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Reports of Cases Decided in the Several Courts of Erie County for the Year 2022

CV

ERIE, PA

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

COURTS OF COMMON PLEAS

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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AMERICAN EXPRESS NATIONAL BANK

v.

BLAINE DURAN and DURAN TRANSFERS INC.

CIVIL PROCEDURE / PLEADINGS / COMPLAINT / PRELIMINARY OBJECTIONS

An amended complaint is void *ab initio* where neither the filed consent of the adverse party or leave of court to amend is obtained prior to its filing, pursuant to Pennsylvania Rule of Civil Procedure 1033(a), nor is the amended complaint filed within 20 days of service of preliminary objections to the prior complaint, pursuant to Pennsylvania Rule of Civil Procedure 1028(c).

CIVIL PROCEDURE / PLEADINGS / LIBERAL CONSTRUCTION

Court has authority to treat improperly filed amended complaint as the operative complaint in an action in the interests of a just, speedy, and inexpensive determination of the matter where the substantial rights of the parties are not affected pursuant to Pennsylvania Rule of Civil Procedure 126; likewise, the Court is within its discretion to treat preliminary objections to an original complaint as preliminary objections to an amended complaint where the contents of the two pleadings are nearly identical.

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS

The plain text of Pennsylvania Rule of Civil Procedure 1019(i) — requiring that a pleader attach a copy of the writing to a pleading where any claim or defense detailed therein is based on that writing, or alternatively, to explain why such writing is not accessible to the pleader — neither requires that the writing be signed nor that it be dated, and the truth and accuracy of said writing cannot be assailed on preliminary objections, particularly where the facts set forth in the pleading are verified as true in accordance with Pennsylvania Rule of Civil Procedure 1024.

COURTS / STARE DECISIS

Unless otherwise inconsistent with higher precedential appellate authority, or absent some other compelling circumstance, a court of common pleas judge should follow the written decision of a colleague on the same bench when based on the same set of facts, because a written opinion addressing the reasons for a decision establishes the law of that judicial district as a matter of stare decisis.

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS

In keeping with longstanding precedent within the Sixth Judicial District — and pursuant to Pennsylvania Rule of Civil Procedure 1019(f), requiring that averments of special damages be specifically stated — in a claim for breach of contract where the plaintiff is seeking to recover on a credit card debt, a "defendant is entitled to know the dates on which individual transactions were made, the amounts therefore and the items purchased to be able to answer intelligently and determine what items he can admit and what he must contest." *Marine Bank v. Orlando*, 25 Pa. D. & C.3d 264, 268 (Erie Co. 1982) (Nygaard, J.).

CONTRACTS / ACCOUNT STATED

In the absence of any Pennsylvania appellate authority to resolve the split among the courts of common pleas to have considered the issue, this Court holds that an account stated cause of action is cognizable in a case alleging a defendant's failure to pay credit card debts.

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS / CONTRACTS / ACCOUNT STATED

The Court declines to extend our holding in *Orlando* — that a plaintiff in a suit for recovery of a credit card debt must detail the individual transactions constituting the alleged debt in its complaint — to a count predicated upon an account stated theory of recovery because *Orlando* did not expressly address such a claim, and because a requirement that a pleader specifically itemize the transactions making up the account in its pleading runs contrary to the gist of the account stated action.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
TRIAL DIVISION – CIVIL
No. 12703 of 2018

Appearances: Jordan W. Felzer, Esq., for the Plaintiff, American Express National Bank
Lloyd Wilson, Esq., for the Plaintiff, American Express National Bank
Guy C. Fustine, Esq., for the Defendants, Blaine Duran and Duran Transfers Inc.
Ashley M. Mulryan, Esq., for the Defendants, Blaine Duran and Duran Transfers Inc.

OPINION OF THE COURT

PICCININI, J., December 23, 2021

Plaintiff, American Express National Bank ("American Express"), brings this action to recover $104,779.08 in unpaid debt it alleges Defendants, Blaine Duran and Duran Transfer, Inc. (collectively "Duran"), accrued on one of its credit cards. Duran raises Preliminary Objections challenging the sufficiency of the Complaint. For the reasons that follow, the Court exercises its discretion under Pennsylvania Rule of Civil Procedure 126 to treat the Amended Complaint, filed September 7, 2021, as the operative complaint in this action, despite the procedural invalidity of its filing, and furthermore, treats the Preliminary Objections to the Complaint as Preliminary Objections to the Amended Complaint. As to the merits of Duran's Preliminary Objections, the Court finds that the Amended Complaint comports with Pennsylvania Rule of Civil Procedure 1019(i) and that Count II alleges a legally cognizable and sufficiently specific cause of action for account stated against Duran. However, Count I does not adequately state a claim for special damages arising from the alleged breach of contract pursuant to Pennsylvania Rule of Civil Procedure 1019(f), and as such, the Preliminary Objection as to Count I is sustained.

I. PROCEDURAL HISTORY

The original Complaint in this case was filed on October 22, 2018. The Complaint alleges that American Express provided a line of credit to Duran through an American Express Business Gold Rewards card. Am. Compl., ¶ 4. Specifically, it avers that Duran accepted a written card member agreement, enabling it to make purchases and or receive cash advances, but that despite agreeing to pay for charges incurred on the credit account as they were billed, Duran is currently in default under the terms of the agreement and remains indebted to American Express in the amount of $104,770.08. Am. Compl., ¶¶ 7, 9-10, 12. Count I of

the Complaint alleges that Duran's failure and refusal to pay the amount due constitutes a breach of contract. Am. Compl., ¶¶ 13-14. Count II alleges an account stated claim, stating Duran received "monthly statements without giving protest or indication that they were erroneous in any respect…thereby acknowledg[ing] the debt owed to American Express[.]" Am. Compl., ¶ 19.

After the filing of the Complaint, a case management order was issued, although it is unclear what, if any, discovery was actually conducted. In 2019, American Express reinstated the Complaint. In October of 2020, the Complaint was reinstated once again. On February 22, 2021, counsel for American Express contacted the Court, inquiring into the process for filing a "praecipe for trial."[1] The following day, the Court ordered that a status conference be held.

A status conference was held on April 12, 2021. At the conference, both parties agreed that the matter was not yet ready for trial. Moreover, Duran, now represented by counsel, questioned the failure of American Express to properly serve a 10-day Notice of default judgment and the lack of a written agreement between the parties in support of its underlying claims for recovery. Citing these concerns, Duran made an oral Motion to Dismiss the Complaint. Rather than rule on the oral Motion, the Court instructed Duran to put its Motion in writing if it genuinely believed a legal basis existed to dismiss the Complaint, and permitted American Express to respond to such a motion, if it were filed; alternatively, if no basis for dismissal existed, the Court instructed the parties to engage in discussions about a revised case management order that would set a mutually agreeable timetable for the case going forward.

Although Duran did not ultimately file a written motion, American Express filed a written Response to Defendant's Motion to Dismiss Complaint on May 4, 2021. American Express, however, never served said response on the Court. Subsequently, on July 12, 2021, Duran filed Preliminary Objections to the Complaint. On July 15, 2021, the Court ordered American Express to respond to the Preliminary Objections and Duran to address in its responding brief the issue of improper service discussed at length by American Express in its Response to Defendant's Motion to Dismiss Complaint.

American Express filed its response and accompanying brief on July 22, 2021. Duran filed its responding brief in support of its Preliminary Objections on August 11, 2021. Thereafter, on September 7, 2021, without leave of Court, and before the Court ruled on Duran's Preliminary Objections, American Express filed an Amended Complaint substantively indistinguishable from the Complaint filed in 2018, except for different attached exhibits.

Duran's Preliminary Objections are now ripe for adjudication, but before turning to the issues raised therein, the Court must consider two threshold procedural questions: whether the original Complaint or the Amended Complaint is currently the operative complaint in this matter, and if it is the Amended Complaint, whether the filing of the Amended Complaint mooted Duran's Preliminary Objections.

II. VALIDITY AND PROCEDURAL EFFECT OF THE FILLING OF THE AMENDED COMPLAINT

Presently before the Court is Duran's Preliminary Objections to the Complaint filed on October 22, 2018, but as just explained, American Express's purported filing of an Amended Complaint on September 7, 2021, complicates matters. The body of the Amended Complaint

[1] Erie County Local Rules do not permit parties to set a matter for trial by praecipe. Instead, the rules employ a certification process. *See* Erie L.R.C.P. 212.1(e).

is identical to that of the original Complaint; the only difference appears to be in the exhibits attached to the pleading. American Express did not seek leave of Court to file the Amended Complaint nor is there any indication in the record that Duran consented to the filing of an amended pleading.

Pennsylvania Rule of Civil Procedure 1033 states that "[a] party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, add a person as a party, correct the name of a party, or otherwise amend the pleading." Pa.R.C.P. 1033(a). Thus, in the normal course of litigation, a plaintiff may not properly amend a complaint unless either one of two conditions occur: (1) leave of court is sought and granted, or (2) the adverse party consents to the amendment and proof of the adverse party's consent is filed on the docket. Neither of those conditions was satisfied here.

Nevertheless, Pennsylvania Rule of Civil Procedure 1028 provides a limited exception to this scheme when preliminary objections are filed whereby "[a] party may file an amended pleading as of course within twenty days after service of a copy of preliminary objections. If a party has filed an amended pleading as of course, the preliminary objections to the original pleading shall be deemed moot." Pa.R.C.P. 1028(c)(1). Rule 1028 further directs that "[o]bjections to any amended pleading shall be made by filing new preliminary objections." Pa.R.C.P. 1028(f). As such, a plaintiff has a rule-based right to amend a complaint to which preliminary objections are filed for a period of twenty days after of service of the preliminary objections. In that case, the plaintiff need not obtain leave of court or the filed consent of the parties to amend the complaint, and the objecting party is required to raise any objection it may still have to the amended pleading by filing new preliminary objections.

One explanation for the appearance of the Amended Complaint is that it was intended to respond to Duran's Preliminary Objections, effectively mooting them by operation of law. But if this were the intent, it seems odd that American Express would take the time to file a response to the Preliminary Objections, only to then later moot the Objections by filing an amended pleading. Whatever the case may be, it is clear that the filing of the Amended Complaint occurred well outside the twenty-day window from the filing of the Objections in which American Express had to file an amended pleading as of right under Rule 1028(c)(1). Thus, because the Amended Complaint was not filed within the period set forth under Rule 1028(c)(1), and because American Express did not follow the procedure in Rule 1033 for amending a pleading, the Amended Complaint was procedurally void *ab initio* when it was filed with the prothonotary on September 7, 2021.

Yet this does not end the inquiry. Pennsylvania Rule of Civil Procedure 126 states that the rules of civil procedure "shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The 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. Here, the filing of an amended complaint — particularly one that does not meaningfully alter the nature of the allegations — does not affect the substantial rights of Duran. The statute of limitations has not yet run, and the Court would have been hard-pressed to find any reason to deny a motion seeking leave of court to amend the original complaint had American Express properly sought one under Rule 1033. And if the Court were to declare the Amended Complaint a nullity, American Express would likely seek leave to amend the complaint

to include the updated exhibits anyhow. Simply accepting the Amended Complaint as the operative complaint in this matter therefore promotes the "just, speedy and inexpensive determination of" this action. Pa.R.C.P. 126. Accordingly, the Court treats the Amended Complaint as a properly filed pleading, exercising its discretion under Rule 126.

By the same token, the Court finds that the just, speedy, and inexpensive resolution of this case is best served by treating the Preliminary Objections to the original Complaint as Objections to the Amended Complaint. Neither the substantial rights of American Express nor Duran are affected given that the averments in the Amended Complaint were taken verbatim from the original Complaint. Were the Court to deem the Preliminary Objections moot, there is no reason to believe that Duran would not file new preliminary objections to the Amended Complaint in substantially the same form, with perhaps only minor adjustments to references made concerning the exhibits. As such, demanding strict adherence to Rule 1028(f) by requiring Duran to file new preliminary objections would only serve to delay this litigation further. The Court therefore exercises its discretion under Rule 126 to treat the Preliminary Objections to the original Complaint as Preliminary Objections to the operative Amended Complaint. With these threshold issues resolved, the Court proceeds to consider the merits of Duran's several Objections.

III. OBJECTION AS TO SERVICE

As previously noted, the Court, in its July 12, 2021, Order directed that Duran brief the issue of service as part of its responding brief. The purpose of this instruction was to respond to American Express's arguments as set forth in its Response to Defendant's Motion to Dismiss Complaint of May 4, 2021. However, Duran concedes that this issue is now moot in light of American Express's July 2, 2021 Notice of Intent to Take Default. Br. in Supp. of Prelim. Obj. to Compl, p. 7. Although the docket does not include such a Notice for the Court's review, the Court accepts Duran's assurance that it received a Notice of Intent to Take Default and its withdrawal of any challenge concerning service of a relevant notice or pleading in this case. As such, the Motion to Dismiss raised orally at the April 12, 2021, status conference is denied as moot.

IV. PRELIMINARY OBJECTION AS TO ATTACHMENT OF A SIGNED DOCUMENT

Duran's first Preliminary Objection relates to both Counts I and II, and concerns what it argues is American Express's failure to provide the writing on which the claims are based in violation of Pa.R.C.P. 1019(i). Rule 1019(i) states:

> When any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.

Pa.R.C.P. 1019(i). Duran asserts that the Cardholder Agreement attached to the Amended Complaint "is not signed by either Defendant nor does it include the date the agreement commenced[,]" and as such, American Express "has failed to produce a signed contract, or an explanation for why the documentation is missing." Br. in Supp. of Prelim. Obj., p. 4.

American Express relies on *Discover Bank v. Stucka*, 33 A.3d 82 (Pa. Super. 2011) for

its assertion that the pleading complies with Rule 1019(i). In *Stucka*, the Court explained "[w]here a complaint is based on the failure of a debtor to pay the balance due on a credit card account, it is proper under Rule 1019(i) for the defendant to assert in preliminary objections that the plaintiff failed to produce a cardholder agreement and statement of account." *Id.* at 87 (citing *Atlantic Credit and Finance, Inc. v. Giuliana*, 829 A.2d 340, 345 (Pa. Super. 2003)). However, the Court held "[w]e do not find persuasive the Stuckas' argument that the Bank was required to attach a signed document. Neither Rule 1019 or *Atlantic Credit* set forth such a requirement." *Id.*

Here, as in *Stucka*, the plaintiff attaches a copy of a cardholder agreement it alleges forms the basis for a contractual relationship between the parties, although the agreement is unsigned. As *Stucka* held, however, that fact that the document is unsigned does not doom the pleading under Rule 1019(i). Neither does Rule 1019(i) require that the writing be dated. It simply requires that "the pleader attach a copy of the writing, or the material part thereof," if "any claim or defense is based upon a writing[.]" Pa.R.C.P. 1019(i). American Express has done so here.

Duran counters that *Stucka* is distinguishable because "[h]ere, Plaintiff fails to produce a true and accurate copy or at least offer an explanation of how the attached copy is a true and accurate copy[,]" observing that the original Complaint exhibited a cardmember agreement from 2011, three years after Duran entered into a relationship with American Express. Br. in Supp. of Prelim. Obj., p. 5. First, it is not clear that the "as of" date of 2011 in the cardholder agreement attached to the original Complaint, or the 2014 "as of" date on the cardholder agreement attached to the Amended Complaint, are indicative of the date when the alleged agreement was entered into. Second, the facts set forth in both the original and Amended Complaint are verified as true and accurate by a custodian of records in accordance with Pennsylvania Rule of Civil Procedure 1024.

Rule 1019(i) itself does not require that the pleader prove the truth and accuracy of the agreement it attaches; the pleader must merely attach the writing it alleges is the basis for its claim or provide an explanation why that cannot be done. Beyond verification, the truth and accuracy of a document goes to its reliability and credibility, evidentiary and factual determinations to be sorted out later in the litigation life cycle. Critically, when considering preliminary objections "all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom." *Feingold v. Hendrzak*, 15 A.3d 937, 941 (Pa. Super. 2011) (citation omitted). In this vein, the Court must presume for purposes of these Preliminary Objections that the attached cardholder agreement is true and accurate as attested to by the custodian of records verifying the Amended Complaint.

Duran further argues that *Stucka* is distinguishable because American Express does not aver that an agreement was submitted to Duran or that Duran agreed to such a contract. However, such a challenge goes not to the legal sufficiency of the pleading under Rule 1019(i), but to the sufficiency of its factual specificity, which the Court addresses separately below. As to legal sufficiency under Rule 1019(i), that Rule does not require that a writing alleged to underlie an action be signed or dated — only that it be attached to the pleading or an explanation be provided as to why it is not. Such a verified writing is attached to the Amended Complaint. Accordingly, the Amended Complaint complies with Rule 1019(i), and Duran's Preliminary Objection for failure to conform to Rule 1019(i) is overruled.

V. PRELIMINARY OBJECTION AS TO SUFFICIENT SPECIFICITY IN COUNT I

Duran next argues that the averments contained in Count I lack sufficient specificity. "Pennsylvania is a fact-pleading jurisdiction; as such, a complaint must provide notice of the nature of the plaintiff's claims and also summarize the facts upon which the claims are based." *Commonwealth by Shapiro v. Golden Gate National Senior Care LLC*, 194 A.3d 1010, 1029 (Pa. 2018) (citation omitted). Rule 1019 encapsulates this theory; its purpose "is to require the pleader to disclose material facts sufficient to notify the adverse party of the claims it will have to defend against." *Id.* (citations omitted). The pleader, however, "need not cite evidence but only those facts necessary for the defendant to prepare a defense." *Id.* at 1030 (citation omitted). "To assess whether a claim has been pled with the requisite specificity, the allegations must be viewed in the context of the pleading as a whole." *Id.* (citation omitted).

Count I alleges a claim for breach of contract. "In a claim for breach of contract, the plaintiff must allege that there was a contract, the defendant breached it, and plaintiff suffered damages from the breach." *Stucka*, 33 A.3d at 87 (citing *McShea v. City of Philadelphia*, 995 A.2d 334, 340 (Pa. 2010)) (internal quotation marks and brackets omitted). "While not every term of a contract must be stated in complete detail, every element must be specifically pleaded." *Pennsy Supply, Inc. v. American Ash Recycling Corp. of Pennsylvania*, 895 A.2d 595, 600 (Pa. Super. 2006) (citing *Corestates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. 1999)).

Count I asserts that American Express extended credit to Duran by way of an American Express Business Gold Rewards card, provided as Exhibit A. Am. Compl., ¶ 7. It states that the agreement was accepted by Duran, enabling it to make purchases and cash advances. Am. Compl., ¶ 7. It enumerates several material and relevant terms of the agreement, including that Duran agreed to pay all amounts charged, pay finance charges on unpaid balances, pay the minimum amount due by the due date, that American Express could charge late fees and declare the account in default if minimum payments were not timely paid, and that American Express could declare the entire balance due immediately if Duran were in default. Am. Compl., ¶ 8. The Amended Complaint further states that Duran is currently in default under the terms of the agreement and remains indebted to American Express in the amount of $104,770.08 as reflected in Exhibit B. Am. Compl., ¶¶ 10, 12. Duran contends that such averments are insufficient to put it on proper notice of how to prepare a defense or how to answer the pleading. Br. in Supp. of Prelim. Obj, p. 6.

The Court finds that the basic contractual elements of offer, acceptance, and consideration are adequately pled to show the existence of a contract. The Amended Complaint states that American Express made an offer to extend a line of credit to Duran subject to certain conditions, which Duran accepted. Am. Compl., ¶ 7. Additionally, the Amended Complaint alleges that Duran agreed to those conditions, including the condition that it make timely payments on the minimum amount due, in return for American Express's promise to make the line of credit available, evincing requisite consideration. Am. Compl., ¶ 7.[2] The Court further finds that the element of breach of contract is sufficiently pled as the Amended Complaint states that the contract was breached when Duran failed to make necessary

[2] The classic Holmesian formula for consideration is that "the promise must induce the detriment and the detriment must induce the promise." *Pennsy Supply*, 895 A.2d at 601 (citations omitted).

minimum payments as required under the cardholder agreement and fell into default. Am. Compl., ¶ 10.

The question of whether damages are sufficiently pled is a more difficult one. The Amended Complaint states that American Express has suffered damages in the amount of $104,770.08 as a result of the breach, which it claims is the sum of "any and all charges, credits, payments, finance charges and late fees relating to Duran's…account which was kept in the ordinary course of business and summarized as the 'previous balance.'" Am. Compl., ¶ 12. Pennsylvania Rule of Civil Procedure 1019(f) requires that "[a]verments of time, place and items of special damage shall be specifically stated." Pa.R.C.P. 1019(f). "The Pennsylvania Rules of Civil Procedure do not define 'special damage.' However, Pennsylvania courts apply 'special damage' to mean calculable monetary losses, such as out-of-pocket expenses." *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1220 (Pa. Cmwlth. 2018) (*en banc*); *see also Agriss v. Roadway Express, Inc.*, 483 A.2d 456, 474 (Pa. Super. 1984) (equating "special damages" with "concrete economic loss computable in dollars"). Here, the $104,770.08 sought by American Express fits that description.

To that end, Duran assails the pleading for not including sufficient detail "regarding the transactions supporting the balance[,]" either in the body of the Amended Complaint itself or in the "incomplete account summary" attached as Exhibit B. Br. in Supp. of Prelim. Obj, p. 6. Indeed, Exhibit B includes only a statement of the total amount due, $104,770.08, and a year-to-date summary of fees and interest from 2018, totaling $8,931.87. Notably, it does not provide an account history of charges or cash advances made on the credit card or an accounting of any fees or interest accrued on the account other than the $8,931.87 in fees levied in 2018.

This Court has confronted this issue before. In *Marine Bank v. Orlando*, 25 Pa. D. & C.3d 264 (Erie Co. 1982), Judge Nygaard, then sitting as a member of this Court, opined that under Rule 1019(f), in a case for recovery of credit card debt, a "defendant is entitled to know the dates on which individual transactions were made, the amounts therefore and the items purchased to be able to answer intelligently and determine what items he can admit and what he must contest." *Id.* at 268. Noting that credit cards have become "a pervasive part of our society[,]" he explained:

> if this were an action by the merchant for merchandise sold and delivered, we would require the claim to show the items sold and the dates of sales or services. A third person such as the issuer herein who has paid such bills in the capacity of a contractor with our defendant, and who sues the cardholder, steps to some extent into the shoes of the merchant as respects pleading and proof of his or her case. Plaintiff or anyone in his position at the least must furnish dates of the transactions, amounts and items purchased, so as to enable defendant to prepare his case and to prepare for the trial of the case.

Id. at 266, 268-69. The Court is unaware of any higher precedential authority contrary to Judge Nygaard's Opinion in *Orlando*. Under such circumstances, this Court is bound as a matter of local stare decisis to apply the *Orlando* rationale in the case *sub judice*. *See Yudacufski v. Commonwealth, Dept. of Transp.*, 454 A.2d 923, 926 (Pa. 1982) (noting it is "well-settled that, absent the most compelling circumstances, a judge should follow the decision of a

colleague on the same court when based on the same set of facts" and that a written court of common pleas decision therefore establishes "the law of that judicial district[.]"); *see also Dibish v. Ameriprise Financial, Inc.*, 134 A.3d 1079, 1093 (Pa. Super. 2016).

Here, just as in *Orlando*, the Amended Complaint does not specifically aver the dates in which the individual transactions were made, the amounts of those transactions, and the items purchased in those transactions. As to these facts, Duran is without sufficient notice to prepare a defense or answer the Amended Complaint.[3] Thus, the alleged damages in the amount of $104,770.08 are not pled with the specificity required under Rule 1019(f), and the Preliminary Objection as to Count I is therefore sustained.

VI. PRELIMINARY OBJECTION AS TO SUFFICIENT SPECIFICITY IN COUNT II

Duran lodges a similar challenge against Count II. Count II states a claim for account stated. "An account stated is a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor." RESTATEMENT (SECOND) OF CONTRACTS, § 282(a). "The idea behind an action upon account stated is that a preceding contract has been discharged and merged into a stated account which is based upon the earlier contract." *Rush's Service Center Inc. v. Genareo*, 10 Pa. D. & C.4th 445, 447 (Lawrence Co. 1991). "It is an agreement to, or acquiescence in, the correctness of the account owed, so that in proving the account stated, it is not necessary to show the nature of the original transaction, or indebtedness, or to set forth the items entering into the account." *Chongqing Kangning Bioengineering Co., Ltd., v. Conrex Pharmaceutical Corporation*, 2021 WL 1529331, *3 (Pa. Super. 2021) (unpublished) (quoting *David v. Veitscher Magnesitwerke Actien Gesellschaft*, 35 A.2d 346, 349 (Pa. 1944)). The effect of an account stated is that:

> the amount or balance so agreed upon constitutes a new and independent cause of action, superseding and merging the antecedent causes of action represented by the particular items. It is a liquidated debt, as binding as if evidenced by a note, bill or bond. Though there may be no express promise to pay, yet from the very fact of stating the account the law raises a promise as obligatory as if expressed in writing, to which the same legal incidents attach as if a note or bill were given for the balance.

Id. at *4 (citation omitted).

Duran argues an "account stated theory is incompatible with credit card cases when acquiescence is based solely on silence due to the rapidly fluid and complex nature of credit card transactions[,]" citing *Capital One Bank (USA) NA v. Clevenstine*, 7 Pa. D. & C. 5th 153 (Centre Co. 2009) for its persuasive value. Br. Supp. of Prelim. Obj., p. 6. The Court in *Clevenstine* reasoned that "[a]n account stated theory is not appropriate in a credit card account case" because "[a]n account stated is more appropriately pled in a situation in which two equal, sophisticated parties have an ongoing business relationship." *Id.* at 157.

[3] American Express responds that it has provided counsel for Duran with "every Statement of Account issued in this Account[.]" Pl.'s Resp. to Def.s' Prelim Obj., ¶ 20. Although American Express's form-over-substance argument is not lost on the Court, the fact remains that the Court's consideration of these Objections is limited to the averments as set forth in the Amended Complaint and any attachments incorporated by reference therein, not evidence that may be available outside the four corners of the challenged pleadings. Furthermore, if this is true, then American Express should have no trouble detailing that transaction history in a subsequent amended complaint.

Noting "something more than mere acquiescence by failing to take exception to a series of statements of account received in the mail is required to create an account stated[,]" the Court observed:

> An account stated theory may have been appropriate when credit card issuers gave cardholders fixed interest rates and charged very few fees. With the proliferation of credit cards over the past two decades, however, interest rates have varied and fees have increased in number and severity. It is unreasonable to expect the average debtor to understand the changing terms of a customer agreement such that he or she can object to any invoice received in a timely manner. For many, the first and only time they will consider what is in the "fine print" is when they fall behind on payments and find themselves in a position like the one in which defendant now finds herself.

Id. at 157-58.

While other courts of common pleas have followed this approach, it has not been accepted uniformly across this Commonwealth. For example, in *Calvary SPV I, LLC v. Michaels*, 2018 WL 7501275 (Lawrence Co. 2018), the Court — while recognizing other courts of common pleas have held an account stated theory of recovery to be unavailable in credit card cases — declined to adopt such a limitation. *Id.* at *3. The *Michaels* Court reasoned:

> If a plaintiff chooses to proceed under account stated, they are disposing of the complex terms of the contract originally underlying the debt, and instead proceeding on the basis of a simpler relationship whereby the creditor lends to the debtor and the debtor takes action on the account to reimburse the creditor …. Such a case may be shown by payments made on the account, or other actions evidencing acceptance of the debt by the debtor. A plaintiff must show a sufficient amount of action by their debtor to prove their case. No controlling precedent has ever disallowed the account stated theory of recovery from proceeding in credit card cases.

Id.

There does not appear to be any Pennsylvania appellate precedent directly on point to resolve this split among the courts of common pleas. Neither is the Court aware of any written opinion from the Sixth Judicial District to address this issue nor do the parties cite to any cases arising out of Erie County which may constitute the law of the Sixth Judicial District on this point. In what appears to be matter of first impression in Erie County, and having considered the merits of the respective rationales as detailed in the opinions of our sister courts of common pleas across the Commonwealth, the Court adopts the approach taken by Lawrence County Court of Common Pleas in Michaels and holds that an account stated cause of action is cognizable in a case alleging a defendant's failure to pay credit card debts.

As the Superior Court recently explained, "an 'account stated' is just a variety of contract... between debtors and creditors." *Chongqing Kangning*, 2021 WL 1529331, at *4 (citation omitted). Just as plaintiffs may be able to recover under quasi-contractual causes of action, such as quantum meruit or unjust enrichment — even when they cannot successfully make out a claim for breach of contract — so may a credit card company alternatively seek to

recover under the elements of an account stated theory, just as would any other creditor filing suit to recover against a debtor. Indeed, there is nothing inherent in the nature of a credit card account that is necessarily incompatible with the elements of an account stated cause of action.

Clevestine's concern that "[i]t is unreasonable to expect the average debtor to understand the changing terms of a customer agreement such that he or she can object to any invoice received in a timely manner" does not support a categorical bar precluding a certain type of creditors (*i.e.*, a credit card company) from asserting a particular cause of action (*i.e.*, an account stated claim). Rather, whether a credit card company can adequately plead or prove an account stated claim will depend upon the particular facts of each case. It may be in the mine-run of cases that a credit card company will be unable to ultimately prove a debtor's assent to the account given that the mere "acquiescence in the correctness of the items of an account is not conclusively established by its retention by the debtor." *Pierce v. Pierce*, 48 A. 689, 691 (Pa. 1901). But a credit card company, like any plaintiff, should, at the very least, be given an opportunity to make its case.

Furthermore, the soundness of this approach is confirmed by the number of decisions from other jurisdictions recognizing account stated claims in the context of credit card accounts. *See, e.g., Portfolio Recovery Associates, LLC v. Sanders*, 462 P.3d 263 (Or. 2020) (*en banc*) (considering claim of account stated brought by assignee of alleged credit card debt against cardholder); *CACH, LLC v. Moore*, 133 N.E.3d 661, 665-66 (Ill. App. 2019) (holding "[i]t is axiomatic that an account stated for a delinquent credit card account could include late-payment fees and interest if the cardholder agreed, through the cardholder agreement, to pay such fees and interest."); *American Express Centurion Bank v. Scheer*, 913 N.W.2d 489 (Neb. App. 2018) (holding debtor liable to creditor for three credit card debts under creditor's account stated claim where debtor did not object to monthly invoices.); *Bushnell v. Portfolio Recovery Associates, LLC*, 255 So.3d 473, 477 (Fla. App. 2018) (noting that because "the amount due here is based on the debtor's failure to pay under the credit card contract…[t]he credit card contract and the account stated cause of action are therefore inextricably intertwined such that the account stated cause of action is an action with respect to the contract") (internal quotation marks and emphasis omitted); *Hadsell v. Mandarich Law Group, LLP*, 2013 WL 1386299, *3 (S.D. Cal. 2013) (applying California law) (noting "Federal courts in California have rejected the notion that an action for unpaid credit card debt must be for a breach of an original credit card agreement rather than for an account stated.") (citation and internal quotation marks omitted); *Capital One Bank (USA), N.A. v. Denboer*, 791 N.W.2d 264, 275 (Iowa App. 2010) (holding "account stated is a potentially valid claim for creditors seeking to collect a credit card debt"); *Busch v. Hudson & Keyse, LLC*, 312 S.W.3d 294, 298 (Tex. App. 2010) (noting "account stated is a proper cause of action for a credit card collection suit.").

Having rejected Duran's argument that an account stated claim is inapplicable to credit card debt-collection actions, the Court must still consider whether the Amended Complaint nonetheless adequately pleads the facts essential to that cause of action. "The necessary averments in a complaint based upon an account stated is that there had been a running account, that a balance remains due upon that account, that the account has been rendered unto the defendant, that the defendant has assented to the account and a copy of said account is attached to the complaint." *Genareo*, 10 Pa. D. & C.4th at 447 (citations omitted). "The complaint need

not set forth the nature of the original transaction" and "[t]he party relying upon the account stated need not individually set forth the items of which the account consist. That is to say that plaintiff is not required to itemize the account." *Id.* at 447-48 (citations omitted).

Duran argues that American Express's account stated theory is inadequately based solely on "(1) its supposition that Defendants received its statements and (2) Defendants' silence." Br. in Supp. of Prelim. Obj., p. 7. American Express responds that Duran "was mailed monthly statements showing all transactions on the account," which it contends "is more than mere 'acquiescence' to the charges on the account when the debtor has received the statement showing the charges, and thereafter makes payment on the account, even if not in full." Br. in Supp. of Pl.'s Resp. to Def.s' Prelim Obj., p. 5.

Count II alleges that "American Express provided credit to Duran…by way of an American Express Business Gold Rewards" at Duran's request and that Duran "agreed to pay for charges incurred on the credit as they were billed by American Express. Am. Compl., ¶ 17. It further states that at the time of default, the total amount remaining outstanding on the account was $104,770.08 as reflected in Exhibit B. Am. Compl., ¶ 18. It alleges that Duran received monthly statements "without giving protest or indication that they were erroneous in any respect…[and] thereby acknowledged that the debt owed to American Express, as set forth in the monthly statement, is true and correct." Am. Compl. ¶ 19. Finally, it claims that although demand has been made upon Duran for payment of the balance, it has "failed and refuses to pay the same." Am. Compl. ¶ 20.

The first element of an account stated claim is satisfied as the Amended Complaint alleges that there was, in fact, a running account. Am. Compl., ¶ 17. Second, the Amended Complaint states that a balance of $104,770.08 remains due on the account. Am. Compl., ¶ 18. Third, it alleges that the account was rendered unto Duran by virtue of its receipt of monthly statements and the demand made unto it for payment of the balance. Am. Compl., ¶¶ 19-20. Fourth, the Amended Complaint adequately alleges that Duran has assented to the monthly statements by not "giving protest or indication that they were erroneous[.]" Am. Compl. ¶ 19. While acquiescence alone may not be enough to conclusively establish assent, admitting as true all inferences reasonably deducible from the facts alleged in the Amended Complaint, Duran did more than silently acquiesce in the account, providing "direct and unconditional" assent by acknowledging the debt owed but refusing to pay it. *Pierce*, 48 A. at 691; Am. Compl. ¶ 20. To the extent that Duran disagrees with that version of events it may say so in its answer to the pleading and procure evidence in discovery that refutes American Express's characterization of the facts. As to the fifth and final element, a copy of the account and the balance owed is provided in Exhibit B. This is sufficient to plead a cause of action for account stated.

Unlike the breach of contract claim alleged Count I, American Express need only state the precise total amount due on the account in order to satisfy Rule 1019(f)'s requirement that special damages be specifically stated, which it does as $104,770.08. Am. Compl., ¶¶ 20-21; *see also Genareo*, 10 Pa. D. & C.4th at 448 (noting that the pleader is not required to itemize the transactions conducted in an account stated claim). This is because "the amount or balance so agreed upon constitutes a new and independent cause of action, superseding and merging the antecedent causes of action represented by the particular items[,]" and thus, "it is not necessary to show the nature of the original transaction, or indebtedness, or

to set forth the items entering into the account." *Chongqing Kangning*, 2021 WL 1529331, at *3-4 (citations omitted).

Moreover, *Orlando* did not consider whether its rationale applied with equal force in the context of an account stated cause of action, and while its reasoning appears harmonious with principles underlying a breach of contract claim, its emphasis on itemization of individual transactions appears inconsistent with the basic premise of an account stated theory, which supersedes "the antecedent causes of action represented by the particular items." *Id.* at *4 (citation omitted). As such, *Orlando* does not control the outcome of this particular Objection. Because the Amended Complaint states with specificity the total amount due on the account — the only amount relevant for purposes of an account stated claim — it sufficiently pleads specific damages under Rule 1019(f). For the foregoing reasons, the Preliminary Objection as to sufficient specificity in Count II is overruled.

* * * * * *

In sum, the Court treats the filing of the Amended Complaint as the operative complaint, and additionally treats the Preliminary Objections to the Complaint as Preliminary Objections to the Amended Complaint, pursuant to its authority under Pa.R.C.P. 126. As to the merits of those Objections, the Amended Complaint complies with Rule 1019(i) because it attaches a verified, written cardholder agreement, and neither the text of Rule 1019(i) nor the case law construing it imposes a requirement that the agreement be signed or dated. Stucka, 33 A.3d at 87. However, the Amended Complaint is insufficiently specific as to Count I because it does not adequately detail the individual transactions constituting the account, the specific amounts assignable to each transaction, and the items purchased in those transactions, such that Duran may "be able to answer intelligently and determine what items he can admit and what he must contest." *Orlando*, 25 Pa. D. & C.3d at 268. As to specificity in Count II, an account stated cause of action is cognizable in a case alleging a defendant's failure to pay credit card debts, and the Amended Complaint properly states such a cause of action. Accordingly, the Preliminary Objection as to inadequate specificity in Count I is sustained, and the Preliminary Objections for failure to attach a signed writing and for inadequate specificity in Count II are overruled. American Express shall have 20 days from the date of the Order accompanying this Opinion to file a second amended complaint curing the defect in Count I.

It is so ordered.

BY THE COURT
/s/ **MARSHALL J. PICCININI, JUDGE**

CHERYL HARRIS, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ZENA SCOTT, DECEASED

v.

SAINT VINCENT HEALTH CENTER D/B/A SAINT VINCENT HOSPITAL AND/OR SAINT VINCENT HEALTH SYSTEMS, ET AL.

PARENT AND CHILD / GUARDIAN AND WARD / INFANT / COMPROMISE, SETTLEMENT, AND RELEASE

No action to which a minor is a party shall be compromised, settled or discontinued except after approval by the court pursuant to a petition presented by the guardian of the minor. Pa.R.C.P. 2039(a).

PARENT AND CHILD / GUARDIAN AND WARD / INFANT / COMPROMISE, SETTLEMENT, AND RELEASE

Court approval is necessary for the sole purpose of protecting the minor's rights.

PARENT AND CHILD / GUARDIAN AND WARD / INFANT / COMPROMISE, SETTLEMENT, AND RELEASE

The primary purpose of Pa.R.C.P.2039 is to prevent settlements which are unfair to minors, and to ensure that the minor receives the benefit of the money awarded.

PARENT AND CHILD / GUARDIAN AND WARD / INFANT / COMPROMISE, SETTLEMENT, AND RELEASE

In considering whether to approve the settlement of a minor's claim, the Court focuses on the best interests of the minor.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
Erie County No.: 13075-2016
PA SUPERIOR COURT
55 WDA 2022

Appearances: Cheryl Harris, pro se, Appellant
Mark A. Hoffman, Esq., Appellee, counsel for Cheryl Harris and Estate of Zena Scott, Deceased
Christopher C. Rulis, Esq., Appellee, counsel for Andrea T. Jeffress, M.D.
John M. Quinn, Jr., Esq., Appellee, counsel for Saint Vincent Health Center
David M. Chmiel, Esq., Appellee, counsel for Dr. Aung Pwint Lee, M.D.
R. Kent Hornbrook, Esq., Appellee, counsel for Dr. Aung Pwint Lee, M.D.
Latisha Bernard Schuenemann, Esq., counsel for Cheryl Harris for trust for Z'MS

Pa.R.A.P. 1925(a) OPINION

DOMITROVICH, J., February 3, 2022

Despite consenting to the "Petition for Approval of Settlement and Allocation and Distribution of Settlement Proceeds in a Wrongful Death Action in which a Minor has an Interest Pursuant to PA.R.C.P. No. 2206 and Erie L.R. 2206" [hereinafter "Petition for

Approval of Settlement"], Appellant Harris filed a Notice of Appeal from the Order granting said Petition. Appellant Harris failed to properly serve this Trial Court with her Notice of Appeal, and she filed no Proof of Service indicating she served all counsel of record and the Trial Court. Moreover, Appellant Harris failed to file objections at the trial level to preserve any issues for Appeal. On January 7, 2022, she was directed to file a Concise Statement of Matters Complained of on Appeal within 21 days of the entry of the January 6, 2022, Court Order. However, Appellant Harris failed to comply with this Trial Court's 1925(b) Order, never filing, submitting or serving any Concise Statement to the Trial Court and all counsel of record. Nevertheless, this Trial Court will address the overarching issue of approval of this Petition for Approval of Settlement:

> Whether this Trial Court erred or abused its discretion by granting the Settlement Petition for two million dollars ($2,000,000.00), after hearing argument from Appellant Harris and her counsel, where Appellant Harris consented orally and in writing, and where this Trial Court determined the proposed settlement properly benefits the Surviving Minor Child and is in his best interest?

BACKGROUND

Appellant Harris is the duly appointed Administratrix of the Estate of Zena Scott and the biological mother of the Decedent, Zena Scott, her adult daughter [hereinafter Decedent]. Appellant Harris is the biological maternal grandmother of Decedent's Minor Child Z'MS, and now by law also said Minor Child's adoptive mother. *See Petition for Approval of Settlement* at p.2. As indicated in this Petition for Approval of Settlement, Decedent suffered intraoperative cardiac arrest while under general anesthesia at Saint Vincent Hospital on November 16, 2014, following the planned Cesarean section delivery of Z'MS. Said general anesthesia was claimed to have resulted in profound, catastrophic, and irreversible central nervous system injury to Decedent. *Id.* at para 7. Decedent passed away on November 30, 2015, due to complications arising from this injury. *Id.* at para. 8.

On January 23, 2017, Appellant Harris retained counsel and signed a Contingency Fee Agreement with her attorneys individually and on behalf of the Decedent's estate, whereupon she agreed to pay 40% of any proceeds awarded in addition to her litigation costs and expenses. *See Plaintiff's Exhibit M.* Appellant's counsel subsequently filed suit against Saint Vincent Health Center, Saint Vincent Hospital d/b/a Saint Vincent Health Systems and/or Saint Vincent Health System, Andrea T. Jeffries, M.D. and Pwint Aung Lee, M.D., alleging wrongful death and medical negligence during the preoperative and intraoperative management of Decedent at and by Saint Vincent Health Center on November 16, 2014, during the Cesarean section delivery of Z'MS. *Id.* at para 4.

Appellant Harris and her counsel made several appearances before this Trial Court to address this action. Prior to September of 2021, the settlement negotiations were "stuck" at one-million two-hundred fifty-thousand dollars ($1,250,000), a figure which Appellant Harris was adamantly opposed to accepting. *See, e.g., N.T.* at p. 6. Then, on September 24, 2021, Appellant's counsel managed to acquire a global settlement offer of two-million dollars ($2,000,000) from several Appellees through significant and repeated attempts at negotiation after more than four years of settlement deadlock. *See Plaintiff's Exhibit F; see also N.T.* at p. 7. At the approval hearing,

Appellant Harris's attorney stated, "I think the settlement, as Your Honor is aware and I think has endorsed, I think that's a good settlement in Erie County. No disrespect to Erie County meant, but I think it is an excellent result to achieve under the circumstances." *N.T.* at p. 7.

Appellant Harris approved, consented, and accepted the settlement offer, and signed the Petition for Approval of Settlement that Appellant's counsel submitted to this Court. *See Petition for Approval of Settlement* at p. 15 and 16; *see also N.T.* at pp. 10-11, 17-18. This Trial Court also notes the Petition for Approval of Settlement signed by Appellant Harris referenced that on October 18, 2021, a "Stipulation to Dismiss Fewer Than all Defendants Pursuant to Pa.R.C.P. 229" was filed as to Defendant Andrea Jeffress, M.D. with prejudice thereby agreeing to remove Defendant Andrea Jeffress, M.D. from this caption, and that said Stipulation was submitted with the accompanying Petition for Approval of Settlement. *See Petition for Approval of Settlement at p. 2 and Plaintiff's Exhibit C.*

Appellant's counsel also obtained authorization from the Department of Revenue to allocate all (100%) of the settlement proceeds to the wrongful death action, and documented for this Court and for the Department of Revenue why that allocation was appropriate. Appellant's Counsel included this documentation and authorization within the Petition for Approval of Settlement that Appellant Harris signed, and submitted said Petition to this Court. *Petition for Approval of Settlement*, pp. 5-10.

Appellant's counsel, after "much negotiation" with the Pennsylvania Department of Public Welfare, succeeded in having the outstanding lien for the medical care and treatment of Decedent reduced from $181,398.08 to $100,566.77, an approximately forty-four and one-half percent (44.5%) reduction. *See Plaintiff's Exhibit N*. Appellant's counsel communicated this negotiated lien amount to Appellant Harris and included said efforts in this Petition for Approval of Settlement consented to and signed by appellant Harris. *See Petition for Approval of Settlement* at pp.11-12.

In this same Petition for Approval of Settlement signed and consented to by Appellant Harris, Appellant's counsel also explained in detail how this settlement money would be allocated: First, the money would be distributed, pursuant to MCARE governing policies, in two equal disbursements of one-million dollars each from the MCARE fund. The first payment disbursement would occur twenty (20) days after the approval of this Settlement, and the second would occur one year after that. Second, the Petition consented to and signed by Appellant Harris asked for the settlement proceeds be allocated as follows:

$650,089.47, for Appellant's Counsel for Attorney Fees;

$91,203.98, for Appellant's Counsel for Litigation Costs and Expenses;

$100,566.74, negotiated amount for lien(s) held by Pennsylvania Department of Human Services for medical payments paid on behalf of Decedent;

$1,049,668.88, to be held in trust (trust vehicle to be created through counsel with expertise in this area who appeared by Zoom at this Petition for Approval of Settlement hearing) as Settlement Proceeds for the benefit of Minor Child, "Z'MS"; and

$108,470.93 to Appellant Harris individually as her Settlement Proceeds. *Id.* at para. 40 (emphasis added).

One of Appellant Harris's attorneys, Attorney Hoffman thoroughly explained these distributions on the record. *N.T.* at pp. 6-7. Appellant Harris confirmed at the hearing she had signed and consented to the Petition for Approval of Settlement as to the two-million dollar ($2,000,000.00) settlement when Appellant Harris stated: "I signed the papers so I can get this settled. I want – we want to move on with our lives... I mean I'm not disagreeing about the two million dollars, no, I'm not disagreeing about that at all. We are – we'll take that." *N.T.* at p. 9, 11.

