails to "use

reasonable care in the construction, maintenance, and management of the facility." *Id*. (*citing Taylor v. Churchill Valley Country Club*, 228 A.2d 768, 769 (1967)). The no-duty rule is based on "the sound policy judgment that it is undesirable to hold individuals liable for failing to warn against or protect others from obvious risks .... " *Craig v. Amateur Softball Ass'n of America*, 951 A.2d 372, 378 (Pa. Super. 2008). Defendants have "no duty of care to warn, protect, or insure against risks which are 'common, frequent, and expected' and 'inherent' in an activity." *Id*. at 375 (*citing Jones v. Three Rivers Management Corp.*, 394 A.2d 546, 549 (Pa. 1978)). If the no-duty rule applies to a claim for negligence, plaintiff is unable to set forth a *prima facie* case for liability under a theory of negligence. *Id*. at 375-76.

Furthermore, when individuals use their senses to ensure their own safety, they are required to do so or be solely liable for the consequences for their actions. *Bartek v. Grossman*, 52 A.2d 209, 211 (Pa. 1947). If victims could have avoided injuries by exercising ordinary care, victims cannot recover damages for their injuries and then the victims' recovery is barred. *Id*.

In the instant case, Appellant M.V. testified by deposition he had previous experiences riding inner tubes and participating in similar attractions to the Endless River at Waldameer Park and Water World. (Marc Valentine's Deposition, May 13, 2019, at pg. 34:2-23). Appellant M.V. also testified he was familiar with getting onto the inner tubes, and had done so in the past. (Marc Valentine's Deposition at pg. 50:7-21). Appellant M.V. stated at his deposition:

> A. --- where you can swim and you could have popped your head up through. Okay? And you could have got your head up, and then wiggled your back out around and then pop one leg up through and then another. You could have easily got up that way. Because I was in a shallow water and the way I got on, like --- like I said, at just a couple other places I've been at, it's similar, but not quite the same condition.

Id. Furthermore, Appellant M.V. was concerned about the inner tube sliding from underneath him or "that one side would kick" out from underneath him and he would go backwards. *Id*. Appellant M.V. admitted he "over-engineered" getting onto the inner tube by forcing the inner tube under the water for him to gain leverage over the inner tube. (Marc Valentine's Deposition, at pg. 53:25, 54:9-11).

Appellant M.V.'s testimony demonstrated he was aware of the risks presented by the Endless River as well as the use of inner tubes at this attraction and the risks commonly associated with attractions of this type. Furthermore, Appellant M.V. indicated he was aware of the possibility of an inner tube flipping over or sliding from underneath him as a patron which is a common risk associated with the activity at issue in this case. Appellant M. V. did not provide any evidence that he used his own senses and perception to avoid the risk encountered by getting onto the inner tube safely and securely. Any risks encountered by Appellant M.V. were common or inherent in participating in this attraction. Appellees owed no duty to Appellants to warn of such risks. Therefore, this Trial Court did not err by applying properly the no-duty rule to the instant case and granting Appellees' Motion for Summary Judgment.

Appellants' second issue regarding no statutorily imposed duty for Appellees' lifeguards and no deviation from an established custom by Appellees' employees:

Plaintiffs must present actual evidence of the established custom violated with sources present in the record. *Craig* at 378-79. If plaintiffs introduce adequate evidence that the amusement facility or operator "deviated in some relevant respect from established custom," then the no-duty rule does not apply and the case will proceed to the jury. *Id*. at 378. Plaintiffs cannot baldly assert customs or duties exist without the presentation of evidence in support. *Id*.

This Trial Court has scoured the legislative law and case law for applicable guidance. The Pennsylvania Legislature has only codified two sections: maintaining an adequate number of lifeguards be present at recreational swimming establishments and qualifying lifeguards by certifying them to perform their duties. 35 P.S. §675.1 and 28 Pa. Code §18.42. However, no Pennsylvania statute imposes a duty as alleged by Appellants making lifeguards or amusement park establishments liable for not assisting patrons onto and off of inner tubes.

Moreover, Appellant M.V. testified he observed employees of the Endless River aiding riders onto and off inner tubes. (Mr. Valentine's Deposition, pg. 29:5-30:6). Appellant M.V. further testified the employees were also collecting the accumulating inner tubes to provide to riders of the Endless River. (Mr. Valentine's Deposition, pg. 40:10-14; 41:5-9). Appellant M.V. stated: "They were more or less stopping inner tubes, like stabilizing inner tubes." *Id*. Appellant M.V. testified: "I mean, they weren't grabbing people, placing them on inner tubes. But they were helping stabilize the inner tube." (Mr. Valentine's Deposition, pg. 32:18-20).

Appellant J.V. contradicted her own husband's testimony. In her deposition, Appellant J.V. stated the employees were grabbing the inner tubes from the river and handing the inner tubes to patrons waiting in line. (Mrs. Valentine's Deposition, May 13, 2019, at pg. 20:11-15). Furthermore, Appellant J.V. did not see any employees assisting the customers or patrons onto the inner tubes. (Mrs. Valentine's Deposition, at pg. 22:12-21).

Appellees provided evidence that Waldameer Park and Water World posted a number of signs regarding "rules" throughout their amusement park. At the entrance of Water World, Appellees' sign stated: "Elderly person, pregnant women, persons with back troubles, those with a heart problem, overweight and out of shape person, etc. are advised not to ride slides." (Defendant's Exhibit 4). Appellees' sign at the entrance to the Endless River also stated: "Children under 42" tall must be with an adult & wear a complimentary life vest." (Defendant's Exhibit 4). With these signs, Appellees established a series of rules and regulations governing conduct within their amusement park, thereby placing patrons on notice of such rules and regulations as well as the conduct expected within the park. No signs made any references to lifeguards assisting patrons onto inner tubes or onto rides within Water World.

In the instant case, Appellants failed to provide any Pennsylvania statutory law or case law of a duty that requires lifeguards to assist patrons in getting onto or off inner tubes. Instead Appellants cited to Lifeguard rules under the American Red Cross which are not mandated by law. By Pennsylvania law, Appellees' lifeguards have no duty to assist patrons onto and off rides at their amusement park. Appellants failed to prove this case is exempt from the application of the no-duty rule. Therefore, this Trial Court did not err by finding Appellants failed to prove a statutorily imposed duty of Appellees' lifeguards existed and that Appellees' lifeguards did not deviate from an established custom and, therefore, this Trial Court properly granted Appellees' Motion for Summary Judgment on this issue.

Appellants' third issue regarding premises liability: Under Pennsylvania Rule of

Civil Procedure 1019(a), "The material facts on which a cause of action or defense is based shall be stated in a concise and summary form." The purpose of Pa.R.C.P. 1019 is to have the pleader disclose sufficient facts to notify the adverse party of the claims to which the adverse party will be required to defend against. *Commonwealth by Shapiro v. Golden Gale National Senior Care LLC*, 194 A.3d 1010, 1029 (Pa. 2018). The Pennsylvania Supreme Court requires plaintiffs satisfy two conditions: "the pleadings must adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense," and the pleadings "must be sufficient to convince the court that the averments are not merely subterfuge." *In re Estate of Schofield*, 477 A.2d 473, 477 (Pa. 1984).

In the instant case, the Pennsylvania Department of Agriculture is tasked with enforcing the Amusement Ride Inspection Act as well as "prescribing safety standards relating to the operation and maintenance of amusement rides or attractions." 4 P.S. §404(1-2). Under the Amusement Ride Inspection Act, a "qualified inspector" shall inspect "any amusement park ride and attraction on a monthly basis." 4 P.S. §407(a)(1).

Paragraph fifty (50) of Appellants' Complaint states: "Plaintiffs were business invitees of the Co-Defendants paid to enter onto the Defendant's property being assured of a safe and well-maintained and supervised recreational area." (Plaintiff's Complaint, ¶50). This Paragraph is not pled sufficiently in that it is difficult to discern whether this Paragraph is a factual allegation or a notice to defend against a possible premises liability claim. Paragraph 50 also lacks a causal connection in that Appellants have failed to allege a causal connection between the alleged unsafe premises and the injuries sustained to Appellant M.V. Therefore, Paragraph 50 of Appellants' Complaint failed to state with any specific details as to how Appellees were negligent in maintaining the Endless River.

Furthermore, Appellants have failed to set forth specific facts and evidence in their subsequent pleadings that Appellees' were negligent in their maintenance of the Endless River attraction. Appellant M.V. testified at his deposition the water was "kind of like dirty-ish," but acknowledged the fact trees lined the Endless River and there were leaves in the water. (Mr. Valentine's Deposition, pg. 44:12-15). Appellant M.V. further testified he slipped on some silt, but was unable to determine if it was "paint silt" or "dirt silt." (Mr. Valentine's Deposition, pg. 62:14-16).

To the contrary, Appellees' evidence demonstrated the Endless River attraction was inspected for purposes of compliance with reporting to the Pennsylvania Department of Agriculture. The Endless River ride was inspected on May 26, 2016, June 26, 2016, July 24, 2016, and August 19, 2016. (Defendant's Exhibits 6 and 7). Stephen Gorman, a certified inspector by the Pennsylvania Department of Agriculture, inspected the Endless River on these days in compliance with the State requirements. (*Id.*). The Endless River attraction was also inspected on the day of the alleged incident for water clarity, objects/debris on the bottom of the river, and around the drains of the attraction. (Defendants Exhibit 9). Furthermore, evidence was presented that a net was placed to collect debris from the Endless River that accumulated overnight. (Defendant's Exhibit 8).

After a thorough review of Appellants' Complaint and the entire record, this Trial Court found that Appellants provided no facts or evidence to assert a claim that Appellees' premises were unsafe or unmaintained. Appellants also have failed to provide evidence the Endless River was unsafe for use by patrons and that Appellees were negligent in maintaining

the Endless River attraction. Therefore, this Trial Court did not err in granting Summary Judgment for Appellees where Appellants' Complaint failed to state clearly any allegations of premises liability.

The fourth issue regarding Appellants' waiver of the Comparative Negligence Act and ASTM Committee Standard F770-15: Appellants failed to raise any issue regarding the Comparative Negligence Act and the ASTM Committee Standard F770-15 in the lower court and, therefore, waived these issues raised for the first time for appellate review. Pennsylvania Rule of Appellate Procedure Rule 302(a) states: "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." *See also Frempong v. Richardson*, 209 A.2d 1006, 1006 (Pa. Super. 2019).

Pa.R.A.P. Rule 302 is clear and explicit in that Appellants are not permitted to raise issues where Appellants did not raise said issues before the lower court. A review of Appellants' "Answer to Defendants' Motion for Summary Judgment" demonstrates Appellants merely made mention of comparative negligence and ASTM Committee Standard F770-15, rather than provide any issue or analysis regarding either comparative negligence or ASTM Committee Standard F770-15 before this Trial Court. Appellants' Concise Statement is the first instance wherein Appellants attempt to raise a comparative negligence issue or ASTM Committee Standard F770-15 issue. This Trial Court has had no opportunity to address either issue below.

Moreover, Appellants' counsel never provided or even showed this Trial Court a copy of the ASTM Committee Standard F770-15 below which Appellants' counsel merely mentions on appeal in his Exhibit List. Appellants' counsel states the ASTM Committee Standard F770-15 "cannot be copied due to the fact that they are protected by copyright law." (Appellants' Matters Complained of Pursuant to the Appeal, p. 9). Appellants' counsel admits the ASTM Committee Standards are proprietary in nature.

Therefore, Appellants' counsel failed to raise either issue on comparative negligence or ASTM Committee Standard F770-15 in the lower court and, therefore, these issues are waived on appeal.

For all of the reasons set forth above, this Trial Court respectfully requests the Pennsylvania Superior Court affirm this Trial Court's Order dated December 9, 2019.

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

COMMONWEALTH of PENNSYLVANIA
v.
THOMAS EUGENE BEEBE, II,

CRIMINAL LAW / TRIAL PROCEDURE / POST-CONVICTION RELIEF ACT

The PCRA procedurally bars claims of trial court error, by requiring a petitioner to show the allegation of error is not previously litigated or waived.

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

To succeed on a claim of ineffective assistance of counsel in a PCRA proceeding, an appellant must prove three elements: 1) the underlying legal claim is of arguable merit; 2) counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his client's interest; and 3) prejudice, to the effect that there was a reasonable probability of a different outcome if not for counsel's error.

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

Counsel is presumed to be effective and the burden of demonstrating ineffectiveness rests on appellant.

CRIMINAL LAW / MERGER

Merger of offenses is appropriate where: 1) the crimes arise from a single criminal act; and 2) all of the statutory elements of one of the offenses are included in the statutory elements of the other offense.

CRIMINAL LAW / MERGER STATUTE

When determining whether merger is appropriate, examination of the elements of the crimes as charged is sometimes necessary, especially when dealing with an offense that can be proven in alternate ways.

CRIMINAL PROCEDURE / DOUBLE JEOPARDY

The imposition of multiple sentences upon a defendant whose single unlawful act injures multiple victims is legislatively authorized and, consequently, does not violate the double jeopardy clause of the Fifth Amendment, which forms the basis of Pennsylvania's merger doctrine.

CRIMINAL PROCEDURE / APPEALS

A concise statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no concise statement.

CRIMINAL LAW / VERDICT / SUFFICIENCY OF EVIDENCE

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

CRIMINAL LAW / VERDICT / SUFFICIENCY OF EVIDENCE

Where the evidence offered to support the verdict is in contradiction 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 PROCEDURE / APPEALS/WEIGHT OF THE EVIDENCE

A prosecutor's remarks do not constitute reversible error unless their unavoidable effect was

to prejudice the jury, forming in their minds a fixed bias and hostility toward the defendant, so the jury could not weigh the evidence objectively and render a true verdict.

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

When raising the failure to call a potential witness as ineffective assistance of counsel, petitioner must establish: 1) the witness existed; 2) the witness was available to testify for the defense; 3) counsel knew of, or should have known of, the existence of the witness; 4) the witness was willing to testify for the defense; and 5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.

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

Trial counsel's failure to call a particular witness does not constitute ineffective assistance without showing that the absent witness' testimony would have been beneficial or helpful in establishing the asserted defense.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 880 of 2017
PENNSYLVANIA SUPERIOR COURT
1156 WDA 2020
1240 WDA 2020

Appearances: William J. Hathaway, Esq. for Appellant Thomas Eugene Beebe, II
Jack Daneri, District Attorney of Erie County, for Commonwealth
Grant T. Miller, Assistant District Attorney for Erie County, for Commonwealth

1925(a) OPINION

Domitrovich, J., December 29, 2020

Appellant Thomas Eugene Beebe II [hereinafter Appellant] currently has two docket numbers, 1156 WDA 2020 and 1240 WDA 2020, before the Pennsylvania Superior Court related to the October 16, 2020 PCRA Court Order denying Appellant's Motion for Post-Conviction Collateral Relief. Appellant, although represented by counsel, Attorney William Hathaway, filed a *pro se* appeal at 1156 WDA 2020.[1] On November 20, 2020, the Pennsylvania Superior Court issued a Per Curiam Order to Appellant Beebe and his counsel, Attorney Hathaway, indicating since "a review of the lower court docket reveals that William Hathaway, Esquire, remains counsel of record, the Prothonotary of this Court is DIRECTED to enter Attorney Hathaway's appearance in this Court on this matter and forward the instant application to counsel pursuant to *Commonwealth v. Jette*, 23 A.2d 1032 (Pa. 2011)." The Prothonotary of the Superior Court was "FURTHER DIRECTED to forward a blank docketing statement to Attorney Hathaway for completion." At 1240 WDA 2020, Attorney Hathaway entered a second Notice of Appeal on November 13, 2020, on

[1] At the same time Appellant filed *pro se* his Notice of Appeal, Appellant filed a Motion to appoint Attorney Hathaway as his appellate counsel. Since Attorney Hathaway was not withdrawn as Appellant's counsel, Attorney Hathaway remained Appellant's counsel, as aptly noted by the Pennsylvania Superior Court.

Appellant's behalf. The event due date for receipt of the original Lower Court record and the Trial Court's Opinion then became January 12, 2021.

On November 25, 2020, Appellant's counsel, Attorney Hathaway, was issued an Amended 1925(b) Order. On December 14, 2020, Attorney Hathaway filed Appellant's 1925(b) Concise Statement of Matters Complained of On Appeal, raising the following ten issues:

1. Whether this PCRA Court abused its discretion by admitting body camera footage during Appellant's trial and, rather than declaring a mistrial, issued a curative instruction to the jury regarding an officer's statements made on said footage.

2. Whether this PCRA Court abused its discretion by denying Appellant's ineffective assistance of counsel claim regarding his trial counsel not challenging Appellant's consecutive sentences.

3. Whether this PCRA Court abused its discretion in not finding Appellant was afforded ineffective assistance of counsel where Appellant, after a *Grazier* hearing represented himself, and failed to preserve for appeal an abuse of discretion claim regarding admission of the body camera footage during trial.

4. Whether this PCRA Court abused its discretion by denying Appellant's ineffective assistance claim regarding his trial counsel not challenging his sentence as against the weight of the evidence.

5. Whether this PCRA Court abused its discretion by denying Appellant's ineffective assistance claim regarding his trial counsel not challenging his sentence as insufficiently supported by evidence.

6. Whether this PCRA Court abused its discretion by denying Appellant's ineffective assistance claim regarding his trial counsel not objecting to or challenging Commonwealth's evidence admitted during trial, and not cross-examining Commonwealth's witnesses.

7. Whether this PCRA Court abused its discretion by denying Appellant's ineffective assistance claim regarding his trial counsel not objecting to the admission of the magazine pieces and shell casings during trial.

8. Whether this PCRA Court abused its discretion by denying Appellant's ineffective assistance claim regarding his trial counsel not calling a witness who allegedly called police and reported Appellant had an outstanding arrest warrant.

9. Whether this PCRA Court abused its discretion by not finding Commonwealth committed prosecutorial misconduct during Appellant's trial, and by denying Appellant's ineffective assistance claim regarding not objecting to and challenging Commonwealth's closing argument.

10. Whether this PCRA Court abused its discretion by denying Appellant's ineffective assistance claim regarding not calling three witnesses on Appellant's behalf.

FACTUAL AND PROCEDURAL HISTORY

The factual and procedural history of the instant case is as follows: this case originates from an incident occurring on December 3, 2016 on a public street outside the Tamarack Bar in Corry, PA, wherein Appellant, after briefly entering and leaving the Tamarack Bar, discharged a firearm. Following Appellant's arrest on December 5, 2016, the Erie County District Attorney's Office filed a Criminal Information against Appellant on April 17, 2017. The Erie County District Attorney charged Appellant with the following offenses: 1) Terroristic Threats Causing Serious Public Inconvenience (18 Pa.C.S. § 2706(a)(3)); 2) Terroristic Threats with the Intent to Terrorize Another (18 Pa.C.S. § 2706(a)(3)); 3) Recklessly Endangering Another Person (18 Pa.C.S. § 2705); 4) Harassment — Follows the Other Person In or About a Public Place or Places (18 Pa.C.S. § 2709(a)(2)); 5) Discharging a Firearm Within the City Limits (L.O. § 750(1)); 6) Receiving Stolen Property (18 Pa.C.S. § 3925(A)); and 7) Carrying a Firearm Without a License (18 Pa.C.S. § 6106(a)(1)). Appellant was tried before a jury of his peers on December 18, 2017, which ended in a mistrial. A new trial was held on December 19, 2017 with a newly empaneled jury. At the conclusion of Appellant's December 19, 2017, jury trial, the jury found Appellant guilty beyond a reasonable doubt on all seven counts.

After being sentenced, Appellant filed a Notice of Appeal to the Pennsylvania Superior Court on February 16, 2018. On February 20, 2018, this Trial Court ordered Appellant to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b), which was filed on March 2, 2018. Appellant's Concise Statement was filed by Attorney John M. Bonanti; however, on March 5, 2018, Appellant filed a *pro se* petition to waive his right to appellate counsel, and on March 21, 2018, Attorney Bonanti filed a Motion to Withdraw as Appellant's counsel. This Trial Court conducted a *Grazier*[2] hearing on April 4, 2018, wherein this Trial Court concluded, after a full colloquy with Appellant consistent with the PA Rules of Criminal Procedure, that Appellant knowingly, intelligently, and voluntarily waived his right to counsel. Both Appellant's and Attorney Bonanti's motions were granted on April 5, 2018. This Trial Court filed its 1925(a) Opinion on April 17, 2018. On May 14, 2019, the Pennsylvania Superior Court filed a Non-Precedential Decision affirming Appellant's judgment of sentence. Appellant petitioned the Pennsylvania Supreme Court for allowance of appeal, which was denied on February 3, 2020.

Appellant filed the instant PCRA Petition on February 21, 2020, which was timely, and this Trial Court appointed William J. Hathaway, Esq. as Appellant's PCRA counsel on March 9, 2020. On June 5, 2020, Attorney Hathaway filed Appellant's Supplement to Motion for Post-Conviction Collateral Relief, to which Commonwealth filed its response on July 8, 2020. After fully reviewing Appellant's PCRA Petition, Appellant's Supplement to Motion for Post-Conviction Collateral Relief, and Commonwealth's Response to Appellant's Supplement to Motion for Post-Conviction Collateral Relief, this PCRA Court issued Notice of Intent to Dismiss the instant PCRA Petition on August 13, 2020. This PCRA Court, in said Notice of Intent to Dismiss, provided Appellant twenty (20) days to file objections, and extended this

[2] *Commonwealth v. Grazier*, 713 A.2d 81 (Pa. 1998).

timeline on August 26, 2020, granting Appellant an additional thirty (30) days from that date to file objections. On September 25, 2020, Appellant filed objections to this PCRA Court's Notice of Intent to Dismiss. After fully reviewing the record in the instant case again, including Appellant's objections, this PCRA Court issued its Order denying Appellant's PCRA Petition on October 16, 2020.

APPELLANT'S 1925(b) ISSUES

Appellant's first issue alleges the admission of body camera footage evidence against him during trial was an abuse of discretion. Appellant also alleges this Court abused its discretion in "seeking to salvage the instant trial from a second mistrial." This is the third time Appellant has asserted this same claim. Initially, Appellant raised this issue on direct appeal before the Pennsylvania Superior Court. Appellant raised this issue for the second time in his Supplement to Motion for Post-Conviction Relief, and has now raised this same issue again on PCRA appeal. The Pennsylvania Superior Court, while dismissing this claim for Appellant's failure to properly preserve the issue on direct appeal, nevertheless determined the Court did not abuse its discretion in admitting said body camera footage along with a curative instruction to the jury. "Because the audio and video from the body camera was used solely for impeachment purposes, and because the trial court gave a curative instruction as to how this evidence was to be considered, if we were to reach this issue, we would discern no abuse of discretion in the trial court's evidentiary ruling." *Commonwealth v. Thomas Eugene Beebe, II*, 2019 WL 2121392, at *3 (May 14, 2019); 247 WDA 2018. For this reason, Appellant's abuse of discretion claim lacks merit, since even if he had raised said claim on appeal, said claim would have been denied.

Moreover, abuse of discretion claims against a trial court related to the admission of evidence are properly raised on direct appeal, and not during PCRA review. "The PCRA ... procedurally bars claims of trial court error ... by requiring a petitioner to show the allegation of error is not previously litigated or waived." *Commonwealth v. Reyes-Rodriguez*, 111 A.3d 775, 780 (Pa. Super. 2015); *see* 42 Pa.C.S. § 9543(a)(3); *Commonwealth v. Jones*, 932 A.2d 179,182 (Pa. Super. 2007). Appellant's claim that the Court abused its discretion by admitting the body camera evidence against him at trial is procedurally barred from consideration during PCRA review, which prevented the evaluation of its merit. Therefore, Appellant's abuse of discretion claim related to the body camera footage lacks arguable merit and is procedurally barred from consideration.

Appellant's third issue[3] alleges Appellant was afforded ineffective assistance of counsel for failing to preserve the admission of the body camera footage on direct appeal. In Pennsylvania, to succeed on a claim of ineffective assistance of counsel in a PCRA proceeding, an appellant must prove three elements: 1) the underlying legal claim is of arguable merit; 2) counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his client's interest; and 3) prejudice, to the effect that there was a reasonable probability of a different outcome if not for counsel's error." *Commonwealth v. Ligon*, 206 A.3d 515, 519 (Pa. Super. 2019) (quoting *Commonwealth v. Grove*, 170 A.3d 1127, 1138 (Pa. Super. 2017)). "Counsel is presumed to be effective and the burden of demonstrating ineffectiveness rests on appellant." *Ligon*, 206 A.3d

[3] Here, Appellant's third 1925(b) claim is addressed before his second as Appellant's first and third 1925(b) claims concern the same subject matter — admission of the body camera footage evidence.

at 516 (quoting *Commonwealth v. Ousley*, 21 A.3d 1238, 1244 (Pa. Super. 2011)).

During Appellant's direct appeal, as cited above, the Pennsylvania Superior Court found no abuse of discretion in admitting the body camera footage for impeachment purposes along with a curative instruction to the jury. *Commonwealth v. Thomas Eugene Beebe, II*, 2019 WL 2121392, at *3 (May 14, 2019); 247 WDA 2018. Appellant's claim, therefore, lacks arguable merit failing the first prong required to sustain a claim of ineffective assistance of counsel on PCRA review.

Moreover, Appellant's trial counsel objected vehemently to the admission of said evidence and moved for a mistrial, thus preserving this issue for direct appeal. Appellant, however, then moved to withdraw his trial counsel and proceed *pro se* on direct appeal. As the Pennsylvania Superior Court stated, it was Appellant's failure to raise this issue properly on direct appeal that led to its dismissal. "By failing to raise this issue in his 1925(b) statement, Appellant deprived the trial court of the opportunity to address Appellant's claim of error; it is well settled that issues not presented in a court-ordered Rule 1925(b) statement are waived on appeal. *See Commonwealth v. Castillo*, 888 A.2d 775, 780 (Pa. 2005) (citation omitted). Because Appellant failed to preserve any issue for appellate review, we affirm Appellant's judgment of sentence." *Id*. at * 3-4. Appellant chose on his own to remove his trial counsel and to proceed *pro se*, yet never included this issue in a 1925(b) Statement after it was properly preserved during trial.[4] Appellant cannot now seek relief from his own ineffectiveness in failing to preserve this issue for review by the Pennsylvania Superior Court.

Appellant's second issue alleges abuse of discretion in denying Appellant's ineffective assistance of counsel claim regarding his trial counsel not challenging the discretionary aspects of Appellant's sentence — specifically, Appellant's consecutive sentences. Under Pennsylvania law, "'merger of offenses is appropriate where: 1) the crimes arise from a single criminal act; and 2) all of the statutory elements of one of the offenses are included in the statutory elements of the other offense.'" *Commonwealth v. Hernandez*, 2020 WL 1149640, at *4 (March 10, 2020) (quoting *Commonwealth v. Roane*, 204 A.3d 998, 1002 (Pa. Super. 2019)); *see also* 42 Pa.C.S. § 9765. When determining whether merger is appropriate, "[e]xamination of the elements of the crimes as charged is sometimes necessary, especially when dealing with an offense that can be proven in alternate ways. Therefore, while [the Merger statute, 42 Pa.C.S. § 9765] indeed focuses on an examination of 'statutory elements' we cannot ignore the simple legislative reality that individual criminal statutes often overlap, and proscribe in the alternative several different categories of conduct under a single banner." *Hernandez*, 2020 WL 1149640 at *5 (quoting *Commonwealth v. Baldwin*, 985 A.2d 830, 837 n. 6 (Pa. 2009)) (emphasis added).

Following Appellant's conviction at trial, this Court sentenced Appellant to serve his five separate offenses consecutively, each of which contains elements unique from the other offenses. The presence of unique elements in each of the offenses precludes merger during sentencing, as none of them are lesser-included offenses. Furthermore, merger is inappropriate where a defendant's actions harm multiple victims. "The imposition of multiple sentences upon a defendant whose single unlawful act injures multiple victims is legislatively authorized and, consequently, does not violate the double jeopardy clause of the Fifth Amendment," which forms the basis of Pennsylvania's merger doctrine.

[4] *See* Pa.R.A.P. 1925(b)(2)(i).

Hernandez, 2020 WL 1149640 at *6 (quoting *Commonwealth v. Frisbie*, 485 A.2d 1098, 1101 (Pa. 1984)); *see also Commonwealth v. Sobrado-Rivera*, 2019 WL 2881486, at *8 (Pa. Super. July 3, 2019).

In the instant case, Appellant was sentenced consecutively for five offenses, all of which contained unique elements, for his actions toward multiple victims, including Kristin Ross and other patrons and employees of the Tamarack Bar. As Appellant's ineffectiveness claim regarding not challenging his consecutive sentences lacks arguable merit, Appellant is not entitled to relief.

Appellant's fourth and fifth issues allege this PCRA Court abused its discretion by denying Appellant's ineffectiveness claims regarding not challenging the weight of the evidence and the sufficiency of the evidence, respectively, used to convict Appellant. Appellant did not provide any further explanation or argument regarding either claim, nor did Appellant point to any authority in support of either claim.

As for Appellant's weight of the evidence issue, a trial court abuses its discretion "when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, or ill will." *Commonwealth v. Widmer*, 744 A.2d 745 (Pa. 2000). During Appellant's trial, Commonwealth introduced eyewitness testimony of Appellant's actions against him during trial, and produced evidence Appellant was apprehended with the firearm in question on his person, in addition to providing other physical and testimonial evidence. This PCRA Court found no indication Appellant's conviction was the result of partiality, prejudice, or ill will, nor that it was unreasonable or in error. Appellant's ineffective assistance of counsel claim regarding not challenging the weight of the evidence used to convict Appellant lacked arguable merit, resulting in this Court's denial of said claim.

As for Appellant's sufficiency of the evidence issue, Appellant did not specify which element of any of the offenses for which he was convicted was not supported by sufficient evidence. "If [an] Appellant wants to preserve a claim that the evidence was insufficient, then the 1925(b) statement needs to specify the element or elements upon which the evidence was insufficient. This Court can then analyze the element or elements on appeal. Where a 1925(b) statement does not specify the allegedly unproven elements, ... the sufficiency issue is waived on appeal." *Commonwealth v. Sipps*, 225 A.3d 1110, 1113 (Pa. Super. 2019) (quoting *Commonwealth v. Williams*, 959 A.2d 1252, 1257 (Pa. Super. 2008)). "A concise statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no concise statement." *Sipps*, 225 A.3d at 1113 (Pa. Super. 2019). This Court cannot determine from Appellant's 1925(b) Statement which offense, or element of any of the offenses, Appellant alleges is not supported by sufficient evidence.

Given Appellant's vague and broad allegation, it is difficult to evaluate whether Appellant's trial counsel was ineffective for not challenging the sufficiency of the evidence supporting Appellant's conviction. Appellant was convicted of five offenses, each of which contain multiple elements. Despite Appellant's overbroad assertion, however, this PCRA Court thoroughly reviewed the record to determine the sufficiency of the evidence offered against Appellant during trial. The Court has reviewed the evidence in total as well as the evidence related to specific allegations made by Appellant in his Supplement to Motion for

Post-Conviction Relief. "Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt." *Id*. (citing *Commonwealth v. Kakaria*, 625 A.2d 1167 (Pa. 1993)). "Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law." *Widmer*, 744 A.2d at 751 (citing *Commonwealth v. Santana*, 333 A.2d 876 (Pa. 1975)).

In the instant case, the evidence fully supports the jury's guilty verdicts against Appellant. Appellant was witnessed performing the acts in question and was apprehended with the firearm in his possession. This evidence was introduced against Appellant both by testimony and through physical evidence, including a shell casing, magazine pieces, and the firearm in question. The evidence did not contradict the physical facts nor was it in contravention to human experience. Appellant's claim for ineffective assistance of counsel regarding not challenging the sufficiency of the evidence lacked arguable merit, and Appellant's claim was denied accordingly.

Appellant's sixth issue alleges this PCRA Court abused its discretion by denying Appellant's ineffective assistance claim regarding his trial counsel not cross-examining the Commonwealth's witnesses about their alleged prior inconsistent statements. While it is unclear, this assertion does resemble Appellant's Supplement PCRA claim that Officer Bayhurst offered inconsistent statements concerning why he reported to the scene on the night in question. Appellant, both in his Supplement and in this 1925(b) Statement, failed to specify any statements Officer Bayhurst made that his trial testimony contradicted. Furthermore, Appellant failed to specify how the outcome at trial would have been any different had his trial counsel cross-examined Officer Bayhurst about these alleged inconsistent statements, meaning Appellant failed to demonstrate prejudice. *See Commonwealth v. Davida*, 106 A.3d 611, 621 (Pa. 2011).

Officer Bayhurst stated he was called to the scene by dispatch, which was corroborated by another witness, Sandra Vantassel. *See* T.T., 12/19117, at 115:3 to 116:10; 89:10-23. *Assuming arguendo*, however, Officer Bayhurst was not at the scene for that reason, Appellant did not allege any reason Officer Bayhurst was present that would have called his testimony or the evidence he collected into question. Appellant's claim provided no alternative reason for Officer Bayhurst's presence at the scene, and no reason to believe his credibility would have been damaged had he actually been present for another reason. Appellant's claim lacks arguable merit and did not provide evidence of prejudice, meaning Appellant's claim failed both the first and third prongs of an ineffective assistance claim.