Attorney Latisha Bernard Schuenemann explained at the hearing how the over one million dollars in trust would be established for the benefit of Minor Child Z'MS pursuant to statutory guidelines, *see N.T.* at 12-13. Attorney Schuenemann stated in more detail:

> Your Honor, it is a minor's trust with a proposed corporate fiduciary… so according to Pennsylvania rules the trust will provide that. [sic] It's there for the minor's health, maintenance, education, support. Income can be spent, but the principal has to get court approval up until the age of 18. So it does actually follow the statute. And then at age 18 he does have a window where he can withdraw those funds. If he does not, then it remains in trust and then he can eventually take…half out at 25, the rest out at 30…. But again it's there for his health, maintenance, education, and support; but in accordance with the rules, Wells Fargo as a corporate fiduciary is going to be the trustee of the trust…following the minors rules of the statute. *N.T.* at p.13.

When this Trial Court inquired into how much Minor Child Z'MS would receive per month, Attorney Schuenemann responded:

> [That's] something that has to be sat down with Wells Fargo as far as between [Appellant] Harris and Wells Fargo developing a budget as to [Z'MS's] needs and his expenses and whatnot. In the first petition we are expecting to request certain allowances… allowance is requested for that first year….[It] takes a little bit of time for those funds to be invested, so the income will not be generated certainly right away. So there will be certain allowances we are requesting and we're working on finalizing that at this time. *N.T.* at p. 14.

Attorney Schueneman further confirmed sufficient moneys would exist to meet Minor Child Z'MS's needs during the establishment period, *See N.T.* at p. 14. This Court then confirmed and noted Minor Child Z'MS has no special needs and was a "relatively healthy child." *see N.T.* at p. 15. Procedurally, Attorney Schuenemann explained she would file, present and submit a petition in trust to the Orphan's Court of Erie County for approval. *Id.* Finally, Attorney Dr. Hoffman assured this Trial Court that no costs associated with the establishment of the trust are borne by either Appellant Harris individually or by the contemplated trust created for the benefit of Minor Child Z'MS. *See N.T.* at 16-17.

At the Approval Hearing, Appellant Harris appeared to disagree with the amount she had

agreed and voluntarily signed with her attorneys on behalf of herself and the Decedent's estate. Appellant Harris stated at the hearing:

> **[I] don't believe that the attorneys should get 300,000 then 91,000; and then on the second payout 340,000…. Why am I paying them all this money? I don't believe that that [sic] should be the way….** *N.T.* at p. 9 (emphasis added);
>
> * * * * * *
>
> [after acknowledging that she had signed a contract with her attorneys] from my understanding that you are the judge and that you could, and you could change anything that's on this piece of paper. *N.T.* at p. 10.

This Trial Court then corrected Appellant Harris's mistaken notion of the concept of court discretion by explaining the Trial Court must exercise reasonable and sound discretion, *see N.T.* at p. 11. Appellant Harris then states: **"I mean, I'm not disagreeing about the two million dollars, no, I'm not disagreeing about that at all. We are – we'll take that."** *N.T.* at p. 11 (emphasis added).

Despite Appellant's disagreement over her attorneys' fees and such dispute not being relevant to the scope of this settlement approval hearing, this Trial Court still permitted Appellant Harris to make her argument and the Trial Court considered her concerns. However, this dispute can be better addressed outside of the scope of this Petition's approval for settlement, in either a separate contract action or at a fee dispute with a bar association entity, so as not to unduly delay the settlement of this civil action in the best interest of this Minor Child Z'MS.

Despite her claims to the contrary, every alleged disagreement Appellant Harris had with her counsel was explicitly approved by Appellant Harris in the Contingency Fee Agreement, and in the Petition for Approval of Settlement – a fact that Appellant Harris herself acknowledges repeatedly at the approval hearing, *see N.T.* at 9-11, ("I signed the papers so I can get this settled"); and 17-19 ("I said, 'Well, do what you have to do.'…. I said "Okay, if that's what you can do, that's what we'll settle on and we'll get this out of the way so [Z'MS] and I can move on with our lives.'").

Appellant Harris's counsel explained to Appellant Harris the terms of the distribution of this settlement in detail. Appellant Harris's counsel and his law firm also explained how they are not holding Appellant Harris to the terms of the Contingency Fee Agreement, *see N.T.* at p. 16-17. Instead, her counsel graciously accepted less than the amount specified in the Contingency Agreement for their fees despite their extensive efforts to generate this settlement amount.

This Trial Court noted the extensive and exemplary work Appellant's counsel performed in negotiating and acquiring this settlement. Her counsel explained how he significantly reduced the amount owed to the Department of Health, and his efforts to have the Department of Revenue approve this settlement as a wrongful death allocation of one-hundred percent (100%) of the settlement proceeds. *See N.T.* at p. 7. Appellant's counsel also explained how his firm was reducing their fees in Appellant Harris' favor by absorbing the costs of

litigation incurred for the benefit of Minor Child Z'MS and by reimbursing Appellant Harris for costs of Decedent's headstone. Appellant Harris' counsel further stated they agreed to make multiple charitable donations at the direction of Appellant Harris at no cost. *See N.T.* at 15, 16-17. This Trial Court noted and explained to Appellant Harris at the hearing that such generosity by counsel is exceptionally rare, and that she presented no reason whatsoever to invalidate the Contingency Fee Agreement.

This Trial Court found this Petition for Approval of Settlement was consistent with the statutory purpose of settlement approval hearings in wrongful death actions for surviving minor children. This Trial Court further found the benefits of this settlement were being properly received by the surviving Minor Child Z'MS, and that granting the settlement was in the Minor Child's best interest and properly benefits him. All parties consented in writing and consented orally to approve this Settlement Petition; accordingly, this Trial Court granted Appellant Harris's Petition for Approval of Settlement.

LAW AND ANALYSIS

"No action to which a minor is a party shall be compromised, settled or discontinued except after approval by the court pursuant to a petition presented by the guardian of the minor." Pa.R.C.P. 2039(a). The Pennsylvania Superior Court has plainly and repeatedly stated the policy underlying this Rule:

> "Pa.R.C.P.2039 adds a requirement of court approval for the sole purpose of protecting the *minor's* rights…." *Dengler by Dengler v. Crisman*, 358 Pa.Super. 158, 516 A.2d 1231, 1233 (1986) (emphasis in original; citations omitted)…. [T]he settlement is enforceable against the "negotiators" without court approval. The Rule's primary purpose is to "prevent settlements which are unfair to minors, and to ensure that the minor receive the benefit of the money awarded." *Power by Power v. Tomarchio*, 701 A.2d 1371, 1374 (Pa.Super.1997). In considering whether to approve the settlement of a minor's claim, the court focuses on the best interests of the minor. *Storms ex rel Storms v. O'Malley*, 779 A.2d 548, 556 (Pa. Super 2001).

In the instant case, Appellant Harris signed the Petition for Approval of Settlement and consented to the Settlement offer. *Petition for Approval of Settlement* at p. 15, 16; *see also N.T.* 10-11, 17. Appellant Harris has explicitly stated her consent and approval of the Settlement amount at the hearing on the record with this Trial Court. *See N.T.* at 10. This Trial Court heard, reviewed and considered the details of the settlement to ensure the surviving Minor Child Z'MS receives the benefit of the money settlement. Here, this Trial Court found the surviving Minor Child is appropriately receiving the reasonable and fair amount of one million, forty-nine thousand, six hundred sixty-eight dollars and eighty-eight cents ($1,049,668.88), after attorney fees.

Pursuant to Pa.R.C.P. No. 2039(b)(4), this Trial Court found and concluded said money would be properly placed in a trust created for the benefit, education, care, and maintenance of the child. S*ee Petition for Approval of Settlement* at p. 13 (chart showing over one million dollars ($1,000,000) allocated under settlement for the benefit of Minor Child Z'MS, trust vehicle to be established) and *N.T.* at pp. 13-15 (Attorney Schuenemann's explanation of

how the trust will work consistent with the statute, and the trust will sufficiently meet Minor Child's Z'MS's needs by counsel meeting with Appellant Harris to establish a budget).

Appellant Harris consented verbally and in writing, and also clearly stated she is satisfied with the two-million ($2,000,000.00) dollar settlement. *N.T.* at 11, 12, 17. All Appellees and their counsel agreed to approve this Petition, as evidenced by the record. (*See* Plaintiff's *Petition for Approval of Settlement* at p. 15 and *N.T.* at pp. 3-6, 17, 23, 24). This Trial Court listened and addressed all issues concerning the Settlement Agreement at said hearing for approval and confirmed the surviving Minor Child Z'MS is healthy and does not have any special needs. *See N.T.* at pp. 6-7, 13-15. This Court then granted said Petition for Approval of Settlement, thereby allocating the majority of the settlement proceeds towards and establishing a trust for the benefit and best interests of said Minor Child. This Court also heard and addressed Appellant Harris's claims about her own counsel's fees before granting said Petition and determined they were without merit.

Wherefore, for all the reasons stated herein, this Trial Court requests the Superior Court of Pennsylvania affirm this Trial Court's decision that granted this Petition for Approval of Settlement.

BY THE COURT
/s/ **STEPHANIE DOMITROVICH, JUDGE**

ERIE INSURANCE EXCHANGE A/S/O BATES COLLISION, INC., JAMES MYERS, ANITA MORGAN, LOSSIE AUTO SERVICE AND BENEDICTINE SISTERS OF ERIE, INC., Plaintiff

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant

v.

BATES COLLISION, INC., Additional Defendant

TORTS / NEGLIGENCE

Under Pennsylvania law, there is no cause of action for third party negligent spoliation of evidence.

PRETRIAL PROCEDURE

"Spoliation of evidence" is the non-preservation or significant alteration of evidence for pending or future litigation.

ESTOPPEL / CONTRACTS / EQUITY

Promissory estoppel provides an equitable remedy to enforce a contract-like promise that would be otherwise unenforceable under contract law principles.

ESTOPPEL / CONTRACTS / EQUITY

To establish promissory estoppel, the aggrieved party must show that: (1) the promisor made a promise that he should have reasonably expected to induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise.

EQUITY / ESTOPPEL

The burden of proof rests on the party asserting an estoppel to establish such estoppel by clear, precise, and unequivocal evidence.

EQUITY / ESTOPPEL

In absence of expressly proved fraud, there can be no estoppel based on acts or conduct of the party sought to be estopped, where they are as consistent with honest purpose and with absence of negligence as with their opposites.

EQUITY / ESTOPPEL

Promissory estoppel requires that plaintiffs reasonably rely on definite promise to their detriment.

EQUITY / ESTOPPEL

If, notwithstanding representation or conduct by defendant, plaintiff was still obliged to inquire for existence of other facts and to rely on them also to sustain course of action adopted, plaintiff cannot claim that conduct of defendant was cause of his action, and no estoppel will arise.

EQUITY / ESTOPPEL

Where there is no concealment, misrepresentation, or other inequitable conduct by one party, other party may not properly claim that estoppel arises in his favor from his own omission or mistake.

EQUITY / ESTOPPEL

Estoppel cannot be predicated on errors of judgment by person asking its benefit.

DAMAGES

Damages for breach of contract are not recoverable if they are too speculative, vague, or contingent and are not recoverable for loss beyond amount that evidence permits to be established with reasonable certainty.

INSURANCE / SUBROGATION

Subrogated insurers have no greater rights than their insured.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION
Erie County NO. 12888 of 2018
PA SUPERIOR COURT
1482 WDA 2021

Appearances: Kyle D. Reich, Esq. for Plaintiff, Erie Insurance Exchange
Patricia A. Monahan, Esq. for Defendant, APPELLEE USAA
William C. Wagner, Esq., for Add'l Defendant, Bates Collision, Inc.

Pa.R.A.P. 1925(a) OPINION

DOMITROVICH, J., February 8, 2022

Appellant Erie IE Erie Insurance Exchange ["Appellant Erie IE"] is Subrogee for its above named Subrogors.[1] Appellant Erie IE filed a Civil Complaint in "promissory estoppel" (Contract/equity) with a Cover Sheet indicating the nature of this action is a "Tort" and entering "Subrogation" as the case claim category. Within its Civil Complaint, Appellant Erie IE attempts to classify its sole cause of action as "a theory sounding in promissory estoppel" by alleging failure of Appellee USAA United Services Automobile Association's ["Appellee USAA"] to preserve Appellee USAA's own BMW. Appellant Erie IE labels its spoliation claim as one of promissory estoppel, attempting to circumvent the precedential Pennsylvania Supreme Court case of *Pyeritz v. Commonwealth*, 32 A.3d 637 (Pa. 2011), which prohibits courts from recognizing third-party negligent spoliation as a cause of action. *See N.T.*, September 27, 2021 at 33. However, the underlying substance of Appellant Erie IE's claim is that Appellee USAA allegedly deprived it of evidence – a scrap-value BMW – for a possible future product liability suit against BMW. Appellant Erie IE now seeks to recover from Appellee USAA the entirety of the money Appellant Erie IE paid out to its insureds for this alleged loss of evidence of over one million dollars. However, this is exactly the type of claim the Pennsylvania Supreme Court in *Pyeritz* refused to recognize as a valid cause of action.

Accordingly, this Trial Court followed and applied the precedent established in *Pyeritz*, by granting Appellee USAA's Cross-Motion for Summary Judgment and denying Appellant Erie IE's Motion for Summary Judgment.

On appeal, Appellant Erie IE enumerates five (5) paragraphs in its Concise Statement of Matters Outstanding which this Trial Court has consolidated into one (1) encompassing issue:

[1] Appellant Erie IE's Subrogors are listed in the above caption: Bates Collision, Inc. [hereinafter "Bates"], James Myers, Anita Morgan, Lossie Auto Service and Benedictine Sisters of Erie, Inc.

Whether the Trial Court properly granted Cross-Motion for Summary Judgment and, accordingly, properly denied Motion for Summary Judgment where action facially labeled as "promissory estoppel" is a third party negligent spoliation of evidence case which cannot be recognized as a cause of action under *Pyeritz*; where no promise was ever made to preserve indefinitely the scrap-valued BMW; where Complainant failed to make a prima facie showing sufficient to maintain a cause of action for promissory estoppel; and where Complainant failed to avail itself of adequate remedies at law until such remedies were no longer an option, thereby creating the very situation from which it seeks to recover.

BACKGROUND

On or about January 22, 2017, a fire caused significant damage to Appellant Erie IE's Subrogors and Appellee USAA's BMW. Appellant Erie IE paid out the following amounts to their insured Subrogors:

$1,572,549.00 to Bates Collision, Inc.;
$6,826.00 to Lossie Auto Service;
$14,220.79 to James Myers;
$7,873.76 to Anita Morgan;
$14,451,10 to Bates Collision, Inc. as Garage keeper; and
$6,396.50 to Benedictine Sisters of Erie, Inc.

The Subrogors themselves paid $1,900.00 in deductibles.

Appellee USAA's insured is Robert Bailey, the owner of a 2013 BMW 3 Series, 335i ["BMW"] parked inside Bates's garage. Although Appellee USAA is the Subrogee to Bailey, Appellee USAA did not pursue subrogation against BMW. *See letter dated October 7, 2021, by Patricia A. Monahan, Esq. on behalf of APPELLEE USAA with excerpts from its agent, Frank Jurado.*

Both parties had their experts examine the BMW. Appellant Erie IE claims this fire started as a result of a defective BMW and/or its component parts. Appellee USAA counters this fire started as a result of the negligence of Bates and its mechanics, one of Appellant Erie IE's insureds. Appellee USAA states: (1) Bates was also a direct repair facility for Appellee USAA; and (2) Bates' mechanics failed to follow the "STARS Agreement" in place at the time of the fire, violating the terms, conditions, and manner in which Bates was contractually obligated to repair the BMW. Appellee USAA states Bates at the time of the fire failed to repair and store properly the BMW by not de-energizing and depowering the BMW. Appellee USAA claims Bates's failure caused an arcing to occur near the electric power steering unit or motor of the BMW.

As per Exhibit 6, Appellee USAA's expert states, "the totality of the evidence indicates that the subject 2013 BMW's battery leads were connected at the time of the fire, which was confirmed by the PA State Police Fire Marshal in his report." *Id.* Moreover, Jason Kehl, the Bates' collision mechanic, who worked on the BMW prior to the fire, stated, "he reconnected the battery in order to test the power steering system after his repair or replacement of the Electric Power Steering Rack." *Id.* Bates replaced the original Electric Power Steering Rack of the BMW with a "used salvage or recycled Electric Power Steering Rack" removed from a 2014 BMW 320i Sedan. *Id.* Bates, however, is required not to use a recycled part for the Electric Steering system as such is in violation of said STARS Agreement.

Appellant Erie IE's counsel states Appellee USAA denied there was ever a promise to preserve the subject BMW. Appellee USAA's counsel admits Appellee USAA, as per its letter on February 23, 2017, complied with Appellant Erie IE's request and made arrangements to tow the BMW from Bates to IAA [Insurance Auto Auctions] after the experts' examined the BMW. However, Appellant Erie IE never communicated any length of time for which said BMW was to be stored by Appellee USAA. *See Pl.'s Mot. Summ. J. Ex.'s B and K.*

Meanwhile, it was not until April 25, 2017, sixty-one days after the joint inspection that Appellant Erie IE in desiring to have a "destructive examination" of the vehicle realized the BMW had been sold at an auction on March 30, 2017, thirty-five days after the BMW was stored by Appellee USAA. Appellee USAA's representative stated she requested a "HOLD" on the BMW at the salvage yard through "electronic notes," and had asked the towing company to wrap the BMW. However, due to the lack of necessary documentation for IAA, Appellee USAA's agent indicated the BMW was sold. *See Def.'s Resp. to Pl.'s Mot. Summ. J. and Counterstatement of Material Facts.*

APPLICATION OF LAW AND ANALYSIS

Appellant Erie IE labeled their Complaint as a subrogation tort[2] and alleged "a single count sounding in Promissory Estoppel;"[3] however, this claim "although labeled as promissory estoppel, sounds in tort." *See generally Cornell Narbeth, LLC v. Borough of Narbeth*, 167 A.3d 228, 240 (Pa. Cmwlth. 2017). As Appellee USAA aptly states in its Cross-Motion, Appellant Erie IE's claim "is a masked cause of action for spoliation of evidence." *Def.'s Cross Mot. Summ. J.* at p. 7, para. 38. The facts and essence of Appellant Erie IE's Complaint are of a third party negligent spoliation of evidence claim – a claim which Appellant Erie IE acknowledges is non-actionable under the landmark case *Pyeritz v. Commonwealth*, 32 A.3d 687 (Pa. 2011). *See N.T.* September 27, 2021 at 33.

In *Pyeritz*, the plaintiff brought suit against the Commonwealth after Trooper Ekis, a law enforcement officer employed by the Commonwealth, agreed to preserve a snapped two tree stand belt (hereafter "the belt") as a piece of evidence recovered from the scene which resulted in the death of Mr. Pyeritz. *Id.* at 690. This piece of evidence was important for both law enforcement's criminal investigation into Mr. Pyeritz's death and for the plaintiff's impending product liability suit against the manufacturer of the belt. *Id.* At the request of the plaintiff's attorney, the trooper agreed to hold the belt for the plaintiff after the criminal investigation had concluded. *Id.* The trooper placed the appropriate labels on this evidence to indicate such purpose and intent. *Id.* However, after the trooper was transferred, the Commonwealth disposed of the belt pursuant to standard police protocol. As a result, the plaintiff was unable to bring this evidence to plaintiff's product liability suit against the manufacturer, and instead accepted a settlement of $200,000. *Id.*

The plaintiff then sued the Commonwealth under a theory of negligent spoliation of evidence, arguing the Commonwealth's failure to uphold its promise and preserve the evidence had deprived the plaintiff of the ability to properly pursue its product liability claim against the belt's manufacturer. *Id.* at 690-91. The trial court granted summary judgment for the Commonwealth, which was affirmed by the Commonwealth Court and appealed again to the Pennsylvania Supreme Court. *Id.* at 691.

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[2] *See Plaintiff's Complaint Cover Page.*
[3] *See Plaintiff's Motion for Summary Judgment* at p. 5, para. 22.

The Pennsylvania Supreme Court held in *Pyeritz* that no cause of action exists for negligent spoliation, reasoning that "as a matter of public policy, this is not a harm against which Appellee USAAs should be responsible to protect." *Id.* at 693. *See also Boris v. Vurimindi*, No. 1215 EDA 2020, No. 1553 EDA 2020, 2022 WL 214287 at 10 (Pa.Sup. 2022); *Schwartz v. Taylor*, 2021 WL 4818283 at 3 (E.D. Pa. 2021); and *Turturro v. United States*, 43 F.Supp.3d 434, 459 (E.D. Pa. 2014) (all reiterating that there is no cause of action for negligent spoliation under *Pyeritz*). The Supreme Court further reasoned a negligent spoliation "tort would allow the imposition of liability where, due to the absence of the evidence, it is impossible to say whether the underlying litigation would have been successful." *Pyeritz* at 693-694.

Moreover, the Supreme Court in *Pyeritz* was opposed to awarding damages for the hypothetical value a piece of evidence may have been worth in a prospective products liability suit, stating: **"It could very well be true in this case, for example, that if the belt had not been destroyed, it would have undermined Appellant Erie IEs' suit against the manufacturers** and they would not have realized even the $200,000 settlement they now have in hand." *Id.* (emphasis added).

The Supreme Court in *Pyeritz* then further explains that even when evidence has been fully tested and alternative evidence exists, the value of such evidence in impending litigation is still inherently speculative:

> Of course, in some cases, one party may have already finished testing the evidence by the time it is destroyed, or as here, photographs or other representations of the evidence may still exist. However, depictions are an inadequate substitute for the evidence itself, as other parties cannot inspect and test the evidence independently, which deprives them of the raw material they need to mount a potentially successful claim or defense. If we were to recognize the tort, the inability of the parties to assess meaningfully the impact of the missing evidence on the underlying litigation would result in potential liability based on speculation. *Id.* at 693-94.

The Supreme Court in *Pyeritz* also addresses the public policy argument in its opinion, and makes note of the existing legal remedies that preclude the need to recognize a negligent spoliation claim:

> To the extent recognition of the tort would encourage the preservation of evidence, that benefit is outweighed by the financial burden the tort would impose. If it were recognized, **businesses and institutions would be forced to preserve evidence, at considerable expense, for a myriad of possible claims that might never be brought. Moreover, this goal can be achieved under existing law…. [P]arties to pending and prospective suits … may be able to obtain injunctive relief to preserve evidence.** *See generally Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 433–34 (W.D.Pa.2004) (applying federal law and listing factors for obtaining such relief)…. **[P]arties to suits have an avenue to obtain physical evidence from non-parties, even pre-complaint, under the Rules of Civil Procedure. See Pa.R.C.P. 4003.8, 4009.21–4009.27.** *Id.* at 694 (emphasis added).

In the instant case, the entirety of Appellant Erie IE's claim against Appellee USAA "sounds" in negligent spoliation. Similar to the plaintiff in *Pyeritz*, Appellant Erie IE's claim of damages arises from the loss of evidence that it would have liked to use in a separate product liability case. Appellee USAA, like the Commonwealth entity in *Pyeritz*, is a non-party to Appellant Erie IE's possible product liability suit against BMW (a suit which Appellant Erie IE never initiated, *see N.T.*, September 27, 2021 at p. 9). Appellee USAA, the rightful title holder of this BMW, had a known protocol regarding the scrapping of valueless vehicles after inspection.

Appellant Erie IE indicated it thought it placed Appellee USAA on notice that Appellant Erie IE *might* wish to pursue a subrogation claim against BMW, that Appellant Erie IE *may* want to carry out a destructive investigation of the BMW at a later date in furtherance of this prospective suit, and that Appellant Erie IE wanted the BMW wrapped and preserved for such possible future use. *See Pl.'s Mot. Summ. J., Ex. A, B, C, and D.* However, Appellant Erie IE never specified a timeframe for such preservation, definite or otherwise. *Id.*

Appellee USAA advised Appellant Erie IE it had ***requested*** the BMW be wrapped and preserved, and Appellee USAA advised Appellant Erie IE of the location of where the BMW was being stored. *See Pl.'s Mot. Summ. J. Ex. L.* Once again, no timeframe was ever mentioned, definite or otherwise.

Like the plaintiff in *Pyeritz*, Appellant Erie IE knew where the evidence was being stored and had multiple opportunities to pursue several other remedies at law. With knowledge of where the BMW was stored, Appellant Erie IE could have followed-up with the storage facility to ensure the BMW was being properly preserved. Appellant Erie IE similarly could have made an offer to purchase the BMW or pursued a court order to preserve the BMW. Appellant Erie IE opted not to pursue any of these available and adequate remedies despite the alleged value of the BMW in Appellant Erie IE's possible future product liability lawsuit.

Instead, much like the plaintiff in *Pyeritz*, Appellant Erie IE unreasonably relied on others to preserve evidence that was only of value to itself, made no effort to avail itself of the adequate remedies at law, and now seeks to recover for the loss of speculatively valued evidence. As the Supreme Court states repeatedly in *Pyeritz*, such a cause of action is not recognizable in the state of Pennsylvania. Therefore, Appellant Erie IE has no cause of action against Appellee USAA and has failed to state a claim upon which relief can be granted. Accordingly, this Court granted Appellee USAA's Cross-Motion for Summary Judgment and thereby denied Appellant Erie IE's Motion for Summary Judgment.

Appellant Erie IE had multiple remedies at law available to it before the BMW was salvaged for scrap – a point which Appellant Erie IE themselves not only concedes but uses as a linchpin for its argument. *Pl.'s Memorandum in Support of its Mot. For Summ. J*, pp. 16-17. Appellant Erie IE also acknowledges in its own pleadings that any one of these available remedies would have effectively preserved the BMW and prevented the harm allegedly suffered. *Id.* However, Appellant Erie IE chose not to avail itself of any of these adequate remedies, and now seeks to recover in equity what it failed to pursue in law.

Appellant Erie IE claims this case is not a negligent spoliation action at all, but instead a contract action "sounding in" promissory estoppel. *See Plaintiff's Complaint, cf. Transcript of Hearing* at 9. For such an action to be recognized, Appellant Erie IE must establish a valid cause of action under the theory of Promissory Estoppel. In Pennsylvania, three elements

are required to make a prima facie showing for Promissory Estoppel:

(1) the promisor made a promise that he should have reasonably expected to induce action or forbearance on the part of the promisee;
(2) the promisee actually took action or refrained from taking action in reliance on the promise; and
(3) injustice can only be avoided by enforcing that promise.
Gutteridge v. J3 Energy Group, Inc., 165 A.3d 908, 919 (Pa. Sup. 2017).

Moreover, promissory estoppel is under the umbrella of equitable estoppel, and has the same evidentiary standard. *Josephs v. Pizza Hut of America, Inc.*, 733 F. Supp. 222, 223-224 (W.D. Pa. 1989). Accordingly, estoppel must be shown by clear and convincing evidence. *Id.* "The essential elements of estoppel are an inducement by the party sought to be estopped to the party who asserts the estoppel to believe certain facts to exist – and the party asserting the estoppel acts in reliance on that belief." *Id.* at 226-227 (quoting *Blofsen v. Cutaiar*, 333 A.2d 841 (Pa. 1975)). No estoppel exists "where the complainant's act appears to be … the result of his own will or judgment [rather than] the product of what defendant did or represented." *In Re Tallarico's Estate*, 425 Pa. 280, 288-89, 228 A.2d 736, 741 (1967).

Furthermore, the promise or representation must originate with the promisor, and not be merely a self-serving promise originating with and acted upon by the promisee. *See, e.g., Home for Crippled Children v. Prudential Ins. Co. of America*, 590 F.Supp. 1490, 1504-1505 (Pa W.D. 1984) ("Mrs. Phillips never made such a remark. Rather, **the words were entirely those of Mrs. Hoffman.** Indeed, Mrs. Phillips **never referred specifically to Jason** or Deborah Sentner and **never stated that coverage was available to Jason.**"(emphasis added)(internal citations omitted)).

The promise or conduct also "must of itself have been sufficient to warrant the action of the party claiming the estoppel…." *Tallarico*, 228 A.2d at 741. "Where there is no concealment, misrepresentation, or other inequitable conduct by the other party, a [plaintiff] may not properly claim that an estoppel arises in his favor from his own omission or mistake…." *Id.* Finally, "[e]stoppel cannot be predicated on errors of judgment by [the] person asking its benefit." *Id.*

In the instant case, the alleged "promise" relied upon by Appellant Erie IE originates with Appellant Erie IE itself by its own admission. *See Pl.'s Mot. Summ. J.* at p.2, para. 6-8 and *Pl.'s Mot. Summ. J. Ex. A, B, C, and D.* Appellee USAA, by Appellant Erie IE's own recounting of the facts, complied with Appellant Erie IE's initial request to wrap and preserve the BMW, and then later requested that IAA wrap and preserve the BMW and informed Appellant Erie IE of this request. *Id.*

Appellant Erie IE claims the "promises" which induced its lack of action to pursue legal remedies at law were: (1) Appellee USAA's initial lack of a response to Appellant Erie IE's letters; (2) statements made by Appellee USAA's fire investigation expert to "*request* that the vehicle wrapped and preserved;" and (3) Frank Jurado's response email answering Appellant Erie IE's inquiry as to the storage location of the BMW and informing Appellant Erie IE that, pursuant Appellant Erie IE's request, Appellee USAA had ***requested*** that the BMW be wrapped and preserved for potential additional investigation. *See Pl.'s Mot. Summ.*

J. Ex. L (emphasis added). Neither party at any point specified a definite duration of time for which the BMW would be maintained, nor did Appellee USAA receive any compensation for such storage and preservation.

The Exhibits submitted along with the facts pled by both parties demonstrate Appellee USAA never offered to preserve the BMW, but instead relayed Appellant Erie IE's request to wrap and preserve said BMW. Even when all facts presented and inferences derived therefrom are viewed in the light most favorable to Appellant Erie IE, the only promise made by Appellee USAA was to ***request*** the BMW be wrapped and preserved. Appellant Erie IE's own Exhibits show the letter sent by Appellee USAA's representative Frank Jurado expressly contains the language "requested" and does not contain any form of the words "we will ensure." Even if we assume – despite ample evidence to the contrary – this communication was intended to be a promise, the very evidence presented by Appellant Erie IE demonstrates this promise would only extend toward making a request for the BMW to be preserved.

Moreover, all communications containing the words "shall" and stating that Appellee USAA "will" preserve the BMW originate with Appellant Erie IE. Appellant Erie IE also points to communications made by Appellee USAA's fire investigation expert – a person who by her own admission only possesses the authority to request certain actions be undertaken by Appellee USAA – as evidence of the alleged promise, *see Pl.'s Mot. Summ. J. Ex.'s B, C, D* (communications in question); c.*f. Pl.'s Mot. Summ. J. Ex. I* (selections from deposition of said expert). However, even these communications were made in direct response to Appellant Erie IE's own proclamations, as reflected in Appellant Erie IE's own Motion for Summary Judgment and accompanying Exhibits. *Id.* at para. 5-8; *Ex.'s B, C, D, K, and L.*

Stated differently, Appellant Erie IE's own Exhibits and averments show the promise originated with Appellant Erie IE, and was for Appellant Erie IE's own benefit. Therefore, the alleged promise was self-serving by originating from Appellant Erie IE, not with Appellee USAA. Frank Jurado only "requested" on behalf of Appellant Erie IE that the BMW be preserved.

For all of these reasons, this Trial Court finds and concludes Appellant Erie IE failed to make its prima facie showing that Appellee USAA made a promise to preserve the BMW.

Appellant Erie IE also fails to make a prima facie showing that Appellee USAA should have reasonably foreseen its conduct would induce Appellant Erie IE to abandon all of its available adequate legal remedies to preserve the BMW. In order to make this showing, a complainant must show that the conduct itself was reasonable given the circumstances: "Where there is no concealment, misrepresentation, or other inequitable conduct by the other party, a [plaintiff] may not properly claim that an estoppel arises in his favor from his own omission or mistake…. Estoppel cannot be predicated on errors of judgment by [the] person asking its benefit." *Tallarico* at 741.

A reasonable actor, when faced with the possibility of losing a piece of evidence the reasonable actor believes to be worth over one million dollars in a prospective suit, would not rely on an email that another party had "requested" the evidence be preserved. A reasonable actor, when faced with the potential risk of losing such a highly valuable piece of evidence, would instead pursue any of the several readily-available adequate remedies at law.

In *Pyeritz*, the Pennsylvania Supreme Court suggests plaintiff's counsel was unreasonable to rely upon a trooper's promise to preserve the evidence rather than utilizing legally available

channels available to secure the evidence for themselves. *Id.* at 693-694. In the instant case, the communication upon which Appellant Erie IE "relies" is far less direct and substantial. The letter stating Appellee USAA had requested the BMW be marked for preservation is, at most, a promise to ***request*** that the BMW be marked and preserved. There is nothing in this letter that communicates any affirmative assumption of responsibility for the BMW on the part of Appellee USAA. Therefore, Appellant Erie IE's expectation that Appellee USAA would affirmatively and actively ensure the preservation of this BMW, where no legal obligation existed to do so, and where Appellee USAA never communicated an intent to do so, is unreasonable.

Moreover, Appellant Erie IE alleges this BMW was potentially worth over one million dollars to Appellant Erie IE in a possible future product liability case against BMW. However, this BMW was worth only salvageable scrap-value to Appellee USAA. A reasonable actor, especially a reasonable and sophisticated insurance provider such as Appellant Erie IE, would have utilized any one of the readily available adequate remedies at law, such as a contract or a court order, to either take possession of the BMW or otherwise ensure the BMW's preservation.

In the instant case, Appellant Erie IE chose not to avail itself of any adequate remedies at law and instead unreasonably relied on mere requests. Moreover, Appellant Erie IE knew where the BMW was being stored. Despite the BMW's alleged importance and value to Appellant Erie IE's prospective lawsuit, Appellant Erie IE made no efforts to visit or communicate with the IAA lot to ensure that the BMW was being properly preserved. Instead, Appellant Erie IE chose to simply wait more than sixty days without following-up with either the IAA lot to ensure the BMW was being preserved or with Appellee USAA to specify a timeframe for the preservation. As stated in *Tallarico*, "errors of judgment" on the part of the promisee are not sufficient grounds for estoppel. *Tallarico* at 741. Therefore, this Trial Court finds and concludes Appellant Erie IE's errors in judgment and its unreasonable reliance are not sufficient grounds to maintain an action in estoppel, especially where no valid promise exists in the first place.

Moreover, no evidence presented by either party demonstrates Appellee USAA's agents engaged in any fraud, misrepresentation, or "other inequitable conduct." *See Tallarico* at 741. Nothing in Appellee USAA's communications to Appellant Erie IE should have reasonably induced Appellant Erie IE to abandon its legally available, more reliable adequate remedies. The emails and written communications to which Appellant Erie IE points never specify a time period in which Appellee USAA would preserve the BMW, definite or otherwise. Pursuant to *Pyeritz*, Appellee USAA had no legal duty to preserve this BMW in the first place. Therefore, any expectation or assumption that Appellee USAA would continue to hold onto this BMW indefinitely, absent a contract or court order to the contrary, is facially unreasonable; ergo, Appellant Erie IE's reliance upon this unreasonable expectation is also unreasonable.

For all of these reasons, Appellant Erie IE's reliance on the alleged promise is facially unreasonable, and therefore not reasonably foreseeable by Appellee USAA. Therefore, this Trial Court finds and concludes Appellant Erie IE has failed to make its prima facie showing that Appellee USAA should have reasonably expected its communications to induce Appellant Erie IE's Appellant Erie IE's reliance.

Finally, there is no estoppel "where the complainant's act appears to be … the result of his own will or judgment [rather than] the product of what defendant did or represented." *Tallarico* at 741; *see also, e.g., Josephs v. Pizza Hut of America, Inc.* at 227 (plaintiff's choice was not sufficiently supported by evidence of inducement and reasonable reliance, even where specific assurances were given to plaintiff during the decision making process).

In the instance case, Appellant Erie IE created this situation itself by not availing itself of the several aforementioned adequate remedies at law. Appellant Erie IE's chose to rely on mere requests to preserve the BMW rather than pursue the much safer adequate remedies at law that were readily available to Appellant Erie IE at the time, despite knowing the clearly foreseeable risk of such reliance. Moreover, the evidence and pleadings submitted by Appellant Erie IE demonstrate that this choice was not the "product" of any representation or inducement by Appellee USAA but instead the result of its own will and judgment. *See Tallarico* at 741. After creating the very situation which caused its alleged harm, Appellant Erie IE should not then be able to channel this Trial Court's equity powers in an alleged action for promissory estoppel after the fact.

Appellant Erie IE chose to rely on mere requests by Appellee USAA for the BMW to be preserved rather than pursue readily available alternatives to secure and preserve the BMW itself. For the reasons set out above, this choice was unreasonable, and the harm suffered was not the result of any inducement or inequitable conduct by Appellee USAA but instead directly resulted from Appellant Erie IE's own "errors in judgment." *See Tallarico* at 741. While this choice is certainly regrettable in hindsight, the consequences of Appellant Erie IE's Appellant Erie IE's failing to avail itself of available adequate remedies at law must fall upon Appellant Erie IE's own shoulders: "errors in judgment" without evidence of fraudulent inducement or other inequitable conduct are not sufficient grounds upon which to maintain an action for estoppel. *Id.*

Appellant Erie IE as a large and sophisticated insurance company is well-versed in the importance and usefulness of contracts. Appellant Erie IE was also fully capable of pursuing subpoenas to protect its interest in securing possession of the BMW and of preparing and drafting a written contract to preserve the BMW. Appellant Erie IE also could have made an offer to purchase said BMW for itself to obtain rightful title after the joint investigation. *See Pyeritz* at 694 (discussing proper alternatives to preserve evidence); *c.f. Pl.'s Mot. Summ. J.* at pp. 25-26; *and N.T.*, September 27, 2021 at p. 47. Appellant Erie IE should not be now permitted to avail itself of equitable remedies after willfully choosing not to utilize any of the adequate remedies at law. Accordingly, this Trial Court found and concluded Appellant Erie IE also failed to make a prima facie showing that injustice could be avoided only by enforcing the alleged promise.

As to Appellant Erie IE's alleged claim of "subrogation" with Appellee USAA, this Trial Court agrees with Appellee USAA's counsel in her Cross-Motion for Summary Judgment: Appellant Erie IE's subrogation claim against Appellee USAA fails as a matter of law because Appellee USAA did not cause the property damage to which Appellant Erie IE was contractually obligated to pay its insureds.

Appellant Erie IE has subrogation rights to Bates Collisions' recovery against any party liable for loss. Because the loss here is the direct and accidental loss of or damage to covered property resulting from the fire, Appellant Erie IE is entitled to recover from any party that

caused or contributed to the fire damage. While the exact cause of the fire is unknown, it is known and undisputed that Appellee USAA did not cause the fire nor the ensuing property damage to which Appellant Erie IE was contractually obligated to pay its insureds. Because none of Appellant Erie IE's Subrogors have a claim against Appellee USAA, and because a subrogee's rights extend no further than those of the subrogor, Appellant Erie IE lacks standing to pursue a subrogation claim against Appellee USAA. *See Insurance Co. of North America v. Carnahan*, 446 Pa. 48, 50, 284 A.2d 728, 729 (1971) (declaring that insurance company's rights as subrogee do not rise above those of their insureds); *see also, e.g., Republic Ins. Co. v. Paul Davis Systems of Pittsburgh South, Inc.*, 543 Pa. 186, 670 A.2d 614 (1995) and *Pennsylvania Mfrs. Ass'n Ins. Co. v. Wolfe*, 534 Pa. 686, 626 A.2d 522 (1993). Therefore, Appellant Erie IE has no subrogation rights against Appellee USAA, and Appellant Erie IE's subrogation claim against Appellee USAA is non-actionable.

Moreover, the damages asserted by Appellant Erie IE are of the same speculative nature expressly disallowed by *Pyeritz*. In *Lobolito, Inc. v. N. Pocono Sch. Dist.*, 755 A.2d 1287, 1293 (2000), the Pennsylvania Supreme Court states damages in a promissory estoppel claim are limited to amounts lost and expended in reliance upon an alleged promise. Assuming arguendo that promissory estoppel is applicable to the instant case, Appellant Erie IE's damages in an alleged promissory estoppel are limited to amounts lost and expended in reliance upon an alleged promise, not the entire amount Appellant Erie IE expended with their Subrogors of over one and a half million dollars. Appellant Erie IE seeks to recover and assign to Appellee USAA the entirety of its policy payout costs, an amount arrived upon entirely on the basis of Appellant Erie IE's prospective possible recovery against BMW as a subrogor in a possible future product liability case. However, *Pyeritz* expressly prohibits recovery under a theory of negligent spoliation for this exact reason. *Id.* at 693.

Damages that cannot be proven with reasonable certainty are generally not recoverable. *Spang & Co. v. U.S. Steel Corp.*, 545 A.2d 861, 866 (Pa. 1988). Damages are considered speculative where damages are not identifiable despite difficulties in calculating an amount. *Newman Dev. Grp. Of Pottstown, LLC v. Genuardi's Family Mkt., Inc.*, 98 A.3d 645, 661 (Pa. Super. 2014), and *Printed Images of York, Inc., v. Mifflin Press, Ltd.*, 133 A.3d 55, 59-60 (Pa. Super. 2016).

In the instant case, no proof exists that a manufacturing defect of the BMW caused the fire; therefore, Appellant Erie IE cannot ascertain and identify its damages as said damage claims are dependent upon Appellant Erie IE's ability to establish BMW caused its insured's damages. However, even if Appellant Erie IE could establish that BMW was the likely cause of the fire, Appellant Erie IE's damages would still be speculative under *Pyeritz*.

The Court in *Pyeritz* also reiterated that the value of lost evidence in a prospective case is inherently speculative, as it may just as easily have harmed the plaintiff's hypothetical case as helped it. *Id.* at 693-694. In the instant case, Appellant Erie IE themselves admits that the investigation of the BMW was incomplete, and that the BMW's probative value in Appellant Erie IE's hypothetical product liability lawsuit against BMW accordingly could not be fully ascertained or confirmed.

However, even if we were to assume that the cause of the fire was fully determined before the BMW was destroyed, the Court in *Pyeritz* clearly and explicitly states that even when the evidence has been fully investigated before its destruction, its value in a prospective

or pending case is still speculative because it is impossible to determine whether it would have ultimately held a positive or negative effect on the would-be plaintiff's case. *Id.* at 694. Thus, the Pennsylvania Supreme Court has already more than sufficiently explained why these exact types of damages complained of in the instant case are speculative and non-recoverable; accordingly, this Trial Court found and concluded Appellant Erie IE's claimed damages arising from the loss of uncertain evidence in a possible future product liability suit are also speculative and non-recoverable.

Appellant Erie IE attempts to contravene *Pyeritz*'s reasoning by claiming that Appellee USAA violated a duty to preserve the evidence, thereby creating a bailment and shifting the burden of proving damages onto Appellee USAA as the alleged bad actor. However, for reasons already discussed at length, this claim is without merit: The Pennsylvania Supreme Court in *Pyeritz* held that no independent cause of action exists for negligent spoliation, and expressly stated that there is no legal duty for third parties to preserve evidence for others. *Id.* at 693-694. Moreover, the Pennsylvania Supreme Court also explicitly states:

> "To the extent recognition of the tort would encourage the preservation of evidence, that benefit is outweighed by the financial burden the tort would impose. **If it were recognized, businesses and institutions would be forced to preserve evidence, at considerable expense, for a myriad of possible claims that might never be brought.** Moreover, this goal can be achieved under existing law." *Id.* at 694 (emphasis added).

Thus, the Pennsylvania Supreme Court makes it abundantly clear that there is a strong, public-policy supported presumption against requiring businesses to preserve evidence without a court order or contract to the contrary. Because Appellee USAA was not under any preexisting legal or contractual obligation, and because Appellee USAA made no promise to affirmatively preserve the BMW, the uncertainty of the BMW's probative value was not created by any breach of duty or bad act on the part Appellee USAA. Accordingly, the burden of showing that the damages are not speculative remains with Appellant Erie IE, and Appellant Erie IE is not capable of meeting said burden under *Pyeritz*.

Appellant Erie IE's counsel claims "[t]here are no reported Pennsylvania decisions with similar facts." *Plaintiff's Memorandum supra* at 19. As explained in detail above, the facts of this case are actually quite similar to those in *Pyeritz*. Nevertheless, Appellant Erie IE's counsel argues this Trial Court should instead apply a California case, *Cooper v. State Farm Mutual Automobile Ins. Co.*, 177 Cal. App.4th 876, 902, 99 Cal. Rptr. 3d 870, 891 (2009), and claims said California case is "persuasive authority." *Id.*

However, the California case of *Cooper* is factually distinguishable from the instant case in that the plaintiff in *Cooper* sued his own insurance company under promissory estoppel alleging State Farm disposed of his "suspected defective tire" after being informed of the importance of the tire to insured's product liability against manufacturer. The California trial court dismissed the case, finding plaintiff would be unable to show he would have prevailed in his case against Continental Tire had the tire not been destroyed. The California Appellate Court disagreed and reversed, holding State Farm's promise to preserve the vehicle created an independent duty, under contractual principles and State Farm's insured met all the requirements of a promissory estoppel claim.

State Farm's responsibility in *Cooper* cannot be separated from its subrogation relationship with its own insured. In the instant case, no subrogation responsibility exists between Appellant Erie IE and Appellee USAA.