Appellant's seventh issue alleges this PCRA Court abused its discretion in denying Appellant's ineffective assistance claim regarding his trial counsel not objecting to the admission of the magazine pieces and shell casings found by Officer Bayhurst. Again, Appellant did not allege a basis for objecting to the admission of this evidence. A review of the entire record does not reveal any discrepancies that would have excluded this evidence during trial; therefore, Appellant did not allege any basis to believe his trial counsel's decision not to object to this evidence prejudiced Appellant. Appellant's claim seems based only on Appellant's conclusion that his trial counsel's decision not to object was harmful because the evidence was harmful, which is not a sufficient basis to sustain an ineffective assistance claim. *See Davida*, 106 A.3d at 621. Appellant's trial counsel was reasonable in not objecting

to this evidence's admission, since there was no justifiable basis to object in the first place. Because Appellant did not provide sufficient evidence of any of the three prongs regarding an ineffective assistance claim, Appellant's claim was denied.

Appellant's eighth issue concerns whether this PCRA Court abused its discretion by denying Appellant's ineffective assistance claim based on his trial counsel not calling the "person who allegedly called police from the bar to report the defendant had an outstanding arrest warrant." Appellant did not allege any basis to believe there was any such witness. During trial, no such witness was mentioned, and the Commonwealth offered testimony from Sandra Vantassel who stated she called the police after witnessing Appellant fire a gun. *See* T.T., 12/19/17, 89:10-23. Appellant also failed to allege how any such witness's testimony would have aided Appellant's case in any way, or how trial counsel's failure to call such a witness prejudiced Appellant in any way. Since Appellant's claim of ineffective assistance regarding not offering this alleged witness lacks arguable merit and any indication of prejudice to Appellant, the Trial Court dismissed said claim.

Appellant's ninth issue alleges this PCRA Court abused its discretion in denying Appellant's ineffective assistance claim regarding his trial counsel not objecting to Commonwealth's closing argument, and in not finding Commonwealth committed prosecutorial misconduct during closing argument. Appellant alleged the prosecutor made "intentional misstatements of fact and render[ed] inflammatory arguments during closing argument not ground (*sic*) to the evidence at trial." Appellant cited specific examples in his Supplement to Motion for Post-Conviction Relief; however, the Court reviewed the entire closing argument in order to fully evaluate Appellant's claim.

In Pennsylvania, "it is axiomatic that during closing arguments the prosecution is 'limited to making comments based upon the evidence and fair deductions and inferences therefrom.'" *Ligon*, 206 A.3d at 519-20 (quoting *Commonwealth v. Joyner*, 365 A.2d 1233, 1236 (Pa. 1976)). "However, because trials are necessarily adversarial proceedings, prosecutors are entitled to present their arguments with reasonable latitude." *Ligon*, 206 A.3d at 520 (quoting *Commonwealth v. Paddy*, 800 A.2d 294, 316 (Pa. 2002)). "Thus, a prosecutor's remarks do not constitute reversible error unless their unavoidable effect ... [was] to prejudice the jury, forming in their minds a fixed bias and hostility toward the defendant so they could not weigh the evidence objectively and render a true verdict." *Commonwealth v. Ragland*, 991 A.2d 336, 340 (Pa. Super. 2010).

As for Appellant's ineffective assistance claim based on alleged prosecutorial misconduct, this PCRA Court, in addition to having presided over the trial as the Trial judge, re-examined said closing argument by reviewing a transcript of the trial. After a full review, this Court determined Commonwealth's closing argument was well within the bounds allowed under Pennsylvania law. Commonwealth did not assert any false statements or make any improper inferences, and there were certainly no statements made that could have resulted in such a fixed bias or hostility toward Appellant that he could no longer have received a fair verdict. For these reasons, Appellant's ineffective assistance claim regarding failure to object to Commonwealth's closing argument lacks arguable merit. As for Appellant's claim this PCRA Court should have found Commonwealth committed prosecutorial misconduct, such a claim is properly raised on direct appeal. Appellant's prosecutorial misconduct claim is, therefore, waived for purposes of PCRA review.

Appellant's tenth issue is whether this PCRA Court abused its discretion by denying Appellant's ineffective assistance claim for trial counsel not calling three witnesses: Debra Hatley, Madison Hatley, and Laura Beebe. Appellant claims their absence deprived him of a fair trial by not allowing him to present a complete and zealous defense, and "depriving the jury of relevant and significant evidence bearing on the guilt or innocence of defendant." Appellant described the value of each witness's testimony in detail in his Supplement to Motion for Post-Conviction Relief.

In a PCRA petition, when raising the failure to call a potential witness as ineffective assistance of counsel, petitioner must establish: 1) the witness existed; 2) the witness was available to testify for the defense; 3) counsel knew of, or should have known of, the existence of the witness; 4) the witness was willing to testify for the defense; and 5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial. *See Commonwealth v. Johnson*, 966 A.2d 523, 536 (Pa. 2009); *Commonwealth v. Washington*, 927 A.2d 586, 599 (Pa. 2007). "Trial counsel's failure to call a particular witness does not constitute ineffective assistance without showing that the absent witness' testimony would have been beneficial or helpful in establishing the asserted defense." *Commonwealth v. Chmiel*, 889 A.2d 501, 546 (Pa. 2005).

In the instant case, Appellant failed to present any evidence he informed his trial counsel of the presence of these witnesses. Appellant merely summarizes what they would have testified to and why that was valuable to Appellant's case. Appellant also overestimated the value any of these witnesses would have had in the case against Appellant. None of these witnesses were present at the bar on the night in question, and none of them witnessed the actions for which Appellant was charged. According to Appellant, their opinion testimony would have established only that Appellant and Kristin Ross were a happy couple, and that it was not within Appellant's character to discharge a firearm at Kristin Ross. Not only is their opinion as to Appellant's character inadmissible, *see* Pa.R.E. 405, but even if it were admissible, their testimony would have been directly contradicted by eyewitness testimony establishing Appellant was at the bar in question, outside the bar in question, and discharged a firearm outside the bar in question, not to mention the physical evidence tying Appellant to the firearm. Therefore, this PCRA Court found the witnesses' absence was not so prejudicial as to have denied Appellant a fair trial. Appellant's ineffectiveness claim regarding failure to call these three witnesses is meritless, as Appellant did not meet any of the relevant prongs for proving such a claim.

For all of the above reasons, this Trial Court requests the Pennsylvania Superior Court affirm this PCRA Court's October 16, 2020 Order denying Appellant's Motion for Post-Conviction Collateral Relief.

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

COMMONWEALTH of PENNSYLVANIA
v.
BILLY RAY GORDON

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

To prove a constitutional violation under the PCRA, a petitioner must prove a violation "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(i).

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

Counsel is presumed to have provided effective representation unless a [PCRA] petitioner pleads and proves all of the following: 1) the underlying legal claim is of arguable merit, 2) counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his client's interest, and 3) prejudice, to the effect that there was a reasonable probability of a different outcome at trial if not for counsel's error. *U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. § 9541 et seq.*

CRIMINAL LAW / TRIAL PROCEDURE / POST-CONVICTION RELIEF ACT

A PCRA Petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.

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

A failure to plead or prove any prong of an ineffectiveness assistance of counsel claim will defeat the claim.

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

With regard to whether counsel lacked a reasonable basis for his or her action or failure to act on a claim for ineffective assistance of counsel, the post-conviction court does not question whether there were other more logical courses of action which counsel could have pursued; rather, the court must examine whether counsel's decisions had any reasonable basis.

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

Absent a demonstration of prejudice, a PCRA Petitioner cannot prevail on a claim for ineffective assistance of counsel and no further inquiry into the claim is warranted.

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

When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.

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

The strength of the prosecution's case from the original proceeding is a vital part of the

reviewing court's inquiry. A verdict or conclusion only weakly supported by the record is more likely to have been affected by defense counsel's errors than one with overwhelming record support. *U.S. Const. Amend. 6.*

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

The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. The court should be concerned with whether the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. *U.S. Const. Amend. 6.*

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
Criminal Court, No. 3070 - 2016
PENNSYLVANIA SUPERIOR COURT
77 WDA 2021

Appearances: Tyler A. Lindquist, Esq., counsel for Appellant, Billy Ray Gordon
John H. Daneri, District Attorney of Erie County
Justin Smith, Assistant District Attorney

1925(a) OPINION

Domitrovich, J., March 1, 2021

The instant appeal concerns a Motion for Post-Conviction Collateral Relief [hereinafter PCRA Petition] filed by Tyler A. Lindquist, Esq., counsel for Appellant Billy Ray Gordon [hereinafter Appellant], on January 2, 2019. Before Appellant's trial began, this PCRA Court, acting as the Trial Court at the time, conducted voir dire with each jury panel member individually with both Appellant and his trial counsel present. Appellant and his trial counsel actively participated in Appellant's jury selection, as Appellant and his trial counsel conferred concerning the decision to excuse the juror in question. All counsel agreed during voir dire that one member of Appellant's jury panel should be excused for cause after she informed counsel and this PCRA Court she overheard a comment concerning Appellant committing a past crime. Appellant's trial counsel conversed with Appellant at that time off the record, after which both Appellant and his trial counsel were satisfied on the record with the excusal of this one juror only. Thereafter, Appellant has not presented any evidence that any other juror on Appellant's jury panel overheard the same comment, let alone was tainted by it. Appellant also claimed his trial counsel was ineffective for not obtaining DNA evidence from two crack pipes found at the crime scene and introducing this evidence at trial. As Appellant also could not provide sufficient evidence that he was prejudiced in any way by his trial counsel's decision not to move to obtain a DNA analysis of two crack pipes found at the crime scene, Appellant's claim failed.

Furthermore, at the August 2019 PCRA Evidentiary Hearing regarding Appellant's PCRA Petition, Appellant's trial counsel credibly provided this PCRA Court with reasonable bases for his decisions not to move to dismiss Appellant's entire jury panel and for not moving to obtain said DNA analysis. For all of these reasons, on December 10, 2020, this PCRA Court denied Appellant's PCRA Petition, thereby denying the same claims Appellant now raises on

appeal. Appellant's counsel has filed the following claims for appellate review: 1) Where this PCRA Court, acting as the Trial Court, excluded one member of Appellant's jury panel during individual voir dire that heard a comment concerning a past crime committed by Appellant, whether this PCRA Court allegedly violated Appellant's constitutional right to a fair and impartial jury by not dismissing the entire jury panel, and whether Appellant's trial counsel was allegedly ineffective for not moving to dismiss the entire jury panel, and 2) whether Appellant's trial counsel was allegedly ineffective for not moving to obtain DNA evidence from two crack pipes found at the crime scene to introduce as evidence at trial.

FACTUAL and PROCEDURAL HISTORY

The factual and procedural history of this case is as follows: On August 3, 2016, Appellant was arrested in connection with the stabbing death of his wife, Linda Gordon. On August 16, 2016, Attorney Mark T. Del Duca was appointed to represent Appellant in the instant case. On October 4, 2016, the Erie City Police Dept. filed a Criminal Information against Appellant for the following six (6) charges: 1) first-degree murder, 18 Pa.C.S. § 2501(a); 2) aggravated assault, 18 Pa.C.S. § 2702(a)(1); 3) recklessly endangering another person, 18 Pa.C.S. § 2705; 4) possession of instrument of crime, 18 Pa.C.S. § 907(a); 5) abuse of corpse, 18 Pa.C.S. § 5510; and 6) tampering with or fabricating physical evidence, 18 Pa.C.S. § 4910(1). On March 30, 2017, Appellant was convicted of all six (6) charges following a four-day jury trial that occurred from March 27 to March 30, 2017. On May 25, 2017, Appellant was sentenced to life imprisonment without the possibility of parole with two and a half (2 1/2) to eight (8) years consecutive.

On June 12, 2017, Appellant, with the assistance of Attorney Del Duca, filed a Notice of Appeal with the Erie County Clerk of Courts and the Pennsylvania Superior Court. On June 29, 2017, Attorney Del Duca filed a Petition to Withdraw Appearance on Appellant's behalf with the Pennsylvania Superior Court, which was dismissed so that Attorney Del Duca could file said Petition with this Court. On July 7, 2017, Appellant, with Attorney Del Duca's assistance, filed a 1925(b) Concise Statement of Matters Complained of on Appeal with this Trial Court. On direct appeal, Appellant asserted two claims: 1) "That the evidence produced at trial by Commonwealth of Pennsylvania was insufficient to support convictions in this matter with First Degree Murder (Murder 1), Aggravated Assault, Recklessly Endangering Another Person, Possession of an Instrument of Crime, Abuse of Corpse, and Tampering With/ Fabricate (*sic*) ... " and 2) "That defense counsel failed to effectively represent the Defendant in the above referenced matter. Specifically, defense counsel did not adequately cross examine Commonwealth's witnesses and failed to introduce proper evidence on behalf of Defendant."

Following a hearing on July 10, 2017, this PCRA Court granted Attorney Del Duca's Petition for Leave to Withdraw Appearance; and on July 13, 2017, Attorney Emily M. Merski, of the Erie County Public Defender's Office, entered her appearance as counsel for Appellant with the Pennsylvania Superior Court. On July 21, 2017, the Pennsylvania Superior Court granted Attorney Del Duca's Petition to Withdraw as Counsel. On July 12, 2018, the Pennsylvania Superior Court affirmed Appellant's sentence. *See Commonwealth v. Gordon*, No. 897 WDA 2017, 194 A.3d 665 (Pa. Super., July 12, 2018).

On January 2, 2019, Appellant filed *pro se* a Motion for Post-Conviction Collateral Relief. On January 8, 2019, Attorney William J. Hathaway was appointed to represent Appellant in the

instant PCRA Petition. On March 20, 2019, Attorney Hathaway filed a Supplement to Motion for Post-Conviction Collateral Relief. Commonwealth filed its response on April 22, 2019.

On August 19, 2019, a PCRA Evidentiary Hearing was conducted before this Court regarding the instant PCRA Petition. Appellant was represented during said hearing by Attorney Hathaway. Following this August 2019 PCRA Evidentiary Hearing, Appellant filed *pro se* a Motion for Withdrawal of Court-Appointed Counsel and to Proceed Pro Se. On October 16, 2019, this Court held a *Grazier Hearing*[1] regarding Appellant's *pro se* Motion to Withdraw his PCRA counsel, Attorney Hathaway. However, during this *Grazier Hearing*, Appellant orally withdrew his request to proceed *pro se* in favor of this PCRA Court appointing Appellant new PCRA counsel. Appellant's new and current PCRA counsel, Tyler A. Lindquist, Esq., was appointed shortly thereafter.

On October 31, 2019, Appellant filed *pro se* a Motion for Continuance, requesting this Court stay the proceedings "and allow new counsel time enough to review the record and determine if he/she should file ... an amended PCRA and/or request another [E]videntiary hearing." On November 8, 2019, Appellant's newly appointed PCRA counsel, Attorney Lindquist, also filed a Motion for Continuance in the instant case. Attorney Lindquist requested ninety (90) days so that he may "review the record of this matter and determine the merits of Defendant's PCRA Petition." On November 18, 2019, this PCRA Court granted Attorney Lindquist's Motion to Continue.

On February 11, 2020, Attorney Lindquist, on Appellant's behalf, filed an Amended Petition for Post-Conviction Collateral Relief, which consisted of two claims: 1) Appellant's constitutional right to an impartial jury was violated, and 2) ineffective assistance of trial counsel for failure to request a mistrial due to an allegedly tainted jury pool. Commonwealth's counsel filed its response to Appellant's Amended Petition for Post-Conviction Collateral Relief on March 2, 2020. On March 31, 2020, this PCRA Court entered an Order postponing proceedings in the instant case due to the Covid-19 pandemic.

On August 4, 2020, this Court conducted a Status Conference with Appellant and all counsel to determine whether a second PCRA evidentiary hearing was required in the instant case. Attorney Lindquist stated on the record the August 2019 PCRA Evidentiary Hearing was sufficient and, by mutual agreement of counsel, this PCRA Court set a briefing schedule for Appellant's PCRA Petition. On September 1, 2019, Attorney Lindquist filed a Motion for Extension of Time, requesting an additional sixty (60) days to file his brief, which was granted by this PCRA Court on September 2, 2019. PCRA counsel for Appellant submitted his "Brief in Support of Petitioner's PCRA Petition" on November 9, 2020. In said Brief, Attorney Lindquist argued two issues: 1) ineffective assistance of trial counsel for failure to request the jury pool be dismissed or for a mistrial, and 2) ineffective assistance of trial counsel for failure to request DNA evidence. Commonwealth's counsel filed its response on December 8, 2020. This PCRA Court denied Appellant's PCRA Petition on December 10, 2020.

On January 11, 2021, Appellant filed Notice of Appeal with the Prothonotary of the Erie County Court of Common Pleas and the Pennsylvania Superior Court. On January 13, 2021, this Court issued a 1925(b) Order directing Appellant's counsel to file a Concise Statement of Matters Complained of on Appeal, which was filed by Appellant's counsel on February 8, 2021.

[1] *Commonwealth v. Grazier*, 713 A.2d 81 (Pa. 1998).

APPELLANT'S 1925(b) ISSUES

Appellant's counsel first alleges this Court abused its discretion by not dismissing Appellant's entire jury panel upon learning one jury panel member overheard another jury pool member discuss a crime Appellant allegedly committed, which deprived Appellant of a fair and impartial jury. The excused potential juror, Juror #26, confirmed said jury pool member was not a member of Appellant's jury panel.[2] Appellant also alleges his trial counsel was ineffective for not moving for a mistrial on said basis although no jurors were sworn at that time until the entire jury was selected.[3]

During voir dire, which was conducted with each panel member individually and not in the presence of the rest of the jury panel, potential Juror #26 candidly informed trial counsel, Appellant, and the Trial Court that she overheard someone in the jury pool say Appellant had murdered her father. Juror #26 stated she did not recognize this person as a member of Appellant's jury panel. Juror #26 also stated she did not see anyone else she recognized from Appellant's jury panel in the vicinity at the time. After hearing this information, and after discussion with counsel and Appellant, who also discussed this matter with his trial counsel off the record, this Court excused Juror #26 for cause, with mutual agreement of counsel and with no objection from Appellant. All other potential jurors were then questioned regarding whether they had heard anything concerning Appellant that would bias them as jurors. *See*, N.T., 8/19/19 PCRA Evidentiary Hearing, at 13:21 - 14:9. This Trial Court determined, therefore, no one else overheard the same or a similar comment as Juror #26, and voir dire continued to occur until jury selection was completed. During Appellant's August 2019 Evidentiary Hearing, Appellant's counsel and Commonwealth's counsel both credibly testified no other jury panel member indicated to them or this Court that they had overheard any comment that may bias them against Appellant.

To prove a constitutional violation under the PCRA, a petitioner must prove a violation "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(i). In the instant case, however, Appellant has not provided any evidence whatsoever any member of Appellant's jury overheard this comment, let alone that said member was prejudiced by this comment. Therefore, Appellant cannot provide any evidence the truth-determining process in his trial was undermined in any way. Appellant is engaging in pure speculation when he alleges his jury was tainted by this comment, as the only member of Appellant's jury pool to overhear this comment was ultimately excused for cause.

As for Appellant's trial counsel's ineffectiveness regarding his failure to move for a mistrial after Appellant's jury pool was not dismissed, "counsel is presumed to have provided effective representation unless a [PCRA] petitioner pleads and proves all of the following: 1) the underlying legal claim is of arguable merit, 2) counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his client's interest, and 3) prejudice, to the effect that there was a reasonable probability of a different outcome at trial if not for counsel's error." *Commonwealth v. Pier*, 182 A.3d 476, 478 (Pa. Super. 2018) (quoting *Commonwealth*

[2] At the time, there were two separate cases selecting juries, and members of both panels in the jury pool were located in the same general vicinity.

[3] As stated in this Court's December 10, 2020 Opinion and Order, Appellant's trial counsel would not have moved for a mistrial at this time since Appellant's trial had yet to begin and jurors were not swom-in until all jurors were selected.

v. Simpson, 112 A.3d 1194, 1197 (Pa. 2015)). "A PCRA Petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place." *Commonwealth v. Ligon*, 206 A.3d 515, 519 (Pa. Super. 2019) (quoting *Commonwealth v. Spotz*, 84 A.3d 294, 311 (Pa. 2014)). "A failure to plead or prove any prong of an ineffectiveness assistance of counsel claim will defeat the claim." *Ligon*, 206 A.3d at 519 (quoting *Commonwealth v. Grove*, 170 A.3d 1127, 1138 (Pa. Super. 2017)).

As Appellant did not present any evidence that the truth determining process was undermined in any way by the comment, Appellant's ineffectiveness claim must fail. Appellant cannot point to any jury panel member, other than the jury panel member excused for cause, that overheard the comment in question. The trial record establishes this Trial Court conducted a thorough analysis of each potential juror to determine if any jury panel member had overheard anything that may bias them against Appellant, and excused for cause the one jury panel member that had. Appellant's August 2019 Evidentiary Hearing further supports this conclusion, as both Appellant's trial counsel and Commonwealth's counsel credibly testified no other jury panel member indicated they overheard any prejudicial comments concerning Appellant, and Appellant offered no evidence to the contrary. Appellant's claim lacks arguable merit.

Furthermore, Appellant's speculation that some other juror may have been tainted by the comment does not provide sufficient evidence Appellant's jury was tainted in any way. Appellant cannot make any demonstration of prejudice, as there is no support in the trial record for the allegation that another jury panel member overheard the same or a similar comment, and Appellant has not offered any such evidence during this PCRA Proceeding, either. *See Commonwealth v. Spotz*, 896 A.2d 1191, 1221 (Pa. 2006). There is no evidence Appellant's trial counsel's failure to move to dismiss Appellant's entire jury panel deprived Appellant of a fair trial, whose result is reliable. *See Commonwealth v. Johnson*, 236 A.3d 63, 69 (Pa. Super. 2020). Appellant cannot prove there is any reasonable likelihood the outcome at trial would have been different had Appellant's counsel moved to dismiss Appellant's entire jury panel.

Moreover, from the perspective of the Trial Court in Appellant's case, had Appellant's trial counsel moved to dismiss Appellant's entire jury panel, there is no reasonable probability the jury would have had any reasonable doubt as to Appellant's guilt. *See Johnson*, 236 A.3d at 69. As there is no evidence Appellant's jury was biased or impartial, there is no indication Appellant's trial counsel's failure to move to dismiss Appellant's jury pool would have had any effect on the evidence this Trial Court and the jury reviewed. *Id*. The Commonwealth's case against Appellant at trial was very strong. *Id*. Therefore, Appellant failed to establish the prejudice prong of an ineffective assistance claim, and his claim thereby fails two of the three prongs required to establish such a claim.

As for the third prong, Appellant's trial counsel, at the August 2019 PCRA Evidentiary Hearing, credibly stated to this Court his reasoning for not moving to dismiss Appellant's entire jury pool. Attorney Del Duca stated there was no evidence any other member of the jury pool overheard this comment. Therefore, trial counsel reasoned, as the Juror in question was excused for cause, any potential taint in the jury pool was excused along with her. This

Court found Appellant's trial counsel's decision not to move to dismiss Appellant's entire jury pool was reasonable, and that Appellant's trial counsel's decision did not affect Appellant's interest at trial. Therefore, Appellant's claim fails all three prongs regarding an ineffective assistance of counsel claim.

Appellant's second claim concerns Appellant's trial counsel's ineffectiveness regarding not moving to obtain a DNA analysis of two crack pipes found at the crime scene. Appellant alleges only that this evidence would "potentially" have been exculpatory. Attorney Del Duca credibly stated his reasoning for not obtaining said DNA analysis during the August 2019 PCRA Evidentiary Hearing: "Looking back, [whether Commonwealth intended to test the crack pipes for DNA] is probably not a question that I would want to be answered at the preliminary hearing, and I will also tell you it's not a question I want answered in the trial for the following reasons: first, if any DNA came back with linking (sic) [Petitioner] at the scene where the body was found, that's not good for my client at that point. Secondly, if it came back his DNA was not on either pipe, I don't believe that to be germane to the issue as to whether or not he committed this homicide ... Again, to reiterate, if it came back positive, we'd have problems; if it was negative, okay, great, but I don't see how that would indicate either way if he committed the crime as well." N.T., PCRA Evidentiary Hearing, 8/19/19, at 15:20 - 16:14.

This Court found Attorney Del Duca made the preferable strategic decision not to move to obtain a DNA analysis of the crack pipes, as the wrong result would have done far more damage to Appellant's case than the right result would have aided Appellant's case. However, even if this Court had found it was preferable for Attorney Del Duca to have moved to obtain the DNA analysis, an ineffective assistance claim cannot be established simply because Attorney Del Duca could have made a better decision. In Pennsylvania, "with regard to whether counsel lacked a reasonable basis for his or her action or failure to act on a claim for ineffective assistance of counsel, the post-conviction court does not question whether there were other more logical courses of action which counsel could have pursued; rather, the court must examine whether counsel's decisions had any reasonable basis." *Commonwealth v. Hopkins*, 231 A.3d 855,874 (Pa. Super. 2020) (quoting *Commonwealth v. Mason*, 130 A.3d 601,618 (Pa. 2015)).

This Court found Attorney Del Duca's decision not to move to obtain a DNA analysis of the crack pipes was reasonable, and, therefore, Appellant's trial counsel was not ineffective for deciding not to obtain said analysis. Furthermore, as Appellant alleges only that this evidence could "potentially" have been exculpatory, Appellant fails to demonstrate Appellant was prejudiced by Attorney Del Duca's decision. Not only can Appellant not establish any reasonable likelihood a favorable DNA analysis would have resulted in a different outcome at trial if granted by this Trial Court, Appellant cannot establish any reasonable likelihood the DNA analysis would have been favorable. In other words, Appellant cannot establish, and does not allege, his DNA would not have been on the crack pipes. There is no evidence in the record suggesting Appellant's DNA would not have been on either crack pipe. Appellant is only speculating the outcome at trial would have been different had his trial counsel moved to obtain a DNA analysis, and if this DNA analysis was favorable.

Moreover, considering the great weight of evidence offered by the Commonwealth against Appellant at trial, there is no reasonable probability that had Appellant's trial counsel obtained

a DNA analysis, and if it were in fact favorable, the jury would have found reasonable doubt. Commonwealth offered its own DNA evidence against Appellant and significant other evidence providing a very strong case against Appellant at trial. Given a favorable DNA analysis would only establish Appellant did not use either crack pipe, there is no indication this would have had any effect on the jury's consideration of the evidence offered against Appellant at trial.

Since Appellant's trial counsel had a reasonable basis not to move to obtain the DNA analysis, and because Appellant cannot establish the lack of this evidence prejudiced Appellant, this Court denied Appellant's ineffectiveness claim.

For all of the above reasons, this Court requests the Pennsylvania Superior Court affirm its December 10, 2020 Order denying Appellant's Motion for Post-Conviction Collateral Relief.

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

KATHERINE M. MOORE
v.
MARK L. MOORE

PRINCIPAL AND SURETY / CONTRACTS

Under Pennsylvania law, a surety agreement is a contract and the language of the surety agreement determines the surety's rights and liabilities.

PRINCIPAL AND SURETY / CONTRACTS

A contract of suretyship is between the principal debtor and the surety.

PRINCIPAL AND SURETY / CONTRACTS

A suretyship is a direct and original undertaking, under which the obligor is primarily and jointly liable with the principal.

PRINCIPAL AND SURETY / CONTRACTS

Customarily, a suretyship arrangement arises when a creditor refuses to extend credit to a debtor unless a third party (the surety) agrees to provide additional security for repayment of the debt by undertaking the debtor's obligation to the creditor if the debtor fails to perform.

DIVORCE / CONTRACTS

Under Pennsylvania law, marital settlement agreements are subject to the law governing contracts and must be interpreted as written.

DIVORCE / CONTRACTS

A settlement agreement between spouses is governed by the law of contracts unless the agreement provides otherwise.

DIVORCE / CONTRACTS

When interpreting the language of a contract, the intention of the parties is a paramount consideration. In determining the intent of the parties, the court looks to what they have clearly expressed, for the law does not assume that the language was chosen carelessly.

DIVORCE / CONTRACTS

In construing agreements involving clear and unambiguous terms, a Court need only examine the writing itself to give effect to the parties' understanding, meaning the intent of the parties is generally the writing itself.

DIVORCE / CONTRACTS

Pennsylvania law is clear that a marital debt is one that accrues to both husband and wife jointly before the separation.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
Civil Court
Trial Docket No. 12434 - 2017
974 WDA 2020

Appearances: Scott M. Hare, Esq. appeared on behalf of Appellant
Steven E. George, Esq. appeared on behalf of Appellee

1925(a) OPINION

Domitrovich, J., November 16, 2020

This case concerns the signing of an Unconditional Guarantee Suretyship Agreement by Appellant Katherine M. Moore [hereinafter Appellant], in her individual capacity, for a Small Business Administration loan [hereinafter SBA loan] to J.J. Moore Sales, Inc. [hereinafter J.J. Moore]. In 2002, both Appellant and Appellee Mark L. Moore [hereinafter Appellee] individually signed separate Unconditional Guarantee Suretyship Agreements to guarantee the SBA loan to J.J. Moore at the time of the loan's disbursement by the SBA.[1] In 2008, Appellant and Appellee initiated divorce proceedings at Docket No. 10800 - 2008, culminating in 2012 with the signing of a Marital Separation and Property Agreement [hereinafter Separation Agreement] and Divorce Decree incorporating said Separation Agreement.[2] This Separation Agreement does not evidence specifically that Appellant's SBA loan debt was contemplated during the formation of the Separation Agreement. The parties did not specifically indicate the Separation Agreement was intended to abrogate Appellant's direct and immediate obligation as surety for the SBA loan. This SBA loan was made to J.J. Moore, not Appellee, as Appellee was also a surety for the SBA loan to J.J. Moore; therefore, Appellee's actions did not result in Appellant's obligation under the loan. More importantly, Appellant's obligation to answer to the SBA for the loan to J.J. Moore is the direct result of her own actions when she signed the Unconditional Guarantee Suretyship Agreement, and not the actions of either J.J. Moore or Appellee. The SBA is seeking repayment from Appellant through the Unconditional Guarantee Suretyship Agreement individually signed by Appellant. Therefore, this Trial Court granted Appellee's Motion for Summary Judgment and denied Appellant's Motion for Summary Judgment as to Appellee's obligation to indemnify Appellant for the instant SBA loan.

In Appellant's 1925(b) Concise Statement, Appellant's counsel alleges this Trial Court erred as to four conclusions of law which this Trial Court has combined into one issue: whether Appellant's executing an individual and separate Unconditional Guarantee Surety Agreement with the SBA to guarantee the SBA loan can be enforced under the indemnification provision of Appellant and Appellee's Separation Agreement which does not indicate any intent of the parties to have Appellee indemnify Appellant for debts and obligations she separately incurred herself?

The procedural history of this case is as follows: In 2012, at the Divorce Docket Number 10800 - 2008, Appellant and Appellee signed the instant Separation Agreement and were issued a Divorce Decree. On August 30, 2017, Appellant filed the instant Complaint at Civil Docket Number 12434 - 2017 seeking to bring Appellant's Suretyship Agreement under the Separation Agreement.[3] Appellant's Complaint alleged one count of breach of contract regarding

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[1] Appellee indicates he was discharged from his obligation to the SBA in Chapter 7 bankruptcy on April 7, 2009. Whether Appellee or J.J. Moore was discharged from any obligation for the SBA loan was not a determinative issue before this Trial Court. Rather, the controlling issue before this Trial Court was whether Appellant's obligation to the SBA, as a result of the Unconditional Guarantee Suretyship Agreement, was subject to the Separation Agreement's indemnification provision.

[2] In 2017, Appellant filed the instant action for enforcement under the Separation Agreement at a new docket number — Civil Action Docket Number 12434 of 2017 — which is not under the parties' divorce Docket Number of 10800 of 2008, where the Separation Agreement was filed and docketed with all other relevant divorce information.

[3] Appellant filed the instant action after receiving a June 2015 Administrative Order from the SBA holding Appellant liable for the SBA loan under the Unconditional Guarantee Suretyship Agreement. Despite Appellant claiming in the initial Complaint she did not remember executing the instant Unconditional Guarantee Suretyship Agreement, Appellant argued in front of the SBA that she was an innocent spouse and that the SBA failed to join Appellee as an indispensable party. The SBA rejected Appellant's claims.

the 2012 Separation Agreement. Appellant also claimed entitlement to attorney's fees for responding to the claims of the SBA/Department of the Treasury against Appellant. Appellee filed Preliminary Objections to Appellant's Complaint on September 21, 2017, which were overruled by this Trial Court on April 17, 2018. Appellee filed an Answer, New Matter, and Counterclaim on May 10, 2018, to which Appellant filed a Reply to New Matter and Answer to Counterclaim on December 24, 2018. A lengthy discovery process ensued. On June 9, 2020, Appellee filed his Motion for Summary Judgment, and on July 1, 2020, Appellant filed her Motion for Summary Judgment. This Trial Court heard argument regarding both Motions for Summary Judgment on August 3, 2020, wherein both parties were represented by counsel. On August 17, 2020, this Trial Court issued an Opinion and Order stating reasons and relevant law for denying Appellant's Motion for Summary Judgment and granting Appellee's Motion for Summary Judgment.

On September 15, 2020, Appellant timely filed a Notice of Appeal with the Prothonotary of the Erie County Court of Common Pleas as well as the Pennsylvania Superior Court. Also on September 15, 2020, this Trial Court issued a 1925(b) Order to Appellant directing Appellant to file a Concise Statement of Matters Complained of on Appeal with this Trial Court. Appellant timely filed her 1925(b) Concise Statement on October 6, 2020.

Under Pennsylvania law, a surety agreement is a contract and the language of the surety agreement determines the surety's rights and liabilities. *Beckwith Machinery Co. v. National Union Fire Ins. Co. of Pittsburgh*, 809 A.2d 403, 406 (Pa. Super. 2005). "A contract of suretyship is between the principal debtor and the surety." *Reliance Ins. Co. v. Penn Paving, Inc.*, 734 A.2d 833, 836 (Pa. 1999). "A suretyship is a direct and original undertaking, under which the obligor is primarily and jointly liable with the principal." *Deeter v. Dull Corp., Inc.*, 617 A.2d 336, 341 (Pa. Super. 1992) (citing *Wurlitzer Co. v. Oliver*, 334 F. Supp. 1009 (W.D. Pa. 1971)). "Customarily, a suretyship arrangement arises when a creditor refuses to extend credit to a debtor unless a third party (the surety) agrees to provide additional security for repayment of the debt by undertaking the debtor's obligation to the creditor if the debtor fails to perform." *Continental Bank v. Axler*, 510 A.2d 726, 729 (Pa. Super. 1986). "A surety is one who undertakes to pay money or perform other acts in the event that his principal fails therein, and the surety is directly and immediately liable for the debt." *Wurlitzer Co.*, 334 F. Supp. at 1013 (citing *In re Brock's Assigned Estate*, 166 A. 778 (Pa. 1933)).

In this case, both Appellant and Appellee signed separate Unconditional Guarantee Suretyship Agreements in their individual capacities. These Unconditional Guarantee Suretyship Agreements provide that Appellant and Appellee are both guarantors and that the borrower is J.J. Moore. Each Unconditional Guarantee Suretyship Agreement provides in relevant part: "Guarantor unconditionally guarantees payment to Lender of all amounts owing under the Note. This Guarantee remains in effect until the Note is paid in full. ***Guarantor must pay all amounts due under the Note when Lender issues written demand upon Guarantor. Lender is not required to seek payment from any other source before demanding payment from Guarantor."***[4] The Unconditional Guarantee Suretyship Agreement requires guarantor

[4] Under Pennsylvania law, a contract that guarantees the debt of another is a suretyship agreement when the creditor is entitled to seek payment directly from the guarantor/surety without being required to first seek payment from the principal debtor. *See Mcintyre Square Assoc. v. Evans*, 827 A.2d 446, 451 n. 7 (Pa. Super. 2003) (citing *Reuter v. Citizens & North Bank*, 599 A.2d 673, 678 n. 3 (Pa. 1991)). Since KeyBank was entitled to seek payment directly from both Appellant and Appellee under the instant agreements, these contracts were suretyship contracts.

waive any right to require demand be made upon the borrower, J.J. Moore. The Unconditional Guarantee Suretyship Agreement requires guarantor waive any right to notice of default and notice of any change in the financial condition or business operations of borrower or any guarantor. The Unconditional Guarantee Suretyship Agreement requires guarantor waive any defense to payment due to any change in the financial condition of borrower or any guarantor. The Unconditional Guarantee Suretyship Agreement requires guarantor waive any defense Borrower has avoided liability on the note. Finally, the Unconditional Guarantee Suretyship Agreement states all guarantors are jointly and severally liable for repayment of the note.

The Unconditional Guarantee Suretyship Agreement clearly states the borrower/principal debtor is J.J. Moore, and Appellant and Appellee are sureties for J.J. Moore's SBA loan. Since under Pennsylvania law a principal debtor may not act as her or his own surety, J.J. Moore and Appellee are not considered the same entity any more than J.J. Moore and Appellant are considered the same entity. *See Hamilton v. Harida*, 421 A.2d 396, 399 (Pa. Super. 1980) (citing *Brock's Assigned Estate (No. 1)*, 166 A. 778 (Pa. 1933)). J.J. Moore, as a corporation, is its own entity. Therefore, Appellant's argument that the debt she incurred in the instant case was incurred solely and entirely by Appellee is without merit. Appellant's argument rests on the idea that since Appellee was President and sole shareholder of J.J. Moore, Appellee is solely and entirely liable for J.J. Moore's inability to repay the loan. However, as Appellee cannot be both principal debtor and surety for the SBA loan, to the extent any person or entity other than Appellant is liable for Appellant's obligation to repay the loan, that person or entity is J.J. Moore, not Appellee.

However, regardless of J.J. Moore's inability to repay the loan and the effect J.J. Moore's inability to repay had on the SBA's choice to seek repayment from Appellant, Appellant's obligations to the SBA are determined by the Unconditional Guarantee Suretyship Agreement she executed, not by any actions of Appellee or J.J. Moore. Under Pennsylvania law, the Unconditional Guarantee Suretyship Agreement determines Appellant's rights and obligations as surety for the SBA loan granted to the borrower, J.J. Moore. Also under Pennsylvania law, a surety incurs a direct and immediate liability for the debt. While the above list of obligations under the Unconditional Guarantee Suretyship Agreement does not represent an exhaustive list of the obligations contained therein, these obligations clearly indicate the instant Unconditional Guarantee Suretyship Agreement led to Appellant's direct and immediate obligation to the SBA for its loan to J.J. Moore. The Suretyship Agreement states clearly Appellant herself undertook as an individual guarantor to repay the full amount of the note, and Appellant remains liable until the loan is repaid in full. Appellant agreed to be unconditionally bound to the instant Unconditional Guarantee Suretyship Agreement. Appellant agreed to be jointly and severally liable for repayment of the note. Appellant waived notice and defenses to repayment regarding the change in financial circumstances or conditions of J.J. Moore or Appellee.

Despite Appellant incurring a direct and immediate obligation for the SBA loan pursuant to the Unconditional Guarantee Suretyship Agreement, Appellant argues she is entitled to indemnification for this obligation from Appellee under the Separation Agreement. In order to determine whether such a direct and immediate obligation is included within the Separation Agreement, the Separation Agreement must be examined closely. Under Pennsylvania law, marital settlement agreements are subject to the law governing contracts and must be

interpreted as written. *In re Estate of Easterday*, 209 A.3d 331, 337 (Pa. 2019). "A settlement agreement between spouses is governed by the law of contracts unless the agreement provides otherwise." *Stamerro v. Stamerro*, 889 A.2d 1251, 1258 (Pa. Super. 2005) (quoting *Chen v. Chen*, 840 A.2d 355, 360 (Pa. Super. 2003)). "When interpreting the language of a contract, the intention of the parties is a paramount consideration. In determining the intent of the parties, the court looks to what they have clearly expressed, for the law does not assume that the language was chosen carelessly." *Melton v. Melton*, 831 A.2d 646, 653-54 (Pa. Super. 2003). "In construing agreements involving clear and unambiguous terms, a Court need only examine the writing itself to give effect to the parties' understanding, meaning the intent of the parties is generally the writing itself. *Rosiecki v. Rosiecki*, 231 A.3d 928, 933 (Pa. Super. 2020) (quoting *Lang v. Meske*, 850 A.2d 737, 739-40 (Pa. Super. 2004); *Stamerro*, 889 A.2d at 1258).

In the instant case, Appellant argues clause 11 of the Separation Agreement, titled *Future Title, Ownership, and Liability*, supports her argument that Appellee is allegedly bound to indemnify her under the Separation Agreement. The first paragraph of clause 11 states: "Each of the parties shall hereafter own, have and enjoy, all items of real and personal property now or hereafter belonging to him or her and now or hereafter in his or her possession, with full power to him or her to dispose of the same as fully and effectively, in all respects and for all purposes, as though her or she were unmarried." The second paragraph, which Appellant relies upon, states: "The Husband and Wife represent and warrant to each other that they have not incurred debts or made any contracts for which the other or his or her estate may be liable and will not hereafter incur any such debts or make any such contracts. Each party agrees to indemnify the other from any debts or contracts that may exist or come into existence in violation of this clause." *See* Complaint, p. 16.

This Trial Court finds and concludes the language of clause 11 in the Separation Agreement is clear and unambiguous. This Trial Court is, therefore, bound to interpret this contract as written. To determine whether Appellant or Appellee is bound to indemnify the other for the Suretyship Agreements which both Appellant and Appellee signed in an individual capacity, this Trial Court must examine the intent of the parties as determined by the language of the Separation Agreement. Vital to this determination is the clear and unambiguous language that "Husband and Wife represent and warrant to each other that they have not ***incurred debts or made any contracts for which the other or his or her estate may be liable ... "*** *Id.* By this clear and unambiguous language, the intent of both Appellant and Appellee was to indemnify each other only for debts and obligations incurred by either person that the other, or their estate, is held liable. Appellant or Appellee must have incurred a debt or obligation for which the other has become liable. Therefore, if either Appellant or Appellee individually incurred a debt obligation for which the other party would be held liable, said person would indemnify the other for that obligation. However, if Appellant or Appellee incurred a debt obligation for which he or she personally is being held liable, Appellant or Appellee would not be entitled to indemnification from the other party.

The interpretation of this contract is further strengthened by the third "Whereas" clause of the Separation Agreement: " ... [T]he parties are desirous of settling fully and finally their respective financial and property rights and obligations ***as between each other*** including, without limitation or specification: the settling of all matters between them relating to the

ownership and equitable distribution of real and personal property ... and in general, the settling of any and all claims and possible claims by one against the other or against their respective estates." *Id*. at p. 12-13. Clearly, the property and financial rights in question are those as between Appellant and Appellee, and not those property or financial rights either Appellant or Appellee had incurred individually.

Moreover, both the first paragraph of clause 11 and the third "Whereas" clause refer to real and personal property as well as financial rights and interests in the context of marital property and interests being divided by the Separation Agreement. All marital debts and obligations incurred between Appellant and Appellee are included, but not debts or obligations incurred individually by either Appellant or Appellee for which said person would now be held liable. Pennsylvania law is clear that a marital debt is one that accrues to both husband and wife jointly before the separation. *See* Standard Pennsylvania Practice 2d § 126:559; *Litmans v. Litmans*, 673 A.2d 382 (Pa. Super. 1996). While in the instant case both Appellant and Appellee were married at the time they executed separate suretyship agreements, Appellant solely and individually executed a separate Unconditional Guarantee Suretyship Agreement. The debt accrued to Appellant individually pursuant to the Unconditional Guarantee Suretyship Agreement she signed.

In the instant case, therefore, Appellant herself incurred the obligation to repay the SBA loan and the instant debt by signing the Unconditional Guarantee Suretyship Agreement in 2002. Otherwise, the SBA would have no mechanism to seek repayment from Appellant for this obligation she incurred separately and not due to Appellee's actions. According to the Separation Agreement, Appellant is only entitled to indemnification from Appellee for debts, contracts, or obligations Appellee incurred for which either Appellant or Appellant's estate is now liable. The Separation Agreement provides for the right of indemnification if either Appellant or Appellee incurred a debt obligation that the other person would be held liable for; however, this is not the case here. Since Appellant's obligation to the SBA stems from Appellant having individually executed the 2002 Suretyship Agreement with the SBA, Appellant's own contract has resulted in her obligation to repay the debt to the SBA. The SBA is entitled through Appellant's signing the Unconditional Guarantee Suretyship Agreement to seek full repayment directly from Appellant without having to seek repayment from either J.J. Moore or Appellee. For these reasons, Appellant is not entitled to indemnity from Appellee for her personal obligation incurred to the SBA.

For all of the above reasons, this Trial Court properly found and concluded the Separation Agreement did not provide for indemnification of debts or contracts incurred by either Appellant or Appellee in an individual capacity. Neither Appellant nor Appellee is entitled to have individual debts or obligations separately incurred indemnified by the other. By individually executing this Unconditional Guarantee Suretyship Agreement in 2002 with the SBA, Appellant herself incurred this debt obligation to the SBA.

This Trial Court honorably requests the Pennsylvania Superior Court affirm this Trial Court's August 17, 2020 Order granting Appellee's Motion for Summary Judgment and denying Appellant's Motion for Summary Judgment.

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

IN THE MATTER OF THE ADOPTION OF K.R.B. (D.O.B.: October 8, 2017) AND THE ADOPTION OF K.J.D. (D.O.B.: October 30, 2018), APPEAL OF: M.B., MOTHER

INFANTS / TERMINATION OF PARENTAL RIGHTS / EVIDENCE / DEGREE OF PROOF

The party petitioning for termination of parental rights has the burden of proving by clear and convincing evidence the parent's conduct satisfies statutory grounds for termination under Section 2511(a).

INFANTS / TERMINATION OF PARENTAL RIGHTS / CHILDREN IN NEED OF AID

The focus in termination of parental rights action is on the conduct of the parent.

INFANTS / TERMINATION OF PARENTAL RIGHTS / CHILDREN IN NEED / QUESTIONS OF FACT AND FINDINGS

In a termination of parental rights case, the trial court, as the finder of fact, is the sole determiner of the credibility of witnesses and all conflicts in testimony are to be resolved by the finder of fact.

INFANTS / TERMINATION OF PARENTAL RIGHTS / CHILDREN IN NEED OF AID / DETERMINATION AND FINDINGS

Only if the court determines that the parent's conduct warrants termination of his or her parental rights does the court engage in the second part of the analysis: determination of the needs and welfare of the child under the standard of best interests of the child. 23 Pa.C.S. §2511(b).

INFANTS / TERMINATION OF PARENTAL RIGHTS / EVIDENCE / DEGREE OF PROOF

In a termination of parental rights case, the standard of "clear and convincing evidence" means the testimony is so "clear, direct, weighty, and convincing" for the trial judge as the trier of fact to arrive at "a clear conviction, without hesitation, of the truth of the precise facts in issue."

INFANTS / TERMINATION OF PARENTAL RIGHTS / REUNIFICATION EFFORTS

Parents are required to make diligent efforts toward the reasonably prompt assumption of full parental responsibilities in order to preserve parental rights when a termination petition has been filed. 23 Pa.C.S. §2511(a).

INFANTS / TERMINATION OF PARENTAL RIGHTS / WEIGHT AND SUFFICIENCY / REHABILITATION AND REUNIFICATION EFFORTS

A parent's vow to cooperate, after a long period of uncooperativeness regarding the necessity or availability of services, may properly be rejected as untimely or disingenuous, in a proceeding to terminate parental rights. 23 Pa.C.S. §2511(a).

INFANTS / TERMINATION OF PARENTAL RIGHTS / CHILDREN IN NEED OF AID / CHILDREN IN NEED

A court may terminate parental rights where the parent demonstrates a settled purpose to relinquish parental claim to a child or fails to perform parental duties for at least the six months prior to the filing of the termination petition. 23 Pa.C.S. §2511(a)(1).

INFANTS / TERMINATION OF PARENTAL RIGHTS / CHILDREN IN NEED OF AID / CHILDREN IN NEED / ABANDONMENT

When considering whether to terminate parental rights on the ground that the parent failed

to perform parental duties for at least six months prior to the termination petition, a court should consider the entire background of the case and not simply mechanically apply the six-month statutory provision; the court must examine the individual circumstances of each case and consider all explanations offered by the parent facing termination of his parental rights, to determine if the evidence, in light of the totality of the circumstances, clearly warrants the involuntary termination. 23 Pa.C.S. §2511(a)(1).

INFANTS / TERMINATION OF PARENTAL RIGHTS / CHILDREN IN NEED OF AID / CHILDREN IN NEED / DEPRIVATION, NEGLECT, OR ABUSE

Statute authorizing termination of parental rights on ground of continued abuse or neglect does not emphasize a parent's refusal or failure to perform parental duties, but instead emphasizes the child's present and future need for essential parental care, control or subsistence necessary for his physical or mental well-being, and therefore, the language in statute should not be read to compel courts to ignore a child's need for a stable home and strong, continuous parental ties, which the policy of restraint in state intervention is intended to protect, and this is particularly so where disruption of family has already occurred and there is no reasonable prospect for reuniting it. 23 Pa.C.S. §2511(a)(2).

INFANTS / TERMINATION OF PARENTAL RIGHTS / REPORTS AND RECOMMENDATIONS; EXAMINATIONS AND ASSESSMENTS

When conducting a bonding analysis in a proceeding to terminate parental rights, a court is not required to use expert testimony, and social workers and caseworkers can offer evaluations. 23 Pa.C.S. §2511(b).

INFANTS / TERMINATION OF PARENTAL RIGHTS / NEEDS, INTEREST, AND WELFARE OF CHILD

Before granting a petition to terminate parental rights, it is imperative that a trial court carefully consider the intangible dimension of the needs and welfare of a child, the love, comfort, security and closeness, entailed in a parent-child relationship, as well as the tangible dimension. 23 Pa.C.S. §2511(b).

INFANTS / TERMINATION OF PARENTAL RIGHTS / CHILDREN IN NEED OF AID

In a proceeding to terminate parental rights, a trial court, in considering what situation would best serve the children's needs and welfare, must examine the status of the natural parental bond to consider whether terminating the natural parents' rights would destroy something in existence that is necessary and beneficial. 23 Pa.C.S. §2511(b).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION
NOs. 65, 65A IN ADOPTION, 2020
376 WDA 2021 and 377 WDA 2021

Appearances: Gregory J. Grasinger, Esq., on behalf of Appellant, M.B., Mother
Christine F. Konzel, Esq., Legal Counsel for Minor Child
Kevin C. Jennings, Assistant Solicitor for ECCYS

1925(a) OPINION

Domitrovich, J., April 16, 2021

Appellant M.B. ("Mother") appeals from the Final Decrees entered February 18, 2021 in the Erie County Court of Common Pleas granting a Petition of Involuntary Termination from the Erie County Children and Youth Services ("ECCYS") thereby involuntarily terminating Mother's parental rights pursuant to 23 Pa.C.S. §2511 (a) (1), (2), (5), (8) and (b), to her daughters, K.R.B. ("Minor Child K.R.B.") born in October of 2017, and K.J.D. ("Minor Child K.J.D.") born in October of 2018 (and collectively referred to as "Minor Children"). At the Common Pleas level, a set of Findings of Fact and Conclusions of Law was filed for both children with separate Final Decrees for each child. On appeal, Mother through her counsel raises identical issues as to each child; therefore, this IVT Court addresses both of Mother's appeals in this consolidated 1925(a) Opinion.[1]

Mother through her counsel raises on appeal in essence one overarching issue which this IVT Court will address first: whether the IVT Court abused its discretion and/or erred by finding and concluding ECCYS met its burden of proof with clear and convincing evidence to terminate involuntarily Mother's parental rights under 23 Pa.C.S. §2511 (a) (1), (2), (5), (8) and (b). Mother's remaining three ancillary issues stem from the overarching issue: 1. Whether the impact of one clerical error in this IVT Court's initial Findings of Fact was *de minimis* where the IVT Court erroneously noted as to the second Emergency Order, Mother was arrested on the same date Minor Children were removed from Mother's care while in reality Mother was already incarcerated for her drug usage prior to Minor Children's emergency removal and remained incarcerated on the date these Minor Children were removed by a second Emergency Protective Order[2]; 2. Whether this IVT Court considered Dependency Court's initial reuniting Minor Child K.R.B. with Mother, where shortly thereafter, within seven months, Mother significantly regressed to the point that both Minor Children had to be removed on an emergency basis from Mother's care; and 3. Whether implementation of Covid-19 procedures negatively affected Mother's ability to follow her court-ordered treatment plan.

As to the overarching issue as well as any and all ancillary issues, the undersigned IVT Court judge was not the Dependency Court judge presiding in this case; therefore, this IVT Court performed its role by evaluating, reviewing and examining the entire record in this instant case and sets forth its methodology in determining the involuntary termination of Mother's parental rights in this case, which includes but is not limited to, as follows: thoroughly reviewing all admitted Exhibits offered by Petitioner's counsel and Respondent's counsel, which were referred to and cited to herein and its initial Findings of Fact; determining the credibility of witnesses' testimony and finding both Erica Moffett, ECCYS Caseworker and Nicole Seelbach, ECCYS Permanency Casework Clinician are credible witnesses; hearing, evaluating and reviewing written testimony from Mother as well as maternal

[1] Father D.D. voluntarily relinquished his parental rights to Minor Child K.R.B. and Minor Child K.J.D. on February 12, 2021. Father reasoned and explained, "I just think it's best at this possible time right now to relinquish my rights. I understand if possible [Minor Children are] going to be in a good spot .... don't normally want to do this, but I do understand it is for the best." *See* N.T.: IVT Hearing, February 12, 2021, 9:1-6. Father completed and signed the required documentation voluntarily relinquishing his parental rights in the presence of this IVT Court via videoconference from the Albion State Correctional Institution after Father's counsel explained Father's rights. *See* N.T., 9:25-11:13.

[2] The IVT did correctly state for the First Emergency Protective Order that Mother was arrested on March 5, 2018 on the same day Dependency Court removed Minor Child K.R.B. due to Mother having an active warrant for her arrest. *See* Petitioner's Exhibits 2A & 4.

grandmother, Sandra Bradley. Moreover, this IVT Court presided over this IVT proceeding regarding Mother and has also had the benefit of reviewing the written transcript which is now available to complete citations in this 1925(a) Opinion.

FINDINGS OF FACT and PROCEDURAL HISTORY

The instant case began in Dependency Court on March 5, 2018, with Minor Child K.R.B. being removed from Mother and Father's custody and placed temporarily into ECCYS's legal and physical custody. This first Emergency Protective Order stated removal was necessary for the welfare and best interest of Minor Child K.R.B. "[Mother] was arrested on March 5, 2018 due to having an active warrant." *See* Petitioner's Exhibits 2A, *Dependency Petition for K.R.B.* & 4, *Emergency Protective Order for K.R.B.*

On March 8, 2018, following a full hearing on the record, Dependency Court ordered custody of Minor Child K.R.B. to remain with ECCYS, as returning Minor Child K.R.B. to Mother's care was not in Minor Child K.R.B.'s best interest. Mother appeared in person at said hearing and stipulated to continued temporary shelter care pending an adjudication hearing. *See* Petitioner's Exhibit 3A, *Recommendation for Shelter Care*.

On March 15, 2018, following a full hearing on the record, Dependency Court adjudicated Minor Child K.R.B. dependent. Dependency Court found clear and convincing evidence existed indicating Minor Child K.R.B. was without proper parental care and control as it pertained to Mother for the following reasons: 1) Mother's history with Venango County Children and Youth Services due to "[Mother] abusing drugs, unstable mental health, failure to follow through with medical care and unstable housing and homelessness"; 2) Mother's severe drug addiction, including her being under the influence when Minor Child K.R.B. was removed from her custody; 3) Mother's history of unstable housing, including that she was homeless at the time of Minor Child K.R.B.'s removal; 4) Mother's "fail[ure] to attend at least three (3) medical appointments since [Minor Child K.R.B.]'s birth," and the fact that Minor Child K.R.B. had not seen a primary care physician since October 2017; 5) Mother's criminal history, including numerous retail theft and drug related criminal convictions; and 6) on the date Minor Child K.R.B. was removed from Mother's custody, Minor Child K.R.B. was found alone, "unrestrained in a car seat and near syringes in a vehicle that had all of the windows down despite the inclement weather," after which Mother, Sandra Bradley, and Mother's brother appeared at the scene under the influence of drugs and/or alcohol according to law enforcement performing the welfare check. Mother appeared at the adjudication hearing and stipulated to the accuracy of Dependency Petition allegations. *See* Petitioner's Exhibits 2A, *Dependency Petition for K.R.B.* & 3A, *Recommendation for Adjudication and Disposition for K.R.B.*

In Dependency Court's March 15, 2018 Order, Dependency Court established Minor Child K.R.B.'s permanent placement goal as return Minor Child K.R.B. to a parent or guardian. Dependency Court also approved Minor Child K.R.B.'s permanency plan, which directed Mother to meet the following requirements: 1) Mother shall maintain stable employment; 2) Mother shall maintain safe and stable housing, and all household members must be approved by ECCYS; 3) Mother shall refrain from drugs and/or alcohol and submit to urinalysis tests via Esper Treatment Center's Color Code Program; 4) Mother shall participate in a mental health assessment and follow any recommendations; 5) Mother shall comply with her probation through Erie County; 6) Mother shall execute all releases for ECCYS;

and 7) Mother shall contact Minor Child K.R.B.'s ECCYS on-going caseworker at least two (2) times per week. Mother was granted visitation with Minor Child K.R.B. at least two (2) times per month, which increased in frequency and duration if Mother complied with her requirements under Minor Child K.R.B.'s permanency plan. Mother's visitation was contingent upon Mother demonstrating she had clean urinalysis screenings. *See* Petitioner's Exhibit 3A, *Recommendation for Adjudication and Disposition for K.R.B.*

On June 1, 2018, Dependency Court issued a Permanency Review Order regarding Minor Child K.R.B.' s dependency proceedings, after conducting a full hearing on the record on May 30, 2018, to which Mother attended in person represented by her counsel. Dependency Court found Mother had made moderate progress toward alleviating the circumstances that necessitated Minor Child K.R.B.'s removal. Dependency Court found Minor Child K.R.B.'s best interest was to remain in ECCYS's custody, with placement in the Gibson foster home. Minor Child's permanent placement goal remained return Minor Child K.R.B. to a parent or guardian. Mother was to continue following the court-ordered treatment plan for reunification. Mother visited with Minor Child K.R.B. once per week, which would continue if Mother remained drug and alcohol free, and continued to follow Minor Child K.R.B.'s permanency plan. *See* Petitioner's Exhibit 4, *Permanency Review Order dated June 1, 2018 for K.R.B.*

On October 30, 2018, Minor Child K.J.D. was born. Mother had full custody of Minor Child K.J.D. at this time.

On November 11, 2018, Dependency Court issued a second Permanency Review Order regarding Minor Child K.R.B.'s dependency proceedings, after conducting a full hearing on November 21, 2018, to which Mother did not attend but was represented by counsel. Dependency Court found Mother substantially complied with Minor Child K.R.B.'s permanency plan. Dependency Court found Minor Child K.R.B's best interests were to remain in the Gibson foster home although Minor Child K.R.B.'s permanent placement goal continued to remain return to a parent or guardian. Mother was ordered to continue to meet the above listed requirements under Minor Child K.R.B.'s permanency plan. Dependency Court directed Mother's visitation with Minor Child K.R.B. to continue and directed Mother's visitation may progress to overnight visitation when deemed appropriate by ECCYS. *See* Petitioner's Exhibit 4, *Permanency Review Order dated November 29, 2018 for KR.B.*

In December 2018, Minor Child K.R.B. was returned to Mother's custody. At that time, Mother had custody of both Minor Children.

On May 22, 2019, Dependency Court issued a third Permanency Review Order regarding Minor Child K.R.B following a full hearing on May 16, 2019, to which Mother attended in person represented by her counsel. Dependency Court found Mother fully complied with Minor Child K.R.B.'s permanency plan. Dependency Court changed Minor Child K.R.B.'s placement goal to remain with parent or guardian as Minor Child K.R.B. was in Mother's custody. Mother was directed to continue to meet the court-ordered treatment plan and a six month review hearing was scheduled. *See* Petitioner's Exhibit 4, *Permanency Review Order dated May 22, 2019 for K.R.B.*

On July 23, 2019, Minor Child K.J.D. was removed from Mother's and Father's custody and placed temporarily into ECCYS's legal and physical custody pursuant to an Emergency Protective Order stating removal was necessary for the welfare and best interest of Minor Child K.J.D. Moreover, Minor Child K.R.B. was also removed from Mother's custody. At

the time of removal of Minor Children on July 23, 2019, Mother was already incarcerated and had been incarcerated since July 17, 2019. *See* Petitioner's Exhibits 2B, *Dependency Petition for K.J.D.* & 4, *Emergency Protective Order for K.J.D.*

On July 26, 2019, following a full hearing on the record, Dependency Court ordered custody of Minor Child K.J.D. to remain with ECCYS in the best interest of Minor Child K.J.D. Mother did not appear at said hearing as Mother was incarcerated after failing a probation-required drug screening. *See* Petitioner's Exhibits 2B, *Dependency Petition for K.J.D.* & 3B, *Recommendation for Shelter Care*.

On August 6, 2019, following a full hearing on the record, Dependency Court adjudicated Minor Child K.J.D. dependent. Mother attended in person and was represented by her counsel. Dependency Court found clear and convincing evidence indicating Minor Child KJ.D. was without proper parental care and control as it pertained to Mother for the following reasons: 1) Mother's past history with ECCYS when Minor Child K.R.B. was adjudicated dependent and with Venango County, for another minor child not in her care nor subject to this IVT Trial, "due to concerns of drug use, lack of stable housing, and mental health"; 2) Mother had been incarcerated twice since June 28, 2019 due to failed probation-required drug screenings; 3) Mother's hospitalization at Millcreek Community Hospital due to her poor mental health, and that Mother checked herself out of Millcreek Community Hospital against medical advice; and 4) Mother's criminal history. Mother stipulated to Dependency Petition allegations and agreed to Minor Child K.J.D.'s placement setting at said hearing. *See* Petitioner's Exhibits 2B, *Dependency Petition for K.J.D.* & 3B, *Recommendation for Adjudication and Disposition of K.J.D.*

In Dependency Court's August 6, 2019 Order, Dependency Court established Minor Child K.J.D.'s permanent placement goal as return Minor Child K.J.D. to a parent or guardian. Dependency Court also approved Minor Child K.J.D.'s permanency plan, which directed Mother to follow the court-ordered treatment plan under Minor Child K.R.B.'s permanency plan, and also required Mother to participate actively in drug and alcohol treatment so Mother could "gain an understanding of how her drug use affects her mental health and decision making." (*Recommendations for Adjudication and Disposition of K.J.D.* at pg. 3). Mother was granted visitation with Minor Child K.J.D., which would increase in frequency and duration if Mother complied with her court-ordered treatment plan. *See* Petitioner's Exhibit 3B, *Recommendations for Adjudication and Disposition of K.J.D.*

On November 7, 2019, Dependency Court issued two Permanency Review Orders, one for each Minor Child, following a full hearing on November 1, 2019 regarding both Minor Children and Mother attended in person represented by counsel. Dependency Court found Mother made minimal progress toward alleviating the circumstances necessitating Minor Children's removal from Mother's custody. Dependency Court found Minor Children's best interests were to remain in the Vivier-Lorenzi kinship home. Minor Children's permanent placement goals remained return Minor Children to a parent or guardian. Mother's visitation with Minor Children was contingent upon Mother demonstrating clean urinalysis screenings. Mother was directed to continue to follow the court-ordered treatment plan. *See* Petitioner's Exhibit 4, *Permanency Review Order dated November 11, 2019 for K.R.B*. and *Permanency Review Order dated November 11, 2019 for K.J.D.*

On May 6, 2020, Dependency Court issued two Permanency Review Orders, one for

each Minor Child, following a full hearing on May 5, 2020 regarding both Minor Children and Mother attended via telephone represented by her counsel, who appeared in person. Dependency Court found Mother minimally complied with Minor Children's permanency plans. Dependency Court found Minor Children's best interests were to remain in Ms. Vivier-Lorenzi's home. Dependency Court changed Minor Children's permanent placement goals to return Minor Children to a parent or guardian, concurrent with adoption. Mother was ordered to continue to comply with the court-ordered treatment plan and noted Covid-19 may affect how some services would be offered to Mother. Mother was granted visitation with Minor Children, which would increase in frequency and duration if Mother complied with Minor Children's permanency plans and remained drug and alcohol free. *See* Petitioner's Exhibit 4, *Permanency Review Order dated May 6, 2020 for K.R.B.* and *Permanency Review Order dated May 6, 2020 for K.J.D.*

On July 13, 2020, Dependency Court issued two Permanency Review Orders, one for each Minor Child, following a full hearing on July 6, 2020 regarding both Minor Children, and Mother attended in person represented by counsel. Dependency Court found Mother made only minimal progress toward alleviating the circumstances that necessitated Minor Children's removal from Mother's custody. Dependency Court found Minor Children's best interests were to remain in Ms. Vivier-Lorenzi's home. Dependency Court changed Minor Children's permanent placement goals to adoption. Dependency Court ordered no further services, including visitation, shall be offered to Mother. *See* Petitioner's Exhibit 4, *Permanency Review Order dated July 13, 2020 for K.R.B.* and *Permanency Review Order dated July 13, 2020 for K.J.D.*

On August 5, 2020, ECCYS filed these Petitions to Involuntarily Terminate Mother's parental rights as to each Minor Child. This IVT Court held the IVT hearing on February 12, 2021.

During the IVT Trial, Mother provided numerous reasons to attempt to justify her missing Esper Treatment Center random drug urinalysis tests. However, in summary, Mother's urinalysis testing results from the Esper Treatment Center during the life of Minor Children's dependency proceedings were: twenty (20) negative tests, seventy-two (72) "no-show positive" tests, two (2) "could not produce" tests, and eighty-four (84) positive tests. Eighty-two (82) of the positive tests were for Suboxone, which Mother was prescribed, one (1) was for cocaine, and one (1) was for methamphetamine. *See* Petitioner's Exhibit 7.