Moreover, even if we were to apply California law to the instant case, Appellant Erie IE would still fail to make a prima facie showing of promissory estoppel. In California, the four elements of promissory estoppel are "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." *US Ecology, Inc. v. State of California*, 129 Cal.App.4th 887, 901 (2005); *Joffe v. City of Huntington Park*, 201 Cal.App.4th 492, 513 (2011); *see also Aceves v. U.S. Bank N.A.*, 192 Cal.App.4th 218, 225 (2011). Here, the communication between Appellee USAA and Appellant Erie IE in no way establishes a promise "clear and unambiguous in its terms;" as stated above in greater detail, the alleged promise here lacks specificity, only stating that Appellee USAA ***requested*** that the BMW be wrapped and preserved. Neither party ever communicates a timeframe for the BMW's preservation, nor is any compensation ever discussed.

The terms here are unclear, nonspecific, and non-definite; as discussed in greater detail above, the nature and level of Appellant Erie IE's supposed reliance on Appellee USAA's communications is patently unreasonable. Therefore, Appellant Erie IE fails to make a showing for promissory estoppel even under California law.

Finally, Appellant Erie IE contends this Trial Court failed to consider the public policy ramifications of not recognizing its cause of action against Appellee USAA. However, this Trial Court notes that the public policy question was already addressed and answered fully by the Pennsylvania Supreme Court in *Pyeritz*:

> To the extent recognition of the tort would encourage the preservation of evidence, that benefit is outweighed by the financial burden the tort would impose. If it were recognized, businesses and institutions would be forced to preserve evidence, at considerable expense, for a myriad of possible claims that might never be brought. Moreover, this goal can be achieved under existing law. Although Pennsylvania law does not permit an equity action for discovery, see Cole v. Wells, 406 Pa. 81, 177 A.2d 77, 80 (1962), parties to pending and prospective suits, upon an appropriate showing, may be able to obtain injunctive relief to preserve evidence. *See generally Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 433-34 (W.D.Pa.2004) (applying federal law and listing factors for obtaining such relief). In addition, parties to suits have an avenue to obtain physical evidence from non-parties, even pre-complaint, under the Rules of Civil Procedure. *See* Pa.R.C.P. 4003.8, 4009.21-4009.27.

Therefore, this Trial Court finds and concludes that there is no public policy issue here that has not already been addressed at length. Appellant Erie IE was fully capable of entering into a contract with Appellee USAA to preserve the BMW, or of purchasing the BMW. Appellant Erie IE was fully capable of traveling to the IAA holding lot to ensure that the BMW was preserved. Appellant Erie IE was fully capable of initiating its product liability suit against BMW and then utilizing the existing Rules of Civil Procedure to acquire and preserve the evidence, or of obtaining preemptive injunctive relief to preserve the BMW.

The failure of a sophisticated insurance company like Appellant Erie IE to avail itself of any of the several readily available legal and self-help remedies does not create a public policy issue, and neither does Appellant Erie IE's unreasonable reliance upon a non-binding, non-specific and ambiguous communication.

For all of the above stated reasons, Appellant Erie IE's issues on appeal are without merit, and this Trial Court respectfully requests the Pennsylvania Superior Court affirm this trial court's rulings.

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

MILISSA A. ENDERS, Plaintiff/Appellee

v.

TERRY L. KERSTETTER, Defendant/Appellant

CONTEMPT

The difference between civil contempt and criminal contempt is that the civil contempt has as its dominant purpose to enforce compliance with an order of court for the benefit of the party in whose favor the order runs while criminal contempt has its "dominant purpose" in "the vindication of the dignity and authority of the court and to protect the interests of the general public."

CONTEMPT

If the dominant purpose is to prospectively coerce the contemnor to comply with an order of the court, the adjudication of contempt is civil. If, however, the dominant purpose is to punish the contemnor for disobedience of the court's order or some other contemptuous act, the adjudication of contempt is criminal.

CONTEMPT

In order to sustain a finding of civil contempt, the complainant must prove certain distinct elements by a preponderance of the evidence: (1) the contemnor had notice of the specific order or decree which is alleged to have disobeyed; (2) the act constituting the contemnor's violation was volitional; and (3) the contemnor acted with wrongful intent.

RES JUDICATA / COLLATERAL ESTOPPEL

Res judicata, or claim preclusion, prohibits parties involved in prior, concluded litigation from subsequently asserting claims in a later action that were raised, or could have been raised, in the previous adjudication. Collateral estoppel is similar in that it bars re-litigation of an issue that was decided in a prior action, although it does not require that the claim as such be the same.

RES JUDICATA

The four elements of res judicata are: (1) the issue or issues in the current case have already been adjudicated on in a prior proceeding; (2) the cause of action in the current proceeding is the same as the cause of action in a prior proceeding; (3) the parties to the current action are the same parties to the prior action; and (4) the quality and capacity of the parties are the same as they were in the prior proceeding.

COLLATERAL ESTOPPEL

The four basic elements of collateral estoppel are: (1) the issue is the same as in the prior litigation; (2) the prior action resulted in a final judgment on the merits; (3) the party against whom the doctrine is being asserted is the same as the party in the prior action; and (4) the person against whom the doctrine is being asserted had a full and fair chance to litigate the issue(s) in the prior action. Courts sometimes impose a fifth element of collateral estoppel namely, that resolution of the issue in the prior proceeding was essential to the judgment.

APPEAL AND ERROR

Issues not raised in the lower court are waived and cannot be raised on appeal.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
FAMILY DIVISION
Erie County Docket No. 13301-2013
PA SUPERIOR COURT
145 WDA 2022

Appearances: Terry L. Kerstetter, *pro se*, Appellant
Patrick W. Kelley, Esq., counsel for Appellee Milissa A. Enders

OPINION

Domitrovich, J., February 22, 2022

This custody matter is before the Court on Terry L. Kerstetter's [Appellant] timely appeal from a January 11, 2022, Order, denying Appellant's December 8, 2021, Petition for Contempt of Custody Order after he failed to carry his burden of proof under the preponderance of the evidence standard. Appellant did not enter or offer properly any evidence in support of his claims before or during his January 11, 2022, hearing.

Appellant failed to serve properly this Trial Court with his Notice of Appeal under Rule 1925(a)(2)(i), and he filed no Proof of Service indicating he served counsel of record. Moreover, Appellant did not file any objections or motions at the hearing to preserve any issues for appeal. Appellant also attached improperly his so called "exhibits" that he failed to present to the Trial Court at or before the custody contempt proceeding.

Appellant *pro se* failed to serve the Trial Court, which this Trial Court discovered after reviewing the list of appeals on the AOPC's UJS Portal Application. Upon learning of Appellant's lack of notice to this Trial Court, this Trial Court directed Appellant on February 3, 2022, to file a Concise Statement of Matters Complained of on Appeal within twenty-one (21) days of the entry of the January 11, 2022, Court Order. However, this Trial Court later discovered its Order was not necessary as Appellant, who did not properly serve this Trial Court, included in his Notice of Appeal a three-page list of eight (8) complaints and comments that is, in essence, his Concise Statement of Issues, even though this document was not labeled as such.

On appeal, Appellant raises eight (8) claims in his unlabeled Concise Statement. However, these claims can be consolidated into one overarching issue:

> Whether this Trial Court erred or abused its discretion by denying Appellant's December 8, 2021, Petition for Contempt of Custody Order where Appellant failed to meet his burden of proof under the preponderance of evidence standard, and where Appellant failed to present to this Trial Court and opposing counsel any of the exhibits in support of his claims which he now attaches after the hearing and decision has been rendered, and where all of Appellant's claims and factual averments were already heard and addressed before the Trial Court in prior proceedings and are therefore precluded from being re-litigated under the doctrines of res judicata and collateral estoppel.

BACKGROUND

Appellant *pro se* has a long, prolific filing history with regards to this case. Appellant has filed no fewer than eight (8) Petitions for Contempt of Custody Orders since the commencement of this case in 2013, only one of which was meritorious. Moreover, Appellant previously filed both a contempt petition and a petition for special relief over these exact

same claims and factual averments, both of which were heard and denied by Judge Elizabeth Kelly of the Erie County bench for the reasons stated in her Court Orders. *See Order dated May 10, 2021, and Order dated September 29, 2021.*

In the instant case, Appellant filed a Petition for Contempt of Custody Order on December 8, 2021, [hereafter the "December 8, 2021, Contempt Petition"]. In this December 8, 2021, Contempt Petition, Appellant alleged Mother Milissa A. Enders [Appellee] was in violation of the October 30, 2020, Custody Consent Agreement. The Order, in relevant part, provides as follows:

> Neither party shall consume alcohol while the child is in his or her presence and neither party shall engage in illegal drug activity.
>
> * * * * *
>
> This custody arrangement may be modified by an agreement of the parties when required for the best interest of the child. The term "mutual agreement" contemplates good faith discussions by both parents to reach an agreement as to specific dates and times of partial custody or visitation, and the unilateral determination of one parent to deny contact shall be viewed as a violation of this provision. *Custody Consent Agreement dated Oct. 30, 2020*, paras. 5 and 16; *c.f. Petition for Contempt of Custody Order dated December 8, 2021.*

In the instant case, Appellant claims Appellee is currently in violation of the October, 30, 2020, Custody Order, alleging: (1) Appellee abused alcohol on prior occasions resulting in Office of Children and Youth [OCY] involvement and was allegedly convicted of child endangerment; and (2) Appellee violated the October 30, 2020, Custody Order by not reaching a mutual agreement with Appellant regarding partial custody of Minor Child.

However, Appellant offered no evidence in support of either of these claims before or during the January 11, 2022, contempt hearing. *See Petition for Contempt of Custody Order dated December 8, 2021, and Tr.* at 12-14. Appellant also inaccurately and incorrectly argued confidential documents that Appellant had subpoenaed were filed by the subpoenaed party into the public record. This Trial Court repeatedly informed Appellant that no such documents had been received or filed, and Appellant has the responsibility to ensure the subpoenas are properly served and evidence he wishes to use are properly entered into the Record. *Tr.* at 12-14. This Trial Court also explained to Appellant how Appellant may ensure that subpoenaed documents are properly authenticated and entered into evidence. *Tr.* at 13-14. Appellant was unreceptive to receiving this information, and instead continued to argue with this Trial Court about said documents. *Id.* at 14. Attorney Kelley for Appellee also tried to explain the procedure to Appellant, but to no avail.

In light of Appellant's insistence and in an attempt to accommodate Appellant as a *pro se* litigant, this Trial Court further inquired as to what documents Appellant was referring to, reiterating yet again that no documents from Office of the Children and Youth of Erie County had been received and that Appellant himself was not offering any evidence to support his claims:

Appellant:	It's interesting because I wonder why they actually sent me those from Harrisburg.
The Court:	Sent you what from Harrisburg? You don't have anything for me today sir. I don't see any paperwork in front of you.

Tr. at 14. *See also, c.f.*, Tr. at 3 (Appellant asking this Trial Court for a copy of the October 30, 2020, Order because he did not have anything with him).

Upon hearing this, **Appellant replied "That's okay. There's always next time."** *Tr*. at 13. *Emphasis added.*

Moreover, Appellant's December 8, 2021, Contempt Petition contains no alleged violations committed by Appellee that were active, ongoing, or current. Both violations alleged by Appellant had already been addressed by Judge Elizabeth Kelly of the Trial Court on two separate previous occasions, and, therefore, are precluded from being considered again under the doctrines of res judicata and collateral estoppel. *See Order dated May 10, 2021, and Order dated September 29, 2021; see also Tr.* at 9.

Historically, Appellant had previously filed a Petition for Contempt of Custody Order on March 8, 2021, [hereafter the "March 8, 2021, Contempt Petition"] in which Appellant alleged, in relevant part, that Appellee had violated the Custody Order by consuming alcohol in front of Minor Child. Said March 8, 2021, Contempt Petition was denied by Judge Elizabeth K. Kelly on May 10, 2021. *See Order dated May 10, 2021*. Appellant then filed a subsequent Petition for Special Relief on July 14, 2021 [hereafter the "July 14, 2021, Special Relief Petition"], requesting in relevant part that Appellee enroll in drug and alcohol treatment "immediately" and for an emergency plan of action in the event Appellee became incarcerated as a result of her pending criminal charge. *See Petition for Special Relief dated July 14, 2021*. This July 14, 2021, Special Relief Petition was also clearly denied by Judge Elizabeth K. Kelly on September 29, 2021:

> Milissa A. Enders [Appellee] … ***is already engaged in treatment to address the concerns raised regarding her alcohol use and she remains available to serve as the Child's custodian.*** Once Father [Appellant] is released from incarceration, allowing him the ability to exercise physical custody of the Child, he may pursue the same through an appropriate petition requesting modification of the October 30, 2020, Order of Court governing custody of the Child. *Order dated September 29, 2021*. (Emphasis added).

In the instant case, Appellee through her credible testimony and argument by her counsel, Attorney Patrick Kelley, rebutted Appellant's claims. Appellee gave credible and candid testimony that Appellee is already enrolled and has been involved in intensive outpatient alcohol treatment that Appellee is and has been sober since Appellee started her treatment, and that the treatment facility can conduct a random urine test on Appellee at any time. *Tr.* at 11-12. Appellee also gave credible and candid testimony that OCY was not involved after the previous 2018 and 2020 evaluations — the same evaluations upon which Appellant's claims are based, and which were addressed and disposed of during the Contempt hearing on May 10, 2021, and the Special Relief hearing on September 29, 2021. *See Tr.* at 9-11. Appellee also gave credible and candid testimony that Appellee had pled guilty to disorderly conduct after one of these incidents, not endangerment of the welfare of a child. *See Tr.* at 9-10.

On behalf of the Appellee, Attorney Patrick Kelley provided the relevant background to this case and informed this Trial Court that both of Appellant's allegations were already addressed already in the aforementioned prior proceedings. *Tr.* at 8-9. Attorney Patrick Kelley also informed this Trial Court that, contrary to Appellant's assertions, Appellee had never been incarcerated, and the charge to which Appellee had pled guilty was disorderly conduct, not child endangerment. *Tr.* at 7. Attorney Patrick Kelley also provided insight into

Appellant's "mutual agreement" claim, explaining how Appellant and Appellee struggled to find a specific time for telephone phone calls that worked well for both parties. *Tr.* at 9.

Appellant, without any proper legal objection, needlessly interrupted Appellee's testimony several times. *See, e.g., Tr.* at 10, 12. Moreover, Appellant presented no evidence to support any of his claims during this January 11, 2022, Contempt hearing. As stated previously, this Trial Court explained to Appellant that he needed to present proper evidence to this Trial Court in support of Appellant's claims, and that Appellant failed to provide this Trial Court with any evidence. *See again, Tr.* at 12-14. As stated previously, Appellant acknowledged this and replied "That's fine. There's always next time." *Tr.* at 14.

This Trial Court then placed its findings, conclusion and decision on the record. *Tr.* at 14. After doing so, this Trial Court gave Appellant, Appellee, and Attorney Patrick Kelley additional time to discuss a potential custody modification in order to reach a mutual agreement. To no avail, no mutual agreement could be reached. This Trial Court entered its Order, denying Appellant's December 8, 2021, Contempt Petition after finding and concluding Appellant failed to carry his burden of proof as the moving party in this custody contempt proceeding.

APPLICATION OF LAW AND ANALYSIS

A. Standard of Review

"Each court is the exclusive judge of contempts [sic] against its process." *Garr v. Peters*, 773 A.2d 183, 189 (Pa. Super. 2001). When reviewing a trial court's finding on a petition for contempt, appellate courts "are limited to determining whether the trial court committed a clear abuse of discretion." *P.H.D. v. R.R.D.*, 2012 PA Super 246, 56 A.3d 702, 706 (Pa. Super. 2012) (quoting *Flannery v. Iberti*, 763 A.2d 927, 929 (Pa. Super. 2000)).

"If the record adequately supports the trial court's reasons and factual basis, the court did not abuse its discretion." *Harman v. Borah*, 562 Pa. 455, 756 A.2d 1116, 1123 (2000). Abuse of discretion only exists "if the trial court renders a judgment that is manifestly unreasonable, arbitrary, or capricious, or if it fails to apply the law or was motivated by partiality, prejudice, bias, or ill will." *Ambrogi v. Reber*, 932 A.2d 969, 974 (Pa. Super. 2007). Moreover, an abuse of discretion "is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record. *Commonwealth v. Santos*, 176 A.3d 877 (Pa. Super. 2017).

Therefore, where there is no evidence on the record to indicate any "clear" misapplication of law during a contempt proceeding, nor any evidence of "manifestly unreasonable" judgment with regards to a trial court's findings in said contempt proceeding, there is also no abuse of discretion in that contempt proceeding.

B. Legal and Evidentiary Standards

1. Civil vs. Criminal Contempt

"Contempt may be of a civil or criminal character and criminal contempts [sic] are further divided into direct and indirect contempts [sic]." *Com v. Marcone*, 487 Pa. 572, 577, 410 A.2d 759, 762. (internal citations omitted). The difference between civil contempt and criminal contempt is that the civil contempt "has as its dominant purpose to enforce compliance with an order of court for the benefit of the party in whose favor the order runs," while criminal contempt has its "dominant purpose" in "the vindication of the dignity and authority of the

court and to protect the interests of the general public." *Id.* (citing *United States v. United Mine Workers of America*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947) and *Gompers v. Back's Stove and Range Co.*, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911)). Finally, the nature of the contemptuous act complained of is not the determining factor in whether the contempt is criminal or civil:

> The distinction between criminal and civil contempt is rather a distinction between two permissible judicial responses to contumacious behavior[.] These judicial responses are classified according to the dominant purpose of the court. If the dominant purpose is to prospectively coerce the contemnor to comply with an order of the court, the adjudication of contempt is civil. If, however, the dominant purpose is to punish the contemnor for disobedience of the court's order or some other contemptuous act, the adjudication of contempt is criminal. *Marcone* at 578 (quoting *In re Martorano*, 464 Pa. 66, 77-78, 346 A.2d 22, 27-28 (1975)(footnotes omitted).

2. Civil Contempt and Preponderance of the Evidence

In the instant case, Appellant's December 8, 2021, Contempt Petition is clearly a petition in the nature of civil contempt. Appellant seeks the enforcement of the October 30, 2020, Custody Order for the benefit of himself as a private party, and no public interests or "judicial vindication" are at stake. Accordingly, this Trial Court applied the preponderance of evidence standard when evaluating Appellant's claims.

In civil contempt proceedings, the proper evidentiary standard is the preponderance of the evidence:

> In order to sustain a finding of civil contempt, ***the complainant must prove certain distinct elements by a preponderance of the evidence:*** (1) that the contemnor had notice of the specific order or decree which she is alleged to have disobeyed; (2) that the act constituting the contemnor's violation was volitional; and (3) that the contemnor acted with wrongful intent.

Harcar v. Harcar, 982 A.2d 1230, 1235 (Pa. Super. 2009) (citing *Stahl v. Redcay*, 897 A.2d 478, 489 (Pa. Super. 2006)).

"A preponderance of the evidence is 'the greater weight of the evidence, i.e., to tip a scale slightly is the criteria or requirement for preponderance of the evidence.'" *In re Nevara*, 185 A.3d 342, 354 (Pa. Super. 2018) (quoting *Raker v. Raker*, 847 A.2d 720, 724 (Pa. Super. 2004).

In the instant case, Appellant failed to meet his burden of proof under the preponderance of evidence standard by failing to submit a single piece of evidence corroborating or supporting any of Appellant's claims to this Trial Court prior to or during the January 11, 2022, Contempt hearing. Appellant was informed repeatedly at this custody contempt hearing of his failure to produce evidence, and this Trial Court even explained how Appellant could properly submit evidence to the Trial Court. While the preponderance of evidence standard is lenient, a moving party must still submit some form of evidence at trial in order to support his claims. Instead, Appellant presented only unsupported, biased claims and previously litigated allegations before this Trial Court.

After hearing the credible testimony of Appellee and weighing Appellant's unsubstantiated assertions, this Trial Court reached its decision by weighing the credibility of the testimony presented and argument given. Appellant first testified before this Trial Court as to his reasons for filing the instant Contempt Petition. *Tr.* at 2-5. Appellee then credibly responded as to

all issues complained of in Appellant's instant Contempt Petition. Moreover, Appellee's counsel provided pertinent, relevant background as to Appellant's prior filings, each of which included Appellant's present claims that were previously adjudicated by another judge in prior court hearings. *Tr.* at 5-8.

After testimony from both parties, where Appellant never produced or presented any evidence to support his alleged claims, and after reviewing the relevant paragraphs in the September 29, 2021, Court Order, this Trial Court found and concluded Appellee credibly stated she was still actively enrolled and monitored in an intensive outpatient alcohol addiction treatment program and has remained sober throughout her treatment process. Therefore, this Trial Court found Appellee was not in contempt of the October 30, 2020, Custody Order, and thereby denied Appellant's December 8, 2021, Contempt Petition.

3. Doctrines of Preclusion: Res Judicata and Collateral Estoppel

The evidence Appellant now submits on appeal was never submitted at the January 11, 2022, Custody Contempt hearing held by this Trial Court, and therefore, was not properly submitted. Moreover, this Trial Court notes every charge and incident report improperly attached to Appellant's Notice of Appeal occurred before the October 30, 2020, Custody Order was issued. *See Pet. To Appeal Denied Contempt of Custody dated January 21, 2022,* at pp. 5-12.[1] However, assuming arguendo these alleged violations occurred after the Trial Court issued the October 30, 2020, Custody Order, this Trial Court would still be required to deny Appellant's December 8, 2021, Contempt Petition because the doctrines of res judicata and collateral estoppel bar appellants from re-litigating the same issues and causes of action against the same parties after a final judgment on those issues has been reached, and, as applied in the instant case, each of Appellant's allegations, issues, and claims against Appellee have all been previously heard, adjudicated and decided in prior hearings and are final judgments.

The Pennsylvania Supreme Court has consistently held the doctrines of res judicata and collateral estoppel bar a complainant from entering into new litigation over claims and issues either already adjudicated, or capable of being adjudicated in an earlier hearing:

> Res judicata — literally, a thing adjudicated — is a judicially-created doctrine. It bars actions on a claim, or any part of a claim, which was the subject of a prior action, or could have been raised in that action…. ***[R]es judicata, or claim preclusion, prohibits parties involved in prior, concluded litigation from subsequently asserting claims in a later action that were raised, or could have been raised, in the previous adjudication.... Collateral estoppel is similar in that it bars re-litigation of an issue that was decided in a prior action***, although it does not require that the claim as such be the same.
>
> *In re Coatesville Area School District*, 244 A.3d 373, 378-379 (Pa. 2021) (emphasis added) (internal quotations omitted) (citing *Wilkes ex rel. Mason v. Phoenix Home Life Mut. Ins. Co.*, 587 Pa. 590, 607, 902 A.2d 366, 376 (2006); *R/S Financial Corp. v. Kovalchick*, 552 Pa. 584, 588, 716 A.2d 1228, 1230 (1998); *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 544 Pa. 387, 404, 676 A.2d 652, 661 (1996); *Balent v. City of Wilkes-Barre*, 542 Pa. 555, 563, 669 A.2d 309, 313 (1995); and *In re Estate of Bell*, 463 Pa. 109, 113, 343 A.2d 679, 681 (1975))(internal citations omitted).

[1] While the Information on page 12 was signed in November of 2020, the Information itself plainly states the underlying charge occurred on June 8th. Moreover, Appellee pled guilty to Disorderly Conduct, not Child Endangerment.

The four elements of res judicata are: (1) the issue or issues in the current case have already been adjudicated on in a prior proceeding; (2) the cause of action in the current proceeding is the same as the cause of action in a prior proceeding; (3) the parties to the current action are the same parties to the prior action; and (4) the quality and capacity of the parties are the same as they were in the prior proceeding. *Coatesville*, 244 A.3d at 379; *see also In re Estate of Tower*, 463 Pa. 93, 100, 343 A.2d 671, 674 (1975). Similarly, the four basic elements of collateral estoppel are: (1) the issue is the same as in the prior litigation; (2) the prior action resulted in a final judgment on the merits; (3) the party against whom the doctrine is being asserted is the same as the party in the prior action; and (4) the person against whom the doctrine is being asserted had a full and fair chance to litigate the issue(s) in the prior action. *Coatesville* at 379; *see also Rue v. K-Mart Corp.*, 552 Pa. 13, 17, 713 A.2d 82, 84 (1998). However, courts sometimes also impose a fifth element, "namely, that resolution of the issue in the prior proceeding was essential to the judgment. *See, e.g., Office of Disciplinary Counsel v. Kiesewetter*, 585 Pa. 477, 484, 889 A.2d 47, 50-51 (2005)." *Coatesville* at 379.

These doctrines of res judicata and collateral estoppel developed to shield parties from the burden of re-litigating a claim with the same parties, and to protect the judiciary from the corresponding inefficiency and confusion that re-litigation of a claim would create. *Id*. Moreover, these doctrines are applicable to contempt proceedings and appeals. *See, e.g., Com. ex rel. Coburn v. Coburn*, 384 Pa. Super. 295, 558 A.2d 548 (1989) (implying appellant could have validly raised res judicata during his trial, and applying doctrine of collateral estoppel to reach its holding).

In *Coburn*, the Pennsylvania Superior Court held in part that the appellee was barred from raising the issue of appellant's paternity in a custody or contempt action due to the doctrine of collateral estoppel. *Coburn*, 384 Pa. Super. at 302-303 ("From this we find appellee is estopped from raising the issue of appellant's paternity.") In reaching this conclusion, the Pennsylvania Superior Court conducted an analysis and application of the four collateral estoppel elements. With regard to the first element, the Superior Court found the issue had already been sufficiently addressed in a prior proceeding, and reasoned "absent an appeal taken directly from the Order or a showing of fraud," the existing order had properly settled the issue and therefore could not "be challenged by an aggrieved party in a subsequent proceeding." *Id*. at 302 (internal citations omitted).

With regard to the second element of collateral estoppel, the Pennsylvania Superior Court found ***"[b]y failing to appeal the 1979 Orders, the finality of the determination of paternity has been decided on the merits."*** *Id*. at 303 (Emphasis added). For the third element, the Superior Court found "[the] third requirement of estoppel of identity of parties is readily met in this case because appellee was a willful party to the 1979 Orders." *Id*. Finally, the Superior Court found the fourth element was satisfied as well, stating "Appellee's failure to object to paternity at that time does not negate the full and fair opportunity to litigate that was present. Appellee has not and can not raise any claim to fraud in this matter." *Id*. Accordingly, the Superior Court reached the following holding with regard to the collateral estoppel claim: "From this we find appellee is estopped from raising the issue of appellant's paternity." *Id*.

In the instant case, the doctrine of res judicata was appropriately raised at trial by Attorney Patrick Kelley for Appellee. *See Tr.* at 9. All four elements of res judicata are met here with regards to Appellant's alcohol and OCY allegations:

(1) Issues of Appellee's alleged alcohol use and treatment, a criminal charge, and Office of Children and Youth investigations based on the same facts were all previously adjudicated on May 10, 2021, and on September 29, 2021; *See Pet. For Contempt of Custody Order dated March 8, 2021; see Order dated May 10, 2021; see Pet. For Special Relief dated July 14, 2021; see Order dated September 29, 2021.*
(2) The causes of action alleged by Appellant in his December 8, 2021, Petition for Contempt of Custody and the subsequent January 11, 2022, hearing were previously adjudicated before another trial judge on May 10, 2021, and September 29, 2021;
(3) All parties involved in the January 11, 2022, custody contempt hearing are the same parties involved in the May 10, 2021, custody contempt hearing and the September 29, 2021, special relief hearing; and
(4) In this January 11, 2022, custody contempt hearing, Appellant and Appellee are of the same quality and capacity as each were in the prior May 10, 2021, and September 29, 2021, proceedings.

Therefore, since all four elements of res judicata are satisfied, the doctrine of res judicata bars Appellant from re-litigating here the same issues already previously adjudicated at prior hearings.

Appellant's allegations are also barred under the doctrine of collateral estoppel. First, Appellant's issues at the January 11, 2022, contempt hearing were Appellee's alcohol use and treatment, criminal charge, and Office of Children and Youth involvement. All of these issues were previously adjudicated in the earlier May 10, 2021, and September 29, 2021, hearings.

Second, there was a final judgment on the merits. As stated in *Coburn*, a failure to appeal Orders creates a final determination on the merits. *Coburn* at 303. Like the appellee in *Coburn*, Appellant in the instant case had the ability to appeal both the May 10, 2021, Order and the September 29, 2021, Order. Appellant's choice not to appeal timely said Orders therefore resulted in final determinations on the merits of the aforementioned identical issues considered in those Orders.

Third, Appellant is clearly the party the doctrine is being asserted against, and this Record reflects Appellant is the party who previously brought the same issues in the prior hearings. Fourth, Appellant did have a full and fair opportunity to litigate these identical claims at both of these prior proceedings. Appellant was served proper notice of the times of his hearings, and had the full ability to present evidence and litigate his claims at each of those prior hearings if he had chosen to do so.

The fifth element, less commonly applied, also weighs in favor of the applicability of collateral estoppel. Appellant's alleged alcohol use, alleged criminal charge of child endangerment, alleged unfitness to parent, and alleged Office of Children and Youth involvement were all previously addressed in the Special Relief hearing on September 29, 2021. In order to decide whether to grant Appellant's Petition for Special Relief, the prior Court evaluated the credibility of all these claims, allegations, and issues, and disposed of these issues fully before reaching its decision. Said consideration is clearly reflected in Judge Kelly's September 29, 2021, Order. Thus, the fifth element of collateral estoppel is also satisfied in the instant case.

C. Response to Appellant's Itemized Comments and Complaints on Appeal

"Claims not raised in the trial court may not be raised for the first time on appeal." *Circle K, Inc. v. Webster Trustee of Webster Irrevocable Grantor Trust*, 256 A.3d 461, 464

(Pa. Super. 2021); *see also Jahanshahi v. Centura Development Co., Inc.*, 816 A.2d 1179, 1189 (Pa. Super. 2003); *see also* Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

In the instant case, Appellant failed to preserve any of the largely nonsensical and borderline illegible comments and complaints he lists in his unlabeled, improperly submitted Concise Statement of Issues. The only objections raised by Appellant at the Contempt hearing were clearly and facially improper. *See Tr.* at 6, 10. After being corrected by this Trial Court and having his improper objections overruled, Appellant even offered an apology to this Trial Court for interrupting Appellee's testimony. *See Tr.* at 12. Therefore, Appellant has waived the complaints and comments submitted improperly in Appellant's unlabeled Concise Statement of Issues. However, assuming arguendo Appellant's comments and complaints were preserved, this Trial Court will attempt to respond to the varied list of comments and complaints contained within Appellant's Notice of Appeal.

1. The current Custody Order requires no party drink alcohol for any reason.

The underlying allegation to this comment is without merit. Contrary to Appellant's bald-faced claims, Appellee credibly stated she is currently undergoing alcohol treatment through intensive outpatient care, as evidenced by the Record. Moreover, Appellee credibly stated under oath she has not consumed alcohol since beginning her treatment. Appellant offered no evidence to the contrary before or during the trial. On appeal, his improperly submitted evidence still only refers to alcohol consumption in 2018 and 2020, both of which occurred before the October 30, 2020, Custody Order and before Appellee began treatment, and both of which have been fully addressed previously by Judge Elizabeth Kelly in her past Orders dated May 10, 2021, and September 29, 2021.

2. Appellant claims Appellee admitted under oath she was abusing quantities of alcohol while "in the care of" their Minor Child.

This comment is very inaccurate, as evidenced by the Record. No such testimony as described by Appellant was given by Appellee during the January 11, 2022, Contempt hearing. To the contrary, Appellee credibly testified she has remained sober since beginning her alcohol treatment. While Appellee did credibly and candidly admit to having an alcohol abuse problem which she is addressing, she is already receiving intensive treatment for this. Moreover, this issue was already disposed of by Judge Elizabeth Kelly in the September 29, 2021, Special Relief hearing.

3. Appellant claims Appellee gave alleged false testimony as to the nature of crime involved regarding Appellee's disorderly conduct plea that was originally filed as endangering the welfare of a child.

To the contrary, Appellee gave no false testimony. With her counsel present, Appellee credibly testified she pled guilty to Disorderly Conduct. This plea was corroborated by Appellee's counsel Attorney Patrick Kelley. Appellant offered no evidence at this custody contempt hearing to contradict Appellee's testimony, only his own testimony to the contrary. Moreover, this was a contempt proceeding, not a custody modification trial. The only concerns within the scope of this hearing were whether Appellee had any new or ongoing violations of the October 30, 2020, Custody Order not previously addressed at the May 10, 2021, contempt proceeding or in the September 29, 2021, special relief hearing. Appellant failed to prove Appellee committed any violations, and Appellant failed to provide and properly

submit any exhibits or other evidence at the instant hearing.

4. Appellant tries to construe a nonsensical argument for direct contempt against Appellee.

Appellant's claim is both untrue and a mischaracterization of the law. As discussed above, a finding of direct contempt is a finding that one party committed an act or failed to perform an act that was ordered by the court, in the presence of the court. It is also a finding of criminal contempt. Appellee made no such act or failure to act at the hearing. Appellee was sober at her hearing, and credibly stated how she is effectively and earnestly participating in ongoing intensive outpatient treatment. Moreover, Appellant's underlying allegations date to 2018 and 2020, both of which pre-date the October 30, 2020, Custody Order, and both of which were previously disposed of in the May 10, 2021, contempt proceeding and the September 29, 2021, special relief hearing. After addressing these allegations in full during said proceedings, Judge Elizabeth Kelly issued Court Orders denying Appellant's March 8, 2021, Contempt Petition and Appellant's July 14, 2021, Petition for Special Relief.

Therefore, Appellant has failed to prove or even allege any current or ongoing contempt of the October 30, 2021, Custody Order, and the allegations underlying this comment are precluded from re-litigation under the doctrines of res judicata and collateral estoppel.

5. and 8. Appellant for the first time, without any substantiation, knowing this Trial Court's decision denying his Petition for Contempt relief, enters now a guised request for recusal for another attempted opportunity to persuade another trial judge despite appellate review pending by the Superior Court.

First, Appellant raised no objection at the hearing or prior to this hearing about the undersigned judge presiding over this Contempt hearing.

Second, and contrary to Appellant's assertions, this Trial Court properly concluded there was not sufficient evidence to support a finding of contempt against Appellee. Appellant now desires another trial judge be assigned so he can have another attempt to persuade another trial judge of the alleged worthiness of his petition despite his appeal to have appellate court review in the instant case.

6. and 7. Appellant improperly attaches alleged copies and requests of confidential OCY reports and OCY Child line Abuse Registry that were neither properly authenticated nor admitted into the Record by this Trial court in the instant case.

Appellant presented no copies of these reports to this Trial Court at the instant hearing and no copies to the opposing party. Moreover, these alleged incident reports are from 2018 and 2020. Both of these incidents were fully considered and disposed of at Appellant's prior two hearings with Judge Kelly. As explained at length above, the doctrines of res judicata and collateral estoppel preclude re-litigation of these issues.

Wherefore, all of Appellant's *pro se* issues, complaints and claims on appeal are without merit. This Trial court respectfully requests the Pennsylvania Superior Court affirm this Trial Court's decision denying Appellant's Petition for Contempt for all of the detailed reasons as specifically addressed above.

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

COMMONWEALTH OF PENNSYLVANIA, Appellee

v.

TERRY ABBEY, Appellant

CRIMINAL LAW

No court has jurisdiction to hear an untimely Post Conviction Relief Act (PCRA) petition.

CRIMINAL LAW

Although legality of sentence is always subject to review within the PCRA, claims must still first satisfy the PCRA's time limits or one of the exceptions thereto.

CRIMINAL LAW

Standard of review for an order denying post-conviction relief is limited to whether the record supports the lower court's determination, and whether that decision is free of legal error.

CRIMINAL LAW

When a Post Conviction Relief Act (PCRA) petition is not filed within one year of the expiration of direct review, or not eligible for one of the exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims.

CRIMINAL LAW

To be eligible for relief under the PCRA, Appellant must plead and prove by a preponderance of the evidence, *inter alia*, the allegation of error has not been previously litigated or waived.

CRIMINAL LAW

An issue is waived if the petitioner could have, but failed, to raise an issue prior to the instant proceeding. 42 Pa.C.S. §9544(b).

RES JUDICATA / COLLATERAL ESTOPPEL

Res judicata, or claim preclusion, prohibits parties involved in prior, concluded litigation from subsequently asserting claims in a later action that were raised, or could have been raised, in the previous adjudication. Collateral estoppel is similar in that it bars re-litigation of an issue that was decided in a prior action, although it does not require that the claim as such be the same.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
Erie County Docket No. CR 446 of 1999
PENNSYLVANIA SUPERIOR COURT
4 WDA 2022

Appearances: William Hathaway, Esq., PCRA counsel for Appellant, Terry Abbey
District Attorney Elizabeth Hirz, for Appellee, Commonwealth

Pa.R.A.P. 1925(a) OPINION

Domitrovich, J., February 22, 2022

This is an appeal of an Order dismissing Appellant's Post Conviction Relief Act Petition [hereinafter "PCRA"], which is Appellant's Fourth PCRA. This PCRA Court issued a

Notice of Intent to Dismiss Appellant's Fourth PCRA on November 2, 2021, after finding and concluding: (1) Appellant's Fourth PCRA was patently untimely by more than twenty (20) years; (2) no timeliness exception applied; and (3) the issues within Appellant's Fourth PCRA were waived because these issues (a) had previously been raised in Appellant's Second *pro se* PCRA, (b) were disposed of in the subsequent Order dismissing said Second *pro se* PCRA, and (c) Appellant never appealed said Order disposing of such issues.[1]

This PCRA Court issued its Order Dismissing Appellant's Fourth PCRA on November 30, 2021. Appellant through his appointed PCRA counsel Attorney Hathaway filed the instant Notice of Appeal on December 28, 2021. Both served this PCRA Court with Notices of Appeal. This PCRA Court subsequently entered a 1925(b) Order on December 28, 2021, compelling Appellant to present a Concise Statement.

With no valid issues to raise on appeal, and due to Attorney Hathaway having already filed a "no-merit" letter on September 15, 2021, in response to Appellant's instant Fourth PCRA, Attorney Hathaway on January 13, 2022, submitted a Statement of Intent to file a Finley Brief, in which he notified this PCRA Court that no counseled Concise Statement would be entered.

Therefore, this PCRA Court will address the underlying issue within Appellant's Fourth PCRA appeal:

> Whether this PCRA Court erred or abused its discretion by dismissing Appellant's Fourth PCRA for untimeliness where the underlying conviction occurred more than twenty years prior to this PCRA, where the timeliness exception cited by Appellant did not apply because the facts Appellant claims to have recently discovered were previously raised by Appellant in a prior PCRA and properly disposed of, where the issues within Appellant's instant Fourth PCRA were waived by Appellant's failure to appeal the prior PCRA Order that addressed and disposed of said issues, and where the doctrines of res judicata and collateral estoppel preclude Appellant from re-litigating the same issues disposed of in the Order dismissing Appellant's Second *pro se* PCRA.

BACKGROUND

On April 22, 1999, Appellant entered counseled and negotiated pleas of *nolo contendere* to one count each of attempted rape, indecent assault, and corruption of minors. Appellant also entered similarly counseled and negotiated pleas for two counts of involuntary deviate sexual intercourse. These convictions arose from Appellant's inappropriate sexual contact with his stepdaughter who was between the ages of five and eight at the time of these offenses.

This PCRA Court served as the Trial Court for Appellant's sentencing hearing, and, on June 2, 1999, sentenced Appellant to an aggregate of 16 years to 65 years of incarceration. These sentences are in the standard ranges of the Sentencing Guidelines.

On July 1, 1999, Appellant filed a counseled Notice of Appeal. On August 13, 1999, this Notice of Appeal was discontinued after Appellant's counsel filed a Praecipe to Discontinue Appeal with the Pennsylvania Superior Court at 1091 WDA 1999.

On March 6, 2007, Appellant filed his First *pro se* PCRA. This PCRA Court appointed PCRA counsel who submitted a "no-merit" letter and a Petition for Leave to Withdraw

[1] Appellant's Third *pro se* PCRA was dismissed as untimely on March 9, 2020.

as Counsel. On March 21, 2007, this PCRA Court issued Notice of its Intent to Dismiss Appellant's First PCRA.

On April 18, 2007, this PCRA Court dismissed Appellant's First PCRA and granted PCRA counsel leave to withdraw representation of Appellant. Appellant then filed an appeal with the Pennsylvania Superior Court for the dismissal of his First PCRA. The Pennsylvania Superior Court then affirmed dismissal of Appellant's First PCRA on January 3, 2008, concurring with the PCRA Court's determination that appellate issues were waived for failure to file a Court-ordered 1925(b) Concise Statement of Matters Complained of On Appeal. *See Commonwealth v. Abbey*, 947 A.2d 820 (Pa. Super. 2008)(non-precedential decision).

After ten years with no subsequent filings from Appellant, Appellant filed on March 7, 2018, a "*Pro Se* Petition to Correct and/or Modify Unconstitutional Sentence Pursuant to *Com. v. Muniz*, J-121 B-2016 (19 July 2017)," which this Court considered as Appellant's Second *pro se* PCRA. This PCRA Court again appointed PCRA counsel who filed a supplemental PCRA. The Commonwealth filed its response.

On June 1, 2018, this PCRA Court issued a Notice of Intent to Dismiss Appellant's Second *pro se* PCRA as untimely after finding: (1) the underlying sentence became final, at the latest, on August 13, 1999, when direct review was concluded by discontinuance of the appeal, and (2) the 42 Pa.C.S. Section 9545(b)(iii) timeliness exception did not apply because, as stated by the Pennsylvania Superior Court in *Commonwealth v. Murphy*, 180 A.3d 402 (Pa. Super. 2018), the Pennsylvania Supreme Court had not held *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017) applied retroactively. This PCRA Court also determined Appellant failed to satisfy the mandates of *Commonwealth v. Lawson*, 549 A.2d 107, 112 (Pa. 1988) and its progeny with regard to Appellant's burden of proof in subsequent PCRA petitions.

On June 28, 2018, this PCRA Court dismissed Appellant's Second *pro se* PCRA. No appeal was filed from the Order dismissing this Second *pro se* PCRA.

On August 21, 2018, Appellant was paroled at this docket.

On September 25, 2019, Appellant filed his Third *pro se* PCRA. Therein, Appellant indicated he wanted to withdraw his pleas or, alternatively, be resentenced. The Commonwealth filed a response indicating the PCRA was untimely by approximately nineteen (19) years, and no exception to the timeliness rule applied. Moreover, assuming *arguendo* said PCRA was timely, the Commonwealth asserted Appellant failed to satisfactorily demonstrate any ineffectiveness which rendered the pleas involuntary.

On December 20, 2019, this PCRA Court issued Notice of Intent to Dismiss the Third *pro se* PCRA, dated September 25, 2019. This PCRA Court stated the basis for this dismissal as follows: (1) the Third *pro se* PCRA was untimely and no exception to the one-year timeliness rule applied; (2) the substantive claim within the Third *pro se* PCRA wholly lacked merit; (3) Appellant again failed to satisfy the mandates of *Commonwealth v. Lawson*, 549 A.2d 107, 112 (Pa. 1988), and its progeny; and (4) the claim of involuntariness of the pleas was waived. This PCRA Court then issued a New Revised Notice of intent to Dismiss on January 17, 2020, as the original Notice was not successfully delivered to Appellant.

On January 29, 2020, Appellant filed objections to the Revised Notice of Intent to Dismiss Appellant's Third *pro se* PCRA. On March 9, 2020, for the reasons set forth in the original and Revised Notices of Intent to Dismiss, this PCRA Court dismissed his Third *pro se* PCRA.

On August 16, 2021, Appellant filed *pro se* his Fourth PCRA, the dismissal of which

is the issue in Appellant's instant appeal. Therein, Appellant avers his sentence is illegal and violated his constitutional rights pursuant to *Commonwealth v. Muniz, supra*. Despite having relied explicitly upon this same *Muniz* case in his Second *pro se* PCRA, Appellant claims he only recently discovered this case during a "scheduled law library" session on approximately August 6, 2021.

On August 19, 2021, this PCRA Court appointed PCRA counsel Attorney Hathaway who, on September 15, 2021, filed a "no-merit" letter and accompanying Petition for Leave to Withdraw as Counsel. Therein, counsel advised this PCRA Court that Appellant's Fourth PCRA is patently untimely; no exception to the timeliness rule applies; the claim wholly lacks substantive merit; the claim was previously litigated in Appellant's Second *pro se* PCRA which was ultimately dismissed on January 29, 2020; and the claim is waived as no appeal was taken from the Order of January 29, 2020. While there appears to have been a clerical error with regards to these given dates, it is true that Appellant's claims in this instant Fourth PCRA were previously raised in Appellant's Second *pro se* PCRA and were fully addressed and disposed of by this PCRA Court in its June 1, 2018, Notice of Intent to Dismiss and subsequent Order, and that Appellant never appealed said Order. *See Notice of Intent to Dismiss dated June 1, 2018.*

On September 22, 2021, Appellant filed (1) an Application for Permission to file *Pro Se* in response to Attorney Hathaway's no merit letter, and (2) a separate Motion for Change of Appointed Counsel. On September 28, 2021, the Commonwealth, through its counsel, now District Attorney Elizabeth Hirz, filed a response concurring with the assessment of PCRA counsel, Attorney Hathaway.

On November 1, 2021, this PCRA Court denied PCRA counsel Attorney Hathaway's Petition for Leave to Withdraw, and dismissed Appellant's Application for Permission to file *Pro Se* and concurrent Motion for Change of Appointed Counsel as a hybrid filing by Appellant. On November 2, 2021, this PCRA Court issued its Notice of Intent to Dismiss Appellant's instant Fourth PCRA as untimely. This PCRA Court conducted its own independent PCRA analysis, and found and concluded as follows: (1) Appellant's Fourth PCRA was patently untimely due to the underlying conviction becoming final over 20 years prior; (2) no timeliness exception applies because Appellant's claims of a newly discovered fact are disingenuous, as Appellant in his Second *pro se* PCRA had previously relied on the exact case he claims to have only recently discovered; and (3) the issue was waived by Appellant after he failed to appeal the Order dismissing his Second *pro se* PCRA, whereupon he would have had the opportunity to litigate said issue.