Erica Moffett, an ECCYS Caseworker, who transitioned into becoming the caseworker in this case prior to the second permanency review, provided credible testimony. *See* N.T.: IVT Hearing, February 12, 2021, 27:1-3. From May 2018 until November 2018, Caseworker Moffett stated Mother was following her treatment plan: Mother maintained employment and housing; Mother was engaged in mental health treatment; Mother failed to appear at only two urinalysis tests; Mother was compliant with her probation; and Mother was attending Minor Child K.R.B.'s medical appointments. *See* N.T., 27:21-25; 28:7-29:6. Minor Child K.R.B. was returned to Mother's care in December 2018. *See* N.T., 29:7-30:6. For a period of time, Mother had both Minor Children in her care and was "doing pretty well." *See* N.T., 30:13-21.

Starting in May 2019, Caseworker Moffett had "some concerns about [Mother] using [drugs]" and Mother's lack of compliance with her mental health treatment plan. *See* N.T., 32:13-21. Mother was committed to Millcreek Community Hospital in June 2019 due to her poor mental health as Mother was paranoid and hearing voices. *See* N.T., 32:18-33:4.

"[A]t one point [Mother] had left the home, was wandering around .... " *See* N.T., 33:4-5. However, Mother refused to stay for the full course of treatment and checked herself out of the hospital against medical advice. *See* N.T., 33:7-11.

In May 2019, Caseworker Moffett explained Dependency Court found Mother was in full compliance with the court-ordered treatment plan, and Mother was doing well until Dependency Court had to remove both Minor Children from Mother's custody in July of 2019. *See* N.T., 31:7-15. Caseworker Moffett stated Minor Children were taken into ECCYS's custody in July 2019 because "[Caseworker Moffett] was informed that [Mother] was incarcerated due to noncompliance, and [ECCYS] had received that ... it was due to her drug use, and [Mother] had been incarcerated for a period of time ... " *See* N.T., 31:22-32:4.

During the fourth Permanency Review period in November 2019, Mother admitted she was incarcerated twice due to testing positive for methamphetamine from June 28 until July 11, 2019, and again July 17 until October 6, 2019. *See* N.T., 34:24-35:13. Dependency Court found Mother's compliance with her court-ordered treatment plan was minimal. *See* N.T., 34:16-21. Mother was a "no-show positive" for all urinalysis screenings during this review period. *See* N.T., 35:14-17. Caseworker Moffett explained Mother was incoherent during this review period: "When we talked about ... [Mother's] accountability, and the importance for [Mother] meeting her appointments, [Mother] could not put two and two together that, in order for [Mother] to ... remain compliant, [Mother] had to follow through .... " *See* N.T., 36:9-23. Mother also was not maintaining her housing during this review period. *See* N.T., 37:2-4. Mother's last visit with Minor Children was in October 2019, specifically, "[Mother] only had visits on October 7 and 8 during that [review period] ...." *See* N.T., 37:9-16. Mother only visited Minor Children twice since being removed from Mother's care in July 2019. *See* N.T., 37:17-18. Minor Children are being cared for by a maternal aunt, Sarah Vivier-Lorenzi, since their removal in July 2019. *See* N.T., 37:19-38:5.

During the fifth Permanency Review period, Dependency Court found Mother only minimally complied with the court-order treatment plan at the Permanency Review Hearing in May 2020. *See* N.T., 41:6-8. Mother was incarcerated again from February 6 until March 10, 2020 due to "probation violations for drug abuse." *See* N.T., 40:4-12. Mother failed to appear to at least twenty (20) urinalysis tests at Esper Treatment Center. *See* N.T., 38:20-39:8. Mother failed consistently to seek drug and alcohol treatment during this time. *See* N.T., 39:9-12. Mother also failed to follow through with her mental health treatment after beginning treatment at Stairways. *See* N.T., 39:13-22. Mother also did not obtain stable employment or housing during this time. *See* N.T., 39:23-40:3. Caseworker Moffett stated: "[Mother] would still continue to put blame on [ECCYS], not giving her the opportunity to be able to parent her kids, even though [Mother] was given the opportunity prior .... " *See* N.T., 40:18-23. Caseworker Moffett explained to Mother the effect of Mother's incarcerations on her ability to parent Minor Children. *See* N.T., 40:13-18. Mother had not visited with Minor Children since October 2019. *See* N.T., 40:24-41:5. Mother was instructed by Dependency Court she was being given one final chance to comply fully with Minor Children's permanency plan. *See* N.T., 41:6-11. Specifically, Dependency Court told Mother "step it up, or we're changing the goal .... " *See* N.T., 41:9-15.

Dependency Court held a sixth Permanency Review hearing in July 2020 wherein the goal changed to adoption. *See* N.T., 41:16-19. During this review period from May to July

2020, Mother started out doing some of her court-ordered treatment plan, but "then lapsed right back to where she was before the hearing .... " *See* N.T., 42:5-9. When the COVID-19 pandemic commenced, Esper Treatment Center stopped doing random color-coded urinalysis testing, but allowed "one-time urines, which is, [ECCYS] ask[s] a client to show up one time and drop a urine for whatever reason." *See* N.T., 42:20-43:9. Mother did not show up for either "onetime urines" she was asked to do and did not participate in color-code urines when Esper Treatment Center started allowing random color-code testing again. *See* N.T., 43:10-22. When Mother was released from prison, Mother would reside at the Thunderbird Motel along with Sandra Bradley, and such accommodations include a small, single room with 2 beds. *See* N.T., 44:17-23. Mother failed to obtain stable employment and housing. Mother continued only sporadically to treat her drug and alcohol addiction as well as her mental health. *See* N.T., 44:24-45:8. Caseworker Moffett explained that during a scheduled appointment with Mother to discuss her compliance with the court-ordered treatment plan and the "possible change of goal," Mother "started yelling and screaming at [Caseworker Moffett]; then it just started becoming counter-productive." *See* N.T., 46:1-7. This was the last meeting between Mother and Caseworker Moffett. *See* N.T., 45:17-19.

Caseworker Moffett also stated Minor Children's interests are best served by terminating involuntarily Mother's parental rights. *See* N.T., 46:24-47:2. Caseworker Moffett explained the reason was, "[l]argely due to [Mother's] lack of compliance. [Mother] was afforded opportunity to have her kids back in her care, which [Mother] did for a period of time, but then [Mother] ended up getting into drugs again, not complying with her probation; her mental health was unstable; [Mother] lost her housing." *See* N.T., 47:3-9. Caseworker Moffett stated no negative effects would occur to either of these Minor Children if Mother's parental rights were involuntarily terminated. *See* N.T., 47:21-24.

ECCYS has been involved in Minor Child K.J.D.'s life "the entire time she's been alive ... " and Minor Child K.R.B. was "five months old when [ECCYS] first got involved." *See* N.T., 49:20-50:1. Minor Children are doing very well in Ms. Vivier-Lorenzi's home. *See* N.T., 48:6-10. Minor Children have developed a "sibling bond" with Ms. Vivier-Lorenzi's three other children, and a "maternal bond" has developed between Ms. Vivier-Lorenzi and Minor Children. *See* N.T., 48:18-24; 49:8-10. "For [Minor Child K.R.B.], she has referred to [Ms. Vivier-Lorenzi] as her mom on a few occasions when [Caseworker Moffett] was there. [Minor Child K.J.D.] will go to [Ms. Vivier-Lorenzi] if she wants something or she needs something ... if she was upset and she wants to be cuddled, [Minor Child K.J.D.] will go to [Ms. Vivier-Lorenzi] for nurturing." *See* N.T., 49:2-7. Both Minor Children are developing normally in Ms. Vivier-Lorenzi's care. *See* N.T., 49:16-18. Minor Children are behaviorally "typical" two- and three-year-olds. *See* N.T., 59:21-23.

Caseworker Moffett stated " ... between April and May [2020], there was a total noncompliance with [Mother]" where Mother was missing scheduled appointments. *See* N.T., 50:20-24. Caseworker Moffett indicated Mother was not able to maintain being a parent to these Minor Children due to her drug usage despite being given ample opportunities to parent these Minor Children in 2018 through 2019. *See* N.T., 57:4-10. ECCYS could not offer "any other services" or done "anything more" to reunify Mother with these Minor Children. *See* N.T., 50:5-8. Caseworker Moffett stated there were no external factors that created problems for Mother, "because prior to ... the pandemic, [Mother] had ample opportunity to maintain

housing, to follow through with her mental health, to have visitation, and [Mother] was not able to do so." *See* N. T., 57:11-18. Mother's only source of income was Department of Public Works Benefits. *See* N.T., 58:18-59:2.

Caseworker Moffett confirmed Mother's last visit with Minor Children was in October 2019. *See* N.T., 61:19-21. Mother was "afforded the opportunity to have video visits with [Minor Children]" in the spring of 2020, which Mother chose not to participate in. *See* N.T., 61:22-62:2. Mother did not show up for the video visit that was set up for Mother on Mother's Day. *See* N.T., 62:3-5.

Nicole Seelbach credibly testified as the ECCYS Permanency Casework Clinician for both Minor Children. *See* N.T., 66:13-24. This case was referred to Permanency Casework Clinician Seelbach in December 2020 since Minor Children's goals were changed to adoption at the last permanency review hearing on July 6, 2020. *See* N.T., 70:13-25. Minor Children are in an adoptive resource home with Ms. Vivier-Lorenzi, who is Mother's half-sister, with whom Mother does not currently have an on-going relationship. *See* N.T., 63:4-22; 67:1-4. Permanency Casework Clinician Seelbach stated: "[Minor Children] are doing very well in the home. [Minor Children] appear to be very bonded with [Ms. Vivier-Lorenzi]. Due to Covid, [Minor Children] are no longer going to daycare, so they're staying home, and [Minor Children] are both working on being potty trained." *See* N.T., 67:6-9.

Permanency Casework Clinician Seelback indicated Ms. Vivier-Lorenzi is meeting all of the social, physical, and emotional needs of Minor Children. *See* N.T., 67:14-20. Ms. Vivier-Lorenzi is a good adoptive resource for Minor Children. *See* N.T., 67:21-23. The Vivier-Lorenzi Kinship home includes three other children ages 14, 15, and 22, wherein only two of whom reside in the home, but all three help care for Minor Children. *See* N.T., 69:2-8. The Vivier-Lorenzi home has successfully completed all home studies and her house size is appropriate for Minor Children. *See* N.T., 69:9-11. Permanency Casework Clinician Seelbach explained: "[Minor Children] do need a provider that will provide them with a stable home, that will ensure all of their needs are being met, that they have food, snacks, that they're being taken care of and loved, and [Minor Children] do have that in their current placement." *See* N.T., 71:6-11. Permanency Casework Clinician Seelbach has observed Minor Children doing incredibly well in Ms. Vivier-Lorenzi's home. *See* N.T., 71:15-21. Both Minor Children are meeting their developmental goals under the care of Ms. Vivier-Lorenzi and do not need any "extra" medical appointments. *See* N.T., 69:20-70:4.

Permanency Casework Clinician Seelbach stated Minor Children's interests are best served by terminating involuntarily Mother's parental rights because "[Minor Children] are in desperate need for stability. They are very bonded to the kinship resource. They have been there for quite some time, and [Minor Children] are doing incredibly well." *See* N.T., 67:24-68:7. Permanency Casework Clinician Seelbach stated Minor Children refer to Ms. Vivier-Lorenzi as "mom." *See* N.T., 68:8-9. Permanency Casework Clinician Seelbach indicated these Minor Children will not face any negative effects if Mother's parental rights are involuntarily terminated. *See* N.T., 68:10-13.

Mother took the stand and testified. As to her drug usage during the time of this case, Mother admitted Minor Child K.J.D. was exposed to cocaine and Suboxone while Mother was pregnant, which caused Minor Child K.J.D. to be hospitalized after her birth. *See* N.T., 74:12-16. Mother was incarcerated four times due to her methamphetamine use, which "leads

to, all the paranoia and whatever issue, hallucinations, due to [Mother's] drug use." *See* N.T., 74:17-23. Mother testified she began using methamphetamine after meeting a friend who used it. Mother testified "[her] drug of choice in the past was heroin, but [Mother has] been clean off of heroin for five years now .... " *See* N. T., 75 :2-6. Further, Mother testified, "my children were in my care the whole time during this paranoia, so-called ... the meth use is just — it was uncalled for, I shouldn't have been using it, but it was due to being badly influenced by another person. But I'm grown and I should have known better." *See* N.T., 75:9-13.

Despite evidence presented to the contrary, Mother testified how her drug usage created her mental health issues and without her drug usage, she has no mental health issues to treat. Mother testified she believes her mental health has never been a problem. *See* N.T., 78:6-8. However, Mother testified "I feel as if everybody thinking that it's the methamphetamine use, due to — like, they're trying to tie that in to my mental health, and it did affect my mental health, but I didn't let it take over my mental health." *See* N.T., 78:9-12. Further, Mother testified, "why my mental health was going downhill for a second was because of the methamphetamine use, so I was able to acknowledge that and was able to get myself off of the methamphetamine." *See* N.T., 78:14-17.

When Mother was asked about her compliance with her probation, Mother testified in a roundabout fashion, "I feel as if I'm in compliance but with using, that's part of not being in compliance. I consider being not in compliance as being on the run — not complying at all." *See* N.T., 88:3-12. Further, Mother admitted, "I know that I have to be compliant as far as keeping clean urines." *See* N.T., 88:21-22. Mother testified she was incarcerated again from September 22, 2020 until November 6, 2020 due to her drug usage. *See* N.T., 90:13-91:1.

Mother placed her own responsibility onto Caseworker Moffett for Minor Children not being in Mother's care due to "a lack of communication with [Caseworker Moffett]." *See* N.T., 91:21-92:4. Mother testified: "All [Caseworker Moffett] had to do was leave a message with my mother, whether it be random urines, one-time urines, color of the random urine — which I've never gotten, never received ... If I would have known, I would have been there." *See* N.T., 94:19-25. Despite evidence to the contrary, Mother denied ever being scheduled for urinalysis tests between May and July 2020. *See* N.T., 84:6-23. Mother was informed about the sixth Permanency Review hearing at the fifth review hearing on May 5, 2020, and Mother testified, she knew about the hearing, but "not in an understanding of what was being asked of me due to not having a Permanency Review order in my hands .... " *See* N.T., 95:4-17.

When asked about her methamphetamine drug usage, Mother testified: "It's not a problem for me. It's not even my drug of choice at all. My drug of choice in the past was heroin, so why meth would be a problem or my drug of choice — it's unheard of." *See* N.T., 97:2-5. Mother testified she is in treatment through Safe Harbor for her drug use but also testified, "I don't have current drug use, and I don't feel as if [group] meetings work for me." *See* N.T., 97:19-98:7. Mother testified she is currently engaged in mental health treatment through Safe Harbor; she will obtain Section 8 housing in the future; that said housing will be suitable for Minor Children; and Mother says she is currently taking medication to treat her mental health issues. *See* N.T., 73:21-74:8; 82:9-22. Although Mother testified, "I'm waiting on my Section 8 [housing]. They're reviewing my case right now. I've been on the list for three years now ... but to bring my children home, I would be able to afford a trailer with two bedrooms, all beds, everything needed", Mother is still residing in the Thunderbird Motel

with maternal grandmother in a room "that has kitchen, bathroom, living room, and it has an off bedroom with one bed in it." *See* N.T., 91:6-20.

Finally, Mother blamed Ms. Vivier-Lorenzi for Mother's lack of video visits with Minor Children. *See* N.T., 98:14-22. Mother testified, "there has been lack of communication between [Ms. Vivier-Lorenzi] and I for the past year since she's had my children, and with that being said, it was her setting up last minute." *See* N.T., 98:22-25. Further, Mother testified without any specific times noted: "There was a group set up on Mother's Day, but before that, there was times when she never even answered her phones. And I was calling [ECCYS] trying to gain an understanding of why there wasn't allowed contact visits due to the fact that [Minor Children] are two and three years old." *See* N.T., 99:2-7.

Although Sandra Bradley, maternal grandmother, testified she would be an appropriate caregiver for her grandchildren, if custody of Minor Children were returned to Mother, this IVT Court finds Sandra Bradley is not an appropriate caregiver. When asked about Mother's illegal drug usage, Sandra Bradley testified she was not aware of her daughter's drug usage, "When [Mother] used methamphetamine ... I didn't see any different actions from her that would make me aware that she had used. She seemed normal to me ... nothing she did was anything out of the ordinary. But she did openly come out and say that she used and was reaching out for help, and it shocked me." *See* N.T., 103:1-8. Sandra Bradley testified, "[Methamphetamine is] definitely an issue. I mean, it's illegal, it's not good for [Mother's] mental — I didn't recognize anything different when she'd used. I don't know the amount that she used." *See* N.T., 105:18-23. Sandra Bradley testified she cannot imagine a better mother for Minor Children and that her daughter (Mother) has obtained a job, income, and is waiting for housing. *See* N.T., 101:20-102:1; 102:14-20. Sandra Bradley fails to realize the severity of her daughter's (Mother's) issues with continuing methamphetamine drug usage and her daughter's (Mother's) struggles and inability to recognize and stabilize her mental health.

GROUNDS FOR TERMINATION - Section 2511(a)(1), (2), (5), (8), and (b)

As to Mother's overarching appellate issue pursuant to 23 Pa.C.S. §2511 (a)(1), (a)(2), (a)(5) and (a)(8) and (b) for involuntary termination of Mother's parental rights, case law is clear "[p]arental rights may be involuntarily terminated where anyone subsection of Section 2511(a) is satisfied, along with consideration of the subsection 2511(b) provisions." *In re Z.P.*, 994 A.2d 1108, 1117 (Pa. Super. 2010).

The party petitioning for termination of parental rights has the burden of proving by clear and convincing evidence the parent's conduct satisfies statutory grounds for termination under Section 2511(a). *In re L.M.*, 923 A.2d 505, 511 (Pa. Super. 2007). The trial court is the finder of fact who is the sole determiner of the credibility of witnesses and resolves all conflicts in testimony. *Id.* at 1115-1116. Pursuant to 23 Pa.C.S. §2511, the trial court must conduct a bifurcated analysis wherein the court's initial focus is on the conduct of the parent. *In re L.M.*, 923 A.2d at 511. Only if the court determines a parent's conduct necessitates termination of her parental rights under Section 2511(a), the court then proceeds to decide the second part of the bifurcated analysis as to the needs and welfare of the child under the standard of best interests of the child under Section 2511(b). *Id.*

The specific relevant statutory grounds for terminating involuntarily a parent's rights are stated in 23 Pa.C.S. §2511(a)(1), (2), (5), and (8) as well as 23 Pa.C.S. §2511(b):

§2511. Grounds for involuntary termination

(a) General rule. — The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:

(1) The parent by conduct continuing for a period of at least six months immediately preceding the filing of the petition either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties.

(2) The repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.

...

(5) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time and termination of the parental rights would best serve the needs and welfare of the child.

...

(8) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency, 12 months or more have elapsed from the date of removal or placement, the conditions which led to the removal or placement of the child continue to exist and termination of parental rights would best serve the needs and welfare of the child.

(b) Other considerations. — The court in terminating the rights of a parent shall give primary consideration to the developmental, physical and emotional needs and welfare of the child. The rights of a parent shall not be terminated solely on the basis of environmental factors such as inadequate housing, furnishings, income, clothing and medical care if found to be beyond the control of the parent. With respect to any petition filed pursuant to subsection (a)(l), (6) or (8), the court shall not consider any efforts by the parent to remedy the conditions described therein which are first initiated subsequent to the giving of notice of the filing of the petition.

Generally, Pa.C.S. §2511(a) states parental rights to a child may be terminated if anyone of the grounds under Section 2511(a) is proven by clear and convincing evidence. *In re Z.P.*, 994 A.2d at 1117. In a termination of parental rights case, the standard of "clear and convincing evidence" means the testimony is so "clear, direct, weighty, and convincing" for the trial judge as the trier of fact to arrive at "a clear conviction, without hesitation, of the truth of the precise facts in issue." *Id.* at 1116.

"Parents are required to make diligent efforts toward the reasonably prompt assumption of full parental responsibilities." *In re Z.P.*, 994 A.2d at 1117-1118 (quoting *In re A.L.D.*, 797 A.2d at 340). "A parent's vow to cooperate, after a long period of uncooperativeness regarding the necessity or availability of services, may properly be rejected as untimely or disingenuous." *Id*. at 1118 (quoting *In re A.L.D.*, 797 A.2d 326, 340 (Pa. Super. 2002)).

> There is no simple or easy definition of parental duties. Parental duty is best understood in relation to the needs of a child. A child needs love, protection, guidance, and support. These needs, physical and emotional, cannot be met by a merely passive interest in the development of the child. Thus, this court has held that the parental obligation is a positive duty which requires affirmative performance. This affirmative duty encompasses more than a financial obligation; it requires continuing interest in the child and a genuine effort to maintain communication and association with the child. Because a child needs more than a benefactor, parental duty requires that a parent exert himself to take and maintain a place of importance in the child's life. Parental duty requires that the parent act affirmatively with good faith interest and effort, and not yield to every problem, in order to maintain the parent-child relationship to the best of his ... ability, even in difficult circumstances. A parent must utilize all available resources to preserve the parental relationship, and must exercise reasonable firmness in resisting obstacles placed in the path of maintaining the parent-child relationship. **Parental rights are not preserved by waiting for a more suitable or convenient time to perform one's parental responsibilities while others provide the child with the child's physical and emotional needs.**

In re Z.P., 994 A.2d at 1118-1119 (quoting *In re B., N.M.*, 856 A.2d at 855).

"A court may terminate parental rights under Section 2511(a)(1) where the parent demonstrates a settled purpose to relinquish parental claim to a child or fails to perform parental duties for at least six months prior to filing of the termination petition." In *re Z.P.*, 994 A.2d at 1117 (citing *In re C.S.*, 761 A.2d 1197, 1201 (Pa. Super. 2000)). "Our Supreme Court has stated: 'Section 2511 does not require that the parent demonstrate both a settled purpose of relinquishing parental claim to a child and refusal or failure to perform parental duties. Accordingly, parental rights may be terminated pursuant to Section 2511(a)(1) if the parent either demonstrates a settled purpose of relinquishing parental claim to a child or fails to perform parental duties.'" *In Re: I.B.T.L., A Minor Appeal of S.L., Mother*, 1230 MDA 2020 (Pa. Super. Ct. April 9, 2021) (quoting *In re Adoption of Charles E.D.M.*, 708 A.2d 88, 91 (Pa. 1998)). "The court should consider the entire background of the case and not simply: mechanically apply the six-month statutory provision. The court must examine the individual circumstances of each case and consider all explanations offered by the parent facing termination of his ... parental rights, to determine if the evidence, in light of the totality of the circumstances, clearly warrants the involuntary termination." *In re Z.P.*, 994 A.2d at 1117 (quoting *In re B., N.M.*, 856 A.2d 847, 855 (Pa. Super. 2004)).

As to 23 Pa.C.S. §2511(a)(1), in the instant case, Minor Children were removed from Mother's care due to Mother's drug usage resulting in Mother's incarceration twice prior to Minor Children's emergency removal in July 2019. *See* N.T., 32:13-21; 34:24-35:13; Petitioner's

Exhibit 4. Mother was committed into Millcreek Community Hospital in June 2019 due to "paranoia, hearing voices; at one point [Mother] had left the home, was wandering around ... ", but Mother refused to stay for the full course of mental health treatment and "left early" against medical advice. *See* N.T., 32:18-33:11; Petitioner's Exhibits 2B & 3B. Mother also failed to treat consistently her mental health. *See* N.T., 39:13-22; 45:4-5. Mother did not maintain stable housing appropriate for Minor Children. *See* N.T., 37:2-4; 40:1-3; 44:17-23. Mother failed to seek consistently drug and alcohol treatment as well as Mother failed to appear for numerous random drug screenings at Esper Treatment Center. *See* N.T., 35:14-17; 38:20-39:12; 43:10-22; 44:24-45:3; Petitioner's Exhibit 7. Mother "was not employed during that time period" of November 2019 to May 2020 and did not inform ECCYS caseworker as to whether she was employed during the final Permanency Review period from May 2020 to July 2020. *See* N.T., 39:23-25; 45:6-8. Mother's last visit with Minor Children was October 2019, despite Mother having "been afforded the opportunity" to have video visits with Minor Children during the Covid-19 pandemic in the spring of 2020, which included a May visit especially for Mother's Day. *See* N.T., 37:9-18; 40:24-41:5; 61:19-62:5.

ECCYS caseworker would discuss with Mother "her accountability, and the importance for her meeting her appointments, [Mother] could not put two and two together that, in order for [Mother] to ... remain compliant, she had to follow through .... " *See* N.T., 36:9-23. ECCYS caseworker explained to Mother the effect of Mother's incarcerations on her ability to parent Minor Children; however, Mother "would still continue to put blame on the agency, not giving her the opportunity to be able to parent her kids, even though she was given the opportunity prior." *See* N.T., 40:13-23; 57:4-10. Dependency Court found Mother minimally compliant with her court-ordered treatment plan in May 2020, despite "a total non-compliance with [Mother]" between April and May 2020, and "[Dependency Court] gave [Mother] another try." *See* N.T., 41:6-11; 50:20-24; Petitioner's Exhibit 4. In May 2020, Dependency Court told Mother "step it up, or we're changing the goal ... " *See* N.T., 41:9-15. Despite having been informed about her court-ordered treatment plan at the final permanency review hearing, Mother testified she did not have an "understanding of what was bring asked of [her] due to not having a permanency review order in [her] hands .... " *See* N.T., 95:4-17. "[Mother] started with a little bit ... right after [Dependency Court] gave her the warning, then lapsed right back to where she was before the hearing .... " *See* N.T., 42:5-9.

Therefore, under 23 Pa.C.S. § 2511(a)(1), EECYS has proven by clear and convincing that Mother deprived Minor Children of essential care and control prior to filing the petition to terminate Mother's parental rights to both Minor Children. ECCYS has proven by clear and convincing evidence that for a period of at least six months Mother has evidenced a settled purpose of relinquishing a parental claim as to Minor Child K.R.B. and Minor Child K.J.D., and Mother has failed and refused to perform parental duties regarding Minor Child K.R.B. and Minor Child K.J.D.

Regarding 23 Pa.C.S. §2511(a)(2), "the following three elements must be met: (1) repeated and continued incapacity, abuse, neglect or refusal; (2) such incapacity, abuse, neglect or refusal has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being; and (3) the causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied." *In re: Involuntary Termination of Parental Rights: A.T.V., A Minor Appeal of H.M., Mother*, 1243 MDA 2020, 2021 WL 1235223, at

*5 (Pa. Super. Ct. Apr. 1, 2021) (quoting *In re Adoption of M.E.P.*, 825 A.2d 1266, 1272 (Pa. Super. 2003)). "Unlike subsection (a)(1), subsection (a)(2) does not emphasize a parent's refusal or failure to perform parental duties, but instead emphasizes the child's present and future need for essential parental care, control or subsistence necessary for his physical or mental well-being. Therefore, the language in subsection (a)(2) should not be read to compel courts to ignore a child's need for a stable home and strong, continuous parental ties, which the policy of restraint in state intervention is intended to protect. **This is particularly so where disruption of the family has already occurred and there is no reasonable prospect for reuniting it."** *In re Z.P.*, 994 A.2d at 1117 (quoting *In re E.A.P.*, 944 A.2d 79, 82 (Pa. Super. 2008)). "Thus, while 'sincere efforts to perform parental duties,' can preserve parental rights under subsection (a)(1), those same efforts may be insufficient to remedy parental incapacity under subsection (a)(2)." *In re Z.P.*, 994 A.2d at 1117 (quoting *In re Adoption of M.J.H.*, 501 A.2d 648 (Pa. Super. 1985)).

As to 23 Pa.C.S. §2511(a)(2) in the instant case, Minor Child K.R.B. was initially removed from Mother's custody after Minor Child K.R.B. was found alone, "unrestrained in a car seat and near syringes in a vehicle that had all of the windows down despite the inclement weather," after which Mother, Sandra Bradley, and Mother's brother appeared at the scene under the influence of drugs and/or alcohol according to law enforcement performing the welfare check. *See* Petitioner's Exhibit 2A. Both Minor Children were removed from Mother's care pursuant to an Emergency Protective Order in July 2019 because "[ECCYS caseworker] was informed that [Mother] was incarcerated due to noncompliance, and [ECCYS] had received that ... it was due to her drug use ... " *See* N.T., 31:22-32:4; Petitioner's Exhibits 2B & 3B. From August 2019, when Minor Children's permanency plan was approved by Dependency Court, until July 2020, when Minor Children's permanency goal was changed to adoption, Mother made no more than minimal progress on her court-ordered treatment plan. *See* N.T., 34:16-21; 41:6-8; 41:16-19; 42:5-9; Petitioner's Exhibit 4.

Mother testified, "[Methamphetamine is] not a problem for me. It's not even my drug of choice at all. My drug of choice in the past was heroin, so why meth would be a problem or my drug of choice — it's unheard of." *See* N.T., 97:2-5. Mother testified she is in treatment through Safe Harbor for her drug use but also testified, "I don't have current drug use, and I don't feel as if [group] meetings work for me." *See* N.T., 97:19-98:7. Mother explained her non-compliance with her probation by testifying, "I feel as if I'm in compliance but with using, that's part of not being in compliance. I consider being not in compliance as being on the run — not complying at all." *See* N.T., 88:3-12. Further, Mother admitted, "1 know that I have to be compliant as far as keeping clean urines." *See* N.T., 88:21-22. Despite evidence to the contrary, Mother denied ever being scheduled for urinalysis tests between May and July 2020. *See* N.T., 84:6-23; 94:19-25. Finally, Mother blamed Ms. Vivier-Lorenzi for Mother's lack of video visits with Minor Children, but testified, "There was a group set up on Mother's Day ... " which Mother also did not attend. *See* N.T., 98:14-99:2.

"[Minor Children] are in desperate need for stability. They are very bonded to the kinship resource. They have been there for quite some time, and [Minor Children] are doing incredibly well." *See* N.T., 67:24-68:7. "[Minor Children] do need a provider that will provide them with a stable home, that will ensure all of their needs are being met, that they have food, snacks, that they're being taken care of and loved, and [Minor Children] do have that in

their current placement." *See* N.T., 71:6-11. Minor Children are two- and three-years old and "[Minor Children] have been in care for pretty much a two-year, or over two-year time period." *See* N.T., 110:16-17.

Therefore, under 23 Pa.C.S. § 2511(a)(2), ECCYS has proven by clear and convincing evidence that Mother's incapacity and neglect have caused Minor Children to be without essential parental care. Mother cannot and has not remedied the causes of this incapacity and neglect of these Minor Children.

Section 2511 (a)(5) requires that: "(1) the child has been removed from parental care for at least six months; (2) the conditions which led to the child's removal or placement continue to exist; (3) the parents cannot or will not remedy the conditions which led to removal or placement within a reasonable period time; (4) the services reasonably available to the parents are unlikely to remedy the conditions which led to removal or placement within a reasonable period of time; and (5) termination of parental rights would best serve the needs and welfare of the child." *In the Interest of D.D-E.L.*, 1513 MDA 2020, at 7-8 (Pa. Super. Ct. April 14, 2021) (citing *In re B.C.*, 36 A.3d 601, 607 (Pa. Super. 2012)); 23 Pa.C.S.A. §2511(a)(5). "To terminate parental rights pursuant to 23 Pa.C.S. §2511(a)(8), the following factors must be demonstrated: (1) the child has been removed from parental care for 12 months or more from the date of removal; (2) the conditions which led to the removal or placement of the child continue to exist; and (3) termination of parental rights would best serve the needs and welfare of the child." *In re Z.P.*, A.2d at 1118 (quoting *In re Adoption of M.E.P.*, 825 A.2d at 1275-1276); 23 Pa.C.S. §2511(a)(8). "Termination under Section 2511(a)(8) does not require the court to evaluate a parent's current willingness or ability to remedy the conditions that initially caused placement or the availability or efficacy of Agency services." *In re Z.P.*, 994 A.2d at 1118 (citing *In re Adoption of T.B.B.*, 835 A.2d 387, 396 (Pa. Super. 2003); *In re Adoption of M.E.P.*, 825 A.2d at 1275-1276). "Additionally, to be legally significant, the post-abandonment contact must be steady and consistent over a period of time, contribute to the psychological health of the child, and must demonstrate a serious intent on the part of the parent to recultivate a parent-child relationship and must also demonstrate a willingness and capacity to undertake the parental role. The parent wishing to reestablish his parental responsibilities bears the burden of proof on this question." *In re Z.P.*, 994 A.2d at 1119 (quoting *In re D.J.S.*, 737 A.2d 283, 286 (Pa. Super. 1999)).