Appellant then filed a Notice of Appeal on November 10, 2021, and said Notice was sent to his appointed PCRA counsel Attorney Hathaway. In this Notice of Appeal, Appellant attached the Order denying PCRA counsel Attorney Hathaway's petition to withdraw as counsel as the Order that Appellant wished to Appeal.

After receiving Appellant's Notice of Appeal, this PCRA Court issued a 1925(b) Order on November 15, 2021. No response to this Order was ever filed.

On November 30, 2021, this PCRA Court issued an Order dismissing Appellant's Fourth PCRA.

On December 28, 2021, this PCRA Court was served a Notice of Appeal of the Order Dismissing Appellant's Fourth PCRA by Appellant's PCRA counsel Attorney Hathaway. This

PCRA Court then issued a Second 1925(b) Order for a Concise Statement, which was served on Appellant and on Appellant's PCRA counsel, Attorney Hathaway. Appellant's PCRA counsel Attorney Hathaway then submitted a Statement of Intent to file a *Finley* Brief on January 13, 2022, informing this PCRA Court that no counseled Concise Statement would be incoming for the same reasons outlined in Attorney Hathaway's September 15, 2021, "no-merit" letter.

DISCUSSION

Any PCRA not filed within one year of the date the judgment becomes final is untimely, except under three very limited circumstances. 42 Pa.C.S. §9545(b). A judgment becomes final at the conclusion of direct review, or at the expiration of time for seeking the review. 42 Pa.C.S. §9545(b)(3). The one-year time limitation is jurisdictional and a trial court has no power to address the substantive merits of an untimely PCRA. *Commonwealth v. Abu-Jamal*, 941 A.2d 1263, 1267-68 (Pa. 2003), cert. denied, 541 U.S. 1048 (2004); *Commonwealth v. Gamboa-Taylor*, 753 A.2d 780, 783 (Pa. 2000); *Commonwealth v. Fowler*, 930 An2d 586, 591 (Pa. Super. 2007).

The three exceptions to the one-year filing requirement are for interference by a government official that prevented a claim from being previously raised, newly discovered evidence that could not have been ascertained by the exercise of due diligence, and the assertion of a newly-recognized constitutional right that has been held by the Supreme Court of the United States or the Supreme Court of Pennsylvania to apply retroactively. 42 Pa.C.S. §9545(b)(1). Any PCRA asserting one of these exceptions must be filed within one year of the date the claim could have been first presented. 42 Pa.C.S. §9545(b)(2). "As such, when a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within [one year] of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims." *Commonwealth v. Gamboa-Taylor*, 753 A.2d at 783; *Commonwealth v. Taylor*, 933 A.2d 1035, 1039 (Pa. Super. 2007). It is petitioner's burden to allege and prove one of the following timeliness exceptions applies. *Commonwealth v. Abu-Jamal*, 941 A.2d at 1268; *Commonwealth v. Fowler*, 930 A.2d at 591. "Although legality of sentence is always subject to review within the PCRA, ***claims must still first satisfy the PCRA's time limits or one of the exceptions thereto.***" *Commonwealth v. Fahy*, 737 A.2d 214, 223 (Pa. 1999) (emphasis added).

As Appellant's Fourth PCRA was not filed until August 16, 2021, more than twenty (20) years after the time prescribed by statute, it is patently untimely. *See* 42 Pa.C.S. §9545(b). No statutory exception to the one-year timeliness rule applies. *See Id.* Appellant's attempt to characterize his "discovery" of *Muniz* as some new event occurring during law library time in August of 2021 is disingenuous. Appellant, who raised this exact *Muniz* claim in his Second *pro se* PCRA of March 7, 2018, was aware of the case by March of 2018 at the latest.

Moreover, to be eligible for relief under the PCRA, Appellant must plead and prove by a preponderance of the evidence, *inter alia*, the allegation of error has not been previously litigated or waived. 42 Pa.C.S. §9543(a)(3). An issue is waived if the petitioner could have, but failed, to raise an issue prior to the instant proceeding. 42 Pa.C.S. §9544(b).

In the instant case, no Notice of Appeal to the Pennsylvania Superior Court was filed from the Order of June 28, 2018, dismissing Appellant's Second *pro se* PCRA. This PCRA

Court's Order dated June 28, 2018, followed the June 1, 2018, Notice of Intent to Dismiss, which addressed and disposed of the same issues presented in the instant PCRA in depth. *See Notice of Intent to Dismiss dated June 1, 2018*. Therefore, Appellant's failure to appeal the June 1, 2018, Notice of Intent and subsequent June 28, 2018, Order dismissing Appellant's Second *pro se* PCRA constitutes a waiver of these issues under 42 Pa.C.S. §9544(b).

Moreover, Appellant's failure to appeal the June 28, 2018, Order dismissing his Second *pro se* PCRA resulted in that judgment on the merits being final. Under the doctrines of res judicata and collateral estoppel, parties are precluded from re-litigating claims that have already been adjudicated by a court of competent jurisdiction where the issues, causes of action, and identities of the parties are the same as in the prior proceeding, and where a final judgment on the merits has been reached. *See In re Coatesville Area School District*, 244 A.3d 373, 378-379 (Pa. 2021).

In the instant case, all parties are the same and are of the same "capacity" as they were at the time of Appellant's Second *pro se* PCRA. *See Id.* As discussed previously, all claims and issues raised by Appellant in his instant Fourth PCRA, are identical to the issues and claims raised by Appellant in his Second *pro se* PCRA. Because Appellant failed to appeal the June 28, 2018, Order dismissing his Second *pro se* PCRA, that judgment on the merits of Appellant's claim became final. Therefore, Appellant is precluded from re-litigating the claims and issues raised in his instant Fourth PCRA under the doctrines of res judicata and collateral estoppel.

For the foregoing reasons, Appellant's Fourth PCRA is untimely and Appellant is not entitled to relief under the PCRA. Moreover, the issues within the PCRA are waived. Wherefore, this PCRA Court respectfully requests the Pennsylvania Superior Court affirm this PCRA Court's decision in denying Appellant's Fourth PCRA.

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

IN THE MATTER OF THE ESTATE RAYMOND E. CRILLEY A/K/A RAYMOND E. CRILLEY, SR.

WILLS / VALIDITY

In making a will, an individual may leave his or her property to any person or charity, or for any lawful purpose he or she wishes, unless he or she lacked mental capacity, or the will was obtained by forgery or fraud or undue influence or was the product of a so-called insane delusion.

WILLS / VALIDITY / EXECUTION

With regard to undue influence, once the proponent of a will establishes proper execution of the same and the will is probated, a presumption of validity arises.

WILLS / ACTIONS

The contestant of the will has the burden of proving undue influence by establishing by clear and convincing evidence that: (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 receives a substantial benefit from the will in question.

WILLS / ACTIONS

If the contestant of a will proves each of the elements of undue influence, the burden shifts back to the will's proponent to show, by clear and convincing evidence, the absence of undue influence.

WILLS / ACTIONS

With regard to the first element of an undue influence claim, weakened intellect, the same is typically accompanied by persistent confusion, forgetfulness and disorientation. Undue influence is generally accomplished by a gradual, progressive inculcation of a receptive mind. The testator's mental condition on the date of the will's execution is not as significant as it is when considering testamentary capacity; remote mental history has more credence when considering undue influence.

WILLS / ACTIONS

A confidential relationship exists where 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.

WILLS / VALIDITY

With regard whether or not the proponent of a testamentary writing receives a "substantial benefit", it may be said no hard or fast rule can be laid down. The court's finding must depend on the circumstances of each particular case.

WILLS / ACTIONS / PARTIES

The personal representative of an estate has a duty to see that purely private interests are not advanced to the estate's detriment.

WILLS / ACTIONS / PARTIES

The court shall have exclusive power to remove a personal representative when, for any reason, the interests of the estate are likely to be jeopardized by his continuation in office.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
ORPHAN'S COURT DIVISION
DOCKET NO. 238-2019

Appearances: Alan Natalie, Esq. for Petitioners, Barry L. Crilley, Richard E. Crilley, Joseph P. Crilley, Mary M. Crilley, and Melissa M. Linville-Thatcher
Anthony Angelone, Esq. for Respondent and Executor, Paul M. Crilley

OPINION

Kelly, J., November 15, 2021

Before the Court are the Petitions to Contest Codicil and to Remove Paul M. Crilley as Executor of Estate filed jointly by Barry L. Crilley, Richard E. Crilley, Joseph P. Crilley, Mary M. Crilley, and Melissa M. Linville-Thatcher. Petitioners request that the court invalidate a February 21, 2019 writing admitted to probate as a codicil ("Codicil") to the September 6, 2017 will ("Will") of Raymond E. Crilley ("Decedent"). Specifically, Petitioners allege that the writing was procured by Paul M. Crilley via undue influence duress, constraint, fraud or scheme at a time when Decedent lacked sound mind or testamentary capacity to execute the same. Petitioners further request the removal of Paul M. Crilley as Executor, alleging that his self-serving conduct resulted in execution of the Codicil.

In July of 2017, Decedent was diagnosed with non-alcoholic cirrhosis of the liver, as well as a coronary artery condition. His diagnosis eventually included liver cancer, specifically, hepatocellular carcinoma. On September 6, 2017, Decedent designated his son, Paul M. Crilley, as his power of attorney and he executed the Will which, in relevant part, appointed Paul as Executor of his Estate. The Will further detailed specific bequests of $5,000 to the Pennsylvania State University Agricultural Education Scholarship Fund, $5,000 to the Albion Area Fair, and the real estate known as 4959 Nye Road in Springfield Township to his son, Barry L. Crilley. *See* Petitioner's Exhibit 4, *Last Will and Testament of Raymond E. Crilley*. Pursuant to the Will, the residue of the estate was devised "in seven equal shares, six of which are to my son, Raymond E. Crilley, Jr., of Kansas City, Missouri; my son, Barry L. Crilley, my son, Richard E. Crilley, of Little Elm, Texas; my son, Paul M. Crilley, of Albion, Pennsylvania; my son, Joseph P. Crilley, of Jefferson City, Missouri; and my son, Kirk Hudacky, of Greenville, Pennsylvania; and the seventh share, one-third of which is bequeathed and devised to my daughter, Mary M. Crilley, of Little Elm, Texas, and two-thirds of which shall be devised and bequeathed to my granddaughter, Melissa M. Linville-Thatcher, of East Springfield, Pennsylvania." *See* Petitioner's Exhibit 4. The Will further provides: "I make no provision in this Will for my wife, T. Augusta Gordon, only as her physical ailments have precluded her from being able to hold and enjoy my residential property in East Springfield."[1] *See* Petitioner's Exhibit 4. The September 6, 2017 Last Will and

[1] In 2014, Attorney Evan Adair prepared a will for Decedent which included a provision of specific bequest of all of the furnishings and contents of his residence to his wife, T. Augusta Gordon. Regarding his personal residence, the 2014 will provided as follows:

> I give and devise my residential real estate, commonly known as 1881 Eagley Road, East Springfield, Pennsylvania, including tools and equipment related directly to maintenance of the residential property (this not including farm equipment and tools), in equal share, to my wife, T. Augusta Gordon, and my son, Paul M. Crilley of Albion, Pennsylvania, subject to both of the two following provisions:

Testament of Raymond E. Crilley, as well as a February 21, 2019 instrument titled Specific Directive Codicil to the Last Will and Testament of Raymond E. Crilley Sr., were admitted to probate and filed of record as Decedent's last will and codicil. *See* Petitioner's Exhibit 3, *Petition for Grant of Letters*, filed March 27, 2019; *see also* Petitioner's Exhibit 1, *Deposition of Evan Adair, Esquire*, at p. 64. The Codicil identifies the September 6, 2017 Will as Decedent's last will and testament and provides: "I give and devise my real estate commonly known as 1881 Eagley Road in Springfield Township, Erie County, Pennsylvania to my son, Paul Matthew Crilley, of Albion, Pennsylvania. The remaining provisions in my Last Will and Testament will remain unchanged." *See* Petitioner's Exhibit 5, *Specific Directive Codicil to the Last Will and Testament of Raymond E. Crilley Sr.*

Evan Adair, Esquire, who had for nearly 40 years handled numerous legal matters for decedent (including multiple engagements for estate planning), prepared the September 6, 2017 Will which was admitted to probate.[2] *See* Petitioner's Exhibit 1, *Deposition of Evan Adair, Esquire,* at p. 19. Attorney Adair did not have any involvement in the preparation or execution of the Codicil. *See* Petitioner's Exhibit 1, *Deposition of Evan Adair, Esquire* at 53. He did not know that the Codicil existed and was surprised to see the same after the Decedent's death. *See id.* at 55-56. Paul M. Crilley, the Codicil's beneficiary, created the same. *See* October 29, 2021 testimony of Paul M. Crilley.

On March 1, 2019, eight days after signing the Codicil, the Decedent died.

DISCUSSION

"In making a will, an individual may leave his or her property to any person or charity, or for any lawful purpose he or she wishes, unless he or she lacked mental capacity, or the will was obtained by forgery or fraud or undue influence or was the product of a so-called insane delusion." *Estate of Nalaschi,* 90 A.3d 8, 11 (Pa. Super. 2014).

A. Undue Influence

With regard to undue influence, Pennsylvania law provides that, once the proponent of a will establishes proper execution of the same and the will is probated, a presumption of validity arises. *See In re Estate of Smaling,* 80 A.3d 485, 493 (Pa. Super. 2013) (citations omitted); *see also Burns v. Kabboul,* 595 A.2d 1153, 1162 (Pa. Super. 1991). Thereafter, the contestant of the will has the burden of proving undue influence by establishing by clear and

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1 continued

(1) T. Augusta Gordon shall have the right to reside undisturbed in the residence for her life or until she agrees in writing to termination of this right, subject to her maintenance of casualty and liability insurance on the premises and her timely payment of all real estate taxes, assessments, insurance premiums and costs of repair and/or maintenance of the residence; and

(2) In the event either T. Augusta Gordon or Paul M. Crilley shall wish to sell her or his one-half interest, such interest must first be offered to the other co-owner, who shall have the right to in the purchase such one-half interest for the sum of $100,000.00, adjusted by increases in the U.S. Bureau of Labor Statistics' Consumers Price Index-All Urban Consumers between January 1, 2015 and the first day of the month preceding that in which such purchase is made.

Should my wife, T. Augusta Gordon, predecease me or fail to survive me by six (6) months, then, in that event, this gift and devise shall be made solely to Paul M. Crilley, in this event neither of the above provisions being applicable.

See Exhibit Adair 8; *see also* Petitioner's Exhibit 1, *Deposition oj Evan Adair, Esquire,* at pp. 19, 39-40 and 56.

[2] Attorney Adair first represented Decedent in the latter part of 1979 in a custody/partition case. *See* Petitioner's Exhibit 1, *Deposition of Evan Adair, Esquire*, at p. 6. Thereafier, he handled a variety of legal affairs for Decedent, including estate planning, business affairs, family law and real estate transactions. *See id.* at 13-14, 26 and 31. Attorney Adair began assisting Decedent with his estate planning more than 30 years prior to his death. *See id.* at 14. The last time that Attorney Adair was directly engaged by Decedent was in January of 2018 to effectuate the transfer of the Nye Road property to Barry as detailed by specific devise in the Will. *See id.* at 43.

convincing evidence that: (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 receives a substantial benefit from the will in question. *See id.* If the contestant proves each of the elements of undue influence, the burden shifts back to the will's proponent to show, by clear and convincing evidence, the absence of undue influence. *See id.*

The Codicil was admitted to probate and its execution was not disputed. As a result, the Petitioners have the burden of proving undue influence.

(1) Weakened Intellect

With regard to the first element of an undue influence claim, weakened intellect, the same "is typically accompanied by persistent confusion, forgetfulness and disorientation." *See In re Estate of Smaling*, 80 A.3d at 493 *quoting In re Estate of Fritts*, 906 A.2d 601, 607 (Pa. Super. 2006). Moreover, as undue influence is "generally accomplished by a gradual, progressive inculcation of a receptive mind," the testator's mental condition on the date of the will's execution is not as significant as it is when considering testamentary capacity; remote mental history has more credence when considering undue influence. *In re Estate of Smaling* at 498; *see also Estate of Fabian*, 222 A.3d 1143, 1150-51 (Pa. Super. 2019).

In late November of 2018, the Decedent was discovered in New York disoriented and driving the wrong way on the interstate. Decedent expressed his belief that he was in the area of his East Springfield, Pennsylvania home and that he was returning to the same. Thereafter, on November 20, 2018, the Decedent was seen by his primary care physician, Dr. David C. Hutzel, who entered into a "gentleman's agreement" with Decedent that he would not drive. At the visit, Dr. Hutzel noted that, in conjunction with his liver disease, Decedent was having "episodic significant hepatic encephalopathy" and "has classic symptoms of a waxing and waning mental status." *See* Hutzel Exhibit 6, Hutzel Raymond E. Crilley Progress Notes. Dr. Bradley Fox, who was accepted by the parties as an expert in medicine and family medicine, testified that hepatic encephalopathy is caused by elevations of liver enzymes within the brain and that, with cirrhosis and hepatocellular carcinoma, high levels of ammonia are the cause of the encephalopathy. *See* Petitioner's Exhibit 2, *Deposition of Bradley Fox, M.D.*, July 28, 2021, at p. 22. With regard to the same, Dr. Fox testified:

> As ammonia levels rise, cognition fails. The synapses in the brain don't connect, and a person who has high ammonia levels becomes extremely fatigued, drowsy, sleeps. When they're awake, their cognition is hazy at best, typically not even that. They become — if you read the medical literature, "goofy" is actually a word that's used within the medical literature to describe how they are, because they make incoherent commentary. They do not recognize things. The don't even recognize themselves at times, because the synapses in the brain with an elevated level of ammonia are not able to appropriately or correctly transmit the neurotransmitters and, therefore, the right brain waves and right function to get coherent thoughts through.

Id. at 20. Dr. Fox further testified that encephalopathy cannot be undone — once it occurs, the patient would always be encephalopathic at some level. *Id.* at 42-44. He further opined that Decedent, at seventy-eight years old with untreated cirrhosis and hepatocellular carcinoma who already had encephalopathy at earlier stages of disease, would have worsening

encephalopathy as the cirrhosis got worse. *Id.* at 35-37.

In December of 2018, Decedent was confused with regard to a stay at the Cleveland Clinic. Specifically, when his son, Barry, arrived to take him home, Decedent refused to sign the discharge papers because he insisted that they were financial papers. Moreover, Decedent insisted on the ride home that Barry was driving the wrong way, and, then, the following day he spent the entire day on the phone calling the hospital and demanding to speak with the people who provided his care because he didn't want to pay since they didn't fix him. In order to facilitate Decedent's discharge from the hospital during that visit, Barry had to ensure hospital staff that someone would be with Decedent 24/7. During the following week, Paul Crilley disclosed to Barry that he had assumed responsibility for writing checks for Decedent as some had bounced. In addition, Barry saw checks written out improperly by Decedent just laying around Decedent's house and he saw overdue bills.

Also in December of 2018, Melissa Thatcher observed Decedent repeatedly attempting to use the phone as the television remote and refusing to accept her explanation of the problem. Around the same time, Ms. Thatcher observed an improperly written check by Decedent and Paul disclosed to her that Decedent had missed payments on his Lincoln, overdrafted his checking account and placed a check in an envelope to the wrong creditor.

On December 14, 2018, Attorney Adair had a telephone conference with Decedent and Paul, initiated by Paul, which caused him to conclude that Decedent would not be able to handle an in-person meeting. *See* Petitioner's Exhibit 1, *Deposition of Evan Adair, Esquire*, at 46-47 and 52. Attorney Adair described the Decedent as being present, but in a weakened state and not really participating. *See id.* at 47-48 and 68 . Meanwhile, Decedent's demeanor prior to mid-year in 2018 was universally described by witnesses as intelligent, engaging and humorous.[3]

Melissa Thatcher testified that progressively through 2018 the Decedent became less conversational and that his awareness came and went. She detailed how he became very forgetful with regard to the weekly Friday errands that she took him on. Specifically, he would forget where they needed to go while they were out and forget what they needed to do when they got someplace. She explained that the Decedent really declined after Christmas of 2018. During most of her January and February 2019 visits to Decedent, he slept often and it was difficult to engage him in conversation; everything happened around him, but he wasn't engaging. During this time, he was easily confused and would get frustrated and stop talking. Ms. Thatcher indicated that she often wondered if Decedent even knew who family members were because he wouldn't even call people by name. Decedent, at one point, referred to Paul's girlfriend, Sherry, who was part of the family for eight years, as the visiting nurse. Ms. Thatcher observed that Decedent declined severely the entire month of February 2019, such that he was rarely awake, didn't have clear conversations and would sit at the table and smile, but would not interact with anybody. Ms. Thatcher further testified that on February 20, 2021, the night before the codicil was signed, the Decedent did not engage in conversation at dinner and was hardly able to hold himself up. Afterwards, while Ms. Thatcher, who Decedent treated like one of his own children, was at Decedent's bedside, he asked her "how am I related to you?"

[3] For example, Decedent's older brother, Joseph Crilley, described the Decedent as "very outgoing, very much, and very personable, very intelligent, could carry on a conversation with virtually anybody." Respondent's Exhibit 8, *Deposition of Joseph Crilley*, June 30, 2021 at 18. These statements echo comments of nearly every witness who knew Decedent.

Based upon all of the foregoing evidence presented by Petitioners, they clearly established that Decedent suffered from a weakened intellect in the timeframe leading up to signing the Codicil. In opposition to such a finding, Paul M. Crilley presented his own testimony, that of his girlfriend, Sherry Kent, the testimony of Duane Regelmarm, the deposition testimony of Joseph Crilley and the deposition testimony of Dr. David Hutzel.

Respondent's witnesses testified to specific interactions with Decedent during the last two months of his life wherein they did not believe that the Decedent was confused. Perhaps the most compelling of these interactions is the deposition testimony of Dr. David C. Hutzel.[4] Dr. Hutzel, who was accepted as an expert in internal medicine by the parties, and who acted as Decedent's primary care physician for 12 years, testified to his last visit with Decedent, which occurred on January 11, 2019. *See* Respondent's Exhibit 9, *Notes of Testimony of Videotaped Deposition of Dr. David C. Hutzel*, August 12, 2021; *see also* Deposition Exhibit 2. Dr. Hutzel reported that Decedent's demeanor, alertness, and mental acuity on January 11, 2019 were "excellent." *See* Respondent's Exhibit 9 at 17. Dr. Hutzel relayed how Decedent became tearful as he talked about his farm and that Decedent further asked about Dr. Hutzel's family and referred to Dr. Hutzel's children by their names. *See id.* at 17-19. Nevertheless, while Dr. Hutzel's testimony depicts the Decedent's mental clarity on January 11, 2019, the undersigned is not convinced that Decedent did not suffer from weakened intellect which could subject him to undue influence. As Dr. Hutzel testified, Decedent was suffering from a condition which would cause his mental clarity to come and go. Dr. Hutzel specifically noted that Decedent's confusion from the onset of the hepatic encephalopathy would "wax and wane." *See id.* at 25-26. He further testified that discretion had to be used in the administration of the Lactulose used to treat Decedent's encephalopathy based upon the variations in the patient's clarity and that, even with compliance with prescribed dosages, patients with encephalopathy can still have the symptoms of confusion and poor cognition, even to the point of debilitation. *See id.* at 83. He further testified: "I think the lactulose would have worked well, but it wouldn't necessarily keep the ammonia under control or prevent hepatic encephalopathy every single day. I would say that it — it typically works well, but it's — it — this is not a — this is not a perfect medicine." *See id.* at p.29. Considered in conjunction with the expert testimony of Dr. Fox that, once encephalopathy begins, it is always present at some level and that it would worsen along with the Decedent's underlying liver disease, the court is not convinced by the January 11, 2019 episode of mental clarity, or the other relayed specific encounters of witnesses, that Decedent did not suffer from weakened intellect.

Both Paul and his girlfriend, Sherry Kent, testified more generally that, once they moved in with Decedent in December of 2018 and Paul began to monitor Decedent's medication that they did not observe any confusion in Decedent. Paul opined that the November driving incident was the result of the Decedent failing to take his Lactulose medication as prescribed, but with him assisting with the medication that Decedent's mental acuity improved and he was better in January of 2019 than he had been the two previous months. Ms. Kent testified that, in January of 2019, Decedent seemed as sharp as ever — he watched CNN every day and talked about politics and was able to interact with visitors — and that, in February, she didn't notice a change mentally — Decedent recognized her, Paul, their son and he knew

[4] Petitioners filed of record Petitoners' Objection to Opinion Evidence of Dr. David Hutzel. To the extent that the same was not addressed of record, it was denied prior to review of Dr. Hutzel's deposition testimony.

where he was. Sherry testified that, when the codicil was signed, Decedent was alert, oriented and aware of everything going on around him. It is noteworthy that both Paul and Ms. Kent have an interest in the outcome of these proceedings.[5] With the aforementioned contradictory evidence regarding Decedent's mental clarity in the last months prior to death, as well as the testimony of both experts that the encephalopathy would come and go and Dr. Fox's opinion that it would worsen with Decedent's condition, the testimony of no observations of confusion is incredible.

It would be remiss not to consider specifically the testimony of Duane Regelmann, who witnessed Decedent sign page 3 of the Codicil. Mr. Regelmann believes that the Decedent recognized him and noted that he didn't address him by name, but by saying "Hi, neighbor," which he asserts was his usual greeting. Mr. Regelmann testified that Paul read the Codicil to he and Decedent and that, when he was done, Mr. Regelmann asked Decedent if that is what he wants, to which Decedent responded "yes." Mr. Regelmann has "no doubt" that Decedent knew what he was saying. Nevertheless, Decedent did not discuss the contents of the Codicil with Mr. Regelmann or say that he wanted Paul to have the house. Moreover, Mr. Regelmann was present in Decedent's home for only 40-45 minutes on the day that the Codicil was executed. Prior to this encounter, Mr. Regelmann had not even seen the Decedent in several weeks. Meanwhile, the testator's mental condition on the date of execution is not as significant when considering undue influence because such influence generally occurs through a "gradual, progressive inculcation of a receptive mind" such that "[t]he 'fruits' of the undue influence may not appear until long after the weakened intellect has been played upon." *In re Clark's Estate*, 334 A.2d 628, 634 (Pa. 1975). In this respect, Mr. Regelmann's impression of the Decedent's overall mental weakness for purposes of whether he could be subject to undue influence is extremely limited. With such a limited encounter, Mr. Regelmann would not know whether, in the weeks prior to February 21, 2019, Decedent's mental state could have rendered him susceptible to undue influence to induce the production and execution of the Codicil.

Accordingly, it is clear that the Decedent suffered from weakened intellect.

(2) <u>Confidential Relationship</u>

A confidential relationship exists where "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." *In re Estate of Smaling*, 80 A.3d 485, 498 (Pa. Super. 2013) *quoting In re Estate of Clark*, 334 A.2d 628, 633 (Pa. 1975). "A confidential relationship is created between two persons when it is established that one occupies a superior position over the other — intellectually, physically, governmentally, or morally — with the opportunity to use that superiority to the other's disadvantage." *In re Estate of Smaling*, 80 A.3d at 498 *quoting In re Estate of Thomas*, 344 A.2d 834, 836 (1975). "[S]uch a relationship is not confined to a particular association of parties, but exists whenever one occupies toward another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other's interest." *Id. quoting Estate of Keiper*, 454 A.2d 31, 33 (Pa. Super. 1982), *quoting Silver v. Silver*, 219 A.2d 659, 662 (Pa. 1966).

[5] While Ms. Kent may not directly benefit financially, she would like for her son to remain enrolled in the school where he is presently attends due to the address of the property devised by the Codicil.

It is relevant that Paul Crilley acted as power of attorney for Decedent. In this respect it is clear that Decedent placed trust in Paul to act in good faith for his interest. Such a relationship is indicative of a confidential relationship. *See In re Estate of Fritts*, 906 A.2d 601, 608 (Pa. Super. 2006) ("The clearest indication of a confidential relationship is that an individual has given power of attorney over her savings and finances to another party."). Nevertheless, while they are facts to be considered, neither the existence of a power of attorney nor the existence of a parent-child relationship are alone sufficient to establish a confidential relationship. *See In re Estate of Luongo*, 823 A.2d 942, 964 (Pa. Super. 2003); *see also Estate of Gilbert*, 492 A.2d 401, 404 (Pa. Super. 1985).

Paul, from at least December of 2018, took on an active role in many aspects of Decedent's life, including his finances, his health care, his calendar and, most telling, communications with Decedent's attorney. Paul testified that, from November of 2018, he managed the Decedent's checkbook. Paul, in December of 2018, moved his family into Decedent's residence in order to provide for Decedent's care. Meanwhile, all of decedent's other children lived remotely and visited infrequently, increasing decedent's reliance on Paul. Paul was very active in the Decedent's health care. Dr. Hutzel testified that the last year or two of decedent's life, Paul attended every appointment. *See Deposition of Dr. David C. Hutzel*, August 12, 2021 at p. 26. Paul spoke with Dr. Hutzel frequently and even had his cell phone number. *See Deposition of Dr. David C. Hutzel*, August 12, 2021 at p. 42. It was primarily Paul, rather than decedent, who communicated to Dr. Hutzel regarding Decedent's compliance with Lactulose. *See id.* at p. 54-56. Paul, rather than the Decedent, managed all of the Decedent's medication and Paul instructed any family members who were present with the Decedent in his absence on the same. Similarly, when Decedent's son, Pete, and Ms. Thatcher took Decedent for a medical appointment, they called Paul so that he could be on the phone for the same. Paul and his girlfriend Sherry provided for Decedent's care from December of 2018 through his death, not even calling for hospice care until three days before he died, despite a January referral for the same. Moreover, Paul assumed an active role in Decedent's legal affairs. The last legal work that Attorney Adair completed for Decedent was in January of 2018. Attorney Adair testified, however, to contacts initiated by Paul regarding Decedent's affairs in late 2018 and 2019. *See* Petitioner's Exhibit 1, Deposition of Evan Adair, Esquire at 46-48, 52 and 67-68. Attorney Adair relayed his impressions regarding one particular telephone discussion as occurring on December 14, 2018. During the same, Attorney Adair described the Decedent as being present but in a weakened state and not really participating, and he described the meeting as follows:

> Q: Any discussion within that conversation about preparing any amendments to his last will and testament?
> A (by Attorney Adair): These are — and, again, let me just preface this, because I don't want to step on confidentiality of a client. [Decedent] participated in the discussion. [Decedent] participated and was on the line during the discussion by phone on December 14, 2018. But he obviously was weakened in condition. And I was not inclined to try to make anything harder for him. The questions were essentially questions we all had. So a variety of questions were asked, and I responded as best I could to those questions.
> Q: Did those questions involve estate planning services, including amendments to his will?

A: They involved estate planning related questions. [Decedent] never asked about revising his will. The question that was asked about doing an irrevocable trust or placing the real estate in joint title. I mean, my notes indicate that I was asked by Paul if the real estate could be placed in joint title. I said — (court reporter requests clarification) — If the real estate could be placed in joint title. And I mean Paul and [Decedent]. And I responded that that would conflict with the statements and intentions in the will. I was asked about whether it could be an irrevocable trust. I expressed an opinion that I didn't see any point at all in an irrevocable trust. And that an irrevocable trust would not accomplish much at all unless — you know, that a will couldn't be handled. There was some kind of discussion about whether the real estate should be sold. And I said they could agree to it. But terms should be set at the time of sale, not after [Decedent's] passing. And so basically I was being asked questions, and I was answering as best I could those questions.
Q: Were these questions directed at you mainly by Paul Crilley?
A: Yes.

See id. at 47-48. Attorney Adair was clear that Decedent did not say much of anything during the December of 2018 meeting and that the discussion was driven by Paul's questions. *See id.* at 68. The fact that Paul initiated the meeting and made inquiries of Attorney Adair, while the Decedent, who was universally described as intelligent, conversational and good-humored, was not engaged in the conversation is compelling. Thereafter, Paul initiated email conversations with Attorney Adair regarding the Decedent's legal affairs, including those surrounding a divorce action filed by Augusta Gordon against the Decedent. Almost invariably, the emails were from Paul to Attorney Adair, with Attorney Adair responding. *See id.* at 67. In one of those February of 2019 emails, Paul indicated that the Decedent's condition had markedly declined within a couple of days. *See id.* at 72 and 74. The Decedent and Attorney Adair had a nearly 40-year attorney-client relationship involving numerous legal affairs, including approximately 30 years' worth of estate planning. *See* Petitioner's Exhibit 1 at 13-14, 26 and 31; *see also* Deposition Exhibit Adair 1. This longstanding relationship had evolved to the point that Attorney Adair testified that "[a]fter 40 years, [Decedent] was something of a friend to me and I was something of a friend to him." *See* Petitioner's Exhibit 1 at 72. "[T]his was a guy I wasn't going to bill for every minute of my time." *See id.* at 71. Considering the relationship, it is contrary to the Decedent's established course of action[6], as well as logic, that Decedent did not seek the assistance of Attorney Adair to effectuate changing the will that he had Attorney Adair draft for him. If the Decedent was aware of the effect of the Codicil, the complete trust that he placed in Paul to draft the same can only be explained to be the result of a confidential relationship. *See generally Burns v. Kabboul*, 595 A.2d 1153, 1163-64 (Pa. Super. 1991) (in finding sufficient evidence to establish a confidential relationship where the proponent of the will was the decedent's primary caretaker, was entrusted with a power of attorney to carry out banking transactions

[6] Not only had Decedent utilized Attorney Adair's services regularly and consistently for decades, but, as recently as January of 2018, he had him handle a matter similar to the one at hand. Specifically, Decedent had Attorney Adair effectuate the transfer of property to his son Barry — property which he specifically devised to Barry via the Will which Attorney Adair had drafted. *See* Petitioner's Exhibit 7.

on the decedent's behalf, and was the scrivener of the testamentary document, the court stated that "[i]t will weigh heavily against the proponent on the issue of undue influence when the proponent was either the scrivener of the will or was present at the dictation of the will.").

Paul asserts that he prepared the Codicil at Decedent's direction. He testified that he did not contact an attorney regarding the Codicil because the Decedent told him to research what it takes to change a will, so he did. Paul testified that he did not think to call an attorney. Meanwhile, as detailed above, Paul was clearly familiar with Decedent's attorney, had very recently engaged in discussions with the same, and was clearly comfortable asking Attorney Adair questions. Paul was not credible. Even if Paul's testimony was accepted as true, it only serves to support the existence of a confidential relationship as it demonstrates that Decedent had so much dependence, confidence and trust in Paul that he chose to abandon the skilled advice of his attorney of nearly forty years in favor of his layperson son to draft a legal document which changed the disposition of a large portion of his estate. It is simply not credible that Decedent who, prior to his weakened state, was clearly precise and business-minded with regard to his affairs would, if he were of mental capacity, ask his layperson son, rather than his attorney of nearly forty years, to draft a document which would change the Will.

Considering the aforementioned evidence, the dependence upon, and trust in, Paul by Decedent while in his weakened state is clear. Even Paul's own statements acknowledge the same, as well as his influence over Decedent, as, on February 26, 2019, he noted in a group text to family regarding Decedent's estranged daughter Mary's inclusion in the Will: "You are only a part of the will because I CHANGED DAD'S MIND." *See* Petitioner's Exhibit II. Accordingly, a confidential relationship between the two existed.

(3) Substantial Benefit

With regard to whether or not the proponent of a testamentary writing receives a "substantial benefit," Pennsylvania law provides: "it may be said no hard and fast rule can be laid down. [The court's finding] must depend upon the circumstances of each particular case." *See In re Estate of Smaling*, 80 A.3d 485, 497 (Pa. Super. 2013) *quoting In re Estate of LeVin*, 615 A.2d 38, 41 (Pa. Super. 1992), *quoting Adams' Estate*, 69 A. 989, 990 (Pa. 1908).

Under the circumstances of this case, there is no doubt that Paul Crilley receives a substantial benefit as a result of the Codicil. During his testimony, Paul set forth that the County assessed value of the property in question is $248,200.00. He further acknowledged that the property is a substantial asset of the Estate. If the Codicil is upheld, Paul will receive this asset, as well as his share of the residuary Estate. Otherwise, he will only be a 1/7 residuary beneficiary.

As all three elements of undue influence were clearly established, the Codicil was the product of undue influence. As the Codicil is invalidated on the basis of the same, it is unnecessary to analyze the remaining counts set forth by Petitioners for invalidation.

B. Removal of Executor

Petitioners further request the removal of Paul M. Crilley as Executor of the Estate based upon his actions in causing the Codicil to be created and executed.

The grounds for removal of a personal representative of an estate are delineated by statute as follows:

The court shall have exclusive power to remove a personal representative when he:

(1) is wasting or mismanaging the estate, is or is likely to become insolvent, or has failed to perform any duty imposed by law; or
(2) Deleted by 1992, April 16, P.L. 108, No. 24, § 4, effective in 60 days.
(3) has become incapacitated to discharge the duties of his office because of sickness or physical or mental incapacity and his incapacity is likely to continue to the injury of the estate; or
(4) has removed from the Commonwealth or has ceased to have a known place of residence therein, without furnishing such security or additional security as the court shall direct; or
(4.1) has been charged with voluntary manslaughter or homicide, except homicide by vehicle, as set forth in sections 3155 (relating to persons entitled) and 3156 (relating to persons not qualified), provided that the removal shall not occur on these grounds if the charge has been dismissed, withdrawn or terminated by a verdict of not guilty; or
(5) when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office.

20 Pa.C.S.A. §3l82. With the determination of undue influence detailed herein, the interests of the estate are likely to be jeopardized by Paul Crilley's continuation as executor. A conflict of interest is readily apparent under the circumstances of this case as, via execution of the Codicil, Paul's personal interests were already advanced to the detriment of the Estate. As the personal representative of an estate has a duty to see that purely private interests are not advanced to the estate's detriment, removal is appropriate in this case. *See In re Estate of Andrew*, 92 A.3d 1226, 1230-32 (Pa. Super. 2014).

An appropriate order will follow.

ORDER

AND NOW, to-wit, this 15th day of November, 2021, upon consideration of the Petitions to Contest Codicil and to Remove Paul M. Crilley as Executor of Estate, and for the reasons set forth in the accompanying Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** that said Petitions are **GRANTED**. Accordingly, the February 21, 2019 Codicil admitted to probate is invalidated and Paul M. Crilley is removed as Executor of the Estate of Raymond E. Crilley, Sr.

BY THE COURT
/s/ **Hon. Elizabeth K. Kelly, Judge**

IN THE MATTER OF THE ADOPTION OF M.H.R. (D.O.B.: NOVEMBER 17, 2018)

IN THE MATTER OF THE ADOPTION OF P.A.R. (D.O.B.: OCTOBER 18, 2020)

APPEAL OF: H.J.S., MOTHER AS TO BOTH NOS. 20 AND 20A IN ADOPTION

INFANTS / TERMINATION OF PARENTAL RIGHTS / JUVENILE

The grounds for termination of parental rights due to parental incapacity that cannot be remedied are not limited to affirmative misconduct; instead, such grounds emphasize 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 statutory language should not be read to compel courts to ignore a child's need for a stable home and strong, continuous parental ties, particularly so where disruption of the family has already occurred and there is no reasonable prospect for reuniting it. 23 Pa.C.S.A. § 2511(a)(2).

INFANTS / TERMINATION OF PARENTAL RIGHTS / JUVENILE

In an action to terminate parental rights, above all else adequate consideration must be given to the needs and welfare of the child. 23 Pa.C.S. § 2511(b).

INFANTS / TERMINATION OF PARENTAL RIGHTS / JUVENILE

"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).

INFANTS / TERMINATION OF PARENTAL RIGHTS / JUVENILE

When a parent has demonstrated a continued inability to conduct her life in a fashion that would provide a safe environment for a child, whether that child is living with the parent or not, and the behavior of the parent is irremediable as supported by clear and competent evidence, the termination of parental rights is justified. 23 Pa.C.S. § 2511(a)(2).

INFANTS / TERMINATION OF PARENTAL RIGHTS / JUVENILE

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 / JUVENILE

A parent facing termination of parental rights 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. 23 Pa.C.S. § 2511(a).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
ORPHAN'S COURT DIVISION
NO. 20 IN ADOPTION, 2021
951 WDA 2021

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
ORPHAN'S COURT DIVISION
NO. 20A IN ADOPTION, 2021
950 WDA 2021

Appearances: Emily Mosco Merski, Esq., for Appellant, H.J.M, a/k/a H.J.S., Mother
Deanna L. Heasley, Esq., Legal Counsel for each Minor Child
Kevin C. Jennings, Assistant Solicitor for ECCYS

1925(a) OPINION

Domitrovich, J., September 9, 2021

Appellant H.J.M, also known as H.J.S (hereinafter Mother) appeals through her counsel Emily Merski, Esq. from the Final Decree dated July 13, 2021 in the Erie County Court of Common Pleas granting the Petition of Involuntary Termination from the Erie County Children and Youth Services (hereinafter ECCYS) terminating Mother's parental rights pursuant to 23 Pa.C.S. §2511 (a) (1), (2), (5), (8) and (b), to her children, M.H.R. (hereinafter Minor Child M.H.R.) born November 17, 2018, and P.A.R. (hereinafter Minor Child P.A.R.) born October 18, 2020 (and collectively referred to as Minor Children).[1]

In lieu of a Concise Statement of Errors Complained of on Appeal and pursuant to Pa.R.A.P. 1925 (c)(4), Emily Merski, Esq. states, as appointed counsel for Mother, "no non-frivolous appellate issues exist and intends to file a petition to withdraw and brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) and *In re Adoption of V.E.*, 611 A.2d 1267 (Pa. Super. 1992)." *Statement of Intention to File an Anders Brief*, filed on August 11, 2021.

Although this IVT Court at the conclusion of this IVT hearing orally on the record provided Findings of Fact and Conclusions of Law, this IVT Court has made the following more specific written Findings of Fact and Conclusions of Law as to the sufficiency of the evidence regarding 23 Pa.C.S. §2511 (a) (1), (2), (5), (8) and (b), with the benefit of a written Transcript for citation purposes.

FINDINGS OF FACT and PROCEDURAL HISTORY

The Dependency case as to Minor Child M.H.R. began on December 10, 2019, with an Emergency Protective Custody Order issued by the Dependency Court at the request of ECCYS. Removal of Minor Child M.H.R was found necessary for his welfare and best interest, and ECCYS made reasonable efforts to prevent removal or provide reunification. Any lack of services to prevent removal were reasonable due to emergency nature of removal and child's safety considerations. Minor Child M.H.R. was placed in the temporary protective physical and legal custody of ECCYS consistent with the Juvenile Act and Child Protective Services Law. *Emergency Protective Custody Order for M.H.R. dated December 10, 2019, Petitioner's Exhibit 4.*

Juvenile Court Dependency Docket Entries as to Minor Child M.H.R. indicate a Shelter Care hearing was held on December 12, 2019, in front of a Juvenile Court Hearing Officer. S*ee Petitioner's Exhibit 5, page 4.* On December 23, 2019, Juvenile Court Hearing Officer filed her Recommendations that were later adopted and ordered by Dependency Court on December 30, 2019, and then filed on January 7, 2020. Mother did not appear for this Shelter Care hearing although given notice by phone by ECCYS staff, and Mother was not represented by counsel. Father appeared and stipulated, through his counsel, to continued

[1] This IVT Court addressed both Minor Children in this same Opinion. Since these two cases captioned above are not consolidated at this time, this IVT Court filed an original of this 1925 (a) Opinion at each Docket No. for each Minor Child.

temporary shelter care pending an adjudication hearing. Minor Child M.H.R.'s Guardian Ad Litem also agreed to continued temporary shelter care pending an adjudication hearing. Reasonable efforts were made by ECCYS to prevent or eliminate the need for removal of this child from the home, and the Order indicates Minor Child M.H.R. was not returned to the home of Mother and/or Father since returning Minor Child M.H.R. was contrary to his welfare and best interests. Both legal and physical custody of Minor Child M.H.R. remained with ECCYS. Minor Child M.H.R. remained in Kinship Care as the least restrictive placement meeting his needs and no less restrictive alternative was available. ECCYS was to continue to engage in family finding efforts including interviewing Minor Child M.H.R. and family members; interviewing any previous caseworkers and probation officers; interviewing past and present service providers and therapists; checking social media sites; completing a genogram, family tree, or mapping; and all other sources that would lead to identification of family members, kin, and fictive kin. ECCYS was directed to present its family finding efforts at the next court hearing scheduled for this child. Mother and Father were permitted one supervised visit before the next hearing. *Recommendation for Shelter Care for Minor Child M.H.R. dated December 23, 2019, and Dependency Order dated December 30, 2019, Petitioner's Exhibit 3, pages 1-2.*

On December 19, 2019, an Adjudicatory hearing was held in the interest of Minor Child M.H.R. Mother did not initially appear despite receiving notification, but appeared during the testimony being presented by the agency. Amanda Kimmy testified from ECCYS about this referral and her concerns about the transiency of the housing of this family. Ms. Kimmy testified about the parents' drug use concerns. Her testimony demonstrated the need for adjudication, and Minor Child M.H.R.'s Guardian Ad Litem agreed with adjudicating Minor Child M.H.R. dependent. The Court found "the testimony does establish the need for an adjudication of dependency for the reasons set forth in the Dependency Petition." The Pre-Dispositional Summary was admitted without objection. The Treatment Plan, placement setting, and visitation schedule were found appropriate for the family. Since clear and convincing evidence existed to substantiate allegations in Dependency Petition, Minor Child M.H.R. was declared a Dependent Child who was "without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals." *Recommendation for Adjudication and Disposition for M.H.R. dated December 19, 2019, Petitioner's Exhibit 3, page 2.*

Upon the parties' agreement, the Dispositional Hearing was also held on December 19, 2019, immediately following this Adjudication Hearing. Juvenile Hearing Officer found, due to findings of abuse, neglect or dependency of the minor Child, the best interest of Minor Child M.H.R. was to remove him from Mother and Father. To permit him to remain in their home would have been contrary to Minor Child M.H.R.'s welfare. Moreover, reasonable efforts were made by ECCYS to prevent or eliminate the need for removal of Minor Child M.H.R. from his home. Additionally, the Court ordered Minor Child M.H.R. remain in Kinship Care, the least restrictive placement meeting his needs, and no less restrictive alternative was available. The goal for Minor Child M.H.R. was determined to be return to parent or guardian with the projected date being uncertain. Mother was directed to refrain from use of drugs and alcohol and submit to random urinalysis screening through Esper Treatment Center as requested by ECCYS. If Mother had a positive urine screen, Mother

would be referred to random urinalysis color code program thorough Esper Treatment Center. Mother was to participate in a drug and alcohol treatment assessment and follow through with any recommendations; participate in a mental health evaluation and follow through with any recommendations; obtain and/or maintain safe and stable housing and provide ECCYS with a signed lease to show she is able to provide stability for Minor Child M.H.R; obtain and/or maintain gainful employment and provide ECCYS with documentation she is employed and was receiving an income; participate in a parenting education program and demonstrate her ability to provide for Minor Child M.H.R.'s needs during visitation; demonstrate her ability to provide for safety and well-being of this child including attending medical, dental, and other necessary appointments; and sign any and all releases requested by ECCYS. Mother and/or Father had supervised visitation once per week and increased in frequency and/or duration according to Mother and/or Father's progress with court ordered services. Visitation was to progress to unsupervised once deemed appropriate by ECCYS. All visitation was contingent upon Mother and/or Father being drug and alcohol free. If a positive urine result was received, Mother and/or Father would have no visits until his or her next clean urine. *Recommendation for Adjudication and Disposition for M.H.R. dated December 19, 2019, Petitioner's Exhibit 3, page 3.*

On January 8, 2020, Dependency Court adopted and ordered the Juvenile Court Hearing Officer's Recommendation for Adjudication and Disposition as to Minor Child M.H.R as being "in the best interest of the child." *Recommendation for Adjudication and Disposition for M.H.R. dated December 19, 2019, Petitioner's Exhibit 3, page 5.*

On January 29, 2020, after considering a Motion to Change Treatment Plan, Dependency Court amended Mother's Treatment Plan as to Minor Child M.H.R. and added: "The mother shall participate in an assessment for the Family Dependency Drug Treatment Court program, which will include a drug and alcohol treatment assessment, and follow through with all recommendations." *Court Order captioned with M.H.R. dated January 29, 2020, Petitioner's Exhibit 4.*

On February 7, 2020, Dependency Court ordered, upon consideration of a Motion for Special Relief, James Smith added as a party and directed him to submit to paternity testing to determine whether he was the biological father of Minor Child M.H.R. *Court Order captioned with Minor Child M.H.R. dated February 7, 2020, Petitioner's Exhibit 4.*

On March 17, 2020, Dependency Court ordered Minor Child M.H.R's Permanency Hearing scheduled for March 23, 2020 at 2:30 p.m. continued to a new date sixty days out. Dependency Court also stated, "reasonable efforts have been made by the Agency to finalize this child permanency plan." *Court Order for of Minor Child M.H.R dated March 17, 2020, Petitioner's Exhibit 4.* Since the hearing was continued to April 21, 2020, the Court Summary dated March 23, 2020, was, therefore, not used although contained in this record.

On April 21, 2020, the Permanency Review Hearing was held as to the seventeen-month-old Minor Child M.H.R. An updated Court Summary for the Permanency Review Hearing indicates: In the beginning, Mother and Father "were resistant to services; however, they have been more open and compliant with services over the past month." Mother and Father have participated in assessments for drug and alcohol and mental health treatment and are scheduled to participate in needed treatment services. Mother and Father have been more consistent in attending urinalysis screens within the past month. Father has submitted

clean urinalysis screens in the past several weeks. Mother has continued to test positive for marijuana, but the level of marijuana in her system appears to be decreasing. ECCYS will continue to monitor Mother and Father's compliance and progress. *Court Summary, Permanency Review Hearing as to Minor Child M.H.R, dated April 21, 2020, Petitioner's Exhibit 6, page 8.*

As to the Court directive that Mother refrain from drugs and alcohol, the Court Summary reveals between December 19, 2019 and April 16, 2020, Mother was to participate in a total of twenty-five urinalysis screenings. Of these screenings, Mother had a total of one Positive for Amphetamine, Methamphetamine and Marijuana, seventeen (17) Positive for Marijuana, one Positive Quantity not sufficient for analysis (specimen leaked in transit), and six (6) Positive No-Shows. *Court Summary, Permanency Review Hearing as to Minor Child M.H.R, dated April 21, 2020, Petitioner's Exhibit 6, pages 8-9.*

Specific Dates for Urinalysis results as to Mother were:

3/16/20 Positive for Marijuana
3/11/20 Positive for Marijuana
3/10/20 Positive for Marijuana
3/06/20 Positive for Marijuana
3/05/20 Positive for Marijuana
3/02/20 Positive for Marijuana
2/28/20 Positive for Marijuana
2/26/20 Positive for Marijuana
2/24/20 Quantity not sufficient for analysis (specimen leaked in transit)
2/22/20 Positive for Marijuana
2/18/20 Positive for Marijuana
2/14/20 Positive for Marijuana
2/13/20 Positive for Marijuana
2/10/20 Positive for Marijuana
2/05/20 Positive for Marijuana
2/04/20 Positive for Marijuana
2/02/20 Positive for Marijuana
1/31/20 Positive for Marijuana
1/28/20 Positive No-Show
1/27/20 Positive No-Show
1/24/20 Positive for Amphetamines, Methamphetamines and Marijuana
1/23/20 Positive No-Show
1/16/20 Positive No-Show
1/09/20 Positive No-Show
1/02/20 Positive No-Show

As to the Court directive that Mother participate in Family Dependency Drug Treatment Court program, Mother participated in the orientation for Family Dependency Drug Treatment Court on February 13, 2020. She also participated in the eligibility assessment on February 28, 2020. She participated in a drug and alcohol assessment on February 12, 2020 and Intensive Outpatient was recommended. She began receiving dual diagnoses services at Stairways Behavioral Health on March 2, 2020. *Court Summary, Permanency Review Hearing as to Minor Child M.H.R,*

dated April 21, 2020, Petitioner's Exhibit 6, page 10.

As to the Court directive that Mother participate in a mental health evaluation, she participated in mental health evaluation on February 28, 2020, and commenced dual diagnoses services at Stairways Behavioral Health on March 2, 2020. ECCYS had not received her treatment plan or any updates on these services.

As to the Court directive that Mother obtain and maintain safe and stable housing, Mother resides with Father and her mother.

As to the Court directive that Mother obtain and maintain employment, Mother reported she would be working for Voices for Independence and will be paid to take care of her mother in the home. No paperwork was received verifying Mother's employment.

As to the Court directive that Mother participate in parenting education program, Amanda DiCola, her Family Reunification caseworker, indicated Mother was compliant in meeting with her.

As to the Court directive that Mother attend medical appointments, Mother attended Minor Child M.H.R.'s doctor appointment on February 28, 2020. Mother attempted to attend a doctor appointment for him in February 21, 2020, but the appointment was rescheduled for a later date. Mother was compliant in signing all necessary documentation requested by ECCYS. *Court Summary, Permanency Review Hearing as to Minor Child M.H.R., dated April 21, 2020, Petitioner's Exhibit 6, pages 10-11.*

After the hearing on April 21, 2020, Dependency Court entered its Order dated April 22, 2020, finding Mother had "moderate compliance with the permanency plan" and "moderate progress toward alleviating the circumstances which necessitated the original placement." The Order further stated, "placement with the child continues to be necessary and appropriate" and "current placement goal for child is to return to parent or guardian." Moreover, the Dependency Court directed legal and physical custody of Minor Child M.H.R. shall remain with ECCYS and placement of this Child would remain in Kinship Care, specifically paternal uncle and wife's Kinship Home. ECCYS Caseworker was directed to contact "the kinship provider to encourage in person visitation with" Mother and Father. The placement goal remained to return Minor Child M.H.R. to Mother and/or Father. The Dependency Court also directed Mother refrain from use of drugs and/or alcohol and submit to random urinalysis testing through color code program at Esper Treatment Center; continue to participate in Family Dependency Drug Treatment Court program and follow all recommendations; continue to participate in mental health services and follow all recommendations; obtain and/or maintain gainful employment and provide ECCYS with documentation she is employed and receives an income; secure and/or maintain safe and stable housing and provide proof to ECCYS; continue to participate in a parenting education program and demonstrate her ability to provide for Minor Child M.H.R.'s needs during visitation, and demonstrate her ability to provide for safety and well-being of Minor Child M.H.R. including Mother's attendance at his medical, dental, or any other necessary appointments. Dependency Court also stated "visitation shall continue with the Mother" and increase in frequency to unsupervised depending on Mother's progress in being drug and alcohol free. *Permanency Review Order for Minor Child M.H.R dated April 22, 2020, Petitioner's Exhibit 4, pages 1-4.*

On July 1, 2020, Second Permanency Review Hearing was held for nineteen- month-old

Minor Child M.H.R. The Court Summary indicates: On May 17, 2020, Mother's mother passed away unexpectedly. There is a concern Mother and Father continue to struggle with substance abuse. Mother recently tested positive for marijuana. As to Mother's refraining from drugs and alcohol, Covid-19 emergency has affected Mother's progress. Mother was unable to participate in random urinalysis testing through color code program. Mother participated in two one-time urinalysis screenings. On May 29, 2020 and June 11, 2020, Mother's results indicated Mother was positive for marijuana. To the Treatment team, Mother admitted she consumed an alcoholic beverage on the day her mother passed away. *Court Summary for Permanency Review Hearing for Minor Child M.H.R., dated July 1, 2020, Petitioner's Exhibit 6, pages 5-6.*

As to the Court directive that Mother participate in the Family Dependency Drug Treatment Court program, Mother on February 13, 2020 did participate in the orientation for Family Dependency Drug Treatment Court, and then on February 28, 2020, she participated in the eligibility assessment. Mother qualified for entry into the Dependency Drug Treatment Court as well as drug and alcohol services by meeting the criteria. Mother participated in drug and alcohol assessment on February 12, 2020, wherein Intensive Outpatient (IOP) was recommended. With the onset of the Covid-19 emergency, Family Dependency Drug Treatment Court did not occur from the middle of March 2020 until June 11, 2020. Mother did attend Court on June 11, 2020, and June 18, 2020. *Court Summary for Permanency Review Hearing for Minor Child M.H.R., dated July 1, 2020, Petitioner's Exhibit 6, page 6.*

As to the Court directive that Mother participate in mental health services, Mother participated in a mental health evaluation on February 28, 2020. On March 2, 2020, Mother commenced dual diagnoses services at Stairways Behavioral Health. Mother continued to have weekly mental health counseling sessions. No medication was prescribed, as Mother was pregnant and due in November 2020. Mother continued to receive drug and alcohol services twice weekly. Mother overslept for her appointment and, therefore, did not attend that appointment on June 17, 2020, and rescheduled her appointment, she reports, for June 19, 2020. Erie County Drug and Alcohol Office suggested to Mother she should participate in twelve step meetings, but Mother refused immediately and also said she would not attend the Smart program and other suggested programs. To the Treatment Court Team, Mother reported in the past she had attended Celebrity Recovery program, but she said she did not like it and informed the Treatment Court Team that she was not "a people person." Mother also refused suggested recovery podcasts. *Court Summary for Permanency Review Hearing for Minor Child M.H.R., dated July 1, 2020, Petitioner's Exhibit 6, page 6.*

As to the Court directive that Mother obtain employment, Mother was unemployed. As to the Court directive that Mother obtain secure and stable housing, Mother was currently living with Father. As to the Court directive that Mother participate in parenting education, Mother was compliant with Ms. DiCola, her Family Reunification Caseworker. Due to Mother's positive urine screen results, Mother was only able to participate in one, in-person visit with Minor child M.H.R. As to the Court directive that Mother attend Minor Child M.H.R.'s medical appointments, Mother had previously attended all of his medical appointments. Because of Covid-19 emergency, Mother was not able to attend the last couple medical appointments. *Court Summary for Permanency Review Hearing for Minor Child M.H.R., dated July 1, 2020, Petitioner's Exhibit 6, pages 6-7.*

At the hearing on July 1, 2020, Dependency Court found Mother had "moderate compliance with the permanency plan" and "moderate progress toward alleviating the circumstances which necessitated the original placement." The placement goal continued to be return to Mother and/or Father. Dependency Court found continued placement of Minor Child M.H.R. was necessary and appropriate. Moreover, Dependency Court directed continued placement of Minor Child M.H.R. in Kinship Care, specifically the paternal uncle and his wife's Kinship Home. Dependency Court further ordered Mother to, "Refrain from the use of drugs and/or alcohol and submit to random urinalysis testing through the color code program at the Esper Treatment Center; Continue to participate in the Family Dependency Drug Treatment Court program and follow all recommendations; Continue to participate in mental health services and follow all recommendations; obtain and/or maintain gainful employment and provide the Agency with documentation that she is employed and receives income; Maintain Stable and safe housing; Continue to participate in a parenting education program and demonstrate the ability to provide for [M.H.R.]'s needs during visitation; and Demonstrate the ability to provide for the safety and well-being of [Minor Child M.H.R.] to include attending medical, dental, or any other needed appointments." The Court Order also continued to provide Mother with supervised visitation once per week with her supervised visits increasing in frequency and/or duration according to Mother's progress with treatment services. Visitation would progress to unsupervised visitation if Mother was drug and alcohol free. If Mother had a positive urine result, Mother would forfeit a visit until Mother produced the next clean urine. *Permanency Review Order for Minor Child M.H.R. dated July 7, 2020, Petitioner's Exhibit 4.*

On October 1, 2020, the Erie County Family Dependency Treatment Court discharged Mother "for consistent failure to attend court, failure to submit to drug testing and non-compliance with treatment recommendations." *See Erie County Case Management Assessment Outcome Letter, Petitioner's Exhibit 7A, page 33A.*

The second sibling is Minor Child P.A.R. born on October 18, 2020 in Chardon, Ohio. On October 20, 2020, upon verbal request of ECCYS, Dependency Court issued a verbal order granting emergency protective custody of Minor Child P.A.R. "as necessary for the welfare and best interest of the child, the verbal order was given due to the emergency nature of the removal and safety consideration of the child, any lack of services to prevent to prevent removal were reasonable." *Written Order dated October 21, 2020 for Verbal Authorization (Emergency Protective Custody) regarding Minor Child P.A.R. made on October 20, 2020, Petitioner's Exhibit 4.*

On October 23, 2020, a Shelter Care hearing was held as to Minor Child P.A.R. in Dependency Court. The Order stated sufficient evidence existed proving continuation or return of Minor Child P.A.R. to home of Mother and/or Father, was not in Minor Child P.A.R.'s best interest. Mother and Father did not appear at the time of this hearing. Minor Child P.A.R.'s Guardian Ad Litem agreed with continued shelter care pending further hearings. Placement of Minor Child P.A.R. remained with Kinship Care as least restrictive placement to meet her needs and no less restrictive alternative was available. ECCYS was directed to engage and continue in family finding in order to present its family finding efforts at the next court hearing. *Shelter Care Order for P.A.R. dated October 27, 2020, Petitioner's Exhibit 4.*

On November 2, 2020, Minor Child M.H.R's Third Permanency Review Hearing was held. The Court Summary indicated he was now twenty-three months old, and the length of his current placement was eleven months. Mother has an educational background of ninth grade. No aggravated circumstances were applicable. ECCYS recommended Reunification concurrent with Adoption. Mother and Father were evicted recently from their residence and were homeless. Mother consistently failed to attend Erie County Family Dependency Treatment Court proceedings, failed to submit to drug testing and was non-compliant with Treatment Court recommendations.

At the Third Permanency hearing for Minor Child M.H.R. held on November 2, 2020, Mother attended and was represented by counsel. The Court Summary explained as to whether Mother refrained from drugs and alcohol. For the period from July 1, 2020 through October 13, 2020, the Court Summary indicated Mother was to participate in thirty-six (36) urinalysis screenings, however, this Court Summary contains only the results for thirty-five (35) urinalysis screenings as indicated below. In summary, Mother had twenty-five (25) No Show Positives [Court Summary counted 9/28/20 twice]; four (4) Negative screenings; three (3) Positive Failure to Produce; one (1) Positive for Marijuana; one (1) positive for Methamphetamines; and one (1) Positive for Amphetamines, Methamphetamines and Marijuana. *See Court Summary for Permanency Review Hearing for Minor Child M.H.R., dated November 2, 200020, Petitioner's Exhibit 6.*

Specific Results for Mother for July 1, 2020 through October 13, 2020 are:

10/11/20 Positive No Show
10/08/20 Positive No Show
10/07/20 Positive No Show
10/05/20 Positive No Show
10/03/20 Positive No Show
10/01/20 Positive No Show
9/28/20 Positive No Show
9/26/20 Positive No Show
9/24/20 Positive No Show
9/22/20 Positive No Show
9/20/20 Positive No Show
9/15/20 Positive No Show
9/13/20 Positive No Show
9/10/20 Negative
9/09/20 Positive Failure to Produce
9/08/20 Positive for Amphetamines, Methamphetamines and Marijuana
9/05/20 Positive No Show
9/04/20 Positive No Show
9/03/20 Positive No Show
8/27/20 Positive No Show
8/24/20 Positive No Show
8/20/20 Positive No Show
8/19/20 Positive Failure to Produce
8/12/20 Positive No Show

8/10/20 Positive No Show
8/07/20 Negative
8/04/20 Positive No Show
7/30/20 Negative
7/27/20 Positive No Show
7/23/20 Positive for Methamphetamines
7/21/20 Positive No Show
7/15/20 Positive No Show
7/14/20 Positive Failure to Produce
7/10/20 Positive for Marijuana
7/06/20 Negative
See Court Summary for Permanency Review Hearing for Minor Child M.H.R., dated November 2, 2020, Petitioner's Exhibit 6, pages 10-11.

As to the Court directive that Mother participate in mental health services, since Mother had positive urinalysis screen results, Erie County Drug and Alcohol recommended Mother participate in inpatient treatment. However, Mother "adamantly refused" inpatient treatment. Mother was then recommended to increase her drug and alcohol treatment sessions. Mother attended drug and alcohol sessions twice weekly and "has occasionally missed scheduled appointments." *Court Summary for Permanency Review Hearing for Minor Child M.H.R., dated November 2, 2020, Petitioner's Exhibit 6, page 9.*

As to the Court directive that Mother participate in parenting education, Mother has been compliant in meeting with Ms. DiCola, her Family Reunification caseworker. No visitation has occurred with Mother and Minor Child M.H.R. in "several months." Mother "was only able to participate in one in-person visit with Minor Child M.H.R. during entirety of this case due to her positive urinalysis test results." As to the Court directive that Mother obtain employment, Mother was unemployed. "Originally, [Mother] had stated that her doctor had told her she shouldn't be working due to her pregnancy; however, the treatment team later was informed that this was not the case and that [Mother] could in fact be working at this time." *Court Summary for Permanency Review Hearing for Minor Child M.H.R., dated November 2, 2020, Petitioner's Exhibit 6, pages 9-10.*

As to the Court directive that Mother maintain stable and safe housing, Mother was previously living with Father and evicted for nonpayment of rent on September 20, 2020. Mother was homeless. Mother owed "over $4,000 in back rent" together with Father. *Court Summary for Permanency Review Hearing for Minor Child M.H.R., dated November 2, 2020, Petitioner's Exhibit 6, page 9.*

By Order dated November 4, 2020, Dependency Court stated Mother demonstrated "no compliance with the permanency plan" and "no progress toward alleviating the circumstances which necessitated the original placement." *Permanency Review Order for M.H.R. dated November 4, 2020, Petitioner's Exhibit 4, page 1.* Said Order further stated the placement plan dated November 2, 2020, developed for Minor Child M.H.R. is appropriate and feasible and, therefore, "[t]he current placement goal is NOT appropriate and/or NOT feasible." Dependency Court directed Minor Child M.H.R.'s new placement goal be return to parent as uncertain regarding the projected date, concurrent with the new placement of Adoption. Dependency Court also directed legal and physical custody of the child shall remain with the

Erie County Office of Children and Youth; placement of the Child shall remain in Kinship Care, specifically paternal uncle and his wife's Kinship Home. Minor Child M.H.R. was in placement for eleven (11) months. Dependency Court directed Mother to comply with the following: refrain from use of drugs and/or alcohol and submit to random urinalysis testing through color code program at Esper Treatment Center; continue to participate in Family Dependency Drug Treatment Court program and follow all recommendations; continue to participate in mental health services and follow all recommendations; participate in a drug and alcohol assessment and follow all recommendations; obtain and/or maintain gainful employment and provide ECCYS with documentation she is employed and receives income; maintain stable housing and provide ECCYS with a signed lease; continue to participate in a parenting education program and demonstrate her ability to provide for Minor Child M.H.R.'s needs during visitation; and demonstrate her ability to provide for the safety and well-being of Minor Child M.H.R. including her attending medical, dental, or any other needed appointments. Mother was granted supervised visitation with Minor Child M.H.R. once per week. Visits increased in frequency and/or duration. Visitation shall also progress unsupervised once deemed appropriate by ECCYS. All visitation was contingent upon Mother being drug and alcohol free. If a positive urine result was received, Mother would not have a visit until her next clean urine. *Permanency Review Order for M.H.R. dated November 4, 2020, Petitioner's Exhibit 4, pages 1-4.*

Also on November 2, 2020, both Adjudication and Dispositional Hearings were held as to Minor Child P.A.R. The Order dated November 12, 2020 states after an adjudication hearing, ECCYS presented testimony from Michelle Rash, Ongoing Caseworker, and Marie Stover of Ashtabula County, Ohio Children and Youth Services. After this testimony, Minor Child P.A.R.'s Guardian Ad Litem agreed with adjudicating Minor Child P.A.R. dependent consistent with the reasons as stated in ECCYS's Dependency Petition. Dependency Court found and concluded clear and convincing evidence existed demonstrating Minor Child P.A.R. was a Dependent Child in that she was without proper parental care or control, subsistence, education as required by law, or other care or control necessary for her physical, mental, or emotional health, or morals. Parties also agreed to proceed immediately to the Dispositional Hearing. *Order of Adjudication and Disposition for P.A.R. dated November 12, 2020, Petitioner's Exhibit 4, page 1.*

The Pre-Dispositional Summary dated November 2, 2020, regarding Minor Child P.A.R. was admitted without objection and states: Minor Child P.A.R. tested positive for Amphetamines and Opiates at birth. Minor Child P.A.R.'s meconium test results revealed Minor Child P.A.R. was positive for Amphetamines, Methamphetamines and Cannabinoids. Minor Child P.A.R. remained in the hospital after birth and was discharged from the hospital to kinship care with paternal uncle and his wife on October 21, 2020. Recommended goal was reunification. On October 25, 2020, Minor Child P.A.R. was transported and admitted to UPMC Hamot Emergency Room due to her fever and signs of drug withdrawal. Upon admission, Minor Child P.A.R. was treated and tested. Both Minor Children were placed together at the same Kinship Care home (paternal uncle and wife's home) so Minor Child P.A.R. can be with her older brother, Minor Child M.H.R. Mother has no prior criminal history except Mother was listed as having pending criminal charges: Offense date of August 30, 2020 for alleged use/possession of drug paraphernalia and failure to use safety belt for the driver

and front seat occupant. Mother has a prior child welfare history as reported by Ashtabula County, Ohio OCY. In 2014, Mother had four children removed from her custody. Then in November 2017, Ashtabula County, Ohio Children Youth Services received permanent custody of those four children. Mother was reported to be abusing drugs, specifically, Methamphetamine. Mother did not participate in either drug and alcohol counseling or mental health counseling. Mother did not have safe and stable housing. Mother admitted at the time of the permanent custody hearing she was still using drugs, specifically Methamphetamine. *Pre-Dispositional Summary, November 2, 2020, Exhibit 6, pages 2-4 and 6.*

The Dependency Court found in the best interest of Minor Child P.A.R., she had to be removed from the home of Mother and Father based upon findings of abuse, neglect or dependency of Minor Child P.A.R. She remained in Kinship Care. The current placement goal was to return to Mother and Father concurrent with the goal of Adoption. Mother was directed to follow same directives she received earlier for Minor Child M.H.R. as to drug and alcohol testing and treatment recommendations, participate in mental health services, gainful employment, stable housing, parenting education and participate in medical and other necessary appointments for Minor Child P.A.R. Mother received supervised visitation with frequency to decreased level of supervision based on Mother's progress. *Order of Adjudication and Disposition for P.A.R. dated November 12, 2020, Petitioner's Exhibit 4, page 1-4.*

On February 1, 2021, combined Permanency Hearings were held for both Minor Children. The Court Summary indicates this was Minor Child M.H.R.'s Fourth Permanency Review Hearing and Minor Child P.A.R.'s First Permanency Hearing. Minor Child M.H.R. has been in placement for "under fourteen months" while Minor Child P.A.R. has been in care for "a little over three months." Mother was to participate in a total of thirty-two (32) urinalysis screenings from November 2, 2020 to January 13, 2021. However, out of those thirty-two (32) screenings, Mother had thirty-two (32) No Show Positives. Mother's drug addiction had a negative effect on her ability to parent. ECCYS recommended a permanency goal change to Adoption for both Minor Children. Mother participated in Intensive Outpatient Treatment sessions through telehealth for weekly individual sessions and no further documentation provided. She self-reported her clean date was October 22, 2020. *Court Summary for Permanency Review Hearing for Both Minor Child M.H.R. and Minor Child P.A.R., dated February 1, 2021, Petitioner's Exhibit 6, pages 1-7.*

Moreover, as to the directive Mother participate in mental health services, ECCYS received information on November 17, 2020, that Mother participated in therapy one time per week and her doctor was working with Mother on prescribing medications, but no updates were received, and Mother did not provide any further documentation. Mother had not attended any medical appointments for Minor Children during this review period. Mother had not seen Minor Child P.A.R. since she was discharged from the hospital after her birth. Mother was only able to participate in one in-person visit with Minor Child M.H.R. during the entire case since Mother had positive urine screen test results. As to housing, Mother stays at a motel in Geneva, Ohio. *Court Summary for Combined Permanency Review Hearing for Minor Child M.H.R. and Minor Child P.A.R., dated February 1, 2021, Petitioner's Exhibit 6, page 5-7.*

After hearings on February 1, 2021, as to both Minor Children, Dependency Court found by Order dated February 3, 2021, Mother had made "no compliance with the permanency plan" and "no progress toward alleviating the circumstances which necessitated the original

placement." Placement of Minor Child M.H.R. was noted as thirteen (13) months and continued as necessary and appropriate. Placement of Minor Child P.A.R. was noted as three (3) months and continued as necessary and appropriate. Dependency Court ordered new permanent placement goal of Adoption. Placement of both Minor Child M.H.R and Minor Child P.A.R. was to remain in Kinship Care, specifically paternal uncle and his wife's Kinship Home. Dependency Court ordered no further services for Mother, including visitation at this time, ECCYS shall proceed with termination of Mother's parental rights and pursue Adoption as the permanent placement goal for Minor Child M.H.R., and complete all necessary paperwork, so that an Adoption may occur. *Permanency Review Order for Minor Child M.H.R., dated February 3, 2021, Petitioner's Exhibit 4, pages 1-3, and Permanency Review Order for Minor Child P.A.R. dated February 3, 2021, Petitioner's Exhibit 4, pages 1-3.*

On March 11, 2021, ECCYS filed the instant Petitions to Terminate Involuntarily Mother's parental rights to each of these Minor Children. The IVT Trial was scheduled for July 13, 2021. Immediately before said IVT Trial, Mother and Father requested to appear by telephone because they indicated their vehicle was having difficulties and they could not appear in person. The IVT Court permitted both Mother and Father to appear by telephone as they both requested. Mother and Father were each represented by counsel. Mother was represented by her counsel, Emily Merski, Esq., who appeared in-person at this IVT Trial. Assistant Solicitor Kevin C. Jennings appeared in person on behalf of ECCYS. W. Charles Sacco, Esq. appeared in person on behalf of Father. Deanna L. Heasley, Esq. appeared in person as Legal Counsel on behalf of both Minor Children who are Minor Child M.H.R. and Minor Child P.A.R. [collectively Minor Children].

This IVT Court heard testimony from the following witnesses who this IVT Court finds provided credible testimony: Michelle Rash, ECCYS Caseworker; Michael Vicander, ECCYS Caseworker; and Amanda DiCola, Family Services of NWPA.

Petitioner's Exhibits 1 through 12 were stipulated by all counsel for admission into the record, and this IVT Court admitted said Exhibits into evidence without any objections raised. For the period from 1/2/20 to 1/29/21, Petitioner's Exhibit 10 indicates Mother had four (4) Negative test results; eighty (80) Positive No Shows; three (3) Could Not Produce; one (1) Specimen Leaked in Transit; and twenty-four (24) Positive screen results that included two (2) for Methamphetamine/ Amphetamine/THC, one (1) for Methamphetamine, and all remaining were for THC. Only Exhibits related to Mother are relevant for this Appeal.

Michelle DuShole, Dependency Treatment Court Liaison Officer, testified in her dual role as Drug and Alcohol Unit worker and as one of the Coordinators for Family Dependency Treatment Court. *See* N.T., July 13, 2021, 10:20-22. Ms. DuShole has held the position of Treatment Court Liaison since June 2014, and entails acting as a liaison officer for Family Dependency Treatment Court, ECCYS and treatment providers that parents utilize. *See* N.T, 11:12-18. As further clarified by Ms. Dushole, Family Dependency Treatment Court is a multidisciplinary team that meets weekly and specializes in high need parents who have substance abuse issues, as well as mental health issues. The goal of Family Dependency Treatment Court is to help parents (ECCYS participants) obtain and maintain sobriety by weekly meetings where parents talk about their strengths and needs as parents try to reunify with their children as "an accountability kind of program." *See* N.T, 11:22-25, 12:7-14. Ms. DuShole indicated this program is "all about dependency." *See* N.T, 12:24-25, 13:1.

Ms. DuShole explained Mental Health Probation is held at 9:30 a.m.; Family Dependency is held at 11:00 a.m.; and Drug Court is held at 1:30 in the afternoon. *See* N.T, 13:4-7. The treatment team is led by a judge, with an assistant district attorney, a public defender, probation officers, coordinators from Erie County Drug and Alcohol and Erie County Care Management as well as treatment providers from Erie County's drug and alcohol and mental health components. *See* N.T, 13:10-15. Ms. DuShole stated both Mother and Father were accepted into this program. *See* N.T, 13:16-18. Ms. DuShole coordinated with Esper on the drug tests and reported Mother and Father in particular came in with substance issues, with the use of meth, THC, amphetamines." *See* N.T, 14:4-8, 14:9-13. Mother and Father had housing issues in that they were close to eviction throughout the entire time they participated in the program. If not for the Covid moratorium, Mother and Father would have been evicted from where they were living most of the time. *See* N.T., 14:20-25, 15:1-5. Mother and Father had employment issues in that "they had multiple job positions, but they would leave or change and just wouldn't stick with a job." *See* N.T., 15:10-15. Transportation was also an issue throughout the Treatment Court in that "most of the times that they missed court, they cited transportation issues of one form or the other." Their truck "that broke down" or a vehicle was a transportation issue throughout, and they were not able to go to Treatment Court meetings, visits and urines. *See* N.T., 15:16-25, 16:1-7. However, Ms. DuShole stated she and other treatment providers were trying to help them in that regard. *See* N.T., 16:8-12. Mother and Father were both assessed to enter Treatment Court on February 28, 2020. They were found eligible and accepted into the program and began going to Court on March 5, 2020, and then unsuccessfully discharged on October 1, 2020, seven months roughly. *See* N.T., 16:15-19.

From end of March 2020 until end of June 2020, Ms. DuShole stated Mother and Father did fairly well in terms of progress with drug and alcohol treatment and telehealth appointments, but after that time period, their attendance became quite sporadic. N.T., 18:5-7. During the same period of time in terms of random urine analysis, "there's a lot of no-shows." Mother had four (4) Negative tests, three (3) Could Not Produce tests, eleven (11) Positive tests and twenty-three (23) No Show tests. *See* N.T., 18:17-19, 19:1-10. Moreover, throughout the life of this case as reflected in Petitioner's Exhibit 10, in terms of random urine screenings, Mother had four (4) Negative test results; three (3) test results where she Could Not Produce; eighty (80) No Shows and one (1) result indicating Leaked in Transit test and twenty-four (24) Positives. *See* N.T., 19:11-21. Mother continued to use drugs "essentially" throughout her pregnancy. Further, Ms. DuShole confirmed Mother last tested positive for marijuana in July of 2020 and positive for meth and marijuana in September 2020 and Minor Child P.A.R. was born thereafter in October 2020. N.T., 20:9-13. In this regard, Ms. DuShole explained having "our first" conversation with Mother on July 30th in 2020 about Mother attending inpatient drug and alcohol and mental treatment for serious drug difficulties "because of her high risk with the pregnancy and her high needs." Mother said she had already done inpatient treatment at some point and was not going to do that again. She had no desire to do so. N.T., 20:14-22. Ms. DuShole then offered to meet Mother in "kind of in the middle" in that Mother was to increase drug and alcohol and mental health treatment via telehealth which Mother did. However, Mother was still "riddled" with no-shows and "riddled" with positives periodically when Mother did show for Esper. N.T., 20:22-24, 21:1-5. Additionally, a note dated September 17 of 2020, Petitioner's Exhibit 7A, at page 27A, indicates, "inpatient

treatment was recommended for the mother for her drug and alcohol issues, but she didn't want to go, because she didn't want to put her dog into shelter." N.T., 21:6-9, 22:2-5. Ms. DuShole explained she had a second conversation with Mother about inpatient treatment on September 3, 2020, and Mother declined the second time for the same reason about the dog. N.T., 22:6-9. And Mother declined help for shelter at another time. N.T., 22:9-12. Drug and alcohol and housing issues were major issues for Mother throughout this entire case.

As to Mother's intention to move to Ohio, Ms. DuShole confirmed the treatment team explained "in a couple conversations" to both parents what issues there would be if they moved to Ohio when the treatment plans and court orders in Pennsylvania had plans for reunification. N.T., 23:1-19. Ms. DuShole and another coordinator explained to Mother the dependency process under court order and the treatment plan in that the judge follows the case, and ECCYS follows the case. Mother was informed she was required to do certain things for reunification to take place, and if Mother moved to Ohio, it would have been difficult in terms of services since it's already been difficult in Pennsylvania, let alone moving to another state. "How are you going to access the services? How are you even going to ultimately reunify? We would love for you to stay. We would like for you to work a treatment plan, but if your decision is to move, we can't stop you. It's going to make things a lot harder." N.T., 23:20-25; N.T., 24:1-7.

Ms. DuShole stated after being evicted on September 24, 2020, these parents spent some time in Conneautville where Mother has family, but Ms. DuShole did not know if they fully moved to Ohio because her end of the case was done on October 1st. N.T., 24:16-23. Ms. DuShole further confirmed things started to fall off in July throughout September, which is the same time period Mother was talking about moving to Ohio. N.T., 24:24-25; N.T., 25:1-14.

Ms. DuShole further stated the Covid pandemic affected the functioning of Treatment Court until June 11, 2020 when Treatment Court resumed in-person. N.T., 25:17-25. The Treatment team still provided services such as contact via e-mail with all treatment providers, including Miss Rash who provided close monitoring of Mother. When in-person attendance resumed for Treatment Court, participants were expected to appear in-person as well. N.T., 26:4-11. Ms. DuShole confirmed when Mother moved to Ohio, Mother was aware of the impact of Covid on everyone's lives. N.T., 26:12-18. By October of 2020, Mother had not made any progress as to housing issues, drug and alcohol rehabilitation, and her last virtual visit was June 29, 2020. N.T., 26:19-25; N.T., 27:1-6.

In assessing Mother's progress for Treatment Court, Ms. DuShole stated Mother was "accepted into Stairways outpatient program, as well as Stairways mental health program," which initially Mother had done biweekly. N.T., 28:14-19. Due to Covid, all telehealth services were provided. N.T., 28:20-21. However, Mother did not progress beyond Phase 1, the level at which Treatment Court begins, although prior to Covid, Mother was attending and participating with her counselors. N.T., 29:3-12; N.T., 29:8-12.

When asked about Mother's drug testing positive results for marijuana, Ms. DuShole stated drug abuse was "a significant factor" so Mother was advised to participate in inpatient services since telehealth is more difficult. N.T., 29:13-25. Mother "never completed" IOP, because due to Covid, everything was shut down. Although Mother "increased her weekly drug and alcohol sessions weekly" and mental health attendance, Mother never demonstrated the type of progress to even consider moving her to Phase 2. N.T., 30:3-11. Some participants thrived

on telehealth services. N.T., 30:12-16. When asked about the virtual program standards during the pandemic, Ms. DuShole stated "for almost three months" the support mechanism worked through telephone and e-mails consistently. N.T., 31:24-25. Ms. DuShole confirmed Mother during that time continued to meet with the provider at Stairways, continued to participate in drug and alcohol counseling and mental health counseling, and at that point she was not on medication to manage her mental health because she was pregnant. N.T., 32:15-25. When face-to-face resumed, Mother was still participating in Treatment Court; however, after July, Mother started missing appointments with her providers, no-shows were still continuing and there was a discussion about Mother's "just sheer frustration" in not being able to visit Minor Child M.H.R. because of her not getting to the drug screens to have negative screens for visits with Minor Child M.H.R. N.T., 33:1-12. Ms. DuShole stated Mother was "living still in Girard in the trailer" in July and presented "a lot of truck issues and car issues," despite ECCYS offering Mother transportation assistance. N.T., 33:18-25; N.T., 34:1-4.

Ms. DuShole confirmed Mother was ultimately "dismissed from Treatment Court" in October of 2020. N.T., 34:22-23.

Amanda DiCola, an employee from Family Services of Northwest PA, credibly testified. N.T., 43:3-5. She was assigned this case on January 15 of 2020 and worked with Mother until February of 2021. N.T., 43:12-13. When Ms. DiCola first received this case, Mother had a need for housing, drug and alcohol and also mental health and parenting. N.T., 44:3-7. Ms. DiCola confirmed when she ended her services, Mother was still working on those same four issues. N.T., 44:12-17.

Ms. DiCola stated Mother did not pay the rent for the trailer where she resided from January 2020 until approximately September 10, 2020. N.T., 45:12-19. The landlord was owed $4,553.00. N.T., 45:21. On September 1st, Mother received the eviction notice. N.T., 45:23-24. Ms. DiCola recommended that in order to prevent eviction, Mother could use the money from the pandemic unemployment that amounted to $10,000.00, and Mother could complete Section 8 housing applications as well as completing the application for Governor Wolf's monies. However, Ms. DiCola confirmed Mother did not follow through with that. N.T., 46:8-25.

From September 2020 through February 2021, Mother was unable to give a current address. N.T., 47:23-25; N.T., 48:1. Ms. DiCola confirmed Mother obtained a job that she could perform during early stages of pregnancy, and she was employed at Wendy's restaurant for a while but later just quit and at Foam Fabricators, and she quit there too. N.T., 49:11-19. Ms. DiCola also confirmed Mother would apply for jobs at a temporary placement agency and would be hired, but then Mother would quit. Ms. DiCola also recommended Mother apply to a temporary agency in Ohio, but Mother provided no documentation as to her attempts in Ohio. N.T., 51:1-12. As to transportation, Ms. DiCola also explained Mother "declined" to use the free bus passes provided by ECCYS where busses do run through Girard; however, Mother indicated she had her own transportation. Mother had vehicles that broke down all the time. N.T., 52:13-20; N.T., 53:3-7.

As to drug and alcohol treatment, Ms. DiCola stated Mother continued to decline inpatient alcohol treatment even though such treatment could have helped her stabilize and possibly assist Mother with any housing concerns. N.T., 54:5-8. Ms. DiCola confirmed Mother's visits with Minor Child M.H.R. were "extremely limited" due to her no-shows at urine

screens. Mother was cautioned that if she did not have negative urines, Mother was unable to see her Minor Children, especially where Mother did not provide any reason why she was not engaging in urine screens. N.T., 55:24-25, 56:1-15. When Mother was asked to attend urinalysis screenings at the Esper Treatment Center in Erie, Mother's reasoning for not going to the Esper Treatment Center was that Mother and Father were living in Ohio. N.T., 57:4-8. Ms. DiCola even recommended Mother bring a copy of the Court Order with her in case she was pulled over by law enforcement because of Covid. N.T., 57:9-12; N.T., 57:17-25; N.T., 58:2-3. Ms. DiCola confirmed by the time she completed the work with Mother in February 2021, Mother had not been able to remedy the reasons that led to her Minor children being placed in foster care. N.T., 59:19-23.

Ms. DiCola also observed the trailer where Mother was living. Mother had trouble maintaining the trailer in a clean condition. Mother was also evicted for being behind in rent. The eviction also entailed property damage. The outside of the trailer was not maintained well. N.T., 60:22-25; N.T., 61:1-3. Ms. DiCola further stated that even though during the thirteen (13) months Mother was provided services, Mother would come into Erie and meet with her in Erie, but "they really weren't making any progress." N.T., 66:9-11, 67:14-16, 67:25; 68:1 Ms. DiCola informed Mother that she was experienced in this area, and Mother was not doing enough. N.T., 69:8-24. For the convenience of Mother, Ms. DiCola would meet Mother "in the community even in the Girard area, closer to the state line" in order to counteract Mother saying she had car problems and could not meet with Ms. DiCola. N.T., 72:6-9, 73:1-10.

ECCYS Caseworker Michelle Rash provided credible testimony. In particular, Ms. Rash stated during December 19, 2019 through April 26, 2020, Mother had one (1) Positive urine screen for marijuana, amphetamines and methamphetamine; seventeen (17) Positive tests for marijuana; one (1) Positive for a leak-in-transit: and six (6) Positive No Shows. *See* N.T., 80:12-20. Caseworker Rash further stated, Mother did participate in orientation treatment court and did participate in a drug and alcohol assessment where intensive outpatient care was recommended. Mother began dual diagnosis services at Stairways on March 2nd with her intensive case manager Leann. *See* N.T., 80:21-25. On February 28, 2020, Mother had a mental health evaluation and was scheduled for mental health intake on March 9, 2020; however, Mother missed that appointment, but Mother did go on March 10, 2020. *See* N.T., 81:1-7.

Caseworker Rash confirmed services were offered to Mother after April 20, 2020, through Zoom and by telephone. *See* N.T., 81:16-22. For the following review period in July of 2020, and as the Covid restrictions began to change, Caseworker Rash had not seen any change in how Mother was interacting. *See* N.T., 83:3-8. On May 29 of 2020 and June 11 of 2020, Mother tested positive for marijuana. *See* N.T., 83:11-13. Between April to July 1, 2020, Mother continued visitation with Minor Child M.H.R. through Zoom video chat lasting for fifteen minutes. *See* N.T., 84:3-16. Caseworker Rash confirmed discussing with Mother as to Mother being pregnant and still using drugs, but Mother continued to use. *See* N.T., 86:2-14. The newly born Minor Child P.A.R. was found to be drug exposed for Methamphetamine. Since Minor Child P.A.R. was discharged from the hospital, Caseworker Rash confirmed Mother did not have any visits with Minor Child P.A.R. *See* N.T., 86:25, 87:1-13.

Caseworker Rash confirmed between July of 2020 and November of 2020, Mother went from having "moderate compliance" to "no compliance." *See* N.T., 87:18-22. In particular,

between July 1 of 2020 and October 13 of 2020, Mother was to participate in thirty-six (36) urine screens. Mother had twenty-six (26) No Shows; four (4) Negatives; three (3) Failure To Produce; one (1) Positive for marijuana and one (1) for methamphetamine, and one (1) for amphetamines, meth, and marijuana. *See* N.T., 88:1-5. On October 1, 2020, Mother was discharged from treatment court due to her consistent failure to attend court, her failure to submit to drug testing, and her non-compliance with treatment recommendations. *See* N.T., 88:7-15. When providers started seeing Mother face-to-face, Mother "was pretty argumentative" and "wouldn't take responsibility for any of her actions." Mother would blame ECCYS and/or other service providers for her own shortcomings or Mother would make excuses as to why she was not doing what she needed to do in the Court Order. *See* N.T., 89:7-11. Caseworker Rash also reported about an "unpleasant interaction" with Mother during a team meeting at Mother's residence in Girard. Mother communicated to Caseworker Rash "she was going to go to the State of Ohio to have her baby so Erie County wouldn't be involved with that child as well." *See* N.T., 89:12-25.

Caseworker Rash confirmed she also had conversations explaining to Mother as to "how difficult that would make things to move to Ohio." Also Ms. DiCola and Ms. DuShole, as well as the Dependency judge at the November 2 hearing, made it very clear to Mother that if she decided to live in the State of Ohio, it was Mother's responsibility from that point on to seek out her own services that she needed. Mother was cautioned that she would still be responsible to do her urine screens at the Esper Treatment Center. *See* N.T., 90:1-20.

In November, when Adoption was established as the concurrent goal with reunification, Mother reported to Caseworker Rash that she was staying in a tent and then in a camper and their vehicle. *See* N.T., 90:21-25. Mother also said she was staying with other family members in Ohio and at the Geneva Motel in Ohio. *See* N.T., 90:21-25, 91:9-16. As to transportation assistance when Mother was living in Girard, Mother was offered gas cards which Mother accepted, but Caseworker Rash confirmed Mother's ability to transport herself did not improve. *See* N.T., 101:6-22.