Regarding 23 Pa.C.S. §2511(a)(5) & (8), Mother has made no more than minimal progress toward remedying the conditions leading to Minor Children's removals from Mother's custody in July 2019. *See* N.T., 34:16-21; 41:6-8; 42:5-9; Petitioner's Exhibit 4. While Mother initially complied with Minor Child K.R.B.'s permanency plan, even regaining custody of Minor Child K.R.B. for a time, it is clear Mother cannot and will not consistently remedy the conditions leading to Minor Children's removal in July 2019. *See* N.T., 27:21-25; 28:7-30:6; 31:7-15. Mother was incarcerated from February 6, 2020 until March 10, 2020 and again September 22, 2020 until November 6, 2020 due to her drug usage. *See* N.T., 40:4-12; 90:13-91:1. ECCYS could not offer "any other services" or done "anything more" to reunify Mother with Minor Children. *See* N.T., 50:5-8. Although Mother testified, "I'm waiting on my Section 8 [housing]. They're reviewing my case right now. I've been on the list for three years now ... but to bring my children home, I would be able to afford a trailer with two bedrooms, all beds, everything needed", Mother is still residing in the Thunderbird Motel with maternal grandmother in a room "that has kitchen,

bathroom, living room, and it has an off bedroom with one bed in it." *See* N.T., 91:6-20. Mother testified, "the reason [Minor Children] weren't returned to [Mother] was lack of communication with [ECCYS] caseworker." *See* N.T., 91:21-92:4.

Since being removed from Mother's custody in July 2019, Minor Children are doing very well in Ms. Vivier-Lorenzi's home. *See* N.T., 67:6. The Vivier-Lorenzi kinship home has more than met each Minor Child's physical, emotional, and social needs. *See* N.T., 67:14-20. Ms. Vivier-Lorenzi is a good adoptive resource for Minor Children. *See* N.T., 67:21-23. "[Minor Children] have been there for quite some time, and they are doing incredibly well." *See* N.T., 68:6-7.

Therefore, under 23 Pa.C.S. §§2511(a)(5) & (8), ECCYS has proven by clear and convincing evidence the conditions leading to these Minor Children's removal still exist. Mother cannot and will not remedy these conditions within a reasonable period of time. Mother has refused to utilize the services available to her to remedy these conditions leading to these Minor Children's removal within a reasonable period of time. Therefore, termination of Mother's parental rights will best serve the needs and welfare of these Minor Children.

Since this IVT Court has determined above that ECCYS has proven by clear and convincing evidence that Mother's conduct necessitates involuntary termination of her parental rights under Section 2511(a), this IVT Court must now proceed to conduct the second part of the statutory bifurcated analysis as to the needs and welfare of the child under the standard of best interests of the child under 23 Pa.C.S. §2511(b).

Although the statutory provision in Section 2511(b) does not contain the term "bond," our appellate case law requires the Orphans' Court judge evaluate the emotional bond, if any, between the parent and child, as a factor in the determination of "the child's developmental, physical and emotional need." *In the Matter of K.K.R.-S.*, 958 A.2d 529, 533 (Pa. Super. 2008)). '"In cases where there is no evidence of any bond between the parent and child, it is reasonable to infer that no bond exists. The extent of any bond analysis, therefore, necessarily depends on the circumstances of the particular case.'" *In the Interest of D.D.-E.L.*, 1513 MDA 2020, at 14 (citing *In re K.Z.S.*, 946 A.2d 753, 762-63 (Pa. Super. 2008)). "Additionally ... the trial court should consider the importance of continuity of relationships and whether any existing parent-child bond can be severed without detrimental effects on the child." *Id*. "When conducting a bonding analysis, the court is not required to use expert testimony." *In re Z.P.*, 994 A.2d at 1121 (citing *In re K.K.R.-S.*, 958 A.2d at 533). "Social workers and caseworkers can offer evaluations as well." *In re Z.P.*, 994 A.2d at 1121 (citing *In re A.R.M.F.*, 837 A.2d 1231 (Pa. Super. 2003)).)). "In addition to a bond examination, the trial court can equally emphasize the safety needs of the child, and should also consider the intangibles, such as love, comfort, security, and stability the child might have with the foster parents." *In re Adoption of C.D.R.* 111 A.3d 1212, 1219 (Pa. Super. 2015).

In the instant case as to 23 Pa.C.S. §2511(b), this IVT Court will now examine and evaluate whether termination of Mother's parental rights is in the best interests of these Minor Children. In the instant case, Ms. Vivier-Lorenzi is Minor Children's maternal aunt, with whom Mother does not have an on-going relationship, and her home is a kinship and adoptive resource for Minor Children. *See* N.T., 37:19-38:5; 63:4-22; 67:1-4. Minor Children are doing very well in Ms. Vivier-Lorenzi's home. *See* N.T., 48:6-10; 67:6. The Vivier-Lorenzi kinship home has more than met both Minor Children's physical, emotional, and

social needs. *See* N.T., 67:14-20. Ms. Vivier-Lorenzi is a good adoptive resource for Minor Children. *See* N.T., 67:21-23. "[Minor Children] have been there for quite some time, and they are doing incredibly well." *See* N.T., 68:6-7; 71:15-21. Both Minor Children refer to Ms. Vivier-Lorenzi as "mom" and Minor Children have developed a "maternal bond" with Ms. Vivier-Lorenzi. *See* N.T., 49:2-10; 68:8-9. Minor Children have formed a "sibling bond" with the other Vivier-Lorenzi children. *See* N.T., 48:22-24. The other Vivier-Lorenzi children "play with [Minor Children] and interact with [Minor Children] in a positive manner." *See* N.T., 48:16-21. The Vivier-Lorenzi home has passed all home studies and is size appropriate for Minor Children. *See* N.T., 69:9-11.

Minor Child K.R.B. is only three (3) years old, and Minor Child K.J.D. is only two (2) years old. ECCYS has been involved in Minor Child K.J.D.'s life "the entire time she's been alive ... " and Minor Child K.R.B. was "five months old when [ECCYS] first got involved." *See* N.T., 49:20-50:1. Mother has little, if any, relationship with Minor Children. Both Minor Children are developing normally in Ms. Vivier-Lorenzi's care. *See* N.T., 49:16-18; 69:20-70:4. Minor Children are behaviorally "typical" two- and three-year-olds. *See* N.T., 59:21-23. "[G]iven [Minor Children's] very young ages, [Minor Children] do need a provider that will provide them with a stable home, that will ensure all of their needs are being met, that [Minor Children] have food, snacks, that they're being taken care of and loved, and they do have that in their current placement." *See* N.T., 71:6-11. ECCYS could not offer "any other services" or done "anything more" to reunify Mother with Minor Children. *See* N.T., 50:5-8. Severing Mother's parental rights will have no detrimental effect on these Minor Children and termination of Mother's parental rights is in these Minor Children's best interest. *See* N.T., 46: 24-47:2; 47:21-24; 67:24-68:2; 68:10-13. This IVT Court considered the relationship between Mother and Minor Children and found little, if any, parent-child relationship existed, therefore, severing Mother's parental rights to these Minor Children will have no detrimental effect on each of these Minor Children.

This IVT Court has also considered statements made by the Minor Children's Legal Counsel, Attorney Christine Konzel, wherein she expressed on the record she is in favor of terminating Mother's parental rights. *See* N.T., 110:13-15. "[Minor Children] have been in care for pretty much a two-year, or over two-year time period." *See* N.T., 110:16-17. Minor Children have not visited with Mother since October 2019, some sixteen (16) months prior to the IVT Trial. *See* N.T., 110:18-21. "I don't believe Covid has been a factor, as was testified to by the caseworker Miss Moffett. I think that this mother has had a lot of opportunity to get housing, which is why the children came into placement. They had a lack of housing, the mom was a drug user, and obviously unable to take care of these children, and also had some mental health concerns." *See* N.T., 110:22-111:3. Minor Children have formed an attachment to the members of the Vivier-Lorenzi home. *See* N.T., 111:12-17. Attorney Konzel stated: "I believe the best thing for [Minor Children's] stability and permanency at this time is to remain in [the Vivier-Lorenzi] home and be adopted into that home." *See* N.T., 111:17-20.

Therefore, this IVT Court finds and concludes ECCYS has established, pursuant to under 23 Pa.C.S. §2511(a)(1), (2), (5), (8), and (b), by clear and convincing evidence, all four separate grounds for the termination of Mother's parental rights as to both Minor Children[3],

[3] "Parental rights may be involuntarily terminated where anyone subsection of Section 2S11(a) is satisfied, along with consideration of the subsection 2S11(b) provisions." In re Z.P., 994 A.2d 1108, 1117 (Pa. Super. 2010).

even though only one is sufficient, and that termination of Mother's parental rights is indeed in the best interests, needs, and welfare of each Minor Child.

THREE ANCILLARY ISSUES RAISED

Next, this IVT Court will address Mother's remaining three ancillary issues stemming from the overarching issue examined above. Mother's first ancillary issue concerns the impact, if any, of one clerical error in this IVT Court's initial Findings of Fact misstating Mother's arrest date as July 23, 2019, instead of July 17, 2019. *See* N.T., 77:17; Petitioner's Exhibit 4. However, this IVT Court did correctly state the Second Emergency Protective Order was on July 23, 2019; therefore, Mother was already arrested six days prior to the removal of her Minor Children and remained incarcerated for a probation violation regarding drug abuse. *See* N.T., 77:17; Petitioner's Exhibit 4. This IVT Court further correctly stated the First Emergency Protective Order for the removal of Minor Child K.R.B. was on the same day (March 5, 2018) that Mother was arrested on an active warrant. *See* Petitioner's Exhibits 2A & 4.

Harmless error is defined as "[a] trial-court error that does not affect a party's substantive rights or the case's outcome." *Error*, Black's Law Dictionary (11th ed. 2019). "An evidentiary error will be deemed harmless if: (1) the error did not prejudice the defendant or the prejudice was *de minimus*; or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence ... was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict." *In re A.J.H.*, No. 1564 MDA 2016, 2017 WL 1573229, at *9 (Pa. Super. Ct. May 1, 2017). Moreover, *de minimis* is defined as "trifling; negligible." *De minimis*, Black's Law Dictionary (11th ed. 2019).

In the instant case, the clerical error does not weigh in Mother's favor and is *de minimis* when weighed against all other evidence presented at the IVT Trial. For the Second Emergency Protective Order, this IVT Court inadvertently wrote Mother was arrested on July 23, 2019, when both Minor Children were removed from Mother's custody. In fact, Mother had been arrested six (6) days earlier on July 17, 2019 and was not released until October 6, 2019. *See* N.T., 35:8-10; 77:17. One of the reasons Minor Children were removed from Mother's custody was due to Mother's multiple incarcerations during this review period, from June 28 until July 11, 2019 and July 17 until October 6, 2019, due to Mother's drug abuse. *See* N.T., 35:3-13; 77:16-17. The properly admitted and uncontradicted evidence is so overwhelming, and any prejudicial effect of this clerical error is so insignificant by comparison that this error did not contribute adversely to the decision in this case.

Mother's second ancillary issue is whether this IVT Court properly weighed, considered, and evaluated the impact and importance of Mother's progress which led to Dependency Court's initial reuniting Minor Child K.R.B. with Mother, where shortly thereafter, within seven months, Dependency Court removed both Minor Children from Mother on an emergency basis when Mother significantly regressed.

"When parents have cooperated with the agency, achieved the goals of their permanency plans, and alleviated the circumstances that necessitated the child's original placement, the agency should continue to put forth efforts to reunite the child with his parents." *In re: W.Z.F.*, 796 WDA 2020, at p. 9 (Pa. Super. Ct. April 5, 2021) (citing *In re A.K.*, 906 A.2d 596 (Pa. Super. 2006)). "However, 'when the child welfare agency has made reasonable

efforts to return a ... child to ... [his or] her biological parent, but those efforts have failed, then the agency must redirect its efforts towards placing the child in an adoptive home.'" 796 WDA 2020, at p. 9 (quoting *In re N.C.*, 909 A.2d 818,823 (Pa. Super. 2006)).

Despite being initially reunited with Mother, Minor Children in the instant case had to be removed from Mother's care due to Mother's noncompliance with her probation resulting in Mother's incarceration. *See* N.T., 31:22-32:6. Dependency Court held a total of six (6) review hearings to assess Mother's progress with the court-ordered treatment plan, with three of those hearings being after Minor Children were removed in July 2019. *See* Petitioner's Exhibit 4. As found by Dependency Court, Mother only made minimal progress toward alleviating the situation which led to Minor Children's removal. *See* N.T., 34:16-18; 38:9-10; 41:6-7; Petitioner's Exhibit 4. In fact, Dependency Court scheduled an extra two-month review hearing for May 2020 and told Mother to "step it up" and make the changes necessary to reunify with these Minor Children or the goal would be changed to adoption. *See* N.T., 41:9-15. Due to Mother's refusal to change her situation that led to Minor Children being removed from her care, Dependency Court changed the goal to adoption and ECCYS filed the instant IVT Petition to terminate Mother's parental rights. *See* N.T., 41:16-42:9; 47:3-9; Petitioner's Exhibit 4. Therefore, this IVT Court considered, evaluated and weighed the impact and importance of Mother's progress as well as Mother's regression in determining that clear and convincing evidence existed to terminate Mother's parental rights.

The third remaining ancillary issue raised by Mother is whether implementation of Covid-19 pandemic procedures negatively affected Mother's ability to follow her Court-ordered treatment plan.

Appellate case law "recognizes that the pandemic has created unique challenges for families involved with the juvenile court system." *In the Interest of A.D.*, *A Minor Appeal of: K.F., Mother*, 1226 WDA 2020, 2021 WL 1233386, at *6 (Pa. Super. Ct. Mar. 31, 2021). However, where a parent has not alleviated the circumstances leading to removal of a minor child from parental care prior to the Covid-19 pandemic, a parent cannot blame her lack of progress on the Covid-19 pandemic. *See also: In the Interest of Z.D.K.*, 765 WDA 2020, 2021 WL 73301, at *13 (Pa. Super. Ct. Jan. 8, 2021); *In the Interest of Z.I.*, 964 WDA 2020, 2021 WL 944546, at *4 (Pa. Super. Ct. March 12, 2021); *In the Interest of J.G.*, 715 WDA 2020, 2021 WL 530949, at *9 (Pa. Super. Ct. Feb. 12, 2021).

In the instant case, at best the Covid-19 pandemic procedures had little if any effect on Mother's ability to follow through with her court-ordered treatment plan. When the Covid-19 pandemic commenced, various services offered to Mother became more accessible and convenient. Esper Treatment Center stopped performing random color-code urinalysis screenings, and Esper Treatment Center permitted ECCYS to request parents to submit to only a one-time random urinalysis test. *See* N.T., 42:20-43:9. Mother was asked to perform two of these one-time urinalysis screenings, which Mother failed to perform. *See* N.T., 43:10-16.

Due to the nature of the pandemic, in-person visits between parents and children had to be suspended for a time. Mother's last visit with Minor Children was in October 2019. *See* N.T., 61:19-21. Mother was offered video visits with Minor Children, which can be conveniently accomplished by Mother's phone regardless of where Mother was located. *See* N.T., 61:22-62:2. Specifically, a video call was scheduled for Mother to visit with Minor Children on Mother's Day through a virtual visitation program, and yet Mother failed to

follow through with the video call. *See* N.T., 62:3-5.

ECCYS caseworker stated there were no external factors that created problems for Mother, "because prior to ... the pandemic, [Mother] had ample opportunity ... to follow through with her mental health, to have visitation, and [Mother] was not able to do so." *See* N.T., 57:11-16; 57:17-18. Further, predating the Covid-19 pandemic, Mother did not secure adequate stable housing for Minor Children, despite "ample opportunity to maintain housing." *See* N.T., 57:16. Mother's only source of income was Department of Public Works Benefits. *See* N.T., 58:18 - 59:2.

Therefore, the Covid-19 pandemic had minimal effect, if any, on Mother's ability to accomplish reunification with Minor Children as Mother was only making minimal progress on her court-ordered treatment plan prior to the Covid-19 pandemic.

For all of the above reasons, since this IVT Court has carefully weighed, considered, and examined all evidence relevant to 23 Pa.C.S. §2511(a)(1), (2), (5), (8), and then (b), and addressed all issues raised by Mother. This IVT Court respectfully requests the Pennsylvania Superior Court affirm its February 18, 2021 Final Decrees involuntarily terminating Mother's parental rights to each Minor Child.

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

NADINE LEACH, individually and as duly appointed executrix of the Estate of Nealy Leach-Ruff, a/k/a Neallie Mae Leach Ruff, deceased v. WILLIE RAY PARKER

INDIVIDUAL RETIREMENT ACCOUNTS /
CHANGE OF BENEFICIARY DESIGNATIONS / VALIDITY

The law presumes a person may leave her property to whomever she wishes.

INDIVIDUAL RETIREMENT ACCOUNTS /
CHANGE OF BENEFICIARY DESIGNATIONS / UNDUE INFLUENCE

Under the burden shifting framework for analyzing testamentary claims of undue influence, once the proponent of the instrument establishes its proper execution, the burden shifts to the contestant to prove by clear and convincing evidence: (1) the testator suffered from a weakened intellect; (2) the testator was in a confidential relationship with the proponent of the instrument; and (3) the proponent receives a substantial benefit from the instrument in question; if the contestant sufficiently establishes each prong, then the burden shifts again to the proponent to produce clear and convincing evidence which affirmatively demonstrates the absence of undue influence.

INDIVIDUAL RETIREMENT ACCOUNTS /
CHANGE OF BENEFICIARY DESIGNATIONS /CAPACITY

Testamentary capacity exists when the testator has intelligent knowledge of the natural objects of her bounty, the general composition of her estate, and what she wants done with it.

INDIVIDUAL RETIREMENT ACCOUNTS /
CHANGE OF BENEFICIARY DESIGNATIONS / CAPACITY

While not an onerous standard, determining whether an individual possess or lacks the requisite testamentary capacity is more than an empty ritual.

INDIVIDUAL RETIREMENT ACCOUNTS /
CHANGE OF BENEFICIARY DESIGNATIONS / CAPACITY

Where mental capacity to execute an instrument is at issue, the real question is the condition of the person at the very time she executed the instrument.

INDIVIDUAL RETIREMENT ACCOUNTS /
CHANGE OF BENEFICIARY DESIGNATIONS / CAPACITY / EVIDENCE

A person's mental capacity is best determined by her spoken words and her conduct, and the testimony of persons who observed such conduct on the date in question outranks testimony as to observations made prior to and subsequent to that date, although evidence of capacity or incapacity for a reasonable time before and after execution can nonetheless be indicative of capacity; evidence of the decedent's state of mind can be supplied by lay witnesses as well as experts.

INDIVIDUAL RETIREMENT ACCOUNTS /
CHANGE OF BENEFICIARY DESIGNATIONS / CAPACITY

Pennsylvania law has long recognized that individuals normally incapacitated by reason of mental illness may nonetheless be subject to so-called "lucid intervals," wherein they temporarily return to full possession of their powers of mind, enabling them to understand and transact their affairs as usual.

EVIDENCE / CREDIBILITY AND PERSUASIVENESS

Although credibility and persuasiveness are closely bound concepts, and sometimes treated interchangeably, they are technically distinct.

CAPACITY / EVIDENCE / CREDIBILITY AND PERSUASIVENESS

A trier of fact's unwillingness to give weight to the testimony of persons who witness events may not always be a matter of disbelieving them; the factfinder may also be influenced by the realization that the witnesses may not have been in a position to properly evaluate the testatrix's testamentary capacity because they were either not adequately aware of her mental condition or were totally ignorant of it.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
TRIAL DIVISION – CIVIL
No. 12499 of 2019

Appearances: Andrew J. Sisinni, Esq., for the Plaintiff, Nadine Leach
Gregory L. Heidt, Esq., for the Defendant, Willie Ray Parker

OPINION OF THE COURT

Piccinini, J., August 27, 2021

The law presumes a person may leave her property to whomever she wishes. *In re Estate of Angle*, 777 A.2d 114, 125 (Pa. Super. 2001). Cases where the person suffers from dementia — an umbrella term encompassing a broad array of degenerative brain conditions characterized by a steady deterioration in memory and cognitive functioning — test the limits of that presumption. This is one such case.

Plaintiff, Nadine Leach, brings this action to challenge the validity of a change of beneficiary designation to an Individual Retirement Account (IRA) executed by her mother, Nealy Leach-Ruff, shortly before her death. In that transaction, Nealy named her husband, Defendant, Willie Ray ("Ray") Parker, as a co-beneficiary to the IRA along with Nadine, who, prior to the amendment, had been designated as the sole beneficiary on the account. At the time of the change, however, Nealy was in the midst of a severe mental and physical decline precipitated by rapid-onset dementia. Nadine claims that, as a result of her mother's condition, she lacked the legal capacity to alter the beneficiary designation on her IRA. Nadine further claims the change in beneficiary designation was the product of Ray's undue influence over Nealy.

In assessing these claims, the Court is bound by the evidence of record presented at trial, including the expert and lay witness testimony, as well as those exhibits admitted for the Court's consideration. After careful review of this evidence, and for the following reasons, the Court finds that, while the evidence of record does not reveal a confidential relationship necessary for a finding of undue influence, it does indicate that Nealy lacked the legal capacity required to change the beneficiary designation on her IRA on July 19, 2019, and as such, the designation is legally invalid.

I. BACKGROUND

By all accounts, Nealy Leach-Ruff was a remarkable person. She grew up in the South, putting herself through college at Mississippi Valley State University by cleaning houses

and working as an agricultural laborer. Transcript (Tr.) Day 1, pp. 62, 64. She eventually moved to Erie, Pennsylvania, working her entire career at the Housing Authority of the City of Erie, where she became the Section 8 program coordinator before retiring in 2009. Tr., Day 1, pp. 64, 117. Nealy was active in her church, participating in the choir, and just as religiously attended her grandson's high school basketball games. Tr., Day 1, p. 65. She had a vivacious personality, dressed "sharp as a tack," and emanated a "big presence" that could not go unnoticed in a room. Tr., Day 1, p. 66. More than anything else, she was devoted to her family, especially her grandchildren. Tr., Day 1, pp. 65-66, 69, 113-14.

For many years, Nealy was married to the Reverend Charles Julius Ruff, III. Tr., Day 1, pp. 66-67. Charles passed away in 2014, and his death took a toll on Nealy, causing her to become uncharacteristically withdrawn for a time. Tr., Day 1, pp. 67-68. Nealy ultimately recovered and eventually remarried Ray Parker on May 11, 2016. Tr., Day 2, p. 21. Six days prior to their marriage, on May 5, 2016, the two signed a prenuptial agreement, in which Ray waived and renounced "any and all rights of any nature whatsoever which he may have as a surviving spouse in the property or the estate of Nealy[.]" Tr., Day 2, p. 95; Plaintiffs' Exhibit (Pls.' Ex.) 22, p. 5, ¶ 13 (emphasis omitted).

In the spring of 2019, Nealy's family grew concerned after she began exhibiting some troubling behaviors. Tr., Day 1, p. 69. The once-active Nealy, who often enjoyed activities like gardening or exercising at Planet Fitness, and who normally walked with "a pep in her step," became sluggish, shuffling her feet, and responding more slowly than usual. Tr., Day 1, p. 73. On an annual visit to Texas in May, her sister observed that Nealy, who was typically "the life of the party" on these trips, slept nearly the entire vacation, barely ate, was often caught staring into space, was persistently cold despite the hot weather, and had such difficulty walking through the airport that she required the assistance of a wheelchair. Tr., Day 1, pp. 226-30. The characteristically "jolly" Nealy had, quite suddenly, ceased to be herself. Tr., Day 1, pp. 66, 234.

Then, on one occasion in late June of 2019, her daughter, Nadine Leach, noticed Nealy greet Nadine's partner, Alfonso Pickens, over and over again as he would exit and re-enter the house while doing yard work as if it were the first time she had seen him that day. Tr., Day 1, pp. 69-70, 72, 216. On another occasion in early July, while visiting Nadine and Alfonso, Nealy was unable to drive the two miles back to her house, and required assistance getting out of the car, into her home, and ready for bed. Tr., Day 1, pp. 75-76, 217, 220-22. Then, shortly after that incident, on July 5th, Nealy was unable to drive home after servicing her car at a dealership in Waterford, Pennsylvania; when Nadine arrived, Nealy was mostly quiet and aloof to the world around her, sitting in her hot car in long sleeves with the windows rolled up, and without having completed the necessary paperwork or paid for the inspection. Tr., Day 1, pp. 76-80, 217-22; Pls.' Ex. 5. Once again, Nealy required physical assistance in getting out of the vehicle. Tr., Day 1, pp. 221-22.

Nadine scheduled her mother for a medical consultation with her family physician where she saw a physician's assistant on July 2nd. Nealy's doctors were so concerned by Nealy's "confusional state" that they sent her directly to the emergency room at Hamot Hospital. Tr., Day 1, pp. 74, 163. There, a CAT scan, blood work, and other diagnostic tests were performed in an effort to discover potential reversible causes of Nealy's behavior, but those tests did not reveal any abnormalities other than mild anemia and low potassium levels. Tr.,

Day 1, pp. 164-66. After the incident at the car dealership on July 5th, however, Nadine immediately sought another appointment with her family physician, which was scheduled for July 15th. Tr., Day 1, pp. 74-75, 80-81, 162-67. Nealy subsequently suffered a fall on July 9th, for which she was treated at the emergency room, leaving her with a fractured finger that doctors placed in a splint. Tr., Day 1, pp. 167-68.

At the July 15th appointment, Dr. James Gade, Nealy's primary care physician, personally examined Nealy, reviewed the July 2nd diagnostic test results, ruled out an infection or other reversible causes, and ultimately concluded that she was suffering from "progressive cognitive impairment." Tr., Day 1, p. 148, 159, 166, 169-72. Dr. Gade ordered an MRI, prescribed a dementia medication called Aricept (also known as donepezil), and also made a referral for a neuropsychological evaluation. Tr., Day 1, pp. 23, 84-84; 170, 171-72, 178-79. Dr. Gade also spoke privately with Ray and Nadine concerning Nealy's condition, offering emotional support and providing them more information about dementia. Tr., Day 1, pp. 168-69. Nealy's family was understandably distraught by the diagnosis, and Nadine sought a second opinion from the Cleveland Clinic, taking the first available appointment for August 1st. Tr., Day 1, pp. 85-86, 134.

The events at the heart of this lawsuit transpired in the midst of Nealy's rapidly deteriorating health. As Nealy's condition worsened, Nadine and Alfonso had canceled all long-distance trips related to their son's travel basketball team, but they decided to attend his final basketball tournament from July 17th to July 21st in Atlanta, Georgia. Tr., Day 1, pp. 87-89. Nadine arranged for Ray to be Nealy's primary caregiver while she was away, and Ray took time off of work to do so. Tr., Day 1, pp. 90-91.

What exactly happened while Nadine was away, and the state of Nealy's mind during this time, particularly on Friday, July 19, 2019, is hotly contested by the parties. What is known is that, on July 19th, Nealy, accompanied by Ray, entered the Erie Federal Credit Union at 3503 Peach Street in Erie and changed the beneficiary designation on her IRA to include Ray as a co-beneficiary on that account. Def.'s Ex. A. According to Ray, Nealy awoke that day able to bathe and feed herself, and then asked to go to the bank, where, to his surprise, she proceeded to add him as beneficiary on her IRA, attempting to add her son Matthew to the account as well, although Matthew could not be added because she did not have his social security number. Tr., Day 2, pp. 11, 40-42. Ray never informed Nadine of the change in beneficiary designation either in his phone conversations with her while she was in Atlanta nor when she returned. Tr., Day 1, pp. 91-100, 105-06.

In the days after the change in beneficiary designation, Nealy's mental and physical condition continued to worsen. Four days after the beneficiary designation, on July 23rd, home healthcare nurse, Robin Post, visited Nealy to assess her condition and compiled a report documenting the visit, noting that Nealy was able to respond to some basic questions, but nonetheless suffered from short-term memory deficits and required daily supervision. Tr., Day 1, pp. 245-50; Def.'s Ex. C. Nealy then underwent a geriatric assessment at the Cleveland Clinic on August 1st and a brain MRI on August 2nd. Tr., Day 1, p. 26, Pl.'s Ex. 4. Nadine noted to the physician at the Clinic that her mother had lost 17 pounds since June and had undergone an exceptional decline just in the last week. Tr., Day 1, pp. 48, 50-51; Ex. 4, p. 7.

On August 12th, Dr. Susan Troutner, a licensed psychologist specializing in dementia

evaluations, was scheduled to conduct a neuropsychological examination of Nealy. Tr., Day 1, pp. 20, 22-23. In reviewing the results of Nealy's August 1st MRI, Dr. Troutner observed significant and irreversible levels of cerebral atrophy or volume loss (in layman's terms, brain deterioration). Tr., Day 1, pp. 26-27; Pl.'s Ex. 3. According to Dr. Troutner, although the symptoms may not have been evident until April or May, the cerebral volume loss would have begun well before that time. Tr., Day 1, pp. 30-31. She also determined that Nealy's particular form of dementia was atypical in that its progression was "very rapid." Tr., Day 1, p. 45. Specifically, Dr. Troutner described Nealy's condition as a "prion," a rare category of rapid-onset dementia that results in a significant degree of neural loss over a period of six to twelve months rather than the more familiar Alzheimer's process, which occurs over seven to nine years. Tr., Day 1, pp. 54-55. By the time of Dr. Troutner's evaluation on August 12th, Nealy was already in the advanced stages of her disease, so much so that Dr. Trounter determined that conducting a neuropsychological examination would be neither beneficial nor appropriate. Tr., Day 1, p. 36. Nealy passed away less than three weeks later, on August 31, 2019. Tr., Day 1, pp. 108, 159.

Shortly after Nealy's death, Nadine discovered that her mother had amended the beneficiary designation on the IRA to include Ray. Tr., Day 1, pp. 105-06. She was shocked. Tr., Day 1, p. 106. According to Nadine, when she confronted Ray about the designation, he told her it was done because Nealy had been angry with her over her desire to move Nealy into a one-story house, which she had thought might be a safer housing option as Nealy's health declined. Tr., Day 1, pp. 107-08, 111. Nadine believed this was a lie. Tr., Day 1, p. 111.

Nadine commenced this action by writ of summons on September 16, 2019, and later filed her Complaint on December 11, 2019. Complaint, p. 1. Over the course of two days, from April 13 to April 14, 2021, this Court held a bench trial where lay and expert testimony was heard from eight witnesses and 24 exhibits[1] were admitted. After careful review of this evidence, this case is now ripe for adjudication.

II. APPLICABLE LAW

Before turning to the merits of Leach's claims, the Court must address a threshold question of law. In Pennsylvania, the respective tests for capacity and undue influence differ depending on the particular type of legal transaction at issue. Those transactions include testamentary dispositions (such as through a will), *inter vivos* transfers (such as gifts given during one's lifetime), and contractual agreements. The Court must determine which of these legal standards apply to a beneficiary designation on an IRA.[2]

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[1] Although numbered and catalogued for purposes of the record, Plaintiff's Exhibit 13 was not admitted into evidence after this Court sustained Defendant's objection to its admission, and it was not considered by the Court in reaching its decision. Tr., Day 1, pp. 111-12, 240.

[2] The Court notes that both parties appear to assume that an IRA is testamentary in nature, but they have made no stipulation to that effect. *See Northbrook Life Insurance Co. v. Commonwealth*, 949 A.2d 333, 337 (Pa. 2008) (noting, generally, parties may by stipulation limit the legal issues in controversy, which become the law of the case) (citation omitted); but *see* Pa.R.C.P. 201 ("Agreements of attorneys relating to the business of the court shall be in writing, except such agreements at bar as are noted by the prothonotary upon the minutes or by the stenographer on the stenographer's notes."); *Sosa v. Rodriguez*, 2019 WL 3738621, *3 (Pa. Super. 2019) (unpublished) (noting "the trial court did not commit an error of law or abuse its discretion when it limited the parties' stipulation to the terms the parties agreed to on the record."). In the absence of a stipulation that Leach's claims are to be analyzed under testamentary principles, the issue technically remains in controversy. Moreover, at the close of trial, the Court noted the possibility that it may be "compelled by the case law" to apply a different standard "between now and issuing an opinion[,]" but the parties declined the invitation to file post-trial briefing on this issue. Tr., Day 2, p. 154. Accordingly, the Court undertakes an independent analysis concerning the applicable legal standard in this case.

A. Tests for Capacity and Undue Influence

In the mine-run of cases there is no question what kind of legal instrument a court is dealing with, be it a will, a contract, or a gift, and thus, it is not particularly difficult to ascertain the test to determine whether an individual lacked capacity or was unduly influenced in executing it. But in a case such as this, the Court must first determine how to categorize the particular transaction whose validity is in dispute in order to determine the test that applies. Before turning to that analysis, however, it is helpful to review these tests and how they vary between the three legal standards.

1. Capacity

"The required degree of legal capacity can be thought of as existing on a spectrum so that the legal capacity sufficient to perform certain acts may be considered insufficient to perform others." LAWRENCE A. FROLIK & MARY F. RADFORD, *"Sufficient" Capacity: The Contrasting Capacity Requirements for Different Documents*, 2 NAELA J. 303, 304 (2006). "It is hornbook law that less mental capacity is required to execute a will than any other legal instrument." *In re Will of Goldberg*, 582 N.Y.S.2d 617, 620 (Sur. Ct. 1992).