Mother dropped out of services January of 2021, and Mother was still claiming to be a resident in Ohio at that time. As to visitation with either of her children, May of 2020 was the actual last in person visit. *See* N.T., 92:3-5, 92:11-13, 92:20-23. When asked how Minor Child M.H.R. is doing since he has been in care, Caseworker Rash stated Minor Child M.H.R. "has been doing great." He is "meeting all his milestones." The pre-adoptive home of paternal uncle was "meeting all of his needs." A "very strong, healthy bond" exists between Minor Child M.H.R. exists in his pre-adoptive home with his paternal uncle and his wife. *See* N.T., 94:9-12. Officer Rash stated Minor Child M.H.R. has experienced no negative or detrimental effect after not seeing his Mother since the May 2020 in-person visit or virtually since June of 2020. *See* N.T., 94:13-17. He has had no negative effects by not seeing his Mother for over a year, and he will be three in November. And Minor Child P.A.R. "hasn't seen her parents since she was born" and her paternal uncle and his wife in her pre-adoptive home "are the only parents that she's known." *See* N.T., 94:22-23, 95:1-3. Mother has done nothing to remedy the conditions that led to the placement of her children. N.T., 95:8-10. Caseworker Rash confirmed it would be in both of these Minor Children's best interest if the Mother's parental rights were involuntarily terminated since "the mother has not made any progress on her court ordered treatment plan." N.T., 95:21-24, 96:1-2. Minor Child M.H.R. has been in care with his paternal

uncle and his wife "for 19 months which is over half of his life…." Minor child P.A.R. "has been in care for her entire life, which is approximately nine months." N.T., 96:1-5. In fact, neither Minor Child M.H.R. nor Minor Child P.A.R. do not even recognize Mother as their mother. Caseworker Rash stated "it would be more detrimental to not terminate [Mother's] parental rights." *See* N.T., 96:3-11.

Michael Scott Vicander credibly testified as an ECCYS Permanency Caseworker for both of these Minor Children. *See* N.T., 116:23-25. Caseworker Vicander stated both Minor Child M.H.R. and Minor Child P.A.R. "are doing very well in their current placement," "all their needs are being met," and confirmed paternal uncle and his wife are an available adoptive resource. *See* N.T., 117:6-12, 118:15-17. The children are undoubtedly thriving there. Caseworker Vicander maintained termination of parental rights is in "the best interest of these children" because Minor Child M.H.R. and Minor Child P.A.R. have not seen their Mother in-person since June 2020. *See* N.T., 117:16-19. In addition, Mother was not able to rectify the situation that led to their placement. *See* N.T., 117:21-25. Caseworker Vicander confirmed there would be no negative effect on both Minor Children if Mother's rights were terminated. *See* N.T., 118:1-6.

H.J.S., Mother to both Minor Child M.H.R. and Minor Child P.A.R also testified. Mother testified her current mailing address is her grandfather's house since Mother was not sure as to whether her mail would get to Ohio. *See* N.T., 120:11-25. Mother confirmed she understands ECCYS is petitioning the Court to terminate her rights which would mean, if granted, the law would no longer identify her as the Mother to either Minor Child M.H.R. or Minor Child P.A.R. N.T., 122:8-15. Mother admitted she was using marijuana when asked about her positive test results, but she added "my levels were going down." N.T., 122:25. She testified, "I stopped smoking." N.T., 123:2. However, she testified that even though she was passing and her levels were going down, she still was not seeing Minor Child M.H.R. *See* N.T., 123:1-6. Mother also testified, "I had the one visit, and then the second visit that I was supposed to go see him, they said they didn't have transportation." *See* N.T., 123:7-10. Mother testified, "I am legally prescribed marijuana" and she currently began this use starting from "January or February 2021" for "PTSD, for mental health." *See* N.T., 123:13-23. Mother also testified she is currently in treatment for drug addiction at "Community Counseling Center" in Ohio, but her "intensive outpatient, which is IOP" has not begun yet, but she is now willing to participate in those services. N.T., 124:4-25, 125:8-9. Mother admitted "being resistant to ECCYS recommendations for drug and alcohol treatment in the past." N.T., 125:10-13. Mother also testified, "I am seeing a counselor" and as to her mental health, Mother testified she is bipolar and has PTSD, depression, ADD and ADHD. *See* N.T., 125:18-25. *See* N.T., 126:1-5. Mother testified she is not using any other medication at the moment, because the medication she was taking continued to have her test positive for amphetamines, so she had to stop taking it. *See* N.T., 126:9-15. When asked about said medication, Mother recalled it was "Wellbutrin" and she was taking it towards the end of her pregnancy. N.T., 133:9-10, 133:19-21. Mother also testified she asked the doctor about changing medication and his suggestion was to "up the dose". *See* N.T., 126:16-23. Mother testified she never mentioned this mental health information to the Court because she was never allowed to talk in court. She claimed she was never given a chance to talk in Court, and she answered the questions she was asked. *See* N.T., 134:17-20, 135:1-3. When asked about testing positive for marijuana in September 2020, Mother testified she used marijuana for the

last time when "[her] mom passed away" in early June 2020 but it took almost three months to get it out of my system the first time. *See* N.T., 131:24-25, 132:1-12, 132:21-25.

Mother further testified at that time that although she is not currently employed, she is "receiving unemployment," specifically $495 a week and is receiving "the pandemic assistance." Mother has also "just put in the application in for food stamps and medical." *See* N.T., 126:24-25, 127:1-6; *See* N.T., 131:9-11. Mother also testified she is living in a house where she has a room in the house, but also has a camper. Her friend, Tiffany, is the owner of this house and lives there in the house too with her husband. *See* N.T., 127:9-25. However, Mother testified she has no lease and does not necessarily pay rent, but if Mother has money and her friend needs money, Mother will help her friend. *See* N.T., 128:1-11. Without any verification, Mother testified she is able to take care of Minor Child M.H.R. and Minor Child P.A.R. because she believes she now has a place to take her Minor Children to reside with her. She testified how she loves her Minor Children and she was and is a good mom. Mother believes what happened with these placements was not fair. *See* N.T., 129:2-8.

GROUNDS FOR TERMINATION — Section 2511(a) (1), (2), (5), (8), and (b)

As 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 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).

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)(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.

Generally, Pa.C.S. § 2511 (a) states parental rights to a child may be terminated if any one 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), this IVT Court will consider the entire background of this case and, as indicated by recent case law, will not simply mechanically apply the six-month statutory provision as to each Minor Child. The timeline of Mother's progress and the lack of her progress is as follows from the Findings of Fact above:

As to Minor Child M.H.R., evidence was presented by Caseworker Amanda Kimmy at the adjudication hearing on December 19, 2019, wherein Mother appeared late for the hearing despite receiving proper notification. Caseworker Kimmy reported her concerns about the transiency of Mother's housing and Mother's drug use concerns.

At Permanency Review Hearing held on April 21, 2020, as to seventeen-month-old Minor Child M.H.R. although, in the beginning, Mother and Father "were resistant to services; however, they have been more open and compliant with services over the past month." Mother participated in assessments for drug and alcohol and mental health treatment and were scheduled to participate in needed treatment services. Mother became more consistent in attending urinalysis screens within the past month. Mother continued to test positive for marijuana, but the level of marijuana in her system appeared to be decreasing. ECCYS continued to monitor Mother's compliance and progress.

Between December 19, 2019 and April 16, 2020, Mother was to participate in a total of twenty-five urinalysis screenings. Of these screenings, Mother had a total of one Positive for Amphetamine, Methamphetamine and Marijuana, seventeen (17) Positive for Marijuana,

one Positive Quantity not sufficient for analysis (specimen leaked in transit), and six (6) Positive No-Shows.

Mother participated in orientation for the Family Dependency Drug Treatment Court program on February 13, 2020, and participated in the eligibility assessment on February 28, 2020, as well as a drug and alcohol assessment on February 12, 2020, wherein Intensive Outpatient was recommended. Mother began dual diagnoses services at Stairways Behavioral Health on March 2, 2020. Mother reported working for Voices for Independence and being paid to take care of her own mother in mother's home. No paperwork was received verifying Mother's employment. Mother was compliant with parenting education program. Mother attended Minor Child M.H.R.'s doctor appointment on February 28, 2020. Mother was compliant in signing all necessary documentation requested by ECCYS.

At the hearing on April 21, 2020, Dependency Court found Mother had "moderate compliance with the permanency plan" and "moderate progress toward alleviating the circumstances which necessitated the original placement." The Order stated, "placement with the child continues to be necessary and appropriate" and "current placement goal for child is to return to parent or guardian."

At Second Permanency Review Hearing for Minor Child M.H.R. held on July 1, 2020, for nineteen-month-old Minor Child M.H.R., Court learned that Mother's mother passed away unexpectedly on May 17, 2020. Mother recently tested positive for marijuana. Mother participated in two one-time urinalysis screenings, on May 29, 2020, and June 11, 2020, with both positive for marijuana. Mother admitted to Family Dependency Drug Treatment team she consumed an alcoholic beverage on the day her mother passed away.

With the onset of Covid-19 emergency, Family Dependency Drug Treatment Court did not occur from the middle of March 2020 until June 11, 2020. Mother did attend Court on June 11, 2020, and June 18, 2020.

Mother participated in a mental health evaluation on February 28, 2020. On March 2, 2020, Mother commenced dual diagnoses services at Stairways Behavioral Health. Mother continued to have weekly mental health counseling sessions. No medication was prescribed, as Mother was pregnant and due in November 2020. Mother continued to receive drug and alcohol services twice weekly. Mother overslept for her appointment and, therefore, did not attend that appointment on June 17, 2020, and rescheduled her appointment, she reported, for June 19, 2020. Mother was suggested to participate in Twelve Step meetings, but Mother refused immediately and said she would not attend the Smart program and other suggested programs. Mother reported she had attended Celebrity Recovery program in the past, but she did not like it because she was not "a people person." Mother also refused suggested recovery podcasts.

Mother remained unemployed but was compliant with her Family Reunification Caseworker. Due to Mother's positive urine screen results, Mother qualified for only one, in-person visit with Minor child M.H.R.

On July 1, 2020, Dependency Court found Mother had "moderate compliance with the permanency plan" and "moderate progress toward alleviating the circumstances which necessitated the original placement." Placement goal continued to be return to Mother with placement of Minor Child M.H.R. in Kinship Care, specifically paternal uncle and his wife's Kinship Home.

On October 1, 2020, the Erie County Family Dependency Treatment Court discharged

Mother "for consistent failure to attend court, failure to submit to drug testing and non-compliance with treatment recommendations." *See Erie County Case Management Assessment Outcome Letter, Petitioner's Exhibit 7A, page 33A.*

Minor Child P.A.R. was born on October 18, 2020 in Chardon, Ohio, and Dependency Court issued a verbal order granting emergency protective custody. On October 23, 2020, at the Shelter Care hearing, Mother did not appear.

On November 2, 2020, at Minor Child M.H.R's Third Permanency Review, he was now twenty-three months old, and in placement for eleven months. Mother's educational background was of ninth grade. No aggravated circumstances were applicable. As Mother was evicted by her Landlord from her residence, Mother was now homeless. Mother attended this hearing and was represented by counsel. For the period from July 1, 2020 through October 13, 2020, Mother's results of thirty-five (35) urinalysis screenings were: twenty-five (25) No Show Positives [Court Summary counted 9/28/20 twice]; four (4) Negative screenings; three (3) Positive Failure to Produce; one (1) Positive for Marijuana; one (1) positive for Methamphetamines; and one (1) Positive for Amphetamines, Methamphetamines and Marijuana. Inpatient treatment was recommended, but Mother "adamantly refused." Mother was then recommended to increase her drug and alcohol treatment sessions and attended drug and alcohol sessions twice weekly and "has occasionally missed scheduled appointments."

No visitation occurred with Mother and Minor Child M.H.R. in several months. Mother was only able to participate in one in-person visit with Minor Child M.H.R. during entirety of this case due to her positive urinalysis test results.

Mother was evicted for nonpayment of rent on September 20, 2020. Mother remained homeless and owed "over $4,000 in back rent" together with Father. The Order dated November 4, 2020, stated Mother demonstrated "no compliance with the permanency plan" and "no progress toward alleviating the circumstances which necessitated the original placement." Minor Child M.H.R.'s placement goal changed to return to parent concurrent with Adoption and in placement for eleven (11) months.

Also on November 2, 2020, Minor Child P.A.R. became a Dependent Child. Minor Child P.A.R. tested positive for Amphetamines and Opiates at birth. Minor Child P.A.R.'s meconium test results revealed Minor Child P.A.R. was positive for Amphetamines, Methamphetamines and Cannabinoids. Minor Child P.A.R. remained in the hospital after birth and was discharged from the hospital to kinship care with paternal uncle and his wife on October 21, 2020. Recommended goal was reunification. On October 25, 2020, Minor Child P.A.R. transported and admitted to Emergency Room due to her fever and signs of drug withdrawal, and upon admission, treated, tested, and then placed with her brother at same Kinship Care home of paternal uncle and wife's home.

Mother has no prior criminal history except Mother was listed as having pending criminal charges: Offense date of August 30, 2020 for alleged use/possession of drug paraphernalia and failure to use Safety belt for the driver and front seat occupant. Mother has a prior child welfare history as reported by Ashtabula County, Ohio OCY: In 2014, Mother had four children removed from her custody. Then in November 2017, Ashtabula County, Ohio Children Youth Services received permanent custody of those four children. Mother was reported to be abusing drugs, specifically, Methamphetamine. Mother did not participate in either drug and alcohol counseling or mental health counseling. Mother did not have safe

and stable housing. Mother admitted at the time of the permanent custody hearing she was still using drugs, specifically Methamphetamine, as per *the Pre-Dispositional Summary, November 2, 2020, Exhibit 6, pages 2-4 and 6.*

On February 1, 2021, at Minor Child M.H.R.'s Fourth Permanency Review Hearing and Minor Child P.A.R.'s First Permanency Hearing, Minor Child M.H.R. in placement under fourteen months while Minor Child P.A.R. in care for a little over three months. Results of Mother's thirty-two (32) urinalysis screenings from November 2, 2020 to January 13, 2021: thirty-two (32) No Show Positives. Mother's drug addiction had a negative effect on her ability to parent. Dependency Court changed the permanency goal change to Adoption for both Minor Children. Mother participated in Intensive Outpatient Treatment sessions through telehealth for weekly individual sessions.

On November 17, 2020, Mother participated in mental health therapy one time per week and her doctor was working with her on prescribing medications, she did not provide any further documentation. Mother had not attended any medical appointments for Minor Children during this review period. Mother had not seen Minor Child P.A.R. since she was discharged from the hospital after her birth. Mother was only able to participate in one in-person visit with Minor Child M.H.R. during the entire case since Mother had positive urine screen test results.

On February 1, 2021, Dependency Court found Mother had "no compliance with the permanency plan" and "no progress toward alleviating the circumstances which necessitated the original placement." Placement of Minor Child M.H.R. was thirteen (13) months and placement of Minor Child P.A.R. was three (3) months.

For January 2, 2020 through January 29, 2021, in Petitioner's Exhibit 10, Mother had: four (4) Negative test results; eighty (80) Positive No Shows; three (3) Could Not Produce; one (1) Specimen Leaked in Transit; and twenty-four (24) Positives including two (2) Methamphetamine/Amphetamine/THC, one (1) for Methamphetamine and all remaining were THC. Mother did not progress beyond Phase 1, the level at which Family Dependency Treatment Court begins, although prior to Covid, Mother was attending and participating with her counselors. N.T., 29:3-12; N.T., 29:8-12. Ms. DiCola confirmed when she ended her services, Mother was "still working on the same issues." As to drug and alcohol, Ms. DiCola stated Mother "continued to decline inpatient alcohol treatment" even though such treatment "would help her stabilize and assist her with any housing concerns." N.T., 53:22-25; N.T., 54:1-8.

Mother's visits with Minor Child M.H.R. were "extremely limited" due to her no-shows at urine screens. Mother was cautioned that if she did not have negative urines, Mother would be unable to see her children, especially where she provided no reason for not engaging in urine screens. N.T., 55:24-25, 56:4-15. When Mother was asked to attend urinalysis screenings at Esper Treatment Center in Erie, Mother said she was now living in Ohio. Mother continued to use drugs "essentially" throughout her pregnancy. Further, Ms. DuShole confirmed Mother tested last positive for marijuana in July of 2020 and positive for meth and marijuana in September 2020 and then Minor Child P.A.R. was born in October 2020. N.T., 20:9-13. Mother was warned about her high risk with the pregnancy and her high needs. Mother said she had already done inpatient treatment at some point and was not going to do that again as she had no desire to do so. N.T., 20:14-22. Ms. DuShole then offered to meet Mother in "kind of in the middle" in that Mother was to increase drug and alcohol and mental health treatment

via telehealth which Mother did. However, when Mother did show for Esper, Mother still presented "riddled" with no-shows and "riddled" with positives periodically. N.T., 20:22-24, 21:1-5. Additionally, she stated a note dated September 17 of 2020, Petitioner's Exhibit 7A, page 27A, indicates "inpatient treatment was recommended for the mother for her drug and alcohol issues, but she didn't want to go, because she didn't want to put her dog into shelter." N.T., 21:6-9, 22:2-5. Mother declined the second time for the same reason. N.T., 22:6-9. Mother declined help for shelter another time. N.T., 22:9-12. Drug and alcohol and housing issues were major issues for Mother throughout this entire time.

Mother was warned more than sufficiently that her choosing to move to Ohio would make it difficult for her to receive services. N.T., 23:20-25; N.T., 24:1-7. Ms. DuShole further confirmed things started to fall off in July throughout September at the same time of Mother talked about moving to Ohio. N.T., 24:24-25; N.T., 25:1-14.

After examining the individual circumstances of each Minor Child's case and considering all explanations offered by Mother facing termination of her parental rights, the evidence, in light of the totality of the circumstances, clearly warrants that this IVT terminate Mother's parental rights as to each Minor child, specifically Minor Child M.H.R. and Minor Child P.A.R. under 23 Pa.C.S. § 2511(a)(1). Indeed, ECCYS has met its burden of proof with clear and convincing evidence that Mother's conduct satisfies statutory grounds for termination under Section 2511(a)(1). The evidence, including but not limited to, numerous Exhibits and testimony are so "clear, direct, weighty, and convincing" for this IVT judge as the trier of fact to arrive at "a clear conviction, without hesitation, of the truth of the precise facts in issue" regarding Mother. Mother by her conduct demonstrated a settled purpose for at least a period of six months to relinquish her parental claim to each Minor Child, specifically Minor Child M.H.R. and Minor Child P.A.R. Moreover, the facts also support and demonstrate Mother failed to perform her parental duties for at least six months prior to the filing of each Termination Petition.

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)). Moreover, the Pennsylvania Supreme Court

in *In re Adoption of Michael J.C.*, 506 Pa. 517, 525, 486 A.2d 371, 375 (1984), stated, "a more appropriate reading of the statute [23 Pa.C.S. § 2511(a)(2)] is that when a parent has demonstrated a continued inability to conduct [her] ... life in a fashion that would provide a safe environment for a child, whether that child is living with the parent or not, and the behavior of the parent is irremediable as supported by clear and competent evidence, the termination of parental rights is justified."

As to 23 Pa.C.S. § 2511(a)(2) in the instant case, on February 1, 2021, Minor Child M.H.R.'s Fourth Permanency Review Hearing was held as well as Minor Child P.A.R.'s first Permanency Hearing. *Court Summary for Combined Permanency Review Hearing for Minor Child M.H.R. and Minor Child P.A.R., dated February 1, 2021, Petitioner's Exhibit 6 at page 6-7.* Mother had "no compliance with the permanency plan" and "no progress toward alleviating the circumstances which necessitated the original placement." *Permanency Review Order, dated February 3, 2021, Petitioner's Exhibit 4.*

Mother had "a need for housing, drug and alcohol and also mental health and parenting." N.T., 44:3-7. Ms. DiCola confirmed when she ended her services, Mother was "still working on the same issues." N.T., 44:12-16; N.T., 69:22-24. Ms. Ms. DiCola clarified even though during the thirteen months Ms. DiCola provided services for Mother, Mother was not really making any progress. N.T., 66:9-11, 67:14-15, 67:25, 68:1. Mother was not doing enough.

Mother failed to pay her rent and owed landlord $4,553.00. N.T., 44:21. Mother and/or Father received $10,000 from pandemic unemployment but did follow through with Section 8 housing at that time. N.T., 44:8-20.

Mother was to participate in 36 urines but had: 26 no shows; 4 negatives; 3 failure to produce; one 1 positive for marijuana and 1 for methamphetamine, and 1 for amphetamines, meth, and marijuana. *See* N.T., 88:1-5. Mother "was pretty argumentative" with providers and "wouldn't take responsibility for any of her actions." Mother blamed ECCYS and other service providers or would make excuses as to why she wasn't doing what she needed to do on the court order. *See* N.T., 89:7-11.

Caseworker Rash confirmed services were offered to Mother after April 20, 2020, through Zoom and by telephone. *See* N.T., 81:16-22. For the following review period in July of 2020, and as the Covid restrictions began to change, Caseworker Rash had not seen any change in how Mother was interacting. *See* N.T., 83:3-8. On May 29 of 2020 and June 11 of 2020, Mother tested positive for marijuana. *See* N.T., 83:11-13. Between April to July 1, 2020, Mother continued visitation with Minor Child M.H.R. through Zoom video chat lasting for fifteen minutes. *See* N.T., 84:3-16. Caseworker Rash confirmed discussing with Mother as to Mother being pregnant and still using drugs, but Mother continued to use. *See* N.T., 86:2-14. The newly born Minor Child P.A.R. was found to be drug exposed for Methamphetamine. Since Minor Child P.A.R. was discharged from the hospital, Caseworker Rash confirmed Mother did not have any visits with Minor Child P.A.R. *See* N.T., 86:25, 87:1-13.

Caseworker Rash confirmed between July of 2020 and November of 2020, Mother went from having "moderate compliance" to "no compliance." *See* N.T., 87:18-22. In particular, between July 1 of 2020 and October 13 of 2020, Mother was to participate in thirty-six (36) urine screens. Mother had twenty-six (26) No Shows; four (4) Negatives; three (3) Failure To Produce; one (1) Positive for marijuana and one (1) for methamphetamine, and one (1) for amphetamines, meth, and marijuana. *See* N.T., 88:1-5. On October 1, 2020, Mother was

discharged from treatment court due to her consistent failure to attend court, her failure to submit to drug testing, and her non-compliance with treatment recommendations. *See* N.T., 88:7-15. When providers started seeing Mother face-to-face, Mother "was pretty argumentative" and "wouldn't take responsibility for any of her actions." Mother would blame ECCYS and/or other service providers for her own shortcomings or Mother would make excuses as to why she was not doing what she needed to do in the Court Order. *See* N.T., 89:7-11. Caseworker Rash also reported about an "unpleasant interaction" with Mother during a team meeting at Mother's residence in Girard. Mother communicated to Caseworker Rash "she was going to go to the State of Ohio to have her baby so Erie County wouldn't be involved with that child as well." *See* N.T., 89:12-25.

Caseworker Rash confirmed she also had conversations explaining to Mother as to "how difficult that would make things to move to Ohio." Also Ms. DiCola and Ms. DuShole, as well as the Dependency judge at the November 2 hearing, made it very clear to Mother that if she decided to live in the State of Ohio, it was Mother's responsibility from that point on to seek out her own services that she needed. Mother was cautioned that she would still be responsible to do her urine screens at the Esper Treatment Center. *See* N.T., 90:1-20.

On October 1, 2020, the Erie County Family Dependency Treatment Court discharged Mother "for consistent failure to attend court, failure to submit to drug testing and non-compliance with treatment recommendations."

In November, when Adoption was established as the concurrent goal with reunification, Mother reported to Caseworker Rash that she was staying in a tent and then in a camper and their vehicle. *See* N.T., 90:21-25. Mother also said she was staying with other family members in Ohio and at the Geneva Motel in Ohio. *See* N.T., 90:21-25, 91:9-16. As to transportation assistance when Mother was living in Girard, Mother was offered gas cards which Mother accepted, but Caseworker Rash confirmed Mother's ability to transport herself did not improve. *See* N.T., 101:6-22.

Mother dropped out of services January of 2021, and Mother was still claiming to be a resident in Ohio at that time. As to visitation with either of her children, May of 2020 was the actual last in person visit. *See* N.T., 92:3-5, 92:11-13, 92: 20-23. When asked how Minor Child M.H.R. is doing since he has been in care, Caseworker Rash stated Minor Child M.H.R. "has been doing great." He is "meeting all his milestones." The pre-adoptive home of paternal uncle was "meeting all of his needs." A "very strong, healthy bond" exists between Minor Child M.H.R. in his pre-adoptive home with his paternal uncle and his wife. *See* N.T., 94:9-12. Officer Rash stated Minor Child M.H.R. has experienced no negative or detrimental effect after not seeing his Mother since the May 2020 in-person visit or virtually since June of 2020. *See* N.T., 94:13-17. He has had no negative effects by not seeing his Mother for over a year, and he will be three in November. And Minor Child P.A.R. "hasn't seen her parents since she was born" and her paternal uncle and his wife in her pre-adoptive home "are the only parents that she's known." *See* N.T., 94:22-23, 95:1-3. Mother has done nothing to remedy the conditions that led to the placement of her children. N.T., 95: 8-10. Caseworker Rash confirmed it would be in both of these Minor Children's best interest if the Mother's parental rights were involuntarily terminated since "the mother has not made any progress on her court ordered treatment plan." N.T., 95:21-24, 96:1-2. Minor Child M.H.R. has been in care with his paternal uncle and his wife "for 19 months which is over half of

his life…." Minor child P.A.R. "has been in care for her entire life, which is approximately nine months." N.T., 96:1-5. In fact, neither Minor Child M.H.R. nor Minor Child P.A.R. do not even recognize Mother as their mother. Caseworker Rash stated "it would be more detrimental to not terminate [Mother's] parental rights." *See* N.T., 96:3-11.

During the instant IVT trial, Mother confirmed she understands ECCYS is petitioning the Court to terminate her rights which would mean the law would no longer identify her as the Mother to either Minor Child M.H.R. and Minor Child P.A.R. N.T., 122:8-15. However, Mother claimed she is able to take care of Minor Child M.H.R. or Minor Child P.A.R. "because [she] has a place to take them to" and "[she] loves [her] children and [she] was a good mom; [she] does not think what happened was fair." *See* N.T., 129:2-8. Mother is living in a house where she only has a room, but also has a camper. Her friend, Tiffany, is the owner of this house, and lives there too, with her husband. *See* N.T., 127:9-25. Mother does not necessarily pay rent, but if Mother has money and her friend needs it, Mother will "help her." *See* N.T., 128:1-11. Mother admitted using marijuana when asked about her positive test results, but failed to blame herself for not seeing her son. *See* N.T., 123:1-6. Mother testified she is bipolar and has PTSD, depression, ADD and ADHD. *See* N.T., 125:18-25. *See* N.T., 126:1-5.

Minor Child M.H.R. and Minor Child P.A.R. "are doing very well in their current placement" and the paternal uncle and his wife as Kinship Care is an adoptive resource for them. *See* N.T., 116:6-12, 118:15-17. Caseworker Vicander maintained terminating Mother's parental rights is in "the best interest of these children" because neither Minor Child M.H.R. nor Minor Child P.A.R. have seen Mother in person since June of 2020. *See* N.T., 117:16-19. In addition, he stated, "parents weren't able to rectify the situation that led to their placement." *See* N.T., 117:21-25. Caseworker Vicander confirmed there would be "no negative effect" on either Minor Child if Mother's rights would be terminated. *See* N.T., 118:1-6.

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 Child M.H.R. and Minor Child P.A.R. to be without essential parental care and control. Mother cannot and has not remedied the causes of her incapacity and neglect as to each of these Minor Children, specifically Minor Child M.H.R. and Minor Child P.A.R. Mother has demonstrated a continued inability to conduct her life in a fashion that would provide a safe environment for either or both of these Minor Children, whether that child was living with that parent or not, and her behavior is irremediable as supported by clear and competent evidence thereby justifying granting ECCYS's both Petitions to terminate Mother's parental rights in the instant case.

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), on October 1, 2020, Mother was discharged from Treatment Court due to her consistent failure to attend Court proceedings, failure to submit to drug testing, and non-compliance with treatment recommendations. *See* N.T., 88:7-11. *See Petitioner's Exhibit 7A at page 33A* Mother did not progress beyond Phase 1, the level at which Treatment Court starts, even though "prior to Covid she was attending and participating with her counselors." N.T., 29:3-12; N.T., 29:8-12. Mother's test results indicated Mother's results of positive for marijuana were "a significant factor" and, therefore, Mother was advised to participate in inpatient services because telehealth is more difficult. N.T., 29:13-25. Although Mother "increased her weekly drug and alcohol sessions weekly" and "mental health" attendance, Mother never showed "the type of progress to even consider moving her to Phase 2. N.T., 30:3-11.

On February 1, 2021, combined Permanency Hearings were held for both Minor Children. The Court Summary indicates this was Minor Child M.H.R.'s Fourth Permanency Review Hearing and Minor Child P.A.R.'s First Permanency Hearing. Minor Child M.H.R. has been in placement for "under fourteen months" while Minor Child P.A.R. has been in care for "a little over three months." Mother was to participate in a total of thirty-two (32) urinalysis screenings from November 2, 2020 to January 13, 2021. However, out of those thirty-two (32) screenings, Mother had thirty-two (32) No Show Positives. Mother's drug addiction had a negative effect on her ability to parent. *Court Summary for Permanency Review Hearing for Both Minor Child M.H.R. and Minor Child P.A.R., dated February 1, 2021, Petitioner's Exhibit 6, pages 1-7.*

Mother had not seen Minor Child P.A.R. since she was discharged from the hospital after her birth. Mother was only able to participate in one in-person visit with Minor Child M.H.R. during the entire case since Mother had positive urine screen test results. As to housing, Mother stays at a motel in Geneva, Ohio. *Court Summary for Combined Permanency Review Hearing for Minor Child M.H.R. and Minor Child P.A.R., dated February 1, 2021, Petitioner's Exhibit 6, page 5-7.*

After hearings on February 1, 2021, as to both Minor Children, Dependency Court found by Order dated February 3, 2021, Mother had made "no compliance with the permanency plan" and "no progress toward alleviating the circumstances which necessitated the original

placement." Placement of Minor Child M.H.R. was noted as thirteen (13) months and continued as necessary and appropriate. Placement of Minor Child P.A.R. was noted as three (3) months and continued as necessary and appropriate. *Permanency Review Order for Minor Child M.H.R., dated February 3, 2021, Petitioner's Exhibit 4, pages 1-3, and Permanency Review Order for Minor Child P.A.R. dated February 3, 2021, Petitioner's Exhibit 4, pages 1-3.*

During the IVT trial, Mother testified about "being resistant to ECCYS recommendations for drug and alcohol treatment in the past." N.T., 125:18, 126:1-5. *See* N.T., 125:10-13. Mother also testified she is currently in treatment for drug addiction at "Community Counseling Center" in Ohio, but intensive outpatient, which is IOP has not started yet. N.T., 124:4-25. Mother provided mere excuses for her positive results without accepting any responsibility and blamed medical professionals for giving the wrong medication and increased dosages of "Wellbutrin" while she was pregnant. N.T., 133:9-10, 133:19-21.

For the period from 1/2/20 to 1/29/21, Petitioner's Exhibit 10 indicates Mother had four (4) Negative test results; eighty (80) Positive No Shows; three (3) Could Not Produce; one (1) Specimen Leaked in Transit; and twenty-four (24) Positive screen results that included two (2) for Methamphetamine/ Amphetamine/THC, one (1) for Methamphetamine, and all remaining were for THC.

On October 1, 2020, the Erie County Family Dependency Treatment Court discharged Mother "for consistent failure to attend court, failure to submit to drug testing and non-compliance with treatment recommendations."

Caseworker Rash confirmed Mother had not made any progress on her court ordered treatment plan. In fact, Minor Child M.H.R. and Minor Child P.A.R. do not even recognize Mother as their mother. Caseworker Rash stated, "it would be more detrimental to not terminate Mother's parental rights." *See* N.T., 95:15-25, 96:1-11.

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 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 each child under the best interests standard pursuant to 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 needs. *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 each of these Minor Children. In the instant case, Minor Child M.H.R. has remained in Kinship Care, specifically the paternal uncle and his wife's Kinship Home. Minor Child P.A.R. is at the same Kinship care home with her older brother Minor Child M.H.R. *Permanency Review Order for Minor Child M.H.R. dated April 22, 2020, Petitioner's Exhibit; Shelter Care Order for P.A.R. dated October 27, 2020, Petitioner's Exhibit 4. Court Summary, Permanency Review Hearing as to Minor Child M.H.R, dated April 21, 2020, Petitioner's Exhibit 6 at page 2. Court Summary for Combined Permanency Review Hearing for Minor Child M.H.R. and Minor Child P.A.R., dated February 1, 2021, Petitioner's Exhibit 6 at page 6-7.*

Mother "dropped out of services January of 2021" and the parents were "still claiming to be residing in Ohio at that time." As to visitation with either of their children, May of 2020 was the actual last in-person visit. *See* N.T., 92:3-5, 92:11-13, 92: 20-23. When asked how Minor Child M.H.R. is doing since he has been in care, Caseworker Rash answered he "has been doing great." The Kinship paternal uncle and his wife "are meeting all of his needs" and there is a "healthy bond between them." *See* N.T., 94:9-12. Caseworker Rash responded Minor Child M.H.R. has not had suffered a "detrimental effect by not seeing his parents since the May 2020 in-person visit or the virtual visit in June of 2020. *See* N.T., 94:13-17. Minor Child P.A.R. "hasn't seen her parents since she was born" and her Kinship paternal uncle and his wife are the only parents she has known. *See* N.T., 1-3. Caseworker Rash confirmed "it would be in these children's best interest if the mother's parental rights were to be involuntarily terminated" since "mother has not made any progress on her court ordered treatment plan." Neither Minor Child M.H.R. nor Minor Child P.A.R. "don't even recognize [Mother] as their mother." Caseworker Rash stated "it would be more detrimental to not terminate Mother's parental rights." *See* N.T., 95:15-25, 96:1-11. Indeed, the parent-child bond with each Minor Child is a "healthy one" with the paternal uncle and his wife, not with the Mother.

Caseworker Vicander credibly stated Minor Child M.H.R. and Minor Child P.A.R. "are doing very well in their current placement" and confirmed "this would be an adoptive resource." *See* N.T., 116:6-12, 118:15-17. Caseworker Vicander maintained that termination of parental rights is in "the best interest of these children" because Minor Child M.H.R. and Minor Child P.A.R. have not seen their Mother "in person since June 2020." *See* N.T., 117:16-19. In addition, "parents weren't able to rectify the situation that led to their placement." *See* N.T., 117:21-25. As confirmed by Caseworker Vicander, there would be "no negative effect" on either Minor Child if Mother's rights were terminated. *See* N.T., 118:1-6.

This IVT Court has considered and adopts the statements made by Minor Children's Legal

Counsel, Attorney Deanna L. Heasley, at the conclusion of the IVT Trial. Deanna L. Heasley, the attorney for each Minor Child, stated Minor Child M.H.R. will be three years old this November while Minor Child P.A.R. is nine months old. Based on their young ages, Attorney Heasley candidly stated, "it is my belief that their legal and best interests merge, and that is what I'm representing to the Court in how I have proceeded today." *See* N.T., 147:1-8. Attorney Heasley indicated, in "the final review period prior to the goal being changed," Mother had not attended any urinalysis tests. During that same period, as per Exhibit 12B, "there were two meetings with Miss DiCola" who would meet Mother in the Girard area. *See* N.T., 147:11-17. Attorney Heasley noted the inconsistencies from Mother: "This is very inconsistent with parents' alleged issues with transportation and their alleged car problems to get into Erie to complete other services, including urinalysis." *See* N.T., 147:17-23. Mother was unsuccessfully discharged from Family Dependency Treatment court on October 1 for non-compliance due to Mother's consistent failure to attend, and failure to submit to drug testing. *See* N.T., 147:24-25, 148:1-2. Mother was evicted with Father from their residence in September, at which time they owed $4,000.00 in back rent. Attorney Heasley rhetorically remarked, "what happened with the $10,000 that they could have used to purchase reliable transportation, if in fact, that was their problem and to secure a residence." *See* N.T., 148:6-12.

Attorney Heasley stated, "nothing has changed" from when Minor Child M.H.R. came into care at the end of 2019. *See* N.T., 148:13-15. Attorney Heasley indicated Minor Child P.A.R. was born positive for amphetamines and opiates and is in an early intervention tracking program. After Minor Child P.AR.'s discharge to kinship care, she was readmitted at another hospital for treatment and testing due to a fever and signs of withdrawal. Attorney Heasley disagreed with Mother that Wellbutrin was the cause. Instead, Attorney Heasley stated, "I attribute that to the mother's addiction issues that she failed to address." *See* N.T., 148:16-25.

This IVT Court finds and concludes that indeed nothing has changed with Mother. Minor child M.H.R. and P.A.R. need to move onto permanency, and in fact, these Minor Children deserve permanency. The testimony reflects these Minor Children will suffer no irreparable harm with Mother's parental rights being involuntarily terminated. This IVT Court has also considered the importance of the continuity of Minor Children's relationship with the paternal uncle and his wife who are meeting the developmental, physical and emotional needs of these Minor Children in their best interests. For all of the above reasons, ECCYS has met its burden of proof by clear and convincing evidence under 23 Pa.C.S. §2511(b).

Therefore, ECCYS has established, pursuant to 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,[2] even though only one ground is sufficient, and that termination of Mother's parental rights is indeed in the best interests, needs, and welfare of each Minor Child, specifically Minor child M.H.R. and Minor Child P.A.R. under 23 Pa.C.S. § 2511(b). As a parent, Mother is required to make diligent efforts toward the reasonably prompt assumption of her full parental responsibilities. Mother's statements that she has a place to take her Minor Children to, after her long period of uncooperativeness regarding the necessity or availability of services, is rejected as untimely and disingenuous. Mother's parental obligation is a positive duty that required her affirmative performance.

[2] "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).

Mother was required to make diligent efforts toward the reasonably prompt assumption of her full parental responsibilities. She was required to have a continuing interest in each of her Minor Children and make genuine efforts in good faith to maintain communication and association with each Minor Child. Mother failed to do so with either Minor Child.

This IVT Court, therefore, requests the Honorable Judges of the Pennsylvania Superior Court affirm the Decrees for each of the Minor Children, specifically Minor Child M.H.R. and Minor Child P.A.R., entered involuntarily terminating Mother's parental rights.

BY THE COURT

/s/ **Hon. Stephanie Domitrovich, Judge**

IN THE MATTER OF THE ADOPTION OF D.I.S. (D.O.B.: MARCH 4, 2014)

IN THE MATTER OF THE ADOPTION OF D.S. (D.O.B.: OCTOBER 26, 2017)

APPEAL OF: A.N.S., MOTHER AS TO BOTH NOS. 68 AND 68A IN ADOPTION 2021; AND 1227 WDA 2021 AND 1228 WDA 2021

INFANTS / TERMINATION OF PARENTAL RIGHTS / JUVENILE

"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).

INFANTS / TERMINATION OF PARENTAL RIGHTS / JUVENILE

The grounds for termination of parental rights due to parental incapacity that cannot be remedied are not limited to affirmative misconduct; instead, such grounds emphasize 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 statutory language should not be read to compel courts to ignore a child's need for a stable home and strong, continuous parental ties, particularly so where disruption of the family has already occurred and there is no reasonable prospect for reuniting it. 23 Pa.C.S.A. § 2511(a)(2).

INFANTS / TERMINATION OF PARENTAL RIGHTS / JUVENILE

In an action to terminate parental rights, above all else adequate consideration must be given to the needs and welfare of the child. 23 Pa.C.S. § 2511(b).

INFANTS / TERMINATION OF PARENTAL RIGHTS / JUVENILE

When a parent has demonstrated a continued inability to conduct her life in a fashion that would provide a safe environment for a child, whether that child is living with the parent or not, and the behavior of the parent is irremediable as supported by clear and competent evidence, the termination of parental rights is justified. 23 Pa.C.S. § 2511(a)(2).

INFANTS / TERMINATION OF PARENTAL RIGHTS / JUVENILE

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 / JUVENILE

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)).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
ORPHAN'S COURT DIVISION
NO. 68 IN ADOPTION 2021
1227 WDA 2021

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
ORPHAN'S COURT DIVISION
NO. 68A IN ADOPTION 2021
1228 WDA 2021

Appearances: Emily Mosco Merski, Esq., for Appellant, A.N.S., Mother
Christine Konzel, Esq., Legal Counsel on behalf of Minor Children
Anthony G. Vendetti, Assistant Solicitor, ECCYS

1925(a) OPINION

Domitrovich, J., November 16, 2021

Appellant A.N.S., [hereinafter Mother] appeals, through her counsel Emily M. Merski, Esquire, from the Final Decrees dated September 17, 2021, in the Erie County Court of Common Pleas, wherein both Petitions of Involuntary Termination were filed by the Erie County Children and Youth Services [hereinafter ECCYS] and granted by this Involuntary Termination [hereinafter IVT] Court pursuant to 23 Pa.C.S. §2511(a)(1), (a)(2), (a)(5), (a)(8); and §2511(b), regarding Minor Child D.I.S. born on March 4, 2014, and Minor Child D.S. born on October 26, 2017, [collectively Minor Children], thereby terminating Mother's parental rights to these Minor Children.[1]

At the First Permanency hearing, held on September 18, 2020, the transcribed record indicates how the Dependency Court judge painstakingly explained on the record each term and condition of her treatment plan. Mother clearly understood every term and condition of her treatment plan. Moreover, the Dependency Court judge provided commentary to Mother as to her role in following through with the treatment plan and her need to comply. *See Notes of Transcript [hereafter N.T., Dependency], First Permanency Hearing, 9/18/202, 12-18, as transcribed and in the record for this IVT Hearing record, with no objection by counsel and the parties, N.T., IVT Hearing, 8/17/2021, 149-150.* Although he had found Mother noncompliant with the treatment plan at that First Permanency Hearing, the Dependency Court judge still provided Mother additional time to comply with said treatment plan by ordering a six-month review instead of a three-month review, as requested by ECCYS. Thereafter, Mother, however, remained noncompliant with her treatment plan during the life span of said Dependency proceedings. Moreover, contrary to said Dependency Court colloquy, Mother testified at this IVT Hearing that she "never knew to contact" ECCYS and "just got papers from the [ECCYS] for this [IVT] hearing and my daughter's, that's it" while in prison regarding this IVT Hearing. *N.T., 118:21-25; 119:1-12.*

As reflected above, this undersigned IVT Court judge was not the Dependency Court judge presiding in this case; therefore, this IVT Court judge performed her role by evaluating, reviewing and examining independently the entire record in this case. This IVT Court found and concluded ECCYS carried its burden of proof and proved by clear and convincing evidence in each of these cases and as to each section referred in each Petition, i.e., 23 Pa.C.S. §2511(a)(1), (a)(2), (a)(5), (a)(8) and §2511(b). Mother, through her counsel, raises on appeal in her Concise Statement of Errors that the IVT Court abused its discretion and/or erred by finding 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)(2), (a)(5), (a)(8) and §2511(b). Counsel did not raise 23 Pa.C.S. §2511(a)(1) on appeal; however, this IVT Court will still address that section.

[1] This IVT Court addresses both Minor Children in this same Opinion. Since these two cases captioned above are not consolidated at this time, this IVT Court filed an original of this 1925(a) Opinion at each Docket No. for each Minor Child.

FINDINGS OF FACT and PROCEDURAL BACKGROUND

The Dependency cases as to Minor Child D.I.S. and Minor Child D.S. began on June 11, 2020, when ECCYS petitioned for emergency relief wherein inappropriate individuals were caring for Mother's Minor Children in Buffalo, New York, wherein Mother had placed her Minor Children with their paternal relatives. Minor Child D.S. suffered a head injury causing him to have a subdural hematoma on May 29, 2020. Upon their return to Erie, the Dependency Court issued two Emergency Protective Custody Orders. Each Court Order directed removal of the Minor Child D.I.S. and Minor Child D.S. from Mother and/or Father as necessary for each Minor Child's welfare and best interest. ECCYS was found to have made reasonable efforts to prevent removal or provide reunification. Any lack of services to prevent removal were reasonable due to the emergency nature of the removal and each Minor Child's safety considerations. Minor Child D.I.S. and Minor Child D.S. were placed in the temporary protective physical and legal custody of ECCYS, consistent with the Juvenile Act and Child Protective Services Law. *Emergency Protective Custody Orders for D.I.S. and D.Z.S., each dated June 11, 2020, in Petitioner's Exhibit 5, pp. 1-2, 20-21.*

On June 12, 2020, Juvenile Court Dependency Docket Entries indicate a Shelter Care Hearing was held before a Juvenile Court Hearing Officer as to each Minor Child. *Petitioner's Exhibit 5, pages 3-4, 22-23.* On June 16, 2020, the Juvenile Court Hearing Officer issued and filed her Recommendations, adopted and ordered by the Dependency Court on June 16, 2020.