Anglo-American courts have long held that testamentary capacity exists when the testatrix knows those who are the natural objects of her bounty,[3] the composition of her estate, and what she wants done with it, even if her memory is impaired by age or disease. *In re Estate of Nalaschi*, 90 A.3d 8, 12 (Pa. Super. 2014) (citation omitted); *In re Estate of Vanoni*, 798 A.2d 203, 207 (Pa. Super. 2002); *see also Greenwood v. Greenwood*, 163 Eng. Rep. 930, 943 (K.B. 1790) (Lord Kenyon) ("I take it, mind and memory competent to dispose of his property, when it is a little explained, perhaps may stand thus: having that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wishes to dispose of it; if he had the power of summoning up in his mind so as to know what his property was, and who those persons were, that then were the objects of his bounty, then he was competent to make his will."). "In determining testamentary capacity, a greater degree of proof of mental incapacity is required than would be necessary to show the inability to conduct one's business affairs." *In re Estate of Smaling*, 80 A.3d 485, 494 (Pa. Super. 2013) (citation omitted).

Slightly more demanding than testamentary capacity is the capacity to make an *inter vivos* transfer, often in the form of a gift.[4] The donor of an *inter vivos* gift must have "an intelligent perception and understanding of the dispositions made of property and the persons and objects one desires shall be the recipients of one's bounty." *In re Null's Estate*, 153 A. 137, 139 (Pa. 1931). This is quite similar to testamentary capacity, but the standard is slightly higher, for "generally speaking, it requires more business judgment to make a gift than to make a will, as the former is immediately active while the latter is prospective[.]" *Horner by Peoples National Bank of Central Pennsylvania v. Horner*, 719 A.2d 1101, 1104-05 (Pa. Super. 1998) (quoting *Null's Estate*, 153 A. at 139).

Above the capacity to make *inter vivos* gifts lies the capacity to contract. This requires

[3] The "natural objects" of a testator's bounty are her family, that is, those related to her by blood, marriage, or adoption. JULIA COWAN SPEAR, *Undue Influence in Louisiana: What It Is, What It Was, What It Might Be*, 43 LOY. L. REV. 443, 451 (1997).

[4] "Inter vivos," Latin for "between the living," means "[o]f or relating to property conveyed not by will or in contemplation of an imminent death, but during the conveyor's lifetime." Black's Law Dictionary (9th ed. 2009).

"the strength and vigor…to digest all the parts of a contract[.]" *In re Lawrence's Estate*, 132 A. 786, 789 (Pa. 1926) (citations omitted).

2. Undue Influence

As for undue influence, the relevant standard affects the substantive elements a contestant of an instrument must prove to support her claim. In the testamentary context, the contestant of a will must establish three elements by clear and convincing evidence: (1) the testator suffered from a weakened intellect; (2) the testator was in a confidential relationship with the proponent of the will; and (3) the proponent received a substantial benefit from the will. *Estate of Smaling*, 80 A.3d at 493. Once the contestant proves each of these prongs by clear and convincing evidence, the burden shifts to the proponent of the will to demonstrate the absence of undue influence by clear and convincing evidence. *Id.*

The test for undue influence in the context of an *inter vivos* transfer is different. There "[t]he challenger need only establish, by clear and convincing evidence, a single thing: that the donor and donee were in a confidential relationship[.]" *In re Balogh*, 2021 WL 3206111, *4 (Pa. Super. 2021) (unpublished). "If the challenger carries that burden, the burden then shifts to the donee to prove affirmatively that it is unaffected by any taint of undue influence, imposition, or deception." *Id.* (quoting *McCown v. Fraser*, 192 A. 674, 676 (Pa. 1937)) (internal quotation marks omitted).

Similarly, a contract may be set aside where the parties to the contract did not deal at arms' length at the time of its formation. *Biddle v. Johnsonbaugh*, 664 A.2d 159, 161 (Pa. Super. 1995). This, in turn, may be demonstrated by showing the parties were in a confidential relationship at the time the agreement was executed. *Id.* Once a confidential relationship is established, the burden shifts to the proponent to show by clear and convincing evidence "that the contract was free, voluntary and an independent act of the other party, entered into with an understanding and knowledge of its nature, terms and consequences" *Id.* (quoting *Kees v. Green*, 75 A.2d 602, 605 (Pa. 1950)).

B. Relevant Factors to Consider in Categorizing an IRA Beneficiary Designation

The question remains: how should an IRA beneficiary designation be categorized for purposes of capacity and undue influence? Is it more analogous to a will, an *inter vivos* transfer, or a contract?[5] In answering this question, the Court finds four factors especially pertinent to its consideration: the defining features and characteristics an IRA beneficiary designation, applicable Pennsylvania statutory law, relevant Pennsylvania case law, and case law from other jurisdictions. The Court addresses each factor in turn.

1. The Defining Features and Characteristics of an IRA Beneficiary Designation

An IRA is a creature of federal statutory innovation, first established in the Employee Retirement Income Security Act of 1974 (ERISA). 26 U.S.C. § 401 et seq.; *Grund v. Delaware Charter Guarantee & Trust*, 788 F. Supp. 2d 226, 237 (S.D.N.Y. 2011) (noting "Title II of 'ERISA' consists of various amendments made to the Internal Revenue Code at the time of

[5] Although arguably the party with an interest in applying a less deferential standard, Leach suggests that an IRA should be considered testamentary because that standard "applies to wills, but it also applies to an asset that has its own dispositive provision, such as an IRA, because you're still…disposing of an asset." Tr., Day 2, p. 153. But *inter vivos* transfers are undeniably disposals of assets from one party to another. And no one doubts that an individual can dispose of an asset through contractual agreement either. As such, Leach's "disposal theory" does not resolve the question.

ERISA's passage, including § 408's provision of IRA guidelines."). Some have described an IRA as a "private contractual arrangement between the individual accountholder and the account custodian she chooses[,]" *i.e.* a bank. STEWART E. STERK & MELANIE B. LESLIE, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U.L. REV. 165, 177-78, 181 (2014) (noting "[t]he critical components of the contract are the beneficiary designation form filled out by the accountholder and the default provisions that apply when the accountholder has made no effective designation."). ERISA itself, however, describes an IRA as a trust, wherein a bank acts as trustee over the contributions made by the employee for her benefit in old age. 26 U.S.C. § 408(a); *see also* 26 U.S.C. § 408A(a) (noting "a Roth IRA shall be treated for purposes of this title in the same manner as an individual retirement plan.").

Whichever way one characterizes an IRA generally, it is ultimately not particularly relevant to this factor. This is because the operative question here is not whether the IRA itself is valid, but whether the amendment to its beneficiary designation made on July 19, 2019, is valid. As such, the question becomes what are the defining features of a payable-on-death beneficiary designation specifically.

By narrowing the question in this way, the similarities between a payable-on-death beneficiary designation and a testamentary disposition are brought into sharper focus:

> Like a will, the owner of a non-probate financial asset may revoke the beneficiary designation until the owner's death or incapacitation. Similarly, like a will and unlike a contract, the designation does not need to be supported by consideration. [Nor can designees] argue that they are entitled to the [proceeds from an] IRA in the absence of a beneficiary designation. Further, like a will, under most circumstances, the beneficiary does not receive any benefits until after the decedent's death and has only an expectancy of the benefit.

Wisconsin Province of the Society of Jesus v. Cassem, 486 F. Supp. 3d 527, 533-44 (D. Conn. 2020). These similarities are striking, and they significantly undermine the contention that payable-on-death beneficiary designations on retirement accounts should be analogized to contracts or *inter vivos* transfers. This Court agrees that the inherent features and characteristics of an IRA beneficiary designation are most akin to a testamentary disposition, such as will. This factor weighs in favor of applying a testamentary standard to Leach's claims.

2. Statutory Law

There is one Pennsylvania statute that arguably speaks directly on this question. Section 6108 of the Probates, Estates and Fiduciaries Code states in relevant part:

> The designation of beneficiaries of life insurance, annuity or endowment contracts, or of any agreement entered into by an insurance company in connection therewith, supplemental thereto or in settlement thereof, and the designation of beneficiaries of benefits payable upon or after the death of a participant under any pension, bonus, profit-sharing, retirement annuity, or other employee-benefit plan, **shall not be considered testamentary and shall not be subject to any law governing the transfer of property by will.**

20 Pa.C.S. § 6108 (emphasis added). Although not mentioned by name, IRAs share many similarities with the kinds of instruments delineated in Section 6108, particularly retirement annuities. Moreover, Section 6108 was last amended in 1972, two years before IRAs were first established by ERISA, and so it is not surprising that the provision would not mention IRAs by name. It is therefore highly likely that IRAs, along with all payable-on-death beneficiary designations in retirement accounts, fall within the scope of Section 6108's mandate. There remains a question of what that mandate precisely entails.

"The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa.C.S. § 1921(a). The legislative history suggests that the General Assembly may not have intended to displace the law of capacity and undue influence as they would have otherwise applied to such beneficiary designations, but rather, may have had a more limited purpose in mind.

The Pennsylvania Supreme Court has previously expounded upon the legislative purpose behind Section 6108. *In In re Henderson's Estate*, 149 A.2d 892 (Pa. 1959), the Court relied on a report of the Joint State Government Commission to ascertain Section 6108's legislative intent. That report explained that "[Section 6108] has two purposes. The most important is to make it clear that unfunded insurance trusts are not testamentary and to that extent the law as stated in *Re Brown's Estate*, 384 Pa. 99, 119 A.2d 513 is changed…" *Id.* at 898.[6] *Brown's Estate* had held that a widow was entitled to take her spousal election from the proceeds of a trust into which certain life insurance policies had been deposited by her late husband. *Id.* at 897. Displeased with this decision, the General Assembly made several amendments to the Estates Act of 1947 in an effort to legislatively overturn it, including the enactment of Section 6108. *Id.* at 897-98. As endorsed by our Supreme Court, it thus appears that the primary legislative purpose of Section 6108 was to make abundantly clear that a spouse's elective share of a decedent's estate may not be applied to non-probate assets such as life insurance policies or retirement annuities, not to displace the application of testamentary principles as they apply to claims of lack of capacity and undue influence.

Nevertheless, "[t]he first and best indication of legislative intent is the language used by the General Assembly in the statute." *Matter of Private Sale of Property by Millcreek Township School District*, 185 A.3d 282, 290-91 (Pa. 2018) (citation omitted). Even accepting our Supreme Court's determination in *Henderson's Estate* that primary intent of the General Assembly in passing Section 6108 was to reject the application of the spousal election rule to non-probate assets, the text of Section 6108 is not so circumscribed to limit itself to this area.

Notably, Section 6108 provides two separate mandates. It first directs that "the designation of beneficiaries… shall not be considered testamentary" and it then further states that such designations "shall not be subject to any law governing the transfer of property by will." 20 Pa.C.S. § 6108. Here, the former command is much broader. It not only rejects application of specific rules unique to the law of wills (like spousal election), but separately mandates that beneficiary designations on such instruments "shall not be considered testamentary[.]" 20 Pa.C.S. § 6108. It would run against elementary principles of statutory interpretation to interpret the second instruction as simply reiterating the first, or vice versa, for "in construing a statute, the courts must attempt to give meaning to every word in a statute, as we cannot

[6] The case does not reference what the second, less important purpose might be.

assume that the legislature intended any words to be mere surplusage." *Schock v. City of Lebanon*, 210 A.3d 945, 964-65 (Pa. 2019). While the latter mandate may reasonably be interpreted as negating the application of certain doctrines and formalities specific to wills and estates, the former mandate arguably alters the substantive nature of non-probate beneficiary designations altogether.

Moreover, Section 6108 is unequivocal in its command that "the designation of beneficiaries of benefits payable upon or after the death… shall not be considered testamentary and shall not be subject to any law governing the transfer of property by will." 20 Pa.C.S. § 6108 (emphases added). Typically, "[t]he word 'shall' carries an imperative or mandatory meaning" and "[a]lthough some contexts may leave the precise meaning of the word 'shall' in doubt… [the Pennsylvania Supreme Court] has repeatedly recognized the unambiguous meaning of the word in most contexts." *In re Canvass of Absentee Ballots of November 4, 2003 General Election*, 843 A.2d 1223, 1231-32 (Pa. 2004).

Finally, even assuming the General Assembly did not specifically have capacity or undue influence in mind when it enacted Section 6108, "the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law[.]" *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1737 (2020). Indeed, as our General Assembly has itself instructed, the intent of the General Assembly may be ascertained through reference to "contemporaneous legislative history," but only "[w]hen the words of the statute are not explicit." 1 Pa.C.S. § 1921(c)(7).

Here, the explicit words of the statute preclude application of testamentary principles to payable-on-death beneficiary designations in retirement accounts without exception. Therefore, this factor, while neutral as to application of either *inter vivos* or contract principles to the case at bar, weighs against application of a testamentary standard.

3. Pennsylvania Case Law

There does not appear to be any precedential appellate decision from this Commonwealth directly on point, but the Court has identified three cases that arguably bear on the question.

i. Fiumara v. Fiumara

Fiumara v. Fiumara, 427 A.2d 667 (Pa. Super. 1981) involved a change to a beneficiary designation on a pension plan. The Superior Court upheld the trial court's determination that the designation was invalid on the basis that the evidence supported a finding of undue influence. *Id.* at 672. In doing so, the Court declined to apply the test for testamentary undue influence, noting "in Pennsylvania the designation of beneficiaries of pension plans is deemed to be an *inter vivos* transaction[,]" citing Section 6108. *Id.* at 671 n.6.

Footnote 6 of *Fiumara* did not explain why *inter vivos* principles should apply even assuming beneficiary designations on non-probate assets are not testamentary. Section 6108 does not direct that these beneficiary designations be deemed *inter vivos*, but only that they not be deemed testamentary. As the United States District Court for the Eastern District of Pennsylvania has noted, Section 6108, "standing alone, does not clearly dictate that *inter vivos* transfer law applies to this case" because "[u]nder Pennsylvania law, a valid *inter vivos* gift requires donative intent and delivery, which divests the donor of all dominion and control over the property and invests the donee with complete control over the subject

matter. *Jackson National Life Insurance Co. v. Heyser*, 2013 WL 5278240, *4 (E.D. Pa. 2013) (citing *Hera v. McCormick*, 625 A.2d 682, 686 (Pa. Super. 1993)).

Nevertheless, in reliance on *Fiumara*, later courts have applied the *inter vivos* test for undue influence to transfers of real property by deed, *Shupp v. Brown*, 439 A.2d 178 (Pa. Super. 1981), and, relevant for our purposes, retirement accounts. *Snizaski v. Public School Employees' Retirement Board*, 2014 WL 3943915 (Pa. Cmwlth. 2014) (unpublished). In *Snizaski*, a non-precedential Commonwealth Court decision, the principal beneficiary argued that the challenger of the designation had not provided sufficient evidence that the decedent suffered from a weakened intellect in proving his case of undue influence. *Id.* at *12. Citing *Fiumara*, the Court noted "[i]n Pennsylvania, the designation of a beneficiary of [a] pension or retirement plan is deemed to be an *inter vivos* transaction." *Id.* at *8. Because the designation of a beneficiary on a retirement account was an *inter vivos* and not testamentary, the Court reasoned that the testamentary test for undue influence was inapplicable and the party claiming undue influence was not required to make a showing of weakened intellect to succeed on its claim. *Id.* at *12.

ii. Fulkroad v. Ofak

Fulkroad v. Ofak, 463 A.2d 1155 (Pa. Super. 1983) involved a change of beneficiary designation to a life insurance policy. Appellants argued that a life insurance policy should not be analogized to a will in light of Section 6108, and relied on *Fiumara* for the proposition that *inter vivos* principles applied instead. *Id.* at 1157. The Court disagreed, holding:

> While the designation must be deemed an *inter vivos* transaction…the lower court correctly equated the requirements for testamentary capacity with that capacity to designate a beneficiary for life insurance benefits. This analysis of the required capacity in no way contravenes the intent of § 6108 and, needless to say, the similarities underlying both instruments are readily apparent.

Fulkroad, 463 A.2d at 1157. At least one Court of Common Pleas has relied on *Fulkroad* in holding that testamentary principles apply to claims of lack of capacity and undue influence in the context of IRA beneficiary designations. *See In re Estate of LaVeglia*, 31 Pa. D. & C. 5th 190, n.5 (Carbon Co. 2013) (Nanovic, J.).

iii. Goodwin v. Goodwin

Most recently, in *Goodwin v. Goodwin*, 244 A.3d 453 (Pa. Super. 2020), the Superior Court considered whether designations on a decedent's various life insurance policies and an IRA — all naming his mother as sole beneficiary to those accounts — were considered *inter vivos* gifts for purposes of the Divorce Code, which excepts gifts from its definition of marital property, and consequently, whether those accounts were subject to equitable distribution as part of the mother's subsequent divorce proceedings. 244 A.3d at 455-57; *see also* 23 Pa. C.S. §3501(a)(3). The Court concluded that:

> By listing someone as the sole beneficiary on an insurance policy or IRA, the giver makes the proceeds into a gift which vests at the time of death. Moreover, because such policies allow for the designation of co-beneficiaries and contingent beneficiaries, the failure to list any makes the intent of the giver clear.

Id. at 459. The Court noted that "[w]e are aware both the [Probates, Estates and Fiduciaries] Code and our Supreme Court have held life insurance is not testamentary in nature[,]" presumably in a nod to Section 6108. *Id.* at 461. It then determined that sole beneficiary designations on life insurance policies and IRAs were *inter vivos* transactions after looking to decisions from other jurisdictions, noting "[w]hile there is minimal case law in the individual states regarding the treatment of non-testamentary inheritances in divorce, those courts which have faced the issue have honored the intent of the giver and treated the property as non-marital" and "[t]hus, our finding the life insurance and IRA funds at issue in the instant matter constitute a gift and thus fall within the exceptions delineated in Section 3501(a)(3) is consistent and in alignment with the holdings of courts in our sister states." *Id.*

Judge McCaffery authored a concurring and dissenting opinion. He held that Section 6108 compelled the result that a beneficiary designation on a life insurance policy was not testamentary. *Id.* at 467. But unlike the majority, he found that the designation was not a gift either because under Pennsylvania law "[i]t is clear that the naming of a beneficiary on a life insurance policy vests nothing in that person during the lifetime of the insured; the beneficiary has but a mere expectancy" and "the naming of a beneficiary on a life insurance policy is *sui generis*; it is not a conveyance of the insured's assets." *Id.* at 467-68 (quoting *Lindsey v. Lindsey*, 492 A.2d 396, 398 (Pa. Super. 1985)). In other words, a life insurance beneficiary designation is unique and cannot be analogized to either a testamentary devise or an *inter vivos* gift, and as such, does not fit into the gift exception to the definition of marital property. Judge McCaffery then addressed the IRA separately, noting the majority had considered "these proceeds together with the life insurance proceeds." *Id.* at 468. He ultimately declined to express an opinion on the nature of the IRA beneficiary designation because, in his view, the trial court failed to articulate a finding as to whether the mother was named as a beneficiary on the son's IRA.[7] *Id.*

These cases do not provide a coherent expression of Pennsylvania law that would strongly favor any approach, although they seem to weigh against the application of contractual principles. As between testamentary and inter vivos standards, this factor is weighted relatively equally.

4. Case Law from Other Jurisdictions

The Court briefly surveys those cases from other jurisdictions to have considered the issue in order to discern if any consensus has developed among our sister states. Many jurisdictions apply testamentary principles to IRA change of beneficiary designations. *See Webb v. Anderson Children Trust*, 160 N.E. 3d 804, 811 (Ohio Ct. App. 1st Dist. 2020) (noting "[e]ven though the transfer on death of IRA proceeds to a designated beneficiary is contractual and not testamentary, Ohio courts have held that the test of testamentary capacity can also be used as a standard for mental capacity to execute a beneficiary designation.") (citation and internal quotation marks omitted); *In re Estate of Langeland*, 312 P.3d 657, 665 (Wash. Ct. App. 2013) (noting "because the designation is merely a means of transmitting property at death and the beneficiary has no rights before the insured's death…naming the beneficiary of an IRA is not an *inter vivos* gift" applying testamentary principles instead)

[7] The majority proceeded to consider the question presented as it applied to the IRA because the parties agreed that the mother was named as sole beneficiary on that account. *Goodwin*, 244 A.3d at 456.

(footnote and internal quotation marks omitted); *McCullough v. McCullough*, 2018 WL 6015841 (W.V. 2018) (unpublished) (applying testamentary standard to claim of undue influence over IRA change of beneficiary designation); *In re Albert*, 30 N.Y.S.3d 121 (N.Y. App. Div. 2016) (same); *Newcomb v. Sweeney*, 2014 WL 1193323, *12 (Conn. Super. 2014) (applying testamentary capacity but noting "[i]t is not clear that lack of testamentary capacity is a valid special defense in this action, since the challenge is not to the execution of a will, but rather to the designation of beneficiary for IRAs.") (internal quotation marks omitted).

Several other jurisdictions have rejected the testamentary approach, typically applying contractual principles instead. *See Ivie v. Smith*, 439 S.W. 3d 189, 203-05 (Mo. 2014) (rejecting testamentary capacity and applying the standard for capacity to contract to a change in beneficiary designation of an IRA); *In re Estate of Wellshear*, 142 P.3d 994, 997 (Ok. Civ. App. 2006) (same); *Alexander v. McEwen*, 239 S.W. 3d 519, 522 (Ark. 2006) (same); *SunTrust Bank, Middle Georgia N.A. v. Harper*, 551 S.E. 2d 419, 425 (Ga. 2001) (rejecting the testamentary capacity standard because an IRA is a non-probate asset and applying the standard for capacity to contract).

At least one jurisdiction seems to apply *inter vivos* principles generally to challenges to beneficiary designations on IRAs on the basis that IRAs are *inter vivos* trusts. *See Ciampa v. Bank of America*, 35 N.E.3d 765, 768 (Mass. App. Ct. 2015) (concerning a scrivener's error on an IRA beneficiary designation). As Goodwin points out, still others appear to treat sole beneficiary designations on life insurance policies as *inter vivos* gifts. *See Angell v. Angell*, 777 N.W.2d 32, 34-37 (Minn. Ct. App. 2009); *In re Marriage of Goodwin*, 606 N.W.2d 315, 318-19 (Iowa 2000); *Sharp v. Sharp*, 823 P.2d 1387, 1388 (Colo. Ct. App. 1991); *Fields v. Fields*, 643 S.W.2d 611, 613-615 (Mo. Ct. App. 1982); *Brunson v. Brunson*, 569 S.W.2d 173, 176-177 (Ky. Ct. App. 1978).

Because it appears there is no consensus among the states on the issue, and cases can be found to support any of the three possible standards that could apply, this factor weighs equally in favor of all three options and is effectively neutral.

C. Balancing of Factors

On balance, the defining features and characteristics of an IRA beneficiary designation suggest it is most analogous to a will. Section 6108, on the other hand, weighs equally against application of testamentary principles. Although there is some out-of-state case law to suggest contract principles may apply, that factor does not figure substantially into the calculus, and there appears to be no Pennsylvania authority to support its application.

Pennsylvania case law is an especially weighty factor since this Court is bound by the precedential pronouncements of our appellate courts. *Walnut Street Associates, Inc. v. Brokerage Concepts, Inc.*, 20 A.3d 468, 480 (Pa. 2011) (holding a lower court is "duty-bound" to effectuate law from a higher court); *Commonwealth v. Randolph*, 718 A.2d 1242, 1245 (Pa. 1998) ("It is a fundamental precept of our judicial system that a lower tribunal may not disregard the standards articulated by a higher court."); *Lowery v. Pittsburgh Coal Co.*, 268 A.2d 212, 215 (Pa. Super. 1970) (holding courts of common pleas are not authorized to contradict established appellate court rulings).

Precedential case law from this Commonwealth sometimes favors a testamentary standard for beneficiary designations (*Fulkroad*) and at other times favors an *inter vivos* standard

(*Fiumara* and *Goodwin*). Of these cases, *Goodwin* is arguably most on point, as that case dealt, at least in part, with an IRA beneficiary designation. Yet, its analysis relied heavily on the fact that the designated party was sole beneficiary and it is unclear to what extent the Court's decision was premised upon "the difficulties which occur when the Probates, Estates and Fiduciaries Code…and the Divorce Code collide." *Goodwin*, 244 A.3d at 460-61. If *Goodwin* really does stand for the proposition that all beneficiary designations on non-probate assets are *inter vivos*, including on life insurance policies, then one would have expected the Court to address the continuing validity of *Fulkroad*, and this Court is hesitant to read *Goodwin* as sweeping so broadly, especially given the presumption against *sub silentio* abrogation. *See Commonwealth v. Jamison*, 652 A.2d 862, 865 (Pa. Super. 1995) (citing *Commonwealth v. Cragle*, 422 A.2d 547, 549 (Pa. Super. 1980)).

The only case directly on point appears to be *Snizaski*, but that decision does not constitute binding precedent. Nevertheless, to the extent it is persuasive, coupled with *Fiumara*'s treatment of pensions, and in light of 6108's command that payable-on-death beneficiary designations are not testamentary, the marginally better synthesis of these precedents may be that *inter vivos* principles apply, at least by default. Yet the Court agrees with Judge McCaffery's observation in *Goodwin* that, even granting that beneficiary designations of non-probate assets are not testamentary, there are fundamental problems with analogizing IRA beneficiary designations to *inter vivos* transfers. That is because *inter vivos* transfers are, by definition, transfers between the living. A payable-on-death beneficiary designation, on the other hand, merely creates an expectancy of a benefit during the settlor's lifetime that does not definitively vest in the beneficiary until the settlor's death.

Whatever the best reconciliation of these authorities may be, the Court is hesitant to make a pronouncement as to the legal standard applicable to IRA beneficiary designations without further guidance from our appellate courts, or better yet, the General Assembly. For now, the more prudent approach is to begin by analyzing the facts of this case under basic testamentary principles, for if Leach can succeed on either her undue influence or lack of capacity claims applying that standard, she would inevitably prevail under any other.[8] With this in mind, the Court proceeds to its analysis of the merits of the two issues raised by Leach, beginning with her claim of undue influence.

III. UNDUE INFLUENCE

Leach argues that Ray exerted undue influence over Nealy's decision to designate him as a co-beneficiary of her IRA. A person's disposition of his or her property should "be what it professes to be, literally his or her will." *In re Paul's Estate*, 180 A.2d 254, 258 (Pa. 1962) (emphases in original). Under the doctrine of undue influence, if "a person causes a disposition of the property of another according to his will rather than the will of the owner of the property, then the law steps in and declares such disposition ineffective." *Id.* Undue influence is a "subtle," "intangible," and "illusive thing" that is "generally accomplished by a gradual, progressive inculcation of a receptive mind." *In re Estate of Clark*, 334 A.2d 628, 634, 635 (Pa. 1975) (quoting *In re Quein's Estate*, 62 A.2d 909, 915 (Pa. 1949)). "[T]he exercise of undue influence, at its core, indicates that an individual so influenced has lost the ability to make an

[8] If Nealy lacked testamentary capacity, then she necessarily lacked the higher level of capacity required for making an inter vivos transfer or entering into a contract.

independent decision." *Yenchi v. American Enterprise, Inc.*, 161 A.3d 811, 822 (Pa. 2017).

As "undue influence is so often obscured by both circumstance and design, our Courts have recognized that its existence is best measured by its ultimate effect." *Owens v. Mazzei*, 847 A.2d 700, 706 (Pa. Super. 2004). "The resolution of a question as to the existence of undue influence is inextricably linked to the assignment of the burden of proof." *Estate of Clark*, 334 A.2d at 632. In the testamentary context, our courts have established the following burden-shifting framework for analyzing claims of undue influence:

> Once the proponent of the [instrument] in question establishes the proper execution of the [instrument], a presumption of lack of undue influence arises; thereafter, the risk of non-persuasion and the burden of coming forward with evidence of undue influence shift to the contestant. The contestant must then establish, by clear and convincing evidence, a *prima facie* showing of undue influence by demonstrating that: (1) the testator suffered from a weakened intellect; (2) the testator was in a confidential relationship with the proponent of the [instrument]; and (3) the proponent receives a substantial benefit from the [instrument] in question. Once the contestant has established each prong of this tripartite test, the burden shifts again to the proponent to produce clear and convincing evidence which affirmatively demonstrates the absence of undue influence.

Estate of Smaling, 80 A.3d at 493 (footnote omitted).[9]

Here, the beneficiary designation appears properly executed on its face; it is signed and dated July 19, 2019, by "Nealy Leach-Ruff" and a witness, "Cait McKinney." Def.'s Ex. A. A presumption of lack of undue influence thus arises and the burden shifts to Leach make a *prima facie* showing of undue influence by demonstrating through clear and convincing evidence each of the elements of undue influence, namely, that Nealy suffered from a weakened intellect, that Nealy was in a confidential relationship with Ray, and that Ray received a substantial benefit from the beneficiary designation.

Leach easily satisfies her burden to prove two of the elements of her *prima facie* case. First, Nealy undoubtedly suffered from a weakened intellect as a result of her dementia. "The weakened intellect necessary to establish undue influence need not amount to testamentary incapacity." *Id.* at 498. Moreover, the hallmarks of weakened intellect for purposes of undue influence are "persistent confusion, forgetfulness and disorientation." *In re Estate of Fritts*, 906 A.2d 601, 607 (Pa. Super. 2006). Nealy exhibited these symptoms in the months leading up to the change of beneficiary designation, for instance, on her trip to Texas in May, her

[9] There is some older case law which may be read to suggest that a showing of a confidential relationship merely shifts the burden to the proponent to prove an absence of fraud and that it is not a necessary element to a claim of undue influence. *See In re Treitinger's Estate*, 269 A.2d 497, 500 (Pa. 1970) (noting "[o]ne can be in a confidential relationship without exerting undue influence, just as undue influence can be exerted by one not in a confidential relationship."). Later cases, however, described the existence of a confidential relationship as one of the "minimum requirements" of a claim of undue influence. *Clark's Estate*, 334 A.2d at 60. To the extent there is a conflict between these cases, this Court is bound to accept the more recent iteration of the law as expressed by the Supreme Court in *Clark's Estate*. *See Hammons v. Ethicon, Inc.*, 240 A.3d 537, 564 (Pa. 2020) (Saylor, C.J., dissenting) (noting "controlling precedent is to be discerned from developmental accretions in the decisional law, attributing due and substantial weight to pronouncements made in the most recent decision."); *D'Alessandro v. Berk*, 46 Pa. D. & C. 588, 601 (Phila. Co. 1943) ("Being thus confronted by apparently conflicting decisions by our appellate courts, we have no choice but to follow that which is both last in time and supreme in point of ultimate authority.").

interaction with Alfonso in June, and during the incident at the Waterford car dealership in early July. Tr., Day 1, pp. 69-70, 72, 76-80, 216-22, 226-30. By mid-July, Nealy required aid and supervision to carry on most, if not all, basic daily needs, including waking up, getting out of bed, using the bathroom, brushing her teeth, combing her hair, bathing, dressing, and walking down stairs. Tr., Day 1, pp. 102-103. Moreover, the brain atrophy causing this behavior was described by Dr. Troutner as "very grave, very serious, and not at a point where it [was] reversible." Tr., Day 1, p. 27. Thus, Nealy undoubtedly suffered from a weakened intellect during the timeframe that Ray would have exercised any influence over Nealy.

Second, to prove Ray received a substantial benefit from the IRA, Leach need only show he "benefited in a legal sense" from the beneficiary designation. *In re Estate of Stout*, 746 A.2d 645, 648 (Pa. Super. 2000). The Court has no trouble in concluding that the more than $45,000 Ray stands to receive from the IRA constitutes a substantial financial and legal benefit. Tr., Day 1, pp. 114-15; Pl.'s Ex. 14.

The existence of a confidential relationship between Ray and Nealy is more difficult for Leach to prove. "[A] confidential relationship exists when the circumstances make it certain that the parties did not deal on equal terms, but on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed." *Estate of Smaling*, 80 A.3d at 499 (quoting *Clark*, 334 A.2d at 633). For influence to be "undue" in this context, there must be imprisonment of the body or mind...fraud, or threats, or misrepresentations, or circumvention, or inordinate flattery or physical or moral coercion, to such a degree" that it destroys the testator's free agency. *In re Ziel's Estate*, 359 A.2d 728, 733 (Pa. 1976).

"Undue influence may be, and often can only be, proved by circumstantial evidence." *Id.* at 734. Nevertheless, proof of opportunity to exercise undue influence, without more, is insufficient, *In re Estate of Luongo*, 823 A.2d 942, 964 (Pa. Super. 2003), so, as Ray correctly points out, "[a] spousal relationship does not automatically translate into a confidential relationship for purposes of determining the presence of undue influence." *In re Staico*, 143 A.3d 983, 991 (Pa. Super. 2016) (quoting *Smaling*, 80 A.3d at 498-99) (brackets omitted). Rather, "[i]n any given case it is a question of fact whether the marital relationship is such as to give one spouse dominance over the other or to put that spouse in a position where words of persuasion have undue weight." *Id.*

Here, there is certainly circumstantial evidence that Ray had ulterior motives in accompanying Nealy to the Credit Union on July 19th. For example, Nadine testified that, throughout Nealy's funeral, Ray was eager to obtain a death certificate, presumably so he could present proof of Nealy's death to the Credit Union, enabling it to release his share of the funds. Tr., Day 1, p. 108. But proof of motive to exert undue influence is not the same as proof of the kind of overmastering influence necessary for a confidential relationship.