As to each Minor Child, Dependency Court found on June 16, 2020, sufficient evidence existed to prove continuation or return of each Minor Child to the home of Mother and/or Father was not in the best interest of each Minor Child. In fact, Mother's physical whereabouts were unknown at that time. Mother did not appear for the Shelter Care hearing although ECCYS had communicated with Mother to give her notice of the hearing date. Minor Child D.I.S. and Minor Child D.S.'s Guardian Ad Litem [GAL] agreed to continued temporary shelter care pending an adjudication hearing. ECCYS was found to have made reasonable efforts to prevent or eliminate the need for removal of these Minor Children from the home of Mother and/or Father. Each Order stated the Minor Child was not returning to the home of Mother and/or Father since returning the Minor Child was contrary to his welfare and best interest. Legal and physical custody of each Minor Child remained with ECCYS. These Minor Children remained in Kinship Care as the least restrictive placement meeting their needs and no less restrictive alternatives were available. ECCYS was found to have satisfied the requirements regarding family finding. *Recommendation for Shelter Care for Minor Child D.I.S. dated June 16, 2020; Recommendation for Shelter Care for Minor Child D.S. dated June 16, 2020, in Petitioner's Exhibit 5.*

On June 25, 2020, Adjudicatory and Dispositional hearings were held in the best interests of the Minor Children. On June 29, 2020, the Juvenile Court Hearing Officer issued her "Recommendations for Adjudication and Disposition." *See Petitioner's Exhibit 5.* "Mother appeared via telephone from her home and wished to represent herself." *Id.* ECCYS amended each Dependency Petition at Paragraphs 1A(a) and 1A(b) by removing language indicating Mother had been actively avoiding and/or refusing to work with the ECCYS and thereby substituting Mother "has been inconsistent in her involvement with [ECCYS]." *Id.* With said amendment being acceptable, "[M]other also stipulated to the allegations set forth

in the Dependency Petition." *Id.* Moreover, "the parties agreed that the Treatment Plans, placement setting, and visitation schedule are appropriate for the family." *Id.*

Immediately thereafter on the same day, June 25, 2020, with counsel, and Mother representing herself, the Dispositional Hearing was immediately held. The Dependency Court found based on findings of abuse, neglect or dependency as to each Minor Child, removal from the home of Mother and/or Father was in the best interest of each Minor Child. A three-month review hearing was ordered. A seven paragraph treatment plan for Mother clearly delineated: 1. Mother must refrain from drugs and/or alcohol; 2. Mother must have random urinalysis through Color Code at Esper Treatment Center; Mother must have drug and/or alcohol assessments, and if treatment recommended, Mother must gain an understanding of how her drug usage affects her mental health and decision-making; 3. Mother must participate in mental health assessment and follow-through; 4. Mother must obtain and/or maintain gainful employment and provide ECCYS with documented proof of an inability to work and subsequent income; 5. Mother must obtain and/or maintain safe and stable housing and provide proof of housing to ECCYS with all household members being approved by ECCYS; 6. Mother must comply with guidelines of Erie County Adult Probation; and 7. Mother must sign and all releases of information as requested by ECCYS. *See Petitioner's Exhibit 5 at p. 3.*

In order to provide Mother incentive to follow her treatment plan, Mother's visitation with Minor Children was contingent upon Mother being drug and alcohol free. Mother's visitation would increase or decrease depending upon Mother's compliance or lack of compliance with her treatment plan. If a positive urine would occur, Mother would not have a visit until her next clean urine. *Id.*

ECCYS was found to have made all reasonable efforts to prevent or eliminate the need for removal of Minor Child D.I.S. and Minor Child D.S. from the home of Mother and/or Father prior to placement. Moreover, ECCYS was found to have made reasonable efforts prior to placement for the siblings to be together. The Court ordered Minor Child D.I.S. and Minor Child D.S. to remain in Kinship Care, the least restrictive alternative meeting the needs of Minor Children, and no less restrictive alternatives were available. The placement goal for Minor Child D.I.S. and Minor Child D.S. was return to parent or guardian with the projected date being uncertain. *Id.*

The *Pre-Dispositional Summary* that was prepared states, Mother "has pending charges regarding retail thefts on February 10, 2020, and February 18, 2020." Mother had a Preliminary Hearing in front of Magisterial District Judge Bizzarro. Mother was noted as supervised by Erie County Adult Probation. Mother is listed with an extensive array of criminal charges and guilty pleas including five (5) retail theft convictions (and a conspiracy to commit retail theft) as well receiving convictions for receiving stolen property, theft, drug paraphernalia and two convictions for false identification to law enforcement in 2018 and 2005 as well as driving violations *Id. at 6.*

In addition, *Pre-Dispositional Summary* states as to a prior child welfare history, referral was received dated 1/18/2019, as to Mother's inadequate healthcare regarding her three children (including these two Minor Children) that Mother had in her care. *Id. at 7.* Those allegations were validated; however, that Case was closed at Intake level due to all of Mother's children being in informal placements with relatives who were able to meet the Minor Children's health needs. Mother was incarcerated at the time of said referral. In addition,

on October 26, 2017, a referral was received concerning substance abuse by Mother due to Mother testing positive for opiates at the time of Minor Child D.S.'s premature birth. Mother said she thought she took Tylenol on the morning of her son's birth; however, Mother had really taken Oxycodone not prescribed to her. Allegation was validated, and case closed at Intake level due to no continued concerns with substance abuse. Mother has one other child, her 13-year-old daughter, who was removed from Mother and placed in Kinship Care with a legal guardian. *Id.*

The *Pre-Dispositional Summary* that was prepared for the Dispositional hearing indicates Minor Child D.S., at the time of this hearing in June of 2020, was two (2) years old and placed in the Emergency Kinship Home of maternal uncle and his wife. Minor Child D.S. had a follow-up medical appointment on June 22, 2020, after he suffered a seizure from a traumatic subdural hemorrhage on May 29, 2020, when he resided in Buffalo, New York. "It was determined the injury was intentional and greater than 28 days." *Id. at 2.* "[T]here was an investigation conducted by the State Police in Buffalo, New York, but it was determined that they could not charge anyone in the incident as all parties were not forthcoming with information." *Id. at 2.* There were also concerns Minor Child D.S. had possible symptoms of Covid-19 as his older sister had tested positive on June 18, 2020. Minor Child D.S. was physically healthy and had no other concerns. However, Minor Child D.S. at the time had "a speech delay" and a referral was made to "Early Intervention." *Pre-Dispositional Summary for Minor Children D.S. and D.I.S. dated June 25, 2020, Petitioner's Exhibit 6, p. 2.*

As to their Kinship care, the *Pre-Dispositional Summary* states the Kinship Caretakers were only able to take in one child. "The kinship families are close, and the children have contact with their siblings." *Id. at 3.*

The *Pre-Dispositional Summary* also indicates Minor Child D.I.S. was now 6 years old and in the Emergency Kinship Home of his maternal aunt. Minor Child D.I.S. "is physically healthy, and no medical concerns have been noted." Minor Child D.I.S. "has not been assessed for mental treatment, but does have a history of physical and mental aggression." ECCYS indicated it will refer him for assessments for treatment. Minor Child D.I.S. also has speech concerns and a referral would be made to Intermediate Unit when appropriate. Minor Child D.I.S.'s educational information can be gathered from "Erie Rise Academy." "Prior to moving to Buffalo," Minor Child D.I.S. "was doing well in school, he does have behavioral concerns but had subsided once he was in a routine at school. Minor Child D.I.S. could possibly move to the First grade when he learns 25 of his sight words fluently. He was at 10-15 words. While residing in Buffalo, Minor Child D.I.S. did not attend any school due to pandemic. Minor Child D.I.S. will need to "attend school daily and may need to be assessed for Individual Education Plan once he is in first grade." *Pre-Dispositional Summary for Minor Children D.S. and D.I.S. dated June 25, 2020, Petitioner's Exhibit 6, pp. 3-4.*

On June 29, 2020, Dependency Court adopted and ordered the Juvenile Hearing Officer's Recommendation for Adjudication and Disposition as to Minor Child D.I.S. and Minor Child D.S. as being the "in the best interest of the child." *Recommendation for Adjudication and Disposition for Minor Child D.I.S. dated June 29, 2020 Petitioner's Exhibit 5, page 4. Recommendation for Adjudication and Disposition for Minor Child D.S. dated June 29, 2020, Petitioner's Exhibit 5, p. 4.*

On September 18, 2020, an Initial or First Permanency Review Hearing was held as to

Minor Child D.I.S. and Minor Child D.S. On September 23, 2020, Dependency Court issued Permanency Review Orders for Minor Child D.I.S. and Minor Child D.S. finding Mother had no compliance with the permanency treatment plan, and Mother made no progress toward alleviating the circumstances that necessitated these original placements of the Minor Children. Mother had not complied with Court-ordered services. Mother had not maintained contact with ECCYS regarding her whereabouts but reported she was still residing in Erie. Mother had not turned herself into authorities for an arrest warrant for pending retail theft charges. Mother had missed two (2) scheduled criminal court hearings on July 15, 2020 and July 29, 2020, regarding her pending criminal charges. Mother says she wanted to be reunified with her children but when confronted with how her actions impacted her Minor Children, she did not want to discuss the impact of her actions on the Minor Children. Mother felt she should be commended for allowing her Minor Children to be taken care of by other family members.

Mother continued to live the street life, and Mother's brother, J.S., indicated he "struggles" over the way, his sister, the Mother is "living that way" and how the family has to care for her Minor Children, not the Mother. Recently, Mother had contacted her Minor Children by telephone and Facebook Messenger, and they were willing to speak to her. Minor Children were reported as being happy to hear from her. *Court Summary, Permanency Hearing as to Minor Child D.I.S. and Minor Child D.S., dated September 18, 2020 Petitioner's Exhibit 6, p. 13.*

The Court Summary dated September 18, 2020, states the Dependency Court states Mother shall refrain from drugs and alcohol and shall submit to random urinalysis testing through Esper Treatment Center with the Color Code program. Between June 30, 2020, and August 27, 2020, Mother was to participate in a total of eighteen (18) urinalysis screenings. However, Mother failed to abide by this Court-directive in that **Mother had not participated in any urinalysis screenings at the Esper Treatment Center.** Therefore, Mother had eighteen (18) No Shows, which are considered as Positive results. *Court Summary, Permanency Hearing as to Minor Child D.I.S. and Minor Child D.S., dated September 18, 2020 Petitioner's Exhibit 6, pp. 13-14.*

Mother's Specific Dates as to Urinalysis results are:

6/30/20	No Show – Positive	7/30/20	No Show – Positive
7/02/20	No Show – Positive	8/04/20	No Show – Positive
7/06/20	No Show – Positive	8/07/20	No Show – Positive
7/10/20	No Show – Positive	8/10/20	No Show – Positive
7/14/20	No Show – Positive	8/12/20	No Show – Positive
7/15/20	No Show – Positive	8/19/20	No Show – Positive
7/21/20	No Show – Positive	8/20/20	No Show – Positive
7/23/20	No Show – Positive	8/24/20	No Show – Positive
7/27/20	No Show – Positive	8/27/20	No Show – Positive

Mother was Court-ordered to participate in a drug and alcohol assessment and follow all treatment recommendations, and if treatment was recommended, Mother was to learn how her drug usage affects her mental health and decision-making. However, this had not occurred since Mother failed to follow-through with this Court-ordered directive to schedule her drug and alcohol assessment.

As to the Court-ordered directive for Mother to participate in a mental health assessment

and follow through with all treatment recommendations, Mother failed to participate in any assessment. Mother did not attend her rescheduled counseling appointment. In fact, Mother's Blended Case Manager [BCM] could not coordinate continuity of care to assist Mother due to Mother's no contact with her BCM since June 25, 2020. *Id. at 14.*

As to the Court Order to obtain and/or maintain gainful employment or provide ECCYS with documented proof of an inability to work and subsequent income, Mother had not reported she gained employment.

Mother was Court-ordered to obtain and/or maintain safe and stable housing and provide proof of housing to ECCYS along with all members of the household being agency approved. However, Mother was "on the run," and Mother would not disclose (and had not disclosed) her location or housing situation. Mother stated she was living somewhere in Erie.

Mother was Court-ordered to comply with the guidelines set forth by Erie County Adult Probation; however, Mother failed to do so. Mother failed to maintain contact with her Erie County Adult Probation Officer since June 3, 2020. Mother failed to follow the guidelines set by Erie County Adult Probation; she stated she would not turn herself into authorities until she gets her life together.

Mother was Court-ordered to sign any and all releases of information as requested by ECCYS; however, Mother had not made herself available since the last hearing to sign the necessary releases. *Court Summary, Permanency Hearing as to Minor Child D.I.S. and Minor Child D.S., dated September 18, 2020 Petitioner's Exhibit 6, p. 14.* Court Summary states Minor Child D.S. had a Neurological appointment for his injuries in Buffalo, New York, and his MRI revealed he has some remnants of the blood clot from the subdural hematoma. *Id. at 3.*

Since residing in kinship home, Minor Child D.S. made more progress with his speech. He used more words when he wants something. Kinship family was monitoring his progress, and Minor Child D.S. continued to improve in his communications. *Id. at 4.*

Additionally, the Court Summary dated September 18, 2020, states Minor Child D.I.S. "endured a lot of trauma in his short life." *Id. at 6.* He "is an intelligent and personable child," but he has a difficult time expressing his emotions without becoming aggressive. He appears to do well on one-on-one when he interacts with structure and consistency. He had witnessed domestic violence while residing with Mother and Father and had lived in a chaotic, unstable environment for most of his life. According to Erie County CYS in Buffalo, NY, Minor Child D.I.S. did not disclose any abuse or neglect, and he was examined at Osai Children's Hospital with no concerns. Despite no disclosure, this Minor child has some behavioral issues after experiencing abuse and neglect in Buffalo, NY. Also, Minor Child D.I.S. has been physically aggressive toward his cousin, attempted to choke his cousin, smeared feces on his cousin, destroyed property in the kinship home, fought with his own sister, dragged another cousin out of bed and fought him. He does not like being told what to do by his older siblings or sitters. *Id. at 7.* Although maternal aunt as his kinship caregiver had Minor Child D.I.S. involved with football, he struggles to get along with his peers during practice. Minor Child D.I.S. is impulsive. The kinship caregiver is unsure if she will be able to maintain him for the long term if his aggression continues. A referral had been made for mental health service for Minor Child D.I.S. and an appointment was scheduled for him for September 2, 2020. Additionally, while in kinship home, Minor Child D.S. sees Minor Child D.I.S. "at least biweekly." *Court Summary dated September 18, 2020, Petitioner's Exhibit 6 at 7.*

During this First Permanency hearing, held on September 18, 2020, the transcribed record illustrates the Dependency Court judge painstakingly ensured on the record for the Mother that the Mother clearly understood every term and condition of her treatment plan, and he provided commentary to her as to her necessity to follow-through with her commitment to comply. *See N.T., Dependency, 12-18.* Although he had found Mother noncompliant with the treatment plan at that First Permanency Hearing, the Dependency Court judge still provided Mother even more ample time to comply with said treatment plan and then cautioned her as to the ramifications for failing to follow-through with said treatment plan. He confirmed Mother was receiving her current and previous court-related mail and information from ECCYS and the Court at the address she stated on the record: 2216 German Street in Erie.

After the First Permanency Hearing on September 18, 2020, Dependency Court entered its Order dated September 23, 2020, finding Mother had "not been in compliance with the permanency plan," and "there has been no progress toward alleviating the circumstances which necessitated the original placement." The Order further states, "placement of the child continues to be necessary and appropriate" and "the permanency plan developed for this child, dated September 18, 2020 is appropriate and feasible and therefore, '[t]he current placement goal is NOT appropriate and/or NOT feasible.'" Dependency Court directed Minor Child D.I.S. and Minor Child D.S.'s permanency placement goal as return to parent as uncertain regarding the projected date, and concurrent with a new permanency goal of Adoption. Placement of Minor Child D.I.S. would remain in Kinship Care, specifically, maternal aunt's Kinship Home and placement of Minor Child D.S. would remain in Kinship Care, specifically, maternal uncle and aunt's Kinship Home. The same seven points or paragraphs in her treatment plan remained in place for Mother who stated at the time of the colloquy with the Dependency Court judge that she understood every term. *Permanency Review Order for Minor Child D.I.S. dated September 23, 2020, Exhibit 5, p. 1; Permanency Review Order for Minor Child D.S. dated September 23, 2020, Exhibit 5, p. 1. See also N.T., Dependency, 12-18.* Instead of granting the request of ECCYS for a three month review hearing, the Dependency Court judge gave Mother additional time to comply with the treatment plan by ordering a six month review, instead of the three month review. *See N.T., Dependency, 4:9-17; 18:14-18.*

On March 3, 2021, Second Permanency Review Hearings were held for Minor Child D.I.S. and Minor Child D.S. The Combined Court Summary dated March 3, 2021, indicates Mother again has not been compliant with Court-ordered services. Mother had not maintained contact with ECCYS regarding her exact whereabouts although she was suspected to be residing in Erie County. A diligent search was conducted on January 8, 2021, which yielded no new results. Mother has received new charges on January 18, 2021, for Possession of Marijuana and Paraphernalia. Mother at that time had three (3) outstanding warrants for her arrest. ECCYS had been informed that there was a likelihood Mother was currently pregnant. The current Kinship Homes for Minor Child D.I.S. and Minor Child D.S. had stated they are not permanent resources, and they would like ECCYS to find an alternative resource for Minor Children. There is a possible paternal kinship who resides in Ohio, and ECCYS was in the process of completing an Interstate Compact to explore this Kinship Home. *Permanency Review Hearing Court Summary for Minor Child D.I.S. and Minor Child D.S., dated March 3, 2021, Exhibit 6, p. 10.*

As to the Court-ordered directive that Mother was to refrain from the use of drugs and/

or alcohol and submit to random urinalysis screenings, Mother had been called-in for fifty-eight (58) urine screens during this review period and all fifty-eight (58) urine screens were No-Show Positives.

As to the Court-ordered directive that Mother was to participate in drug and alcohol assessment and follow all treatment recommendations, Mother failed to do so. If recommended treatment, Mother was to gain an understanding of how her drug use affects her mental health and decision-making. Mother failed to schedule an assessment to begin the process.

As to the Court-ordered directive for Mother to participate in a mental health assessment and follow all treatment recommendations, Mother failed to do so.

As to the Court-ordered directive for Mother to obtain and/or maintain gainful employment or provide ECCYS with documented proof of an inability to work and subsequent income. Mother failed to do so as Mother failed to have any contact with ECCYS and did not verify anything with ECCYS.

As to Mother being directed to obtain and/or maintain safe and stable housing and provide proof of housing to ECCYS as well obtain approval of all household members, Mother failed to do so. Mother was on the run and had not disclosed her exact location and housing situation although it is believed Mother is somewhere in Erie County. *Permanency Review Hearing Court Summary for Minor Child D.I.S. and Minor Child D.S., dated March 3, 2021, Exhibit 6, p. 11.*

Mother was Court-ordered to comply with the guidelines set forth by Erie County Adult Probation. Mother has failed to maintain contact with Adult Probation since June 3, 2020. Mother has not followed through with her guidelines on probation and has stated she is not going to turn herself in until she has her life together.

As to the Court-ordered directive that Mother comply with signing any and all releases of information, ECCYS had been unable to contact or locate Mother. *Permanency Review Hearing Court Summary for Minor Child D.I.S. and Minor Child D.S., dated March 3, 2021, Exhibit 6, p. 12.*

Minor Child D.S.'s latest MRI revealed most of the bleeding from his subdural hematoma had been reabsorbed. Minor Child D.S. needs no further follow-up appointments. *Permanency Review Hearing Court Summary for Minor Child D.I.S. and Minor Child D.S., dated March 3, 2021, Exhibit 6, page 3.*

Minor Child D.I.S. was seen at Behavioral Health on October 27, 2020. He was diagnosed with ADHD and given medication to help manage his behavior. Minor Child D.I.S. was prescribed Intuniv (Guanfacine) 1mg to be taken daily. Minor Child D.I.S. also began seeing a therapist on November 4, 2020, but the provider has not seen him since, as Kinship provider reported, that agency provider cancelled his appointment. Kinship provider had difficulties getting through to provider to reschedule. He continued to struggle with behaviors in the Kinship home. Continued medication and therapy will be required to address these behaviors. *Permanency Review Hearing Court Summary for Minor Child D.I.S. and Minor Child D.S., dated March 3, 2021, Exhibit 6, page 5.*

In its Order dated March 9, 2021, Dependency Court found "Mother had not complied with the permanency plan" and had "no progress toward alleviating the circumstances which necessitated the original placement." The Order further states, "placement of Minor Child

D.I.S. and Minor Child D.S. continues to be necessary and appropriate." The placement goal is appropriate and feasible which is to continue the current goal of return to parent with a projected date of unknown and concurrent with the goal of Adoption. Moreover, Dependency Court directed legal and physical custody of Minor Child D.I.S. and Minor Child D.S. shall remain with ECCYS. Placement of Minor Child D.I.S. would remain in Kinship Care, specifically, maternal aunt's Kinship Home, and placement of Minor Child D.S. would remain in Kinship Care, specifically, maternal uncle and aunt's Kinship Home. Dependency Court further ordered ECCYS shall no longer offer any services, which included visitations, to the Mother. *Permanency Review Order for Minor Child D.I.S. dated March 9, 2021, Exhibit 5, p. 2. Permanency Review Order for Minor Child D.S. dated March 9, 2021, Exhibit 5, p. 2.*

On May 10, 2021, Minor Child D.I.S. and Minor Child D.S. had their Third Permanency Review Hearing. The Court Summary indicates Minor Child D.S. was now 3 years old and in placement for 11 months. Minor Child D.I.S. was now 7 years old and in placement for 11 months. Both Minor Child D.S. and D.I.S. were placed in the least restrictive placement to meet their needs and no less restrictive alternative available. *Permanency Review Hearing Court Summary for Minor Child D.I.S. and Minor Child D.S. dated May 10, 2021, Exhibit 6, pages 45-48.*

By Order dated May 11, 2021, Dependency Court stated compliance with the Permanency Plan was not applicable to Mother, and Mother made no progress toward alleviating the circumstances that necessitated the original placement. *Permanency Review Order for Minor Child D.I.S. dated May 11, 2021, Exhibit 5, p. 36. Permanency Review Order for Minor Child D.S. dated May 11, 2021, Exhibit 5, p. 17.* Said Order further stated the permanency plan developed for these Minor Children dated May 10, 2021 was appropriate and feasible, and, therefore, the current placement goal was not appropriate and/or not feasible. Dependency Court directed Adoption as the new permanent placement with a projected date for Adoption goal to be achieved in six (6) months. All other matters as to placement etc. remained the same. *Permanency Review Order for Minor Child D.I.S. dated May 11, 2021, Exhibit 5, p. 1-3. Permanency Review Order for Minor Child D.S. dated May 11, 2021, Exhibit 5, p. 1-3.*

On June 11, 2021, ECCYS filed the instant Petitions for Involuntary Termination of Parental Rights to a Child Under the Age of 18 Years as to each Minor Child. On August 17, 2021, the IVT trial was held. Assistant Solicitor Anthony G. Vendetti appeared in-person on behalf of ECCYS. Christine Konzel, Esquire appeared in-person as Legal Counsel on behalf of the Minor Children. Mother was present and appeared in-person. *See Petitioner's Exhibit 1, Proof of Service.* Mother was represented by Emily M. Merski, Esquire who appeared in-person.

This IVT Court heard testimony from the following ECCYS witnesses who this IVT Court found provided credible testimony: Danielle Urban, ECCYS On-going Caseworker; Craig Christensen, Erie County Adult Probation Supervisor; and Julie Lafferty, ECCYS Supervisor. H.S., as Minor Child D.S.'s kinship provider, was called to testify by Mother's counsel, credibly testified. Mother also testified.

Petitioner's Exhibits 1 through 9 were stipulated to by all counsel for admission into the record, and this IVT Court admitted said Exhibits into evidence, without any objections raised. Mother's urinalysis testing results during the life of Minor Children's Dependency proceedings from June 30, 2020 to February 26, 2021 were ninety-six (96) "no-show"

positive tests. Petitioner's Exhibit 7 is as to Magisterial District Court Docket sheets for Mother. Petitioner's Exhibit 8 includes Common Pleas Criminal Dockets for Mother.

Danielle Urban, Ongoing Caseworker with ECCYS, stated she became involved in this case around November 23, 2020, taking the case over from another ECCYS caseworker, Erica Moffett. *N.T., 13:14-18; 13:24-25; 14:1.* Ms. Urban explained some of the issues that ECCYS was having with Mother who already had an open case with ECCYS for another child, and that Mother and her Minor Child D.I.S. and Minor Child D.S. were "missing in action." ECCYS was unable to locate them. Minor Children were found in Buffalo where they were subject to abuse and returned to Erie. ECCYS obtained emergency custody on June 11, 2020, and the whereabouts of Mother at that time were still unknown. *N.T., 14:10-17.* Minor Children were taken to a hospital in Buffalo with injuries and Buffalo CYS became involved. Minor Child D.S. had suffered a subdural hematoma. Mother had left Minor Child D.I.S. and Minor Child D.S. in Buffalo with some of Father's family members. No charges were filed for what happened to Minor Child D.S., as per Caseworker Urban. *N.T., 15:3-14.* ECCYS had been looking for Minor Children for approximately six months to check on their safety and welfare to make sure the Minor Children were healthy. Ultimately, ECCYS did find the Minor Children and there were some injuries. Minor Child D.S. may never be able to play contact sports due to the head injury he suffered. *N.T., 16:1-7.* The Shelter Care Hearing held on June 12, 2020, and the record indicate Mother did not attend the hearing. *N.T., 17:18-21.*

ECCYS filed a Dependency Petition on June 17, 2020, and Mother's whereabouts were still unknown. *N.T., 17:24-25; 18:1-2.* Mother did attend the Adjudicatory hearing by being present over the telephone, still not disclosing her whereabouts. Mother had a history with ECCYS since October 2019 with an older child who was removed from Mother's care. Since January of 2020, ECCYS had been trying to work with Mother, but ECCYS could not locate Mother. In March, ECCYS received a report that Mother had sent Minor Children to live with relatives in Buffalo, New York. *N.T., 18:17-25.*

At the time ECCYS filed Dependency Petitions, Mother was still having problems with her housing. Mother resided in Shelter Services but was not complying with the shelter's terms of services. *N.T., 18:25; 19:1-6.*

Mother was allowing inappropriate individuals to care for the Minor Child and as a result, Minor Child D.S. suffered a head injury. *N.T., 19:7-10.*

ECCYS also indicated Mother has an extensive criminal history. *N.T., 19:11-13. Exhibit 7 & Exhibit 8.*

At the Dependency hearing, Mother and ECCYS stipulated to the amendment to remove the language that she had been actively avoiding or refusing to work with ECCYS, and instead ECCYS accommodated Mother by substituting new language indicating Mother had been inconsistent with her involvement with ECCYS. The Minor Children were adjudicated dependent on June 29, 2020, and placed in kinship care. Minor Child D.S. went with a maternal uncle whereas Minor Child D.I.S. went with a maternal aunt. *N.T., 21:11-25.*

Caseworker Urban stated immediately after the Adjudication hearings, they went into the Dispositional hearings. The goal at that time was set as reunification, and numerous services were ordered for Mother. Mother was to submit to urinalysis screens, participate in drug and alcohol assessment, gain employment, obtain housing, comply with all the guidelines set by Erie County Adult Probation, and sign all the required releases for ECCYS. *N.T., 22:5-15.*

The First Permanency Review Hearing was held on September 18, 2020. Mother was present by telephone. At that hearing, the Dependency Court found there was no compliance from Mother with the permanency plan and no progress by Mother to alleviate the circumstances of placement. At that time, the Dependency Court changed the goal from reunification to concurrent with Adoption. *N.T., 23:3-10.*

The Second Permanency Review Hearing was held six (6) months later in March of 2021. Neither parent attended said hearing. According to Caseworker Urban, she took the case over from Caseworker Moffett after the first permanency review hearing in November of '20. When Caseworker Urban took the case over, she attempted to make contact with Mother with all the telephone numbers she had for her, but to no avail since all of Mother's telephone lines were disconnected. *N.T., 24:7-14.*

Caseworker Urban had no contact with Mother from the time she received the case on November 23, 2020 until the March of 2021 Permanency Review hearing. ECCYS never received any letters from Mother on how her Minor Children were doing in care. ECCYS never received any gifts from Mother to give to her Minor Children. *N.T., 25:10-12.* No visitation occurred between Mother as to either Minor Child from the time these Minor Children were detained to the March of 2021 hearing.

When Caseworker Urban had a conversation with the Erie County Probation Officer regarding Mother, Caseworker Urban discovered Mother still had some theft charges. Moreover, Mother also received charges for drug possession as well Mother had three (3) outstanding active bench warrants for her arrest. *N.T., 24:19-25; 25:1.*

Even at this time when Caseworker Urban had no contact with Mother, Ms. Urban still recommended the goal remain as reunification. Dependency Court established a shorter time period for the next review hearing to be heard of sixty (60) days. Also, at the time of the March of 2021 hearing, Dependency court ordered no further services to be offered to Mother to accomplish reunification and no further services to Mother as Mother had made no progress on the treatment plan in place. Caseworker Urban then worked with the Father. *N.T., 28:14-25; 29:1-7.*

At the May 10, 2021 hearing, neither Mother nor Father were present for the hearing. Caseworker Urban at that time requested the goal be changed to Adoption since she felt no progress had been made on the treatment plan and the Minor Children were deserving of permanency. Minor Children still remained in their respective Kinship homes where all of their needs were being met. Caseworker Urban stated it would not be in Minor Children's best interest to disrupt them from their Kinship homes.

Ultimately, Dependency Court changed the goal to Adoption at the May 10, 2021 hearing. *N.T., 35:2-22.* Caseworker Urban remained the caseworker for this case, and the Minor Children remained in the same respective Kinship Care Homes. Although the Kinship Caregivers "vacillated" about being permanent resources, the Minor Children's needs were being met in their Kinship Homes. ECCYS did not want to disrupt that placement. There have been no visitations between Mother and these Minor Children in over a year. Petitions to Terminate Mother's parental rights were filed on June 11, 2021. A year of placement has occurred, and all of the issues that initially led to placement of both of these Minor Children in the care of ECCYS still exist.

While Mother's whereabouts were initially unknown, Mother is now incarcerated at this

time with new charges with possible revocations on five (5) other dockets. *N.T., 37:2-5.*

When Caseworker Urban was asked, "Regarding Minor Child D.S. do you feel there would be any detrimental impact upon children in the event the Court terminated the parental rights? Let's start with Mother." *N.T., 37:22-25.* Caseworker Urban replied no, she did not feel any detrimental impact to these Minor Children would occur in the event the Court terminated Mother's parental rights. Then Caseworker Urban was asked what led her to that conclusion. She replied Mother did not work a treatment plan and did not stay in contact with ECCYS. Mother failed to make efforts to alleviate the reason that placement of her Minor Children became necessary. *N.T., 37:22-25; 38:1-5.* Mother never earned any visits with Minor Children so Caseworker Urban was never able to witness any interaction with her and Minor Children. Caseworker Urban, therefore, did not view any bond that was healthy or unhealthy between Minor Children and Mother. Minor Child D.S. is verbal and has not inquired about the whereabouts of Mother. If Mother's parental rights are terminated, ECCYS would have more options, i.e., actually more expanded options, available to locate permanent resources for the Minor Children. The same reasons for Minor Child D.S. as to why Mother's rights could be terminated were given by Caseworker Urban for Minor Child D.I.S. *N.T., 38:1-25; 39:1-13.* Mother submitted no letters and gifts to ECCYS. Caseworker Urban to the best of her knowledge was not aware of any gifts or letters sent by Mother to the Minor Children. *N.T., 39:15-24.* Mother has done nothing while either incarcerated or on the run to further whatever relationship she had with her Minor Children. *N.T., 39:25; 40:1-3.* Termination of Mother's parental rights would best serve the needs and welfare of Minor Children to allow them to obtain some permanency moving forward. *N.T., 40:4-8.*

ECCYS first became involved with this case when Mother was homeless due to losing her home to a fire and was living in Shelter while she was searching for more stable housing. *N.T., 40:18-25; 41:1-17.* Mother was asked to leave the Shelter for not following the rules, according to Caseworker Urban. Mother claimed the Shelter was not clean and had bed bugs so she took her Minor Children to Buffalo, New York to stay temporarily until, as Mother claimed, she could find permanent housing. Mother claimed ECCYS gave her the application to stay at the Shelter. Caseworker Urban had no contact at all with Mother since Caseworker Urban took over the case and did not know whether Mother had contact with the prior caseworker.

Minor Children are placed in Kinship Homes, but these Kinship Homes are not permanent resources. Caseworker Urban believes if these Minor Children were free for adoption, "it would be easier to find a family for them." *N.T., 49:7-8.* A kinship resource in Ohio was being explored as a permanent resource for Minor Children, but ECCYS was not able to use her as a permanent resource as her home study was not approved. Her housing was only marginal, and she has a criminal record. *N.T., 49:9-18.*

Caseworker Urban stated Mother provided no monetary support for her Minor Children. Mother had not asked how her Minor Children were doing, and Mother had not asked how Minor Child D.I.S. was doing in school. *N.T., 55:1-14.* Mother could have asked ECCYS for assistance in finding housing for her and Minor Children. Minor children are not bonded with Mother since the Minor Children have been bounced around with different family members their whole lives. *N.T., 57:5-13.* Minor children, however, are bonded with their Kinship Caregivers, their foster parents. *N.T., 57:17-25; 58:1-11.* Mother's rights should

be terminated. There would be "an ill effect for the children not to terminate the rights" because Minor Children deserve permanency and stability. *N.T., 58:1-11.* "They've spent the last year, even though with kinship and their bond is to the kinship, those kinships are not permanent homes for them." *N.T., 58:5-11.* The Minor Children do not get to be together every day. Caseworker Urban "believe[s] it would be in their best interest for them to be somewhere that was going to be a permanent home and for them to be placed together." *N.T., 58:8-11.* The Minor Children do not get to be together every day as siblings and the best scenario for Minor Children is to be together with one adoptive resource, which can be accomplished if Minor Children were freed for Adoption. *N.T., 58:2-11.*

Erie County Adult Probation and Parole Supervisor Craig L. Christensen credibly testified. He is the supervisor of Mother's Probation Officer, Ryan Platz. Officer Platz began supervising Mother on June 5, 2019, and Mother is still on supervision. *N.T., 60:15-18; 60:23-25.* When Mr. Platz lost contact with Mother, which caused an arrest warrant to be issued for Mother on February 19, 2021. *N.T., 61:1-10.* According to Supervisor Christensen, the last detainer was placed against Mother on May 13, 2021. At that time, Mother had at least two pending dockets against her. *N.T., 61:17-24.* At Docket No. 1854 of 2021, a Preliminary Hearing was held on August 30, 2021. Mother is facing Manufacturing Delivery or Possession with Intent to Manufacture or Deliver, Flight to Avoid Apprehension and Possession of a Controlled Substance with an offense date of May 12, 2021. Supervisor Christensen indicated the Possession with Intent to Deliver was withdrawn by the lower court. *N.T., 62:1-11.* Mother also has two other matters with Magisterial District Judge Bizzaro. At Docket No. 40 of 2021, Mother faces charges of Possession of Marijuana, Use or Possession of Drug Paraphernalia, Escape, and Flight to Avoid Apprehension with an offense date of January 13, 2021, waived over to court. *N.T., 62:16-23.* At Docket No. 247 of 2020, Mother has a Retail Theft with an offense date of February 10, 2020, bound over to court on August 13, 2021. *N.T., 63:1-4.*

Mother is currently being supervised on five (5) dockets, which are 659 of 2019; 351 of 2019; 574 of 2017; 1357 of 2016 and 2859 of 2016. Once the new charges are dealt with, Mother may face revocation on the five (5) dockets for which she is presently being supervised. *N.T., 63:11-18.* Mother is currently detained in the Erie County Prison. The Preliminary Hearing would have met the Gagnon I standard. At this point, Erie County Adult Probation is waiting for disposition of her current charges, and then Probation will move forward with any possible revocation. Some of the charges Mother is facing are felony charges.

Julie Lafferty, a Supervisor at ECCYS, employed there for fourteen (14) years, nine (9) of which she has been a supervisor. She provided credible testimony. Ms. Lafferty was the supervisor of the previous caseworker, Caseworker Moffett, during her involvement in this case. *N.T., 67:24-25; 68:1.* ECCYS became open with this family prior to Minor Child D.I.S. and Minor Child D.S. being removed in June. Initially, these Minor Children were an open case with ECCYS when Mother was incarcerated and her older daughter became dependent. The older daughter was residing with an aunt and had some medical issues that needed addressed due to the fact both Mother and Biological Father were incarcerated. *N.T., 68:7-15.* At that time, Minor Child D.S. and Minor Child D.I.S. were staying with their Father and were closed out during the initial investigation. ECCYS officially closed the case with Father on November 13, 2019.

ECCYS became involved again January 17, 2020, when Father became incarcerated. Mother was not providing the Minor Children with much care at this time. Mother was at Shelter when ECCYS got a referral for Minor Child D.S. in regards to a hernia. *N.T., 69:3-5.* The hospital called with concerns Mother was stealing food to provide for her Minor Children. Mother was homeless after Mother's house caught on fire, and she had to stay at a Shelter. Mother bounced around for a while with her friends because she was waiting for the Family Room to open up at the Shelter to remain in compliance with her Probation Officer. ECCYS did supervised visitations with Mother and her three Minor Children which included Minor Child D.S. and Minor Child D.I.S. while they were altogether at the Shelter. This was around January of 2020 Mother had three children altogether in her care.

Supervisor Lafferty stated bed bugs were never brought up to Caseworker Moffett's attention. Caseworker Moffett was at the Shelter to supervise visits between Mother and her older daughter who was in placement. At this time in January of 2020, Minor Child D.I.S. and Minor Child D.S. were at Shelter with Mother. *N.T., 70:10-25.* In February of 2020, ECCYS was told by the Shelter that Mother was asked to leave because she could not follow the rules. *N.T., 71:7-12.*

In March of 2020, ECCYS lost contact with Mother who did not ask for assistance for alternative housing or any other assistance from ECCYS. Mother has been involved with ECCYS as an open case beginning October of 2019. *N.T., 71:22-25.*

Mother was aware of the terms and condition of her treatment plan and what she needed to do and what needed to occur for Dependency Court. Her treatment plan is ultimately the same for her older daughter S as it was for Minor Child D.S. and Minor Child D.I.S. It was the same treatment plan for her older daughter's case. *N.T., 72:1- 9.* This treatment plan was explained in detail to Mother by the Dependency Court judge in an on the record colloquy. Caseworker Moffett also had subsequent conversations with Mother as to what she needed to do. Mother signed releases for her mental health services; however, ECCYS has not been able to verify whether Mother had any compliance since on or about March of 2020 by Mother. *N.T., 72:6-14; 72:17-25.* ECCYS stated no issue existed with bed bugs at the Shelter, to its knowledge. *N.T., 73:1-4.*

H.S., as Minor Child D.S.'s kinship provider, credibly testified as the maternal sister-in-law. H.S. and her husband, J.S., provide care only for the three year old, Minor Child D.S. At the time of this IVT trial, Minor Child D.S. had been in their care for "a little over fourteen months." *N.T., 80:9.* Prior to his placement in her and her husband's care, H.S. had had limited interactions with Minor Child D.S. and Mother. When H.S. would see Mother, "it was holidays or birthdays and everything seemed fine." *N.T., 79:13-15.* H.S. has facilitated interactions between Minor Child D.S. and Minor Child D.I.S. Over the last fourteen months, Mother had had no formal visitation with the Minor Children. *N.T., 80:10-12.* Mother contacted H.S. and her husband "during the entire time" Minor Child D.S. has been in their care by leaving gifts on their porch or would "try to meet to give money and we refused." *N.T., 80:18-20.* They refused because they "were trying to follow the rules of the law." *N.T., 80:21-22.*

These kinship providers knew about the rules regarding Mother's visitation from ECCYS. Mother was allowed telephone contact with each Minor Child and exercised said telephone contact by calling H.S. and J.S. Prior to Mother being incarcerated, Mother contacted these Minor Children at least once monthly. When Mother was incarcerated, Mother contacted the Minor Children several times a week by telephone, not letters. These kinship providers

would monitor Mother's telephone calls by placing her calls on speaker, "but Minor Child D.S. knows she's on the phone and he'll say, is that aunty, my mommy, stuff like that." *N.T., 81:21-25; N.T., 82:1-2.* Mother is "very careful" in these conversations with Minor Children because she knows H.S. is there listening.

Mother offered on several occasions to bring money to Minor Children, and J.S. "just refused." *N.T., 82:11-12.* However, Mother placed money in Easter eggs and gave them to the Minor Children. H.S. and J.S. provide Mother with information about the Minor Children, and they have offered and given Mother photos "and things like that." *N.T., 82:11-20.* These kinship providers are not permanent resources for Minor Child D.S. since they thought they were only there to help on an emergency, temporary basis for Mother and Father. They had hoped for Father "or what his future holds," if not Mother, to reunify with the Minor Children. H.S. and J.S. were relying on the prior ECCYS Caseworker who claimed to be trying to reunify Mother and/or Father so H.S. and J.S. "always held tight just hoping." *N.T., 83:4-13.* Minor Child D.S. does say mommy or "Mommy A." regarding his Mother. *N.T., 83:16-18.*

H.S. knows this three-year-old Minor Child's emotions having taken care of him over the last fourteen months. And as to whether Minor Child D.S. would be negatively impacted if his Mother's rights were terminated, H.S. stated, "my honest opinion is that [Minor Child D.S.] being 3 will be fine." *N.T., 86:14-15.* H.S. further stated, "He's resilient and he's – he attaches to people easily so he would be okay. However, I can't testify for her older children." *N.T., 83:15-17.*

H.S. further stated Minor Child D.S. has endured some lifetime confusion causing some instability in his life; therefore, he deserves a permanent, stable home. *N.T., 87:9-13.* H.S. understood Mother "is facing a possibly lengthy incarceration given the current state of [her] affairs." *N.T., 83:15-18.* H.S. responded sincerely she did not think it was fair for Minor Child D.S. to live in an uncertain environment waiting for Mother to become stable again.

H.S. stated when the Minor Children visit with each other, they get along great with each other and are upset when they are separated from each other to return to their respective Kinship homes. Minor Child D.S. and Minor Child D.I.S. are bonded to each other. H.S. stated she cannot be a permanent resource for both of these Minor Children which is what ECCYS is searching for, but this is the hardest decision that H.S. and J.S. have ever made in their lives. It is hard for her to share Minor Child D.S. moving forward with the family who continue to want to be a part of his life just as much as H.S. and J.S. want to. *N.T., 90:5-13.*

Mother provided testimony. She testified she is currently incarcerated in the Erie County Prison under two dockets as well as has former convictions for which she is under adult probation supervision. Her Probation Officer detained her. Mother testified as to her various outstanding charges and/or resolved charges that include marijuana and retail theft. She admits these charges have not "been actually resolved yet." *N.T., 93:1-14.* Mother admitted she did not follow much of what the Court asked her to do in the treatment plan. Mother testified she had not done so because she had no residence, and she testified she did not know when she had to attend her Dependency hearings. She testified she did not stay at the Shelter because the Shelter had alleged bed bugs and she testified that the Shelter was not a safe place for her and her Minor Children. She testified she violated the Shelter's rules by hoarding food in her room despite the Shelter providing food for her and her Minor children three times a day. Mother testified she needed to have snacks for her Minor Children. She

testified she had to leave the Shelter, in addition to the alleged bed bugs, due to the Shelter not being clean. Mother testified she was asked ultimately to leave the Shelter for hoarding food as snacks for her Minor Children. Mother denied being asked to leave the Shelter due to a fight, and she denied she brought drugs into the Shelter.

Mother testified someone started a fire at the home she owned so that is why she was at the Shelter. Mother testified as to injuries she received from someone named L.S. who hit her with a bat. As a result Mother has scars on her head, and she went to Safe Harbor for medications. And she testified that if she had a card for marijuana, the authorities would then have no problem with her usage of marijuana. She testified she used marijuana because she did not want to take "a lot of pills" and marijuana calmed her down. *N.T., 97:10-19.* She claimed her resulting head trauma only affects her a little bit, and this injury did not interfere with her ability to care for her Minor Children. She would receive medication and therapy, she claimed, at Safe Harbor but provided no corroborating evidence of such medication and therapy. She claimed to have brought her Minor Children to her mental health appointments while they were all living at the Shelter. She testified her BCM would come to the Shelter to check up on her. She received disability payments. She testified she did not know which way to turn when Covid occurred. *N.T., 99:5-25.*

Mother testified in a confusing manner about her Probation Officer and how he knew where she was located but he still asked the Court to issue warrants for her arrest. She testified her other warrants were "outdated." *N.T., 100:10-21.* Mother admitted to being on the run and claimed to have had clean urines. She claimed she did not call her caseworker because she did not know the identity of her caseworker. Mother admitted she did not follow her treatment plan as ordered by Dependency Court. She testified, "that was not a good decision on my part, but if I had a stable place and a good contact and like Erica [her past caseworker] was on me all the time and I never had any type of contact with the new people." Mother testified she thought everything was "legit," and she did not know anything was still open or doing anything with the court as to her Minor Children. She testified she provided gifts and talked to her Minor Children in Kinship care over the telephone. She testified she has a plan now to live with her aunt, and her plan would be to work at a particular fast food restaurant where she knows the manager, but she provided no proof of such employment.

Mother testified she does not really know when she will be released from incarceration. She testified she wanted the IVT Court to give her more time to achieve reunification now that she claimed to have a permanent residence. Mother testified to a complex amount of criminal charges, old and new, and possible revocations. Mother claimed incarceration did not stand in her way for taking care of her Minor Children since her family will perform her duties of raising her Minor children for her. *N.T., 109:3-14.* Mother admitted it was okay for her Minor Children to be cared for by relatives so her Minor Children can wait for her to become stable again. She claimed she knows her Minor Children will be in good hands with her family instead of being with someone else. She claimed her Minor Children's best interests were to be in the care of her family "instead of them was going through what [she] was going through." *N.T., 114:11-17.*

Mother testified to dropping urines for Probation with Safe Harbor but provided no proof of such claims. Mother admitted to not contacting ECCYS from June 25 of 2020 until May 13, 2021, because she did not think she had to do so since her family had her Minor

Children. *N.T., 118:17-24.* Mother testified her family "stuck to their guns and told [her], like, I couldn't see them, but I was still confident with the children." *N.T., 119:2-5.* In response to whether her Minor Children are supposed to wait for her to become stable, Mother testified, "I'm sticking with it until I get stable because I am going to get stable." *N.T., 119:13-16.*

Mother admitted to being arrested twenty-one (21) times dating back to 2005, for the last sixteen years. Then Mother minimized her lengthy record as "not harsh sentences." *N.T., 120:4-21.* Mother admitted at least 11 or 12 theft related offenses by stating rhetorically, "Okay. You cannot judge a book by its cover, can you?" *N.T., 120:14-18.*

This IVT Court did not have the benefit of being the Dependency Court judge so Mother's claims of lack of notice, etc. were of concern to this IVT Court. All counsel agreed with no objection by the parties or counsel that the IVT Court could have access to the transcript of the First Permanency held on September 18, 2020, wherein another trial judge, a Dependency Court judge, had the benefit of interacting early with the Mother. *N.T., Dependency, 9/18/2020.* Mother appeared by telephone for this hearing representing herself. At this First Permanency Hearing, due to her lack of compliance, Attorney Kevin Jennings, as Assistant Solicitor for ECCYS, was requesting a concurrent goal for Adoption and a three-month review. He stated Mother had done no work on her treatment plan. Attorney Jennings also indicated if Mother continues with no compliance, he "will no doubt be asking for adoption in three months." *N.T., Dependency, 4:9-17.*

According to the GAL, Minor Child D.I.S. "was experiencing some angry episodes." *N.T., Dependency, 5:4-6.* The ECCYS Caseworker, Erica Moffett, stated she made referrals for psychological services for him to two services. His aggression had escalated with the other children in the kinship home. Caseworker Moffett also explained the confusion with his school laptop and Mother's interference and involvement. She stated Mother had called the school about the laptop and a grandmother was supposed to pick up the laptop. Caseworker Moffett informed the school that that was not correct in that either herself as the caseworker or the Kinship provider B.S., not Mother, would take care of the laptop. After that, Caseworker Moffett and the Kinship provider were able to resolve the laptop issue. Then Caseworker Moffett explored with the Kinship provider, B.S., as to whether she had contact with Mother because the school indicated Mother had called the school. Mother claimed, "she was calling the school and couldn't get in touch with nobody and wondering why my son was not in school." *N.T., Dependency, 7:8-10.* However, Caseworker stated she herself had not heard from Mother since the end of August. Mother should have communicated with Caseworker Moffett instead of adding to the confusion. Mother had stipulated and thereby knew this Minor Child D.I.S. had been adjudicated dependent. Mother was to work through Caseworker Moffett as to any issues with school. Mother added to the confusion. Moreover, Mother interrupted the testimony at this hearing defending her inappropriate actions of contacting the school and interjected she claimed to do so as a "concerned parent." *N.T., Dependency, 7:8-10.*

The GAL addressed how Mother should be working on her treatment plan instead of interfering with this Minor Child D.I.S.'s schooling. The GAL discussed, first of all, the impressive progress that the Minor Child D.S., the younger sibling, has had in the foster home and how well he was doing there. Minor Child D.S. "made some significant strides since being placed there on June 11, especially with walking – or not walking, with potty training and talking." *N.T., Dependency, 10:16-22.* The GAL further stated, "Which it's

my understanding when he first got there he was hardly saying anything, even though he's going to be 3 years old in another month." *N.T., Dependency, 10: 22-25.* The GAL, however, indicated her concern about Minor Child D.I.S.'s anger and schooling issues as well as the GAL "believe[d] the mom calls him daily, but she has yet to do any part of her treatment plan." *N.T., Dependency, 11:4-7.* Mother has failed to complete anything in the treatment plan yet Mother maintained contact with her children daily, "possibly giving them false hope of, you know, returning or something, but she's not doing anything to be compliant." *N.T., Dependency, 11:7-12.* Mother's interjection of directly calling Minor Child D.S. daily was affecting Minor Child D.I.S. whose anger issues were increasing.

The Dependency Court judge then permitted Mother to weigh-in to provide testimony for his decision as to whether he would implement a concurrent goal of Adoption with the Reunification goal. The Dependency Court judge explained to her how he has "to get to some timely decision on behalf of these kids to give them something permanent." *N.T., Dependency, 12:5-8.*

Mother testified she was currently on the run from the authorities and incredulously testified she cared about her children. Mother claimed to be clean of drugs, but she failed to provide proof of such to the Dependency Court. Mother indicated she was 34 and "have been going through a lot of things." *N.T., Dependency, 13:22-25.* Mother indicated she was "unable to do the tasks that they want me to do to go forward with getting my kids." She apologized about that. Mother said if her family wanted to adopt her children, she knew she had no choice because the Kinship providers were family. However, the Dependency Court judge informed Mother the goal was to reunify her with her Minor Children, but she had to follow through with the treatment plan and this was her first review hearing. The Dependency Court judge noted and clearly informed Mother had done nothing in the treatment plan to-date and, therefore, made a finding "you've engaged in no compliance." *N.T., Dependency, 15:2-3.* Despite no compliance, Mother received more opportunities from the Dependency Court judge to comply when he stated, **"But we're going to keep the treatment plan in place and we're going to set this for a six month review. In six months – I'm telling you today that I had better see full compliance with the treatment plan between now and the next hearing. Do you understand that?" Whereupon Mother answered, "Yes, sir."** *N.T., Dependency, 15:11.* (Emphasis added).

The Dependency Court judge further stated to Mother, "And this isn't something – it's not the agency – OCY's job to get you to comply. It's not their job to make sure you're in contact with your children and know what's going on. It's your job. You need to maintain regular contact with your caseworker and you're to start complying with the terms and conditions of the treatment plan. Do you understand that?" And whereupon Mother again responded, "Yes, Sir." *N.T., Dependency, 15:12-20.* (Emphasis added).

The Dependency Court judge clearly explained to Mother each term and condition of her treatment plan as follows, and this IVT Court includes the pertinent sections of the colloquy below to put them in context:

Judge: I'm not making any decision about adoption today. Our primary goal for you is reunification with your children. Okay.

Mother: Yes.

Judge: In order for you to reunify, we have a treatment plan. My decision about whether

or not to change the goal to adoption will depend on whether you can follow through with treatment. This is just our first review, and as of today, you've done nothing to follow through with the treatment plan. So I'm going to make a finding that you've engaged in no compliance. Okay.

Mother: Well –

Judge: But we're going to keep the treatment plan in place and we're going to set this for a six month review. In six months – I'm telling you today that I had better see full compliance with the treatment plan between now and the next hearing. Do you understand that?

Mother: Yes, sir.

Judge: And this isn't something – it's not the agency – OCY's job to get you to comply. It's not their job to make sure you're in contact with your children and know what's going on. It's your job. You need to maintain regular contact with your caseworker and you're start complying with the terms and conditions of the treatment plan. Do you understand that?

Mother: Yes, sir.

Judge: Here are the terms and conditions of your treatment plan. You're to refrain from the use of drugs and alcohol and submit to random urinalysis as well as the Color Code program at Esper Treatment Center. A no-show will be considered a positive. Do you understand?

Mother: "Yes, sir."

Judge: You will participate in a drug and alcohol assessment and follow all treatment recommendations. If recommended treatment, you will be required to gain an understanding of how your drug use effects your mental health and your decision making. Do you understand that?

Mother: Yes.

Judge: You will participate in mental health assessments and follow all treatment recommendations. Do you understand?

Mother: Yes.

Judge: You will obtain and maintain gainful employment or provide the agency with some documented proof of an inability to work and any income that you might be drawing. Do you understand?

Mother: Yes.

Judge: You have to obtain and maintain safe and stable housing and provide proof of the housing. It's not that you're going get it, but you're going to provide the agency proof of your housing. And that household will have to be approved by the agency, because we want to make sure it's safe for your kids. Do you understand that?

Mother: Yes sir.

Judge: Apparently you're on probation.

Mother: Yes.

Judge: You're going to comply with any and all guidelines from Erie County Probation. Are you on the run from something now, is that what you're telling me?

. . . .

Judge: ….What I'm trying to figure out is what your status is with probation, which is a requirement to reunify with your kids, if you're on the run from probation. Do you understand that?

Mother: Correct. Yes, sir.

Judge: You need to sign any and all releases of information that the agency wants so that they can get the information to prove whether you're doing the things that you're saying you're doing. Do you understand those conditions of your treatment plan?

Mother: Yes, sir.

N.T., Dependency, 15:21-25; 16:1-25; 17:1- 8; 17:15-25; 18:1 -2.

Also the Dependency Court judge confirmed Mother's mailing address as to where the Court has been and will be sending her information such as the treatment plan. Mother stated it was 2216 German Street in Erie. She also confirmed she was receiving information already sent to her. However, at the IVT hearing, Mother's testimony appeared confusing as to whether she knew the details of her treatment plan and the necessary steps she needed to fulfill to reunite with her Minor Children.

Moreover, Mother's record includes several offenses involving dishonesty such as crimen falsi crimes that affect her credibility as a witness. This IVT Court finds her testimony was not credible. Mother was fully informed, in detail, by the Dependency Court judge as to what she needed to do to comply with the treatment plan tailored to meet her needs in order to reunify her with her Minor Children. Moreover, she failed to avail herself of any of the programs ECCYS had available for her to meet the requirements and recommendations of her treatment plan, despite the efforts of the Dependency Court judge.

ANALYSIS AND CONCLUSIONS OF LAW

Case law is clear "[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.*, 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: 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.

(1) 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)(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.

Generally, Pa.C.S. §2511(a) states parental rights to a child may be terminated if any one 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)). The meaning of parental duties is:

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).

With the above specific Findings of Fact and after a review of the relevant statutory law and case law, *see In re Adoption of B.G.S.*, 240 A.3d 658, 663 (Pa. Super. 2020), this IVT Court, therefore, made specific Conclusions of Law.

"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)).

With regard to 23 Pa.C.S. § 2511(a)(1), this IVT Court considered the entire background of this case and, as indicated by case law, did not simply mechanically apply the six-month statutory provision as to each Minor Child. The timeline of Mother's progress and/or the lack of her progress were definitely considered as reflected in the Findings of Fact above.

ECCYS had been looking for Mother and her Minor Children since January of 2020, for about six (6) months. ECCYS was trying to locate Minor Children to verify their safety and welfare. Despite ECCYS's efforts, these Minor Children and Mother were unable to be located as they were "missing in action." Both Minor Children were ultimately found in Buffalo, New York, where Minor Children were subjected to possible abuse and then taken to a hospital to address injuries. Buffalo CYS became involved. Minor Child D.S. had subdural hematoma.

Mother had placed Minor Children with paternal family members in Buffalo, and Mother left the Minor Children there. No charges were ever filed, as per Caseworker Urban, regarding abuse. Both Minor Children were returned to Erie as ECCYS was open with this family with an older child. This abuse will have lasting injuries on Minor Child D.S.

On June 11, 2020, ECCYS obtained emergency custody of both Minor Children, but whereabouts of Mother were unknown at that time so these Minor Children had to be placed.

Mother's urinalysis testing results during life of Minor Children's dependency proceedings from June 30, 2020 to February 26, 2021 were: ninety-six (96) "no-shows" indicated as positive results.

Pre-Dispositional Summary for Dispositional hearing on June 25, 2020, revealed Mother "has pending charges regarding retail thefts on February 10, 2020, and February 18, 2020." Mother is supervised by an Erie County Adult Probation for other charges. Mother has an extensive criminal history.

On June 29, 2020, upon finding allegations of abuse, neglect or dependency of both Minor Child D.I.S. and Minor Child D.S., the best interest of each Minor Child was removal from home of Mother and Father. Mother was directed to comply with her seven point treatment plan to reunify her with her Minor Children as indicated and delineated in the above Findings of Fact.

On September 18, 2020, at the Initial Permanency Review Hearing, mother appeared by telephone and represented herself. Dependency Court found Mother had no compliance with the permanency plan and Mother made no progress toward alleviating the circumstances that necessitated the original placement. Mother continued to report she was residing in Erie, but she was not turning herself into the authorities due to a current warrant for her arrest for retail theft charges. Mother missed criminal court hearings. Mother did not desire to discuss how her actions impacted her Minor Children. Mother continued to live the street life. Mother had contacted her Minor Children by telephone and Facebook Messenger, and Minor Children were happy to hear from her.

The Dependency Court judge carefully reviewed with Mother her treatment plan, and Mother confirmed affirmatively on the record she understood each and every term and condition of her treatment plan on the record. He cautioned her about her need to comply with her treatment plan so she could reunify with her minor Children.

On March 1, 2021, a second Permanency Review Hearing was held wherein Mother was found again to have no compliance with the treatment permanency plan. Mother had no progress toward alleviating the circumstances which necessitated the original placement.

On May 10, 2021, at the Third Permanency Review Hearing, Mother again had no compliance with the permanency treatment plan, and Mother lacked progress toward alleviating circumstances that necessitated the original placement. Specifically, the Court Summary dated May 10, 2021, states, "there has been no contact with Mother since the last court hearing and no services were offered to her during this review period."

Mother's criminal history is extensive.

The Six Month Review occurred in March of 2021. Neither Mother nor Father attended. When Caseworker Urban was assigned this case on November 23, 2020, she tried to make contact with Mother with all the telephone numbers she had for her, but to no avail for all of Mother's telephone lines were disconnected. Ongoing Caseworker Urban had no contact

with Mother from the time she took over the case in November 23, 2020 to the time of the Permanency hearing in March of 2021. ECCYS did not receive any letters or information from Mother asking how her Minor Children were doing. Mother sent no gifts to her Minor Children for this time period of November 23, 2020 through March 1, 2021. Mother did not appear for urine screens. Mother did not do a drug and alcohol assessment and did not do a mental health assessment. Nothing was done by Mother.

No visitation occurred between Mother and either Minor Child from the time Minor Children were detained to the March hearing in 2021. At that time, even though no contact occurred with Mother, Caseworker Urban still had reunification as the goal. Dependency Court scheduled a shorter review of sixty (60) days at the March hearing. Dependency Court directed no more services be offered to Mother for reunification since Mother made no progress. Caseworker Urban then focused on Father at that time. Dependency Court ordered a two (2) month review to see whether either Mother or Father complied in this case. Neither Mother nor Father were there to participate at that hearing.

At the hearing on May 10, 2021, Caseworker Urban requested the goal be changed to Adoption because no progress had been made on Father's treatment plan, and both Minor Children were deserving of permanency. Both Minor Children still remained in Kinship Care homes. These Minor Children need love, protection, guidance, and support that are not being met by Mother. Their physical and emotional needs cannot be met by a parent who has a merely passive interest in their development. Mother, in the instant case, has failed to perform her parental obligation as a positive duty and in an affirmative and genuine way. Mother "talks the talk" but has failed to demonstrate she is capable of walking the walk in order to take and maintain a place of importance in her Minor Children's lives. Mother has failed to exercise reasonable firmness in resisting obstacles placed in the path of maintaining her parent-child relationships. Mother cannot expect that her parental rights will be preserved by waiting for a more suitable or convenient time for her to perform her parental responsibilities. Others, her family members, instead have stepped up to the plate to provide for her Minor Children's physical and emotional needs. Mother cannot expect her family members to be placeholders to fill her place temporarily as a Mother in order to keep her parental role open for her to step in when she finally gets her life together. Moreover, the record demonstrates Mother has failed to utilize all available resources that the Courts and ECCYS have offered her in order to preserve her parental relationship and reunify with her Minor Children.

After examining the individual circumstances of each Minor Child's case and considering all explanations offered by Mother facing termination of her parental rights, the evidence, in light of the totality of the circumstances, clearly supports this IVT Court's terminating Mother's parental rights as to each Minor child, specifically Minor Child D.I.S. and Minor Child D.S. under 23 Pa.C.S. § 2511(a)(1). Indeed, ECCYS met its burden of proof with clear and convincing evidence that Mother's conduct satisfied statutory grounds for termination under Section 2511(a)(1). The evidence, including but not limited to, numerous Exhibits and testimony are so "clear, direct, weighty, and convincing" for this IVT judge as the trier of fact to have arrived at "a clear conviction, without hesitation, of the truth of the precise facts in issue" regarding Mother. Mother by her conduct demonstrated a settled purpose for at least a period of six months to relinquish her parental claim to each Minor Child.

Moreover, these Findings of Facts above also support and demonstrate Mother failed to perform her parental duties for at least six months prior to the filing of each Termination Petition.

Therefore, under 23 Pa.C.S. § 2511(a)(1), ECCYS proved by clear and convincing that Mother deprived each Minor Child of essential care and control prior to the filing of these Petitions to Terminate Involuntarily Mother's parental rights. ECCYS proved by clear and convincing evidence that for a period of at least six months Mother evidenced settled purposes in relinquishing her parental claims as to each of these Minor Children, and Mother failed and refused to perform her parental duties regarding each Minor Child.

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), since residing in his Kinship home, Minor Child D.S. is making more progress with his speech; using words to ask for things; and answers questions in short simple answers. His Kinship family is monitoring his progress, and he continues to improve in his communications. He had suffered a seizure from a traumatic subdermal hemorrhage on May 29, 2020, when his Mother placed the Minor Children to reside in Buffalo, New York. The New York authorities determined his injury was intentional and greater than 28 days.

Minor Child D.I.S. has also endured a lot of trauma in his short life. He is an intelligent child and personable, but has a hard time expressing emotions without getting aggressive. He appears to do well with one-on-one interaction and needs structure and consistency. He has witnessed domestic violence while residing with Mother. He has not disclosed abuse, but there is some concern this Minor Child experienced abuse and neglect in Buffalo, New York. Minor Child D.I.S. has been physically aggressive toward his cousin, attempted to choke the cousin, has destroyed property in the kinship home, tried to fight with his sister, and dragged another cousin out of bed, and fought him. Additionally, while in Kinship home, Minor Child D.S. and Minor Child D.I.S see each other "at least biweekly," and really need and want to be together as siblings.

Minor Child D.I.S was seen at Behavioral Health and was diagnosed with ADHD. He has been prescribed medication to help manage this diagnosis. Minor Child D.I.S. also began seeing a therapist. He continues to struggle with behaviors in the Kinship home. Continued medication and therapy are necessary to address his behaviors.

Mother has an extensive criminal record and new charges to address. Her life has been chaotic and unstable, and she refuses to be compliant with her treatment plan despite being advised fully as to the ramifications if she fails to follow-through with her treatment plan. These children have serious present and future needs and difficulties, which necessitates that they have a stable and caring parent to address in a genuine and critical fashion for their physical and well-being and development. Mother cannot fulfill that necessary parental role due to her own need for stability and treatment, of which she has failed to avail herself. These children have a need for a stable home and deserve strong, continuous parental ties, not a parent "on the run" from law enforcement authorities and not a parent who cannot even address her own treatment needs as to sobriety and mental health counselling, etc. This record demonstrates how much disruption and pure chaos these Minor Children have already endured in the care of Mother, and there is no reasonable prospect for reuniting Mother with them in their best interests. Their safety has been jeopardized when in Mother's care.

H.S. knows this three-year-old Minor Child's emotions having taken care of him over the last fourteen months. And as to whether Minor Child D.S. would be negatively impacted if his Mother's rights were terminated, H.S. stated, "my honest opinion is that [Minor Child D.S.] being 3 will be fine." *N.T., 86:14-15*. H.S. further stated, "He's resilient and he's – he attaches to people easily so he would be okay. However, I can't testify for her older children." *N.T., 83:15-17*.

H.S. further stated Minor Child D.S. has endured some lifetime confusion causing some instability in his life; therefore, he deserves a permanent, stable home. *N.T., 87:9-13*. H.S. understood Mother "is facing a possibly lengthy incarceration given the current state of [her] affairs." *N.T., 83:15-18*. H.S. responded sincerely she did not think it was fair for Minor Child D.S. to live in an uncertain environment waiting for Mother to become stable again.

H.S. stated when the Minor Children visit with each other, they get along great with each other and are upset when they are separated from each other to return to their respective Kinship homes. Minor Child D.S. and Minor Child D.I.S. are bonded to each other. H.S. stated she cannot be a permanent resource for both of these Minor Children which is what ECCYS is searching for, but this is the hardest decision that H.S. and J.S. have ever made in their lives. It is hard for her to share Minor Child D.S. moving forward with the family who continue to want to be a part of his life just as much as H.S. and J.S. want to. *N.T., 90:5-13*.

Moreover, Mother could have asked ECCYS for assistance in finding housing for her and Minor Children. Minor children are not bonded with Mother since the Minor Children have been bounced around with different family members and homes their whole lives. *N.T., 57:5-13*. Minor children, however, are bonded with their Kinship Caregivers, their foster parents. *N.T., 57:17-25; 58:1-11*. Mother's rights should be terminated. There would be "an ill effect for the children not to terminate the rights" because Minor Children deserve permanency and stability. *N.T., 58:1-11*. "They've spent the last year, even though with kinship and their bond is to the kinship, those kinships are not permanent homes for them." *N.T., 58:5-11*. The Minor Children do not get to be together every day. Caseworker Urban

"believe[s] it would be in their best interest for them to be somewhere that was going to be a permanent home and for them to be placed together." *N.T., 58:8-11*. The Minor Children do not get to be together every day as siblings and the best scenario for Minor Children is to be together with one adoptive resource, which can be accomplished if Minor Children were freed for Adoption. *N.T., 58:2-11*.

Therefore, under 23 Pa.C.S. § 2511(a)(2), ECCYS has proven by clear and convincing evidence that both Mother's incapacity and neglect have caused each Minor Child to be without essential parental care. Mother has not remedied the causes of this incapacity and neglect for each of these Minor Children. Mother cannot and has not remedied the causes of her incapacity and neglect as to each of these Minor Children. Mother has demonstrated a continued inability to conduct her life in a fashion that would provide a safe environment for either or both of these Minor Children, whether that child was living with that parent or not. Her behavior is irremediable as supported by clear and competent evidence above, thereby substantiating this IVT Court's granting ECCYS's Petitions to terminate Mother's parental rights in the instant case.

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).

Section 2511(a)(8), "requires 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 I*n 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) & (a)(8), Mother has a history with ECCYS dating back to October 2019 for an older daughter who was removed from her care. ECCYS had been attempting to work with Mother since January 2020, but ECCYS had been unable to locate her. Then in March, ECCYS received a report that Mother sent Minor Children to live with relatives in Buffalo, New York. Mother was also allowing inappropriate people

to care for her Minor Children and that resulted in Minor Child D.S.'s head injury. Minor Child D.S. suffered a seizure from a traumatic subdural hemorrhage on May 29, 2020, when Mother placed him with relatives in Buffalo, New York while she was "on the run." "It was determined the injury was intentional and greater than 28 days."

Mother's criminal history is extensive and has pending charges to resolve. Mother is currently detained in prison, and her prior sentences may be revoked.

Mother has been consistently been noncompliant with her treatment plan to reunify her with her Minor Children. Hearing after hearing, she has been found by the Dependency Court as noncompliant with her treatment plan despite efforts of Dependency Court to explain to her and advise her about the consequences of her careless behavior. The Dependency Court judge carefully reviewed with Mother her treatment plan, and Mother confirmed affirmatively on the record she understood each and every term and condition of her treatment plan on the record. He cautioned her about her need to comply with her treatment plan so she could reunify with her minor Children.

A full colloquy, therefore, establishing Mother knew what she had to do to reunify with her Minor Children is on the record, and yet Mother incredulously told this IVT Court that she did not know about the treatment plan and did not receive it. She confirmed with the Dependency Court that she was receiving her mail with the court information and documents and yet she tells this Court another version of her story. Her inconsistencies in her testimony before the IVT Court are as chaotic as her life has been at the young age of around thirty-four. Her list of retail thefts are mounting as well as other crimes. Mother admitted to being arrested twenty-one (21) times dating back to 2005, for the last sixteen years. Then Mother minimized her lengthy record as "not harsh sentences." *N.T., 120:4-21*. Mother admitted to at least 11 or 12 theft related offenses by stating rhetorically, "Okay. You cannot judge a book by its cover, can you?" *N.T., 120:14-18*. However, in Mother's situation, her life is very revealing on the cover and continues throughout her "book" as a chaotic lifestyle. She has failed to vary the theme of her life's book yet even for the sake of reuniting with her children. To introduce herself at her initial Permanency hearing for these Minor Children in September of 2020, Mother testified: "I am 34. I have been going through a lot of things. I am clean and I'm currently on the run. I'm unable to do the tasks that they want me to do to go forward with getting my kids. I apologize about that." Nothing has changed since that time. The Dependency Court judge found Mother was noncompliant with her treatment plan at that hearing, and at every Dependency hearing thereafter. She was found noncompliant with her treatment plan over and over. She also has failed to alleviate the situation that brought her Minor Children into Dependency court. Her story to-date is never-ending as to her series of noncompliance, and her recent claims in IVT Court stating otherwise lack corroboration. Her actions, therefore, demonstrate how she lacks the commitment to be an appropriate parent for these Minor Children. They need a diligent parent to provide them with permanency. They deserve to have a capable parent who can assist them in addressing their myriad of issues rather than one creating more issues for them to endure as Mother has done.

Under 23 Pa.C.S. §§ 2511(a)(5) & (a)(8), ECCYS has proven by clear and convincing evidence the conditions leading to each Minor Child's removal still exist. Mother cannot and did not remedy these conditions within a reasonable period of time. Mother has refused to utilize the services available to her to remedy the conditions leading to each Minor Child's

removal within a reasonable period of time and Mother just cannot do so. Therefore, termination of Mother's parental rights will best serve the needs and welfare of each Minor Child.

Since this IVT Court determined above that ECCYS has proven by clear convincing evidence that Mother's conduct necessitates involuntary termination of Mother's parental rights under Section 2511 (a)(1), (a)(2), (a)(5), and (a)(8), this IVT Court must now proceed to conduct the second part of the statutory bifurcated analysis as to the needs and welfare of each Minor Child under the standard of best interests as to 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 (quoting *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 I*n 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).

This IVT properly made specific Conclusions of Law, pursuant to 23 Pa.C.S. § 2511(b), regarding the effect of the termination of parental rights on each Minor Child as per the above Findings of Fact.

Caseworker Urban credibly stated both Minor Children should remain in their respective Kinship homes. Indeed, all of their needs are being met in these Kinship homes. Caseworker Urban indicated it was best at this time for these two Minor Children not to be disrupted. There has been no visitation for approximately a year now. Petitions to Terminate both Mother's and Father's parental rights were filed on June 11, 2021. A year of placement for these Minor Children has occurred, and all of the problems that initially led to placement of both of these Minor Children in the care of ECCYS still exist.

While Mother's whereabouts were unknown, Mother is now incarcerated at this time. Mother agrees she is facing new charges and a revocation on five (5) other criminal docket numbers. Mother testified she does not really know when she will be released from incarceration. She testified she wanted the IVT Court to give her more time to achieve reunification now that she claimed to have a permanent residence. Mother testified to a complex amount of criminal charges, old and new, and possible revocations. Mother claimed incarceration did not stand in her way for taking care of her Minor Children since her family will perform her duties of raising her Minor children for her. *N.T., 109:3-14*. Mother admitted it was okay for her Minor Children to be cared for by relatives so her Minor Children can wait for her to become stable again. She claimed she knows her Minor Children will be in

good hands with her family instead of being with someone else. She claimed her Minor Children's best interests were to be in the care of her family "instead of them was going through what [she] was going through." *N.T., 114:11-17*. Her Minor Children should not have to wait until their parent gets her act together. Mother should have complied with the court-ordered treatment plan to be with them; however, Mother did not comply.

Mother says she wanted to be reunified with her children but when confronted with how her actions impacted her Minor Children, she did not want to discuss the impact of her actions on the Minor Children. Mother instead felt she should be commended for allowing her Minor Children to be taken care of by other family members. To the contrary, Mother cannot expect her parental rights will be preserved by waiting for a more suitable or convenient time for her to perform her parental responsibilities. Others, such as her family members, instead have stepped up to the plate to provide for the Minor Children's physical and emotional needs. Mother cannot expect her family members to be placeholders to fill her place temporarily as a Mother in order to keep her parental role open for her to step-in when she finally gets her life together. Moreover, the record demonstrates Mother has failed to utilize all available resources that the Courts and ECCYS have offered her that would have preserved her parental relationship and reunified her with the Minor Children.

When Mother was living on the streets, Mother's brother, J.S., indicated he "struggles" over the way, his sister, the Mother is "living that way" and how the family has to care for her Minor Children, not the Mother. Mother has caused stress on her own family members who have been taking care of her Minor Children. Although recently Mother had contacted the Minor Children by telephone and Facebook Messenger, and they were willing to speak to her, such contact is not sufficient for a parent in a true parenting role. Of course, these Minor Children were happy to hear from her because that is the best they can expect from her, mere minimum contact by telephone. Mother could have had in-person visits if she just would have followed her treatment plan to reunify with them.

Caseworker Urban stated if Mother's parental rights are terminated, termination will not have an impact on these Minor Children in that Mother did not work a treatment plan; Mother did not stay in contact with ECCYS; and Mother did not alleviate any of the reasons these Minor children were placed in care of ECCYS. Caseworker Urban did not have the opportunity to see whether there was any bond, healthy or unhealthy, between Minor Children and Mother, due to Mother's lack of compliance with the treatment plan for visitations and she was "on the run."

In fact, Caseworker Urban has never seen any interaction between Minor Children and Mother. Minor Child D.S. has not asked about the whereabouts of Mother so it will not be a problem for either Minor Child if the Court terminates parental rights. If the rights of Mother are terminated, both Minor Children will have more resources to give them permanency. Same reason for Minor Child D.I.S. as Minor Child D.S. as to why Mother's rights could be terminated. Minor Child D.I.S. has not asked about his parents either. No gifts or letters were sent by Mother to Minor Children at the Kinship homes. Mother has not done anything to maintain contact with her Minor Children.

At the time ECCYS became involved, Mother and Father were not living together as a family. Minor children lived with Father, and he dropped them off to live with Mother. Minor Children had been with Father for about two (2) months. Minor Child D.I.S. was truant from school when Father had custody.

Mother has not provided monetary support for Minor Children. Mother has not inquired about how Minor Children are doing, especially D.S. because of his injury. Mother is on probation and is incarcerated.

Since the needs and welfare of each Minor Child are paramount, terminating Mother's parental rights will provide each Minor Child with the necessary permanence each Minor Child indeed deserves. Each Minor Child will obtain fulfillment of his potential in a permanent, healthy, and safe environment with an adoptive resource. Minor Children are placed in Kinship Homes, but these Kinship Homes are not permanent resources. Caseworker Urban believes if these Minor Children were free for adoption, "it would be easier to find a family for them." *N.T., 49:7-8.*

Moreover, this IVT Court accepted the position of Attorney Christine Konzel as Legal Counsel for each Minor Child. She stated each Minor Child in this case deserves permanency since they have been in placement and care for over fourteen (14) months. And the older child, D.I.S. "more than anything ... wants to be with his brother." Termination of the parental rights of Mother will provide these Minor Children the opportunity to be in a "reunified" setting in order to provide ECCYS "more leeway and more hope to get these children in an adoptive resource." Mother was duly informed by the Dependency Court personally as to what she needed to do to have her Minor Children returned to her. By terminating Mother's rights, Attorney Konzel stated these Minor Children must move forward to a permanency plan where both Minor Children can share one house, one home, in their best interests.

At the time of the Initial Permanency Hearing, Attorney Konzel as GAL remarked about the impressive progress Minor Child D.S., the younger sibling, has had in the foster home and how well he was doing there. Minor Child D.S. "made some significant strides" since being placed there on June 11, especially with potty training and talking. *N.T., Dependency, 10: 16-22.* The GAL further stated, "Which it's my understanding when he first got there he was hardly saying anything, even though he's going to be 3 years old in another month." *N.T., Dependency, 10:22-25.* The GAL, however, indicated her concern about Minor Child D.I.S.'s anger and schooling issues as well as the GAL "believe[d] the mom calls him daily, but she has yet to do any part of her treatment plan." *N.T., Dependency, 11:4-7.* Mother has failed to complete anything in the treatment plan yet Mother maintained contact with her children daily, "possibly giving them false hope of, you know, returning or something, but she's not doing anything to be compliant." *N.T., Dependency, 11:7-12.* Mother's interjection of directly calling Minor Child D.S. daily was affecting Minor Child D.I.S. whose anger issues were increasing.

This IVT Court properly concluded ECCYS established by clear and convincing evidence that termination of Mother's parental rights will best serve each these Minor Children's needs and welfare as well as serving each Minor Child's best interests. And as detailed above, ECCYS has established, by clear and convincing evidence, four separate grounds for the termination of Mother's parental rights as to each Minor Child (even though only one is sufficient), and also termination of Mother's parental rights are in the best interests, needs, and welfare of each Minor Child.

This IVT Court, therefore, requests the Honorable Judges of the Pennsylvania Superior Court to affirm the Decrees for each of the Minor Children, specifically Minor Child D.I.S. and Minor Child D.S., involuntarily terminating Mother's parental rights.

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

ROBERT WIERBINSKI

v.

CITY OF ERIE

AGENCY / APPEAL AND ERROR

Where no additional evidence is taken on appeal to the court of common pleas from a local agency adjudication, its review is not *de novo*; rather, the reviewing court must affirm the decision below unless it identifies a constitutional violation, an error of law, a failure by the local agency to comply with the statute's procedural provisions, or a material finding of fact that is unsupported by substantial evidence.

AGENCY / APPEAL AND ERROR

Errors of law include misinterpretations or a misapplication of law.

AGENCY / EMPLOYMENT / ACCIDENTS

Unlike the Workers' Compensation Act, which caps recovery for a total disability at sixty-six and two-thirds percent of the employee's average weekly wage, the Heart and Lung Act guarantees certain public employees engaged in police work and firefighting their full rate of salary during a temporary disability until their return to duty.

AGENCY / EMPLOYMENT / ACCIDENTS

A covered employee is eligible for benefits under the Heart and Lung Act if he is injured in the performance of his duties.

AGENCY / EMPLOYMENT / ACCIDENTS

The inquiry to determine if a police officer was injured in the performance of his duties is whether the officer was engaging in an obligatory task, conduct, service, or function that arose from his or her position as a police officer as a result of which an injury occurred; this does not mean only those duties unique to police officers such as making arrests or investigating crimes, but includes any duties assigned to a police officer.

AGENCY / EMPLOYMENT / ACCIDENTS

While an officer's status as on or off-duty is not dispositive of whether an injury occurred in the performance of duties, it is certainly one factor to be considered.

AGENCY / EMPLOYMENT / ACCIDENTS

An officer injured while actively on patrol is injured in the performance of his duties pursuant to the Heart and Lung Act.

COURTS / JUDICIAL POWERS

The doctrine of *stare decisis* maintains that for purposes of certainty and stability in the law, 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.

COURTS / JUDICIAL POWERS

While an *en banc* court may overturn its own precedents if it identifies a special justification for doing so, it is a fundamental precept of our judicial system that a lower tribunal may not disregard the standards articulated by a higher court

AGENCY / APPEAL AND ERROR

An agency adjudicator contravenes basic principles of *stare decisis*, and therefore, commits an error of law, when he finds the case before him to be factually analogous to an established appellate court precedent, nonetheless determines that the precedent was wrongly decided,

purports to correct its holding, and proceeds to apply the reimagined holding to the facts of the case.

COURTS / JUDICIAL POWERS / EVIDENCE

It is material facts which are relevant to distinguishing or analogizing one case from another, not the particular evidence that was offered to establish those facts.

STATUTES / CONSTRUCTION

A statute's plain language generally provides the best indication of legislative intent; thus, in close cases, where the express terms of a statute provide one answer and extra-textual considerations suggest another, the written word must prevail.

AGENCY / APPEAL AND ERROR

Remand is unnecessary where the material facts of a holding have already been determined, and there is but one conclusion of law that may be reasonably drawn when applying analogous precedent to the facts.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
TRIAL DIVISION – CIVIL
No. 11849 of 2021

Appearances: Douglas G. McCormick, Esq., Attorney for Petitioner, Robert Wierbinski
Richard E. Bordonaro, Esq., Attorney for Respondent, the City of Erie
Joseph E. Sinnott, Esq., Attorney for Respondent, the City of Erie

OPINION OF THE COURT

Piccinini, J., May 20, 2022

Pennsylvania law contains various provisions providing recovery for workers in the event of occupational injury or illness, including those found in the Workers' Compensation Act, the Occupational Disease Act, Act 534, and the statute at the center of this dispute, the Heart and Lung Act. As relevant here, the Heart and Lung Act guarantees certain public employees engaged in police work and firefighting their "full rate of salary" during a temporary disability until their return to duty. 53 P.S. § 637(a). To be eligible, however, the employee must be "injured in the performance of his duties[.]" *Id.*

This case concerns Robert Wierbinski, a seasoned patrolman with the City of Erie Police Department. Shortly after beginning his shift on the morning of January 27, 2021, he pre-ordered a Starbucks latte from his phone. He spent all of thirty seconds inside the coffee shop retrieving the beverage, but while walking back to his patrol vehicle, he slipped on a patch of ice, tearing the rotator cuff in his right shoulder. The tear required surgery and post-operative rehabilitative care, during which time Wierbinski was unable to work. He subsequently filed a claim for Heart and Lung Act benefits, but the City of Erie denied it. On appeal, a hearing examiner, sitting as factfinder, affirmed that decision.

The sole question in this statutory appeal of the hearing examiner's ruling is whether Wierbinski was injured "in the performance of his duties," thereby entitling him under the Heart and Lung Act to reimbursement of his full rate of salary for the time he was off the job. Consistent with settled case law construing the phrase, the answer is yes. In misapplying these cases, the hearing examiner below committed an error of law, and consequently, this Court now reverses.

I. BACKGROUND

A. Factual History

The facts of this case are straightforward and undisputed. Petitioner, Robert Wierbinski, a patrolman and 23-year veteran with the City of Erie Police Department arrived at the station in full uniform on the morning of January 27, 2021, shortly before his 6:30 a.m. shift was scheduled to start. Tr., p. 7. He pre-ordered a Starbucks latte (his caffeinated beverage of choice) from a mobile app on his phone and left the station at approximately 6:45 a.m. to begin his patrol and pick up his order from the Starbucks on Fifth and State Streets. Tr., pp. 8-9, 34. He parked just south of the Starbucks on the west side of State Street. Tr., pp. 8-9. He walked in, greeted the barista, grabbed the latte, which was already waiting for him on the counter, and walked back out. Tr., pp. 9-10. The entire exchange lasted about 30 seconds. Tr., p. 10. On his way out, while heading toward his parked cruiser, he slipped on a patch of ice, falling directly on his right shoulder. Tr. p. 10. His right arm went immediately numb, and he was on the ground for roughly 20 seconds before he was able to pull himself up. Tr., pp. 13-14. Eventually, he drove back to the station to alert his supervisor what had happened, and thereafter, went to UPMC Hamot Hospital for x-rays. Tr., pp. 14-15.

It was eventually determined that Wierbinski suffered a tear to his right shoulder rotator cuff and bicep. Tr. p. 40. On February 4, 2021, Wierbinski was cleared to return to work on light duty. Tr., p. 19. On March 3, 2021, after an MRI was taken, Dr. Williams, an orthopedic surgeon, recommend Wierbinski undergo arthroscopic surgery[1] as soon as possible to treat the traumatic full thickness tear in his right shoulder. Tr., pp. 20-21. Wierbinski sought a second opinion from Dr. Burke in Pittsburgh, who recommended against the less invasive arthroscopic procedure because the damage to his shoulder was so severe that a surgeon would "have to open it up completely." Tr., p. 21. Wierbinski agreed to undergo the more extensive procedure with Dr. Burke, and his last day of work prior to the surgery was March 23, 2021. Tr., pp. 27, 29. Dr. Burke performed the surgery on March 25, 2021. Tr., p. 22.

After the surgery, Wierbinski required several weeks of post-operative care, including four weeks in which his shoulder was completely restricted in a foam wedge, two weeks in a smaller wedge, and more time beyond that in a sling. Tr., pp. 22-23.[2] Dr. Burke imposed work restrictions on Wierbinski during this time and ordered him to participate in physical therapy. Tr., pp. 23-24. The parties agree that Wierbinski made a full recovery and eventually returned to work on June 21, 2021. Pet.'s Post-Argument Br. in Supp. of Granting Pet. for Review, p. 7; Post-Argument Brief for the City of Erie, p. 2.

B. Procedural History

The City of Erie approved Wierbinski for workers' compensation benefits stemming from his injury, but he disclaimed those payments, opting to use sick time instead because workers' compensation benefits would not reimburse him at his full rate of pay, and more importantly for Wierbinski, because he would not continue to accrue seniority during the time he collected these benefits. Tr., pp. 26-27, 37-38. Wierbinski did, however, file a claim for benefits under the Heart and Lung Act, which the City of Erie denied. Tr., p. 25. Wierbinski contested that decision, so the matter was scheduled for a hearing pursuant to Pennsylvania's

[1] Arthroscopic surgery is "surgery performed on joints using a fiberoptic system that allows visualization of the joint and surrounding structures for the purpose of diagnosis and treatment." Stedman's Medical Dictionary (2014).

[2] Indeed, Wierbinski was still in the sling at the time of his May 10, 2021, hearing in this matter. Tr., p. 23.

Local Agency Law. *See* 2 Pa.C.S. § 553 ("No adjudication of a local agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard.").

The hearing was held on May 10, 2021, before an adjudicator, known as a hearing examiner. Tr., p. 1. Wierbinski testified at the hearing, and the parties stipulated to a set a facts concerning the circumstances surrounding the fall and the nature of his injury. Tr. p. 40. As the parties both agreed, the only meaningful issue in dispute was whether Wierbinski was "injured in the performance of his duties" as required under the Heart and Lung Act. Tr. pp. 43-44.

The hearing examiner issued a written decision on July 26, 2021, affirming the denial of Heart and Lung Act benefits. A Petition for Review to this Court followed. Oral argument was held on January 20, 2022. Post-hearing briefs were submitted by the City of Erie and Wierbinski on March 2, 2022, and March 3, 2022, respectively. The matter is now ripe for review. After careful consideration of the arguments presented by the parties at oral argument and in their post-argument briefs, this Court now reverses the hearing examiner's denial of benefits under the Heart and Lung Act.

II. APPLICABLE LAW

A. Standard of Review

This Court has jurisdiction to review the Petition for Review of the Decision of the Adjudicator pursuant to Section 752 of the Local Agency Law and Section 933(a) of the Judicial Code. *See* 2 Pa.C.S. § 752 ("Any person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to [the Judicial Code]."); 42 Pa.C.S. § 933(a)(2) ("each court of common pleas shall have jurisdiction of appeals from final orders of government agencies … [including a]ppeals from government agencies, except Commonwealth agencies, under Subchapter B of Chapter 7 of Title 2[.]").[3] Sitting in such a capacity, this Court functions as an appellate court. *See* 42 Pa.C.S. § 701(a) (stating "[t]he provisions of this subchapter shall apply to all courts of this Commonwealth, including the courts of common pleas when sitting as appellate courts.").

The standard of review for the decision below is initially set forth in Section 754(b) of the Local Agency Law. *See* 2 Pa.C.S. § 754(b). Where, as here, no additional evidence is taken on appeal to the court of common pleas, its review is not *de novo*; rather, the reviewing court "shall affirm the adjudication unless" it identifies "a constitutional violation, an error of law, a failure by the local agency to comply with the statute's procedural provisions, or a material finding of fact that is unsupported by substantial evidence." 2 Pa.C.S. § 754(b); *Johnson v. Lansdale Borough*, 146 A.3d 696, 711 (Pa. 2016). This deferential standard permits both "local agencies to manage their employees without fear that a trial court may 'second-guess' their every prerogative" and "breathe[s] vitality into civil service commissions, which otherwise would appear to constitute nothing more than an unnecessary stop between a local agency decision and trial court review." *Id.* at 713.

[3] While the record is not entirely clear on this point, even if the hearing examiner was appointed as an arbitrator, this Court has jurisdiction to review the decision pursuant to Section 933(b) of the Judicial Code. *See* 42 Pa.C.S. § 933(b) (stating "each court of common pleas shall have jurisdiction of petitions for review of an award of arbitrators appointed in conformity with statute to arbitrate a dispute between a government agency, except a Commonwealth agency, and an employee of such agency.").

"Errors of law include misinterpretations or a misapplication of law[.]" *AFSCME, District Council 33 v. City of Philadelphia*, 95 A.3d 966, 971 (Pa. Cmwlth. 2014). "Substantial evidence is such evidence that a reasonable person would accept as adequate to establish the fact in question. A reviewing court will examine, but not weigh, the evidence because the [hearing officer], acting as the factfinder, is in a better position to discover the facts based upon the testimony and the demeanor of witnesses." *Sheppleman v. City of Chester Aggregated Pension Fund*, 271 A.3d 938, 947 (Pa. Cmwlth. 2021).

"If the adjudication is not affirmed," then the reviewing court "may affirm, modify, vacate, set aside or reverse any order brought before it for review, and may remand the matter and direct the entry of such appropriate order, or require such further proceedings to be had as may be just under the circumstances." 2 Pa.C.S. § 754(b); 42 Pa.C.S. § 706. "If a trial court determines the record before the local agency is incomplete, the court has discretion to determine the manner of implementing (completing) a deficient record before the agency." *Carson Concrete Corp. v. Tax Revenue Board, City of Philadelphia*, 176 A.3d 439, 454 (Pa. Cmwlth. 2017) (citation omitted). It "may either hear the appeal *de novo* itself or remand the matter to the agency for supplementation of the deficient record. However, the trial