There is also circumstantial evidence that Ray waited for the perfect opportunity to exert his influence, leveraging Nadine's absence to persuade Nealy to amend the beneficiary designation without interference. As alleged by Ray, the change in beneficiary designation (as well an astonishingly "good day" for Nealy in terms of her cognitive abilities) happened to coincide with the short period when Nadine, Nealy's primary caregiver, was out of town. Happenstance can only stretch so far, however, and the set of circumstances surrounding the

change in beneficiary designation — Nealy's rapidly declining health, Nadine's trip to Atlanta, Ray's prior pre-nuptial agreement with Nealy — all suggest something more pernicious at play than Ray's version of events would offer. But once again, proof of opportunity to exercise undue influence, alone, does not suffice. *Estate of Luongo*, 823 A.2d at 964. Leach is still required to show by clear and convincing evidence that the relationship between Nealy and Ray was a confidential one, that is, that Nealy's free agency was compromised by Ray's overmastering influence. *Ziel's Estate*, 359 A.2d at 733.

Leach did develop some proof of a confidential relationship. For instance, on July 21, 2019, just two days after the change in beneficiary designation, Ray wrote out a check for Nealy, suggesting control over her finances. Tr., Day 2, pp. 63-70; Pl.'s Ex. 19. On the other hand, Nealy's prior checks seem to have been written and signed by her, so there is little evidence of a "gradual, progressive inculcation" that is typically the hallmark of undue influence. *Estate of Clark*, 334 A.2d at 634; Pl.'s Ex. 19.

Nealy's sister Lula testified that Nealy often referred to Ray as "Charles," the name of her former husband. Tr, Day 1, p. 233. There is also evidence to suggest that she referred to Ray as "the love of her life" on the day of the beneficiary designation, despite previously stating that Charles was her true love. Tr., Day 1, pp. 232-33, Day 2, 59-60, 135-36. The obvious inference is that Nealy believed she designated her beloved husband Charles as a co-beneficiary to the IRA, not Ray, and that Ray may have preyed upon Nealy's confusion in order to be named as a co-beneficiary. This claim is further supported circumstantially by the fact that Ray had previously disclaimed "any and all rights of any nature whatsoever which he may have as a surviving spouse in the property or the estate of Nealy" as part of their prenuptial agreement. Pls.' Ex. 22, p. 5; Tr., Day 2, p. 95.

In the end, although there is enough evidence here to give the Court pause as to whether a confidential relationship existed, it is not enough to prove a confidential relationship by clear and convincing evidence. "Clear and convincing evidence is defined as testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *In re Adoption of L.J.B.*, 18 A.3d 1098, 1107 (Pa. 2011) (quoting *Matter of Sylvester*, 555 A.2d 1202, 1203-04 (Pa. 1989)) (internal quotation marks omitted).

While there is certainly some circumstantial evidence of Ray's overmastering influence, some of Leach's other evidence cuts in the other direction. According to Nadine, if anyone had a confidential relationship with her mother during this time, it was her. Nadine testified that she primarily took care of all of her mother's needs, including waking her up, bathing and dressing her, administering her daily medications. Tr., Day 1, pp. 101-02. Nadine characterized Ray as somewhat aloof to her mother's situation, indicating that while she was away in Atlanta she hoped "he would step up." Tr., Day 1, pp. 101-02. Thus, while the Court cannot say that Ray is completely innocent in this regard, it also cannot say that it has "come to a clear conviction, without hesitancy, of the truth of" these accusations. *Adoption of L.J.B.*, 18 A.3d at 1107. Indeed, even applying the more lenient preponderance of the evidence standard, although a closer question, the Court cannot say that it was more likely than not that Ray was in a confidential relationship with Nealy.

Because Leach cannot prove a confidential relationship, she cannot make out a *prima*

facie case of undue influence. Moreover, she cannot prove undue influence regardless of how an IRA is characterized because a confidential relationship is a necessary element of a claim of under influence challenging any instrument, be it a will, an *inter vivos* transaction, or a contract. *See Balogh*, 2021 WL 3206111, at *4 (concerning the test for undue influence for *inter vivos* gifts); *Biddle*, 664 A.2d at 161 (concerning the test for undue influence for contracts). Accordingly, Leach cannot succeed on her claim of undue influence, irrespective of the legal standard that applies.

IV. CAPACITY

Distinct from her undue influence claim, Leach argues that Nealy lacked the legal capacity to designate Ray as a co-beneficiary to her IRA. Every adult is presumed to possess testamentary capacity. *Estate of Angle*, 777 A.2d at 125. Neither old age, sickness, nor bodily debility are sufficient to rebut this presumption, "[n]or will inability to transact business, physical weakness, or peculiar beliefs and opinions." *Lawrence's Estate*, 132 A. at 789. Indeed, a person with testamentary capacity "may not be able at all times to recollect the names of persons or families of those with whom he has been intimately acquainted" and he "may ask idle questions, and repeat himself, and yet his understanding of the ordinary transactions of his life may be sound." *Id.* As such, "[f]ailure of memory does not prove incapacity, unless it is total or so extended as to make incapacity practically certain." *Id.*

"The law's liberal definition of testamentary capacity is central to the concept of 'freedom of testation,' which means simply that testators should be free to dispose of their property however and to whomever they wish." FROLIK & RADFORD, 2 NAELA J. at 305. As Professor Frolik has explained, the rationale underpinning this low standard is simple:

> Courts are reluctant to rely solely on a finding of incapacity for fear that to do so would gradually raise the standard of the degree of testamentary capacity needed to execute a valid will. Were that to happen, many older persons of marginal capacity would be barred from writing a will or revising a preexisting will, thereby causing more estates to pass by intestacy or preventing some individuals from changing their testamentary bequests. Either of these outcomes would conflict with the societal goals of avoidance of intestacy and protection of the rights of individuals to leave their estates to whomsoever they please…[and thus] the doctrine permits testators with very low levels of capacity, too low even for them to manage their own property during life, nevertheless to direct its passage at their deaths.

LAWRENCE A. FROLIK, *The Biological Roots of the Undue Influence Doctrine: What's Love Got to Do With It?*, 57 U. PITT. L. REV. 841, 868 (1996).

Testamentary capacity exists when the testator has intelligent knowledge of the natural objects of her bounty, the general composition of her estate, and what she wants done with it. *In re Bosley*, 26 A.3d 1104, 1111-12 (Pa. Super. 2011). While not an onerous standard, determining whether an individual possess or lacks the requisite testamentary capacity is more than an empty ritual. Particularly where the testator's cognitive abilities are compromised, either by internal or external forces, testamentary capacity may very well be lacking. *See In re Hunter's Estate*, 205 A.2d 97, 100 (Pa. 1964) (upholding finding that testator lacked

testamentary capacity where "the [trial] court concluded that the stroke she suffered affected the frontal lobe of her brain and permanently impaired her judgment, reasoning and thinking processes."); *In re Estate of Long*, 2016 WL 5417701 (Pa. Super. 2016) (unpublished) (upholding trial court's determination that decedent's lacked testamentary capacity where her cognitive abilities were impaired by high doses of medication). Dementia diagnoses present unique challenges to courts tasked with determining the capacity of testators suffering from these diseases, but even so, as in all cases, judges "are not required to exhibit a naiveté from which ordinary citizens are free." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (applying the deferential "arbitrary and capricious" standard of review) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)).

"Where mental capacity to execute an instrument is at issue, the real question is the condition of the person at the very time [she] executed the instrument[.]" *Cardinal v. Kindred Healthcare, Inc.*, 155 A.3d 46, 50 (Pa. Super. 2017) (quoting *Evans v. Marks*, 218 A.2d 802, 804 (Pa. 1966)) (bracket omitted). To that end, a "person's mental capacity is best determined by [her] spoken words and [her] conduct, and the testimony of persons who observed such conduct on the date in question outranks testimony as to observations made prior to and subsequent to that date." *Id.* (bracket omitted); *Bosley*, 26 A.3d at 1112 (noting "impressions of the Decedent on the very date he executed his will are more probative of the Decedent's testamentary capacity than those of someone...who never met the decedent and formulated an opinion of Decedent's mental state based solely on medical records."). Nevertheless, "evidence of capacity or incapacity for a reasonable time before and after execution" can be "indicative of capacity." *In re Kuzma's Estate*, 408 A.2d 1369, 1371 (Pa. 1979). Moreover, evidence of the decedent's state of mind "can be supplied by lay witnesses as well as experts." *In re Agostini's Estate*, 457 A.2d 861, 867 (Pa. Super. 1983).

Here, Leach presents strong, corroborated, and credible evidence that Nealy was incapacitated in the days immediately before and after the execution of the change in beneficiary designation. Nadine credibly testified that by July 19th Nealy could not physically dress herself, bathe herself, or brush her teeth; she was incontinent, could not change her own adult diaper, and required assistance walking and eating. Tr., Day 1, pp. 100-01. Nealy's "appetite had declined severely" and Nadine managed and administered her mother's medications, feeding them to Nealy in applesauce. Tr., Day 1, p. 101. Nealy would not get out of bed until Nadine physically would get her out on her lunch break between 11 a.m. and noon, at which time Nadine would take her to the bathroom and help her shower. Tr. Day 1, pp. 102-03. Assisting her mother down the stairway was a particularly arduous task, and sometimes Nealy would have to "scoot down the stairs" with Nadine's help. Tr., Day 1, p. 103. By August, it was necessary to install a stairlift. Tr., Day 1, pp. 103-04.

Lula Mickel, Nealy's sister, who helped care for Nealy while Nadine was away in Atlanta, confirmed much of the same. Although Lula noted that Nealy did not need help in the shower "all the time" and "could feed herself[,]" with supervision, Lula did consistently help bathe Nealy, brush her teeth, and brush her hair. Tr., Day 1, p. 231. Lula also observed that Nealy, who was normally "very talkative," barely spoke and "wouldn't eat much." Tr., Day 1, p. 231. Nealy's condition was so progressed by the time of the beneficiary designation that Lula recalls having to ask Nealy if she even knew who Lula was, and although Nealy was

able to recognize Lula eventually, she stared with a blank expression for a long while before doing so. Tr., Day 1, pp. 236, 238.[10]

The Court credits the testimony of Nadine and Lula indicating that Nealy was substantially mentally and physically debilitated on or about July 19, 2019. Indeed, this testimony is further corroborated by Parker's own witness, home healthcare nurse, Robin Post, who indicated in the report based off of her July 23rd visit, and confirmed in her testimony at trial, that Nealy failed to recognize familiar persons and places, lacked the ability to recall events of the past 24 hours, and suffered from significant memory loss such that daily supervision was required. Def.'s Ex. C, p. 16; Tr., Day 1, pp. 197, 249.

Even more telling was the expert testimony offered by Leach as to Nealy's mental condition. On July 15th, just four days before the beneficiary designation, Dr. James Gade personally examined Nealy and diagnosed her with "progressive cognitive impairment" and prescribed her a typical starting dose of the dementia medication Aricept. Tr, Day 1, pp. 168-69, 171-72, 179. The results of the MRI he ordered that day later confirmed that Nealy had "profound volume loss" in her brain, particularly in her hippocampus region, responsible for "executive functioning thought processes." Tr., Day 1, p. 173. He testified that this involved not so much her basic "orientation," but rather, her "decision making capability" and "higher level functioning," in other words, her "ability to take information, process it, and be able to make a decision or be able to process that information," such as processing a "complex question." Tr. Day 1, pp. 173-74, 191.

Based upon this information, as well as the report of Dr. Troutner, he would later conclude in a July 29, 2020, letter, within a reasonable degree of medical certainty, Nealy was "completely impaired" at the time of her visit with him on July 15, 2019. Tr., Day 1, pp. 174-75. In that opinion and at trial he further stated that Nealy would have been cognitively impaired on July 19, 2019, the day of the beneficiary designation, and that she would not have had the capacity to understand the significance of a beneficiary designation on that date. Tr., Day 1, pp. 175-76.

Parker resists Dr. Gade's description of Nealy being "completely" impaired, noting that Dr. Gade himself observed at times in his letter that Nealy was both "impaired" and "completely impaired." Parker, however, makes too much of this distinction. When questioned about the discrepancy, Dr. Gade testified that there was not "much difference" between the two. Tr., Day 1, p. 176. When asked what the term "completely cognitively impaired" meant to him, he explained that "[t]o me, that means a patient cannot process information appropriately and come up with an intelligent answer to problems. They can't manage their own finances; they can't make end-of-life decisions; they can't manage their own medications; they need to have supervision." Tr., Day 1, p. 177.

Parker attempted to impeach Dr. Gade by noting he himself observed Nealy could undoubtedly process *some* information. Specifically, he testified that she was alert, meaning her eyes were open and she could speak. Tr., Day 1, p. 177. She was oriented to person,

[10] On cross-examination, Parker attempted to impeach Lula with her prior deposition testimony based on medical records stating that Nealy's condition "changed significantly" in August, sometime after the change in beneficiary designation, to which Lula responded that it did, but regardless of whether Nealy's condition worsened in August, that does not detract from the credible testimony of Nadine and Lula concerning the severity of the symptoms as they existed in the days immediately preceding the beneficiary designation. Tr., Day 1, pp. 236-37.

place, and time, meaning she could answer who she was, where, she was, and generally what month and year it was, although Dr. Gade did note it took her a significant amount of time to realize where she was. Tr., Day 1, pp. 32, 177-78. Nealy also evinced some basic recognition that she was "slowing down." Tr., Day 1, pp. 179-80. When asked who the President of the United States was, Nealy responded that it was "Trump" but "he's not my president." Tr., Day 1, pp. 127, 178.

First of all, it is clear that Dr. Gade did not mean "completely" in a literal sense. As he later clarified, someone who was, as he put it, "completely cognitively impaired" could nonetheless process some information, even though she could not process a "more complex question." Tr., Day 1, pp. 180, 191. This is entirely consistent with Dr. Gade's direct testimony that Nealy's executive functioning was compromised due to the significant cerebral atrophy in her hippocampus region. Tr. Day 1, p. 173. This affected her decision making capabilities and "higher level functioning[,]" but not "so much orientation." Tr. Day 1, pp. 173-74. Thus, while Nealy could process basic information, albeit with "significant difficulty," Tr. Day 1, p. 191, in Dr. Gade's opinion, she could not adequately appreciate the significance of her IRA beneficiary designation, a more complex challenge than mere orientation to time, place, or person. Tr. Day 1, pp. 175-76, 191.

Parker makes much of Dr. Gade's testimony that Nealy "did admit to some cognitive decline" and recognized she was "slowing" at the July 15th appointment. Tr., Day 1, pp. 179-80. Parker's argument suggests that if she was able to recognize that she was slowing down, she possessed the requisite testamentary capacity to amend the beneficiary designation on her IRA. Upon closer consideration, however, this testimony is not the smoking gun that Parker would make it out to be. It is not apparent from Dr. Gade's notes the degree to which Nealy comprehended her decline. Had Dr. Gade asked her an open-ended question, then her response would be more probative of her mental state because it would require Nealy herself to articulate the answer using more complex words and thoughts. On the other hand, a mere "yes or no" question does not reveal whether Nealy fully comprehended the severity of her decline or even fully understood the question for that matter. The Court cannot glean from Dr. Gade's notes the precise nature of Nealy's response nor how it was solicited. It also is unclear the extent to which Nealy would have been more aware than usual of her condition in that moment given the conversations taking place around her at the appointment, which would naturally have been focused on her declining health.

Parker's argument is also undercut by Plaintiff's Exhibit 20, the notes from Nealy's July 2nd emergency room visit, Tr., Day 2, p. 77, which indicate that "[t]he patient does not feel she's been confused, but the husband does. He said she'll repeat questions seems to be more confused and this is worsening." Pl.'s Ex. 20. Not only does this indicate that Nealy was unaware of her decline nearly two weeks before the visit with Dr. Gade, it also shows that Ray himself was well aware of this fact, substantially discrediting his argument to the contrary.

It is worth recalling that, while testamentary capacity is a low standard, it is not without teeth. A testator must still possess "an intelligent knowledge" of their family, their property, and what they want done with it. *Bosley*, 26 A.3d at 1111-12. That Nealy may have had a basic understanding that she was slowing down does not automatically translate into

evidence that she had an intelligent understanding of her IRA, the identities of her loved ones, and how she wished to divide the proceeds from her IRA amongst them upon her death. Dr. Gade's notes from July 15th that Nealy admitted to some cognitive decline are thus of limited persuasive value and do not particularly tip the scales in Parker's favor.

Perhaps Parker's best evidence is Nealy's statement that President Trump was "not my president." Tr., Day 1, pp. 127, 178. On the one hand, this suggests the ability to appreciate more complex thought and emotion than merely identity. On the other hand, her response might be considered a mere visceral reaction to a polarized and ubiquitous figure. But in any event, this statement alone does not necessarily discredit Dr. Gade's testimony nor does it sufficiently rebut Leach's overarching claim of lack of capacity. Dr. Gade was entitled to his opinion as a qualified expert in the field of geriatrics, specifically with regard to the treatment of dementia, Tr., Day 1, 156, and his professional opinion was that, within a reasonable degree of medical certainly, Nealy's mind was inferior to normal minds when he examined her and that she lacked adequate freedom of thought and decision. Tr., Day 1, pp. 203-04. And while at times he waivered on whether he could opine with a reasonable degree of medical certainty as to her condition on July 19th, he was confident that Nealy would likely not have been able to fully recognize the nature of the property she possessed on that day, nor would she have been able to make a disposition of her property consistent with her desires, based upon his assessment of her four days earlier. Tr. Day 1, pp. 203-05, 208. The Court credits the testimony of Dr. Gade.

Parker also attempts to cast doubt upon Dr. Gade's (and by implication, Dr. Troutner's) assessment by highlighting a portion of the report of home healthcare nurse Robin Post. Post's report suggests that Nealy's principal diagnosis was hypotension with "mild cognitive impairment" listed as another pertinent diagnoses. Tr., Day 1, pp. 183-84.[11] She testified, however, that she had no control over the prioritization of the diagnoses, and that the order is determined by Medicare coding. Tr., Day 1, pp. 277-78. Moreover, Post's report based off of her July 23rd visit is consistent with the testimony of Nadine and Lula, and Dr. Gade himself testified it was consistent with his earlier assessment of Nealy on July 15th. Tr., Day 1, p. 197. In particular, Post observed that Nealy's coordination and balance were compromised, that she required help dressing, bathing, walking, and being transferred to the toilet, that her medication could not be administered on her own, and that her cognitive deficits were occurring on a daily basis. Tr., Day 1, pp. 197-201. Post's report, therefore, confirms, rather than undermines, the lay and expert evidence that Nealy was suffering from significant cognitive and physical impairment between July 15th and July 23rd.

Dr. Susan Troutner also testified as to Nealy's mental state during this time. Based upon the MRI, she noted that Nealy's cerebral volume loss was in the fourth percentile, meaning that only 4% of people suffer from a greater degree of brain atrophy, and that her hippocampus region fell within the tenth percentile. Tr., Day 1, pp. 27-28. She indicated that this constitutes a "very substantial" and "very significant" degree of brain volume loss. Like Dr. Gade,

[11] Whether Nealy's dementia on July 19th was properly categorized as clinically mild, moderate, or severe is of critical importance as testators in the early stages of dementia will typically be found to possess testamentary capacity. *See* WARREN F. GORMAN, M.D., *Testamentary Capacity in Alzheimer's Disease*, 4 ELDER L.J. 225, 234-35 (1996); LESLIE PICKERING FRANCIS, *Decisionmaking at the End of Life: Patients with Alzheimer's or Other Dementias*, 35 GA. L. REV. 539, 548-49 (2001).

she testified that this kind and level of cerebral atrophy would translate to deterioration in memory, ability to access information, and "deterioration in higher-order skills, the ability to think, reason, problem solve, organize." Tr., Day 1, pp. 42-43. That Nealy was oriented to person, place, and time at Dr. Gade's appointment was not necessarily inconsistent or surprising given that answering these questions do not involve "high levels" of awareness. Tr., Day 1, pp. 32-33.

She also opined that by the time of her examination on August 12th Nealy's condition had further deteriorated since Dr. Gade had assessed her nearly one month earlier. Tr., Day 1, p. 36. Indeed, by August 12th Nealy "was not able to verbalize any responses that would indicate that she was oriented to self, location, or time" and the clearest verbal response she was able to vocalize was her daughter's name and her relationship to Nealy. Tr., Day 1, p. 35. This unusually rapid decline was due to the precise nature of her dementia, a "prion," which Dr. Troutner defined as a form of rapid-onset dementia occurring over a six to twelve-month period, as opposed to an Alzheimer's process, which would occur over seven to nine years. Tr., Day 1, pp. 54-55. All of this corroborates the testimony of Dr. Gade as well as the observations of Nadine and Lula.

Dr. Troutner's understanding of capacity did appear to differ somewhat from the legal definition of testamentary capacity. In evaluating capacity, she noted:

> I'm looking for what their overall general cognitive functioning is, because…if you're basing it on the moment of presentation, that decision can vary. And in my opinion, that does not represent capacity. It has to be an ability to make consistent decisions. And that's really representative of comprehending information, being able to weigh the pros and cons and communicate a choice.

Tr., Day 1, p. 42. This is not completely congruent with the legal concept of capacity, which is determined by the condition of the individual at the very time she executes the instrument in question. *Estate of Vanoni*, 798 A.2d at 210. In this regard, the Court must be mindful that "[c]redibility is not a substitute for competency." *In re Adoption of C.M.*, --- A.3d ---, 2021 WL 3073624, *17 (Pa. 2021). While Dr. Troutner is qualified to provide an opinion as to psychological matters, it is for the Court to determine, based on the evidence, including Dr. Troutner's clinical assessment, whether Nealy had the requisite capacity to change the beneficiary designation on her IRA on July 19, 2019.

That being said, Dr. Troutner's testimony is not only relevant, but probative, of the question of Nealy's state of mind on July 19th because, as previously explained, "evidence of capacity or incapacity for a reasonable time before and after execution" can be "indicative of capacity." *Kuzma's Estate*, 408 A.2d at 1371. Dr. Troutner recognized the limits of her ability to render an opinion, noting that she would have no way of knowing whether Nealy, on July 19th, understood the nature of her estate and to whom she wanted her IRA funds to go precisely because she had no occasion to interact with her on that day. Tr., Day 1, pp. 44, 57. Yet, she was able to confidently opine that Nealy "certainly did not" have the capacity on August 12, 2019, and likely did not have capacity on August 1, 2019, based upon the geriatric assessment and Mini-Mental Status examination conducted at the Cleveland Clinic

on that day. Tr., Day 1, pp. 43-44. In light of the progressive nature of Nealy's condition and the level of cerebral atrophy documented on August 1st and 2nd, she was also able to testify that "there's enough here that you would have to seriously question what someone's capacity was" on July 19th. Tr., Day 1, p. 45. All things considered, the Court finds Dr. Troutner to be credible and finds her testimony to be based on observations sufficiently close in time to July 19th to be probative of Nealy's state of mind on that date.

Additionally, check No.1168 included in Plaintiff's Exhibit 19, also provides further evidence that Nealy was not of sound mind, at least as of July 21st. While the body of the check was written by Ray, the signature's is in Nealy's hand, as is apparent from a comparison to the signature on Check No. 1167, written on July 7th. Pl.'s Ex. 19. However, the signature on Check No. 1168 reads "Nealy Leach-Parker" not her actual name of Nealy Leach-Ruff, as she signed on Check No. 1167. Pl.'s Ex. 19. Ray admitted that Nealy had never gone by the name "Nealy Leach-Parker" and appeared to the Court to have just realized this fact when it was brought to his attention at trial. Tr. Day 2, p. 65. This evidence establishes that on July 21, 2019, just two days after the change of beneficiary designation, Nealy did not even know her own name.

Taking into account the testimony of Dr. Gade, Dr. Troutner, Nadine, Lula, and even Parker's own witness, Robin Post, all of which is based on personal observations of Nealy reasonably close in time to July 19th, as well as the Plaintiff's various exhibits, the evidence establishes that Nealy could not intelligently appreciate the objects of her bounty, the nature of her property, including her IRA, and what she wished to do with it on the day the change of beneficiary designation was executed.

While Parker may question the degree of Nealy's cognitive impairment as of July 19th, he cannot dispute that Nealy was in the midst of a rapid mental and physical decline by that time. *See* Tr., Day 1, p. 14 ("I don't think there's any question that Miss Leach-Ruff was cognitively impaired."). Unsurprisingly then, Parker's argument is more nuanced. He contends that in the course of a mental decline "there are going to be days that are better than other days" and that Nealy was experiencing one of these so-called "good days" when she added him as a co-beneficiary to the IRA. Tr., Day 1, p. 17.

To Parker's credit, Dr. Troutner did testify that such occurrences are not uncommon in dementia patients. She explained "[y]ou will see that with any type of a dementia. Any type of progressive dementia, you will have days someone is doing better and days where they're struggling more." Tr., Day 1, p. 40. She further opined that a dementia patient's capacity can vary depending on "the moment of presentation." Tr., Day 1, p. 42.[12] The Court thus accepts that such "good days" or "moments of clarity" were a medical possibility in this case.

Pennsylvania law has long recognized that individuals normally incapacitated by reason of illness may nonetheless be subject to so-called "lucid intervals." A lucid interval is defined as "a full return of the mind to a state where a party is in possession of the powers

[12] At first glance, Dr. Gade's testimony may appear to conflict with Dr. Troutner on this point. When asked whether he would disagree if another witness testified to Nealy's decline "not being a consistent downward decline in cognitive abilities[,]" he stated that he would disagree with that conclusion, Tr., Day 1, p. 209, but Dr. Troutner made no such conclusion. Rather, her testimony was that it was progressive, so much so that she determined further neuropsychological testing would have been inappropriate. Tr., Day 1, pp. 30, 36. As such, Dr. Troutner's conclusion that an individual will have "good days and bad days" in "any form of progressive dementia" is not inconsistent with Dr. Gade's conclusion that the progression was a "downward decline." Tr., Day 1, pp. 40, 209.

of his mind enabling him to understand and transact his affairs as usual." *In re Meyers*, 189 A.2d 852, 863, n.17 (Pa. 1963) (citation and internal quotation marks omitted). "The lucid interval…has been likened to an interval of sunshine during a storm." WARREN F. GORMAN, M.D., *Testamentary Capacity in Alzheimer's Disease*, 4 ELDER L.J. 225, 234 (1996) (citing the Oxford English Dictionary). Throughout the 19th and early-to-mid 20th centuries, Pennsylvania courts routinely upheld the legal validity of instruments signed by individuals experiencing lucid intervals. *See, e.g, In re Gangwere's Estate*, 14 Pa. 417, 417 (Pa. 1850) (noting "[a]n act done in a lucid interval by one who has been found to be a lunatic, is binding on him, but the proof of the lucid interval in which it was done, must be clear."); *Thompson v. Kyner*, 65 Pa. 368, 381 (Pa. 1870) (holding "[t]here was no evidence whatever of previous dementia, and consequently…the necessity of proving a lucid interval was not therefore in the case."); *Aggas v. Munnell*, 152 A. 840, 844 (Pa. 1930) (holding "[t]here was in the instant case no such proof of general insanity as to cast upon proponent the burden of showing a lucid interval when the will was executed.").

For instance, in *Meyers*, the principal beneficiary of an *inter vivos* trust, who also happened to be the settlor of the trust, and who had been institutionalized for four years prior to the trust's creation on account of paranoid schizophrenia, brought an action to rescind the trust on the grounds that she lacked the capacity to execute the original trust deed in the first place. 189 A.2d at 853-55. The Court explained that "[o]rdinarily, the mental competency of a person who executes an instrument is presumed and the burden of proof is upon the person who alleges incompetency[,]" but after that initial burden was satisfied, the burden then shifted to the party alleging competency to show by clear and convincing evidence that they retained "the ability to understand and appreciate the nature and effect of the trust agreement" by virtue of a lucid interval. *Id.* at 858-59 (emphasis omitted).

Noting that evidence of capacity or incapacity from a reasonable time before and after the date of execution was "admissible as indicative of capacity or lack of it on the particular day" the Court noted "[a] review of this record clearly indicates, as found by the court below, that shortly before and after [the date of execution] appellant was mentally incompetent." *Id.* at 860, 862. Nonetheless, noting oral testimony credited by the trial court that the settlor appeared of sound mind when she executed the trust deed, the Court upheld the trial court's finding that the proponent of the trust had proven a lucid interval by clear and convincing evidence, despite a finding of mental incompetency in the time shortly before and after the execution date. *Id.* at 863.

Although the term "lucid interval" appears less frequently in contemporary cases, it has not been repudiated. As recently as the 1980s, our Supreme Court has stated in the context of a dementia case:

> The ultimate issue was not whether Weir was suffering from Alzheimer's disease at the time of the conveyances as testified to by the expert. Neither was it whether Weir had previously engaged in bizarre behavior, as testified by other lay witnesses. One may accept those as facts and still conclude, as the trial court did, that Weir was competent at the time of the conveyances, based on the evidence that although the disease caused him to be confused at times, it left him lucid at others. There is no necessary conflict in the positions.

Weir by Gasper v. Estate of Ciao, 556 A.2d 819, 825 (Pa. 1989). The operative question is whether the individual possess capacity at the "very time" of the instrument's execution. *In re Hasting's Estate*, 387 A.2d 865, 867 (Pa. 1978). Implicit in this focus on the moment of execution is the concept of the lucid interval. The Court will therefore consider any evidence that Nealy was experiencing a "good day" on July 19, 2019.

Parker offers two witnesses to support his claim of a lucid interval. First, he offers his own testimony. He testified that on the morning of July 19th he woke her up, and to his astonishment, Nealy showered (and presumably dressed) by herself, came downstairs by herself, and fed herself breakfast without any assistance. Tr., Day 2, pp. 40, 89-90. She then told Ray, "I want you to take me somewhere" and Ray acquiesced without initially inquiring where exactly she wanted to go. Tr., Day 2, p. 41. Once they were in the car, Ray asked where they were going and Nealy told him to go to the Credit Union, where he assumed she would be going to the ATM. Tr., Day 2, p. 41. But when they arrived at the bank, Nealy wanted to go inside. Tr., Day 2, p. 41. Nealy proceeded to tell the receptionist that she wanted to speak to them about her IRA "or something like that" although he "seriously paid no attention to what she was there for." Tr., Day 2, p. 42. When Nealy explained that she wished to add Ray and her son Matt as beneficiaries of her IRA, Ray was "shocked." Tr., Day 2, p. 42. On the way home from the bank, Ray asked Nealy "why you putting me on there?" to which she responded "because I want you to have something." Tr. Day 2, p. 43. Ray warned her that Nadine was "going to fly off" but Nealy responded "that's my money, not Nadine's." Tr., Day 2, p. 43.

Ray claims Nealy started to significantly deteriorate by the end of July, although "she kept her mind" until close to the very end. Tr. Day 2, p. 43. As the end drew near, however, Ray claims that Nealy stated on "several occasions" that she wanted Ray to stay in the house, and that Nadine reassured her mother that she would never force him to leave; nonetheless, Nadine informed Ray via text message three days after Nealy's burial that he had thirty days to vacate the residence. Tr., Day 2, pp. 44-45.

The Court finds, however, that Ray's version of events is incredible, uncorroborated, and self-serving. First of all, his testimony regarding Nealy's mental state on the weekend of July 19th is inconsistent with Lula's observations of Nealy during the time Nadine and Alfonso were away in Atlanta from July 17th to July 21st. Lula testified that when she went to see her sister while Nadine and Alfonso were in Atlanta, she questioned whether Nealy even knew who she was and asked her to identify her by name; in response, Nealy stared for a long while "like she was in space" before finally saying her name. Tr., Day 2, pp. 236, 238. Of course, Lula could not identify whether this visit occurred July 19th or some other day that week, so this alone does not preclude a finding of a lucid interval on that day; however, other aspects of Ray's testimony are inconsistent as well. For example, Ray claims Nealy "kept her mind almost to the end, till she went into intensive care[,]" and that Nealy stated several times to Nadine that she wished for Ray to stay in the residence after her death, Tr., Day 2, pp. 44-45, 99, but Dr. Troutner opined that Nealy was no longer oriented to person, place, or time when she examined her on August 12th and could barely verbalize any responses by that point. Tr., Day 1, p. 35. It belies the medical reality of the situation to assume that Nealy experienced several lucid intervals during the late stages of

her dementia, moments of "sunshine during a storm" in which, apparently (and conveniently for Ray), the most pressing issue on Nealy's mind was Ray's future living arrangements.

Ray was also forced to double back on some of his original testimony. For instance, he first claimed that Nealy was able to walk into the bank. Tr., Day 2, p. 41. Yet, when confronted with his deposition testimony stating that he assisted her walking into the bank, his response was inconsistent, stating "I didn't have to assist her. I was with her. No. I'd assist her, hold her hand, and stuff." Tr., Day 2, p. 90. After reviewing his prior deposition testimony, he then admitted "Okay. Yes; I assisted her. Yeah; I assisted her…I assisted her walking into the bank. I opened the car door." Tr., Day 2, p. 93; Pl.'s Ex. 21, p. 24.

Most damning to Ray's credibility, however, is the fact that he was less than honest about a material aspect of his testimony. Ray testified that Nealy was capable of writing a check on July 19, 2019. Tr. Day 2, pp. 62-63. Ray was then confronted with Check No. 1168, dated July 21, 2019, and made out to "Saint James" for "tith," which he admitted was in his handwriting and meant "tithe." Tr., Day 2, pp. 64, 106; Pl.'s Ex. 19. He explained "this is what we did a lot of the times. We both paid tithes. We paid tithes together. And I write the check out, at times, and then she sign it." Tr., Day 2, p. 69. When confronted with the fact that, up until the date of her death, Check No. 1168 was the only check not in Nealy's handwriting, he could suddenly not recall whether he had ever written a check for Nealy in the past. Tr., Day 2, pp. 69-70. Although perhaps not reflected in the transcript of the proceedings, the Court observed that during the tense few minutes of cross-examination on this subject, Ray appeared taken off-guard by the questions related to Check 1168 and took long pauses in answering certain questions, and it was visible to the Court that Mr. Parker realized he had been caught in a lie. Finding that Ray was disingenuous with the Court on this question, the Court questions the credibility of his entire testimony, including his testimony that Nealy was lucid and had capacity to designate him as a co-beneficiary on July 19, 2019. *See McMichael v. McMichael*, 241 A.3d 582, 589 n.5 (Pa. 2020) (noting that under the legal precept *Falsus in uno, falsus in omnibus*, which translates to 'false in one, false in all,' where a witness testifies falsely to any material fact, the factfinder may disregard all the witness's testimony).

But Parker also presented another witness in support of his lucid interval argument. He offered Katelyn McKinney, the member service officer at the Credit Union who witnessed the change of beneficiary designation. Tr., Day 2, p. 5; Def.'s Ex. A. McKinney testified that she assisted Nealy in amending her IRA beneficiary designation to include Ray, and that she also desired to add her son, but that he could not be added because Nealy did not have his social security number. Tr., Day 2, p. 11. She further testified that Nealy appeared physically normal to her, she recalled no change in her behavior from what she had seen before, and if she had any concerns, she would have brought them to the attention of her manager. Tr., Day 2, p. 14. If credible, McKinney's testimony would be entitled to great weight as evidence of Nealy's state of mind at the very moment she executed the beneficiary designation.

However, various considerations lead the Court to find the testimony of Ms. McKinney unreliable. First, McKinney testified that she was with Nealy for only about 15 to 20 minutes in total. Tr., Day 2, p. 13. She could not clearly remember certain aspects of the transaction, particularly the initial greeting, and whether she met Nealy and Ray outside of her office

or whether they came to her. Tr., Day 2, p. 9. When asked when Nealy arrived at the bank, she first responded "I don't remember the time." Tr., Day 2, pp. 8-9. Then when prompted "Morning, afternoon?" she responded "Afternoon, maybe?" Tr., Day 2, p. 9. The Court recalls that, in responding, McKinney looked to Parker's counsel as if for confirmation that she was correct. She seemed less than sure of other answers too. *See* Tr., Day 2, p. 10 (stating "[f]rom what I recall, she walked."). At one point, she admitted her recollection of events was foggy due to the passage of time, noting "[w]hen we first talked it was soon after the transaction, and then because of Covid, it's been a while[.]" Tr., Day 2, p. 16.

McKinney may also have been distracted due to her recent enrollment in nursing school; her last day working at the Credit Union was only one week later on July 26, 2019. Tr., Day 2, p. 18. Moreover, she lacked the proper perspective and knowledge concerning Nealy's medical situation that would have alerted her to be on the lookout for suspicious behavior. For example, she testified that she noticed Nealy had broken her finger because it was in a splint, however, McKinney simply asked her what happened and, as far as she can remember, did not pursue the issue further. Tr., Day 2, p. 19. Had McKinney known about Nealy's dementia diagnosis, perhaps she would have inquired deeper into Nealy's mental state, which likely contributed to Nealy breaking her finger, and then consulted with her manager before proceeding with the transaction.

McKinney also testified that Nealy introduced her husband as "Willie." Tr. Day 2, pp. 10, 16. But no one, especially Nealy, ever referred to Mr. Parker by the name Willie; rather, he is commonly known as "Ray," and almost certainly would have been introduced as such. Tr., Day 2, p. 101. In fact, it was suggested that the rest of Nealy's family did not even know Mr. Parker's first name was actually Willie until they saw the change of beneficiary form, and even Ray was forced to concede on cross-examination that if Nealy were to introduce him to someone else "[s]he going to say Ray." Tr., Day 2, pp. 102-03. McKinney obviously lacked the fore-knowledge and proper perspective that would have raised a red flag by Nealy introducing Ray by another name. These concerns render McKinney's testimony unreliable.

As our Supreme Court explained in the context of another challenge to testamentary capacity:

> This court's unwillingness to give controlling weight to the testimony of persons who witnessed the events…was not entirely a matter of disbelieving them. The court was undoubtedly influenced also by the realization that some of these witnesses were not in a position to evaluate properly testatrix's testamentary capacity because they were either not adequately aware of her mental condition or were totally ignorant of it.

Hunter's Estate, 205 A.2d at 102-03. Although "credibility and persuasiveness are closely bound concepts" and "sometimes treated interchangeably," they are technically distinct:

> Suppose a plaintiff is doing her best to recount a car accident to prove her case for damages. She testifies earnestly that she thought the traffic light was green when she entered an intersection. The plaintiff says she was then broadsided by the defendant who was traveling on a cross street and ran a red light. Later in the proceedings, however,

> the defendant presents video footage and the testimony of other witnesses, all of which show that it was really the plaintiff who drove through a red light and the defendant who had the right of way. It's easy enough to imagine that a factfinder might not describe the plaintiff as lacking credibility — in the sense that she was lying or not "worthy of belief," Black's Law Dictionary 448 (10th ed. 2014) (defining "credibility") — yet find that her testimony on a key fact was outweighed by other evidence and thus unpersuasive or insufficient to prove the defendant's liability. It's not always the case that credibility equals factual accuracy, nor does it guarantee a legal victory.

Garland v. Ming Dai, 141 S. Ct. 1669, 1680-81 (2021). Such is the case with McKinney's testimony. Although one could say McKinney's testimony was credible in the sense that it was her subjectively honest recollection of events, the Court finds she nevertheless lacked the proper knowledge and perspective concerning Nealy's condition to make a reliable assessment of Nealy's mental state and capacity to execute the change of beneficiary designation on July 19th or whether she was experiencing a lucid interval on that day.

Without the benefit of the testimony of Mr. Parker or Ms. McKinney, there is a complete lack of evidence — let alone clear and convincing evidence — of a lucid interval on July 19, 2019. Moreover, without sufficient proof that Nealy was experiencing a lucid interval, the Court is left with the overwhelming evidence from the days immediately preceding and following the change in beneficiary designation that Nealy was mentally incapacitated to the point she could not intelligently appreciate the objects of her bounty, her property, including her IRA, and how she wished to dispose of it on upon her death. As such, Leach has proven Nealy's lack of capacity on July 19, 2019, by clear and convincing evidence, evidence which Parker fails to rebut.

The Court does not reach this conclusion lightly. Reticent to disturb the presumptively valid final wishes of this decedent, the Court nonetheless concludes that the reliable evidence presented at trial established that Nealy lacked testamentary capacity to amend the beneficiary designation on her IRA that day. Consequently, the Court is constrained to hold that the designation of Willie Ray Parker as a co-beneficiary to that instrument was null and void under the law and that Nadine Leach remains the only legally valid beneficiary named to that account. She is thus entitled to the entirety of the proceeds from the IRA. Pl.'s Ex. 14.

V. CONCLUSION

Freedom of testation is of paramount concern, but it is not without limits. While Plaintiff has not offered sufficient evidence to make out her *prima facie* case of undue influence, she has nevertheless provided clear and convincing evidence that Nealy Leach-Ruff could not intelligently appreciate the natural objects of her bounty, the composition of her property, particularly her IRA, nor what she wished to do with it on July 19, 2019, as a result of rapid-onset dementia. For his part, Defendant offers no reliable evidence to the contrary. Therefore, the Court finds Nealy lacked the capacity to change the beneficiary designation on the IRA on the day in question, and as a result, the designation of Willie Ray Parker as a co-beneficiary on the account was legally invalid.

It is so ordered.

BY THE COURT
/s/ **Marshall J. Piccinini, Judge**

MANDY M. MILANI
v.
LEVI KALKA

EVIDENCE

"Preponderance of evidence" standard is defined as the greater weight of the evidence.

PROTECTION OF ENDANGERED PERSONS

In the context of a protection from abuse case, the court's objective is to determine whether the victim is in reasonable fear of imminent serious bodily injury.

PROTECTION OF ENDANGERED PERSONS

When faced with a sufficiency challenge under the PFA Act, the evidence is viewed in the light most favorable to the petitioner with the benefit of all reasonable inferences. The appellate court then determines whether the evidence was sufficient to sustain the trial court's conclusion by a preponderance of the evidence.

PROTECTION OF ENDANGERED PERSONS

The aim of the PFA Act is to protect victims of domestic violence from perpetrators of abuse as a means of "advance prevention of physical and sexual abuse."

PROTECTION OF ENDANGERED PERSONS

"Abuse" is defined as an act between intimate partners that places a petitioner in reasonable fear of imminent serious bodily injury. 23 Pa.C.S. §6102(a).

PROTECTION OF ENDANGERED PERSONS

As to the sufficiency of the evidence, the evidence is reviewed "in the light most favorable to the petitioner and granting her the benefit of all reasonable inference," to determine whether a petitioner has met her burden of proof by a preponderance of the evidence that petitioner is in reasonable fear of imminent serious bodily injury from respondent.

PROTECTION OF ENDANGERED PERSONS / EVIDENCE

Applying criminal cases or criminal concepts to civil PFA proceedings would be improper or "misplaced" since criminal cases focus on the intent of the perpetrator, not on a victim's response to a perpetrator's actions.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL COURT DIVISION
NO. 16419 OF 2021
1091 WDA 2021

Appearances: Levi Kalka, pro se
Patrick W. Kelley, Esquire, on behalf of Appellee, Mandy M. Milani

OPINION

Domitrovich, J., November 3, 2021

On September 10, 2021, Appellant, Levi Kalka, [hereinafter Appellant], filed a Notice of Appeal *pro se* from this Trial Court's Final Order entered against him on August 12, 2021, granting relief sought by his former girlfriend, Mandy M. Milani [hereinafter Appellee],

pursuant to the Protection from Abuse Act [hereinafter "PFA Act"] at 23 Pa.C.S. §§ 6101 et seq., after a full hearing.[1]

On September 16, 2021, this Trial Court directed Appellant to file a Concise Statement of Matters on Appeal. Appellant filed a timely *pro se* Statement of Matters Complained of on Appeal on October 7, 2021; however, Appellant did not serve this Trial Court with his Statement of Matters Complained of on Appeal until October 11, 2021. Within his Statement, Appellant's "matters" are in four lengthy, convoluted paragraphs that this Trial Court has discerned as his "issues":

1. Appellant's third "statement" [labeled as "Mistake of Fact — restrain for protection"] challenges the sufficiency of Appellee's evidence that Appellant placed her in reasonable fear of bodily injury; and
2. Appellant's remaining first, second and fourth statements are **unpreserved** tangential "issues":
   (a) Constitutionality of federal and state statutes mandating seizure of Appellant's firearms during the existence of a Final Protection from Abuse Order;
   (b) Applicability of mens rea to this civil action; and
   (c) Relevance, if any, of Appellant's claim of alleged perjury.

Procedurally, on August 3, 2021, Appellee filed a Protection from Abuse Petition, alleging various acts of physical and emotional abuse by the Appellant. A Temporary Protection from Abuse Order was granted on August 3, 2021, by another Trial Court judge, against Appellant pending a Final Hearing. On August 12, 2021, a Final Hearing was held before this Trial Court. Both parties appeared and testified. Appellant *pro se* appeared in-person. Appellee, Mandy Milani, appeared in-person represented by counsel, Patrick W. Kelley, Esquire. Both parties testified, presented evidence and argued.

When faced with a sufficiency challenge under the PFA Act, the evidence is viewed in the light most favorable to the petitioner with the benefit of all reasonable inferences. The appellate court then determines whether the evidence was sufficient to sustain the trial court's conclusion by a preponderance of the evidence. *Custer v. Cochran*, 933 A.2d 1050, 1058 (Pa.Super.2007) (en banc), citing *Hood-O'Hara v. Wills*, 873 A.2d 757, 760 (Pa.Super.2005). A petitioner's testimony is sufficient if it is believed by the trial court. *Id.* The role of the trial court is to make credibility determinations and apply the preponderance of the evidence standard. The preponderance of the evidence standard is defined as the moving party or petitioner proving her case by the greater weight of the evidence through tipping the scale slightly in her favor by a mere scintilla of the evidence over the opposing party. *Ferri v. Ferri*, 854 A.2d 600, 603 (Pa.Super.2004).

The aim of the PFA Act is to protect victims of domestic violence from perpetrators of abuse as a means of "advance prevention of physical and sexual abuse." *Mescanti v. Mescanti*, 956 A.2d 1017, 1022 (Pa.Super.2008), citing to *Custer v. Cochran*, 933 A.2d 1050, 1054 (Pa.Super.2007). As applied to the instant case, "abuse" is defined as an act between intimate partners that places a petitioner in reasonable fear of imminent serious

[1] **As noted in this Trial Court's 1925 (b) Appeal Order**, Appellant did not timely serve this Trial Court with his Notice of Appeal until after this Trial Court discovered on its own that Appellant filed a Notice of Appeal. Appellant then served this Trial Court afterwards with a copy of the Notice of Appeal on **September 21, 2021, eleven days thereafter**.

bodily injury. 23 Pa.C.S. §6102(a). The court must determine whether a petitioner is in reasonable fear of imminent serious bodily injury. "In the context of a PFA case, the court's objective is to determine whether the victim is in reasonable fear of imminent serious bodily injury…. Appellant's intent is of no moment." *Raker supra*, at 725. As to the sufficiency of the evidence, the evidence is reviewed "in the light most favorable to the petitioner and granting her the benefit of all reasonable inference," to determine whether a petitioner has met her burden of proof by a preponderance of the evidence that petitioner is in reasonable fear of imminent serious bodily injury from respondent. *Raker supra* at 724, citing to *Fonner v. Fonner*, 731 A.2d. 160, 161 (Pa.Super.1999).

The hearing on August 12, 2021 produced the following evidence: The parties did not reside together and maintained separate residences. They had been dating for four to five months. On August 1, 2021, after Appellee finished work, Appellee arrived at Appellant's house at about 1:00 a.m. and soon thereafter, an argument commenced. Unexpectedly, when the Appellant and Appellee were watching a television show, which had nothing to do with religion, an intoxicated Appellant ranted to Appellee as to "why Jesus died, who Jesus died for and — or who killed Jesus is exactly what he asked [Appellee]." *N.T., p. 10: 18-20*. Appellant argued Appellee's ethnic and religious background were responsible for Jesus's death, and Appellant then referred to Appellee as "a piece of sh**" and an idiot" for not believing that. *N.T., p. 11: 3-6*.

Appellant had drank a beer and a mixed drink, and Appellant continued to drink after Appellee arrived. Appellee "actually attempted to open a drink and [Appellant] took it and put it in his cup and drank the whole thing." *N.T., p. 12: 5-6*. Appellant's accusations escalated into aspersions against Appellee's family as "nothing but a bunch of pieces of sh**," her brothers as "garbage," her father as "worthless," and her family members as being shameful. *N.T., p. 12: 9-12*. Appellee then "got mad" and "threw [her] glass of water … in his face and [Appellant] immediately attacked [her]." *N.T., p. 12: 12-14*. Events escalated immediately, and Appellee described in detail the nature of Appellant's physical attacks on her:

APPELLEE: He charged at me and pinned me in the corner of the couch. He had both of his legs on my knees and he would not let go of my wrists and he was nose-to-nose screaming in my face, spiting (*sic*) in my face. He then picked me up and slammed me on the coffee table, which is where I got the bruises on my back from. From there he picked me up and got me on the ground on top of me, and that's when it was getting worse. And he would not let go of me. Now mind you, now he has me on the ground and he is completely on top of me. *N.T., p. 12: 17-25; p. 13:1*.

COUNSEL: While he had you on the ground, did he threaten you verbally while he was physically assaulting you?

APPELLEE: Yes, he said I should just kill you. *N.T., p. 13: 2-4*.

COUNSEL: Did you — I know this is a strange question, but did you ask him, please stop; please get off of me?

APPELLEE: Yes, I was begging him.

COUNSEL: Did he stop? Did he get off of you?

APPELLEE: No, he did not, he got louder. And like I said, he was nose-to-nose, he was spitting in my face.

COUNSEL: After he said that he should just kill you, did he continue with any physical aggression?
APPELLEE: Yes. He still wouldn't let go of my wrists and he was just squeezing tighter and tighter. And he let go of my left wrist and his fist went back. And the second he let go of my left wrist, I hit him in the face to get away from him. And when that happened, it escalated and got even worse. And that's when he literally picked me up, slammed me against the corner of the wall and like scraped down my face, which is where all the scratches came from. And I was bleeding some. And then he lifted his right knee into my gut and called me a f***ing c**t. And said, you're never going to get away from me and wrapped his arms around — his hands around my neck. And I had to pry his hands from my neck. And I was lucky enough to do that and I got out of there. N.T., p. 13: 5-25.

Appellee offered into evidence Plaintiff's Exhibits A-1, A-2, A-11, and A-12, photographs of her injuries taken two days after the incident at the PFA Office. All of these Exhibits were admitted into the Record, without any objection by Appellant. As depicted in the photographs, Appellee described her injuries in detail as inflicted by Appellant on her:

"Scratch marks. That's where I was bleeding initially. And that's the bruise — that's one of the bruises. That was on my back, which is — that's exactly where the top of my — like right by the top of my spine is where that bruise is, which is where I initially hit the coffee table.… [The scratches on Appellee's face] happened when he pinned me against the wall in the kitchen." *N.T., p. 14: 14-19; p. 14: 25; p. 15:1.*

COUNSEL: So all of these injuries depicted in these photographs were inflicted by [Appellant]?
APPELLEE: Absolutely.
N.T. p. 15: 2-4.

. . . .

COUNSEL: So the wounds that you received in those four pictures, they healed on their own?
APPELLEE: Yes.
COUNSEL: Do you have any lingering effects, physically, from the attack?
APPELLEE: No, I do not.
COUNSEL: But what about mentally?
APPELLEE: Yes.
COUNSEL: How is it affecting you now mentally?
APPELLEE: I have never been more emotionally abused in my life.
COUNSEL: In addition to the emotional abuse, are you afraid for your physical safety because of the events that occurred on this evening?
APPELLEE: Yes.
N.T., p. 17: 2-16.

After Appellee was able to get away from Appellant that evening, Appellee pulled her car into the Country Fair convenience store parking lot and telephoned 911 who in turn "sent the officers." *N.T., p. 15: 14-19*. Two officers arrived, and when Appellant called Appellee at 4:06 a.m., an officer asked if he could pick up the phone and then answered her phone. Appellant and the officer talked on the phone for six to eight minutes or ten minutes maybe. Appellee could not initially hear the conversation between the police officer since she was talking to another officer. The second officer had walked away with the phone ten feet away from Appellee, but the officer immediately told her when he got off the phone that Appellant appeared extremely intoxicated and Appellant did not remember what happened. *N.T, p. 16: 1-14*.

Appellee later stated in her testimony the officers told Appellant to stop contacting Appellee because she showed the officers all of the text messages that Appellant kept sending her, "like one after another after another." *N.T., p. 18: 19-22*. And Appellee kept telling Appellant to "leave me alone, leave me alone, leave me alone." *N.T., p. 18: 22-23*. Appellant's father followed Appellee home from Country Fair to make sure she "was okay." *N.T. p. 18:25*. However, Appellant "continued to text [Appellee] for two and a half hours and the texts got worse." *N.T. p. 18: 25; N.T. p. 19: 1*.

Appellee offered into evidence "Plaintiff's Exhibits A-4 through A-10," which are copies of the various text messages between Appellant and Appellee after Appellee left Appellant's home. "Plaintiff's Exhibits A-4 through A-10 "which were admitted without objection by Appellant depict Appellant's continuing text messages to Appellee before and after the police officers cautioned him to stop texting Appellee. One of Appellant's text messages included Appellant's threat to shoot the Appellee, "You left your keys to my apartment. Don't come back. I will shoot on sight." Plaintiff's Exhibit A-10. *N.T., p. 19: 4-5*.

Appellee also recounted past similar types of abuse with Appellant. The week before this current event, Appellant walked into the apartment after she arrived home after work. Appellant "was on a boat all day hanging out with his friends, and [Appellant] was so highly intoxicated and had made irrational comments that didn't make sense." *N.T. p. 17: 19-23*. Appellant said, "like f**k your daughter, blah, blah, here and there." *N.T., p. 17: 23-24*. Appellee left that night, "[b]ut before that, there was never really any arguing." *N.T. p. 17: 24-25*. Appellee stated when Appellant "would get drunk, he would get more aggressive in terms of his voice would get louder and louder." *N.T. p. 17: 25; p. 18: 1-2*. Appellee would try to calm Appellant down and ask him why he was so angry. *N.T., p. 18: 2-3*.

In the reading of the rights, Appellant had been warned about testifying in the colloquy of rights. Moreover, since Appellee testified the police filed criminal charges against Appellant and she was filing a private criminal complaint against Appellant, this Trial Court cautioned Appellant about incriminating himself. Appellant chose to testify. Appellant testified he received a text from Appellee around 10:40 p.m. that night saying Appellee had just worked a double shift and she wanted to meet him at his apartment that night. Appellant testified he asked her not to get mad at him because he had no wine for her. He testified she persisted about the wine but he explained the stores were closed for wine sales and besides he had only "$1 in cash $3 in the bank account." *N.T. p. 20: 14*. Appellant also testified he had no alcohol in his apartment. Appellant testified "I was at my mother's house helping her with some stuff and I had to do a seminar for one of her classes." *N.T. p.20: 20-22*.

Appellant testified Appellee arrived at his apartment at 1:00 a.m. and they both started to

have a few drinks that she brought which was a case of Blue Moon and two small Smirnoff Ice smashes. Appellant testified he was "getting a bit irritated that [he] was doing another assignment for her again, because [he] did the majority of her course assignments last semester." *N.T. p. 21: 6-9*. Appellant testified they agreed he was only helping her with her math assignments this semester. Appellant testified their discussion elevated about her doing her own assignments and she called him a German which he testified she frequently did so and he found her calling him a German was "insulting." *N.T. p. 21: 12-16*. Appellant testified how he explained to Appellee she was Italian and how the Romans killed Jesus. He testified, "how classifying someone or calling them by a certain ethnicity is insulting." *N.T. p. 21: 21-22*.

Appellant testified the conversation escalated and how he was omitting certain specific details but then testified, "about an event involving her and her daughter, which triggered her and she threw her drink in my face and slapped me." *N.T. p. 22: 5- 8*. Appellant testified, "[i]t got out of control and [he] attempted to restrain her, in which she slipped loose and then started to hit [him] repeatedly in [his] face." *N.T. p. 22: 8-10*. Appellant testified, "I restrained her against the couch and I was screaming at her telling her to stop. And then once I realized I was bleeding, quite extensively from the upper part of my mouth, I let her go and I walked over to the kitchen sink to try and clean the bleeding." *N.T. p. 22: 11-16*. Appellant testified, "while I was at the sink she went into the bathroom, changed out of my clothes that she had put on back into her own clothes, gathered her bag and some of her other things, took my apartment keys off of her car keys and hung them up on my key rack and then she left." *N.T. p. 22: 17-22*.

Appellant admitted he continued to text Appellee repeatedly, "many times, admittedly saying some stupid things." *N.T. p. 22: 23-24*. Appellant continued "to call her repeatedly and a man [the police officer] picked up the phone, whom I thought was her brother pretending to be an officer. I told the man that [I] would stop trying to call her, because he asked me to. And then after that call I sent a few more messages and that was how it ended." *N.T., p. 22: 24-25; p. 23: 1-5*. Appellant testified he "was only trying to restrain her for self-protection and I was never trying to prevent her from leaving my apartment at all." *N.T., p. 23: 5-8*.

On cross-examination, Appellant testified that this "was both of our faults." *N.T. p. 23: 17*. Appellant testified he did pin down Appellee at some point, which was not an act of aggression meant to intimidate her or to inflict physical harm. Appellant testified he "was restraining her before — because I didn't want her to keep hitting me." *N.T., p. 24: 20-21*. Appellant testified he had "picture evidence of the injuries I sustained." *N.T., p. 24: 23-24*. Appellant testified he had not been drinking before Appellee's arrival as he was at his mother's house. Appellant admitted he saw the photographs of Appellee's injuries but Appellant testified he was not sure of whether Appellee's injuries were a result of his inflicting those injuries on her. *N.T., p. 26: 5-11*. Appellant testified he had a photograph of his lip for the Trial court to review. Despite Appellee's counsel's objection, this Trial Court admitted Appellant's photographs labeled "Defendant's Exhibits 1-1, 1-2, 1-3, 1-4, 1-5, 1-6. 1-7, 1-8 and 1-9."

Appellee on redirect stated Appellant had a box of wine at his home on the day before this incident and Appellee assumed he drank that box of wine if he is now testifying there was not any wine at his house when she arrived at his house.

In turn, Appellant testified and argued Appellee was not at his apartment for four days prior to August 1st because she had her daughter with her and was working night shifts so she was not staying with him.

In this instant case, as to Appellant's claim regarding the sufficiency of the evidence, this Trial Court observed and listened to the testimony, reviewed all of the evidence and weighed all testimony and evidence to make credibility determinations. Appellee accurately described her injuries as corroborated by the photographs in her Exhibits. *N.T., p. 15: 2-4*. Her repeated requests to Appellant to stop contacting her were confirmed in the text messages. *See Plaintiff's Exhibits A-5, A-6 and A-7*. As to Appellant, he claimed he did not know how Appellee sustained the injuries depicted in the photographs. *N.T., p. 26: 8-11*. Appellant did not deny he sent Appellee a threatening text to shoot her. Appellant minimized the serious and harassing nature of his threats via text by referring to his own text messages as "stupid things." *N.T., p. 22: 24*.

Viewing the above evidence in the light most favorable to Appellee with the benefit of all reasonable inferences, Appellee provided sufficient evidence to sustain her burden of proof by a preponderance of the evidence. This Trial Court had the opportunity of observing in-person the attitudes and demeanors of the parties as witnesses and found Appellee was a more credible witness. Appellee proved Appellant placed her in reasonable fear of imminent serious bodily injury through competent evidence. After a full hearing, this Trial Court appropriately entered this Final PFA order in favor of Appellee and against Appellant for a three (3) year period in order to prohibit Appellant from abusing, harassing, stalking, or threatening Appellee and to forbid Appellant from entering Appellee's residence. Appellant's claim to the contrary as to the sufficiency of the evidence is meritless.

As to Appellant's remaining three "issues," Pa.R.A.P. 302 clearly states issues not raised in the lower court are waived and cannot be raised for the first time on appeal. To preserve an issue for appellate review, a party must make a timely and specific objection at the appropriate stage of the proceedings before the trial court. A party's failure to object timely to a basic and fundamental error results in a waiver of that issue. On appeal, appellate courts will not consider a claim not called to a trial court's attention at a time when any error committed could have been corrected by the trial court. A party must object to "errors, improprieties or irregularities at the earliest stage of the adjudicatory process to afford the jurist hearing the case the first occasion to remedy the wrong and possibly avoid an unnecessary appeal to complain of the matter." *Thompson v. Thompson*, 963 A.2d 474, 475-476 (Pa.Super.2008)(citation omitted). Only claims properly presented in the lower court are preserved for appeal including issues of constitutional dimension. *Coulter v. Ramsden*, 94 A.3d 1080, 1090 (Pa.Super.2014).

In the instant case, Appellant had opportunities to raise issues such as:

THE COURT: So we have all the evidence in; is that correct, sir?
APPELLANT: Yes, ma'am.
N.T., p. 28:8-10.

. . . .

APPELLANT: Your Honor, can I make a statement?
THE COURT: Sure.
N.T., p. 29: 5-7.

Appellant failed to raise and preserve his three "issues," and, therefore Appellant waived them for purposes of appeal. Moreover, as to "seizure of his firearms" during the three

year time-period of this Final Protection from Abuse Order, federal and state law clearly prohibit Appellant from possessing or acquiring any firearms for the duration of this Order. *23 Pa.C.S. § 6108(a)(7)*.

Furthermore, Appellant also alleges for the first time on appeal that, "Appellee's counsel attempted to reach an agreement with the [A]ppellant regarding the PFA before initial proceedings in which he stated that a request would be made to allow the appellant to keep his firearms as well as requesting a reduction for the term of the PFA." *See Appellant's Statement of Matters Complained of on Appeal, first paragraph*. The Record herein is devoid of any such discussions with Appellant and Appellee's counsel to resolve this case especially since Appellant requested a hearing. This Trial Court asked Appellant as to whether he would consent to a Final PFA Order without any admission or did he want a hearing. In the instant case, Appellant clearly requested a hearing by stating to this Trial Court, "I want a hearing." *N.T. p. 8: 24*. Any attempts to resolve this case prior to the hearing are not relevant. After a full hearing, this Trial Court determined the outcome of this instant case based on sworn testimony and all other evidence such as Exhibits.

Appellant's next "issue" claims a criminal element of "mens rea for abuse" applies in this civil case. *See Appellant's Statement of Matters Complained of on Appeal, second paragraph*. In the instant case, the Record is devoid of Appellant raising any such issue to this Trial Court. Therefore, Appellant failed to preserve this "issue" for appeal. Moreover, Appellant clearly misapplies the criminal concept of *mens rea* to this civil action in a Final Protection from Abuse proceeding. Applying criminal cases or criminal concepts to civil PFA proceedings would be improper or "misplaced" since criminal cases focus on the intent of the perpetrator, not on a victim's response to a perpetrator's actions. *Raker supra* at 725. "It is hornbook law that *mens rea* is the state of mind a defendant must possess to commit a crime. The term *mens rea* is Latin for guilty mind and is defined as '[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime[.]' *Black's Law Dictionary, (3rd Pocket ed. 2006)*." *Commonwealth v. Andre*, 17 A.3d 951, 958 (Pa.Super.2011). *Mens rea* refers to a defendant's specific intent to commit a crime as defined at 18 Pa.C.S. §302.

No criminal intent element is applicable in proceedings under the Protection from Abuse Act, which are clearly civil proceedings. '[T]he [PFA] Act does not seek to determine criminal culpability. A petitioner is not required to establish abuse occurred beyond a reasonable doubt, but only to establish it by a preponderance of the evidence.' *K.B. v. Tinsley*, 208 A3d. 128 (Pa.Super.2019), quoting *Snyder v. Snyder*, 427 Pa. Super. 494, 629 A.2d 977, 982 (1983). A "preponderance of the evidence standard is defined as the greater weight of the evidence, *i.e.*, to tip a scale slightly is the criteria or requirement for preponderance of the evidence." *Raker v. Raker*, 847 A.2d 720, 724 (Pa.Super.2004). "In the context of a PFA case, the court's objective is to determine whether the victim is in reasonable fear of imminent serious bodily injury…." *Raker, supra*, at 725, and also *Buchhalter v. Buchhalter*, 959 A.2d 1260, 1263 (Pa.Super.2008). Moreover, "Appellant's intent is of no moment." *Raker, supra* at 725.

In this instant civil case, Appellant's claim as to a *mens rea*, that is, whether Appellant had an intent to inflict injury upon the Appellee, is not applicable and not relevant; Appellant's intent herein is of no moment. After hearing and weighing all testimony and other evidence, this Trial Court followed the law and properly applied the applicable burden of proof of a preponderance of the evidence, and this Trial Court found Appellee met her burden of proof.

This Trial Court then issued the resulting Final Protection from Abuse Order. Appellant's claim of a *mens rea* is inapplicable to this civil case and is, therefore, without any merit.

Appellant's final claim refers to his belief of an alleged perjury regarding Appellee's testimony. Any claim regarding contradictory statements is a challenge to the weight of the evidence. *See Commonwealth v. Antidormi*, 84 A.3d 736 (Pa.Super.2014). Case law clearly indicates, "The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and determines the credibility of witnesses." *Commonwealth v. Champney*, 574 Pa. 435, 443, 832 A.2d 403, 408 (2003). The trial court, as fact-finder, determines the credibility of any witnesses and the weight accorded their testimony. *Mescanti v. Mescanti*, 956 A.2d 1017, 1019-1020 (Pa.Super.2008).

In the instant case, this Trial Court, as the trier of fact, listened, observed and weighed the testimony, demeanor and attitudes of both Appellant and Appellee, and also weighed all other evidence. Appellant testified as to his story about the incident, and Appellee stated her story. This Trial Court determined Appellee's testimony was more credible than Appellant's testimony, and Appellee established she was in reasonable fear of imminent serious bodily injury from Appellant and that abuse exists in the instant case pursuant to the Protection from Abuse Act for a Final Order. Appellant now contends for the first time this Trial Court should address his claim of Appellee's alleged perjury for lying "knowingly and intentionally" under oath about being at his house "within a few days" before the alleged event. *See Appellant's Statement of Matters Complained of on Appeal, fourth or last paragraph*. This Trial Court notes the act of lodging any criminal charge including perjury against an alleged actor is clearly within the authority and province of the District Attorney in the Executive Branch, not with a trial court within the Judicial Branch. Appellant's unpreserved claim lacks any merit.

For all of the above reasons, this Trial Court requests the Honorable Judges of the Pennsylvania Superior Court affirm this Trial Court's Final Order of Protection from Abuse in the instant case.

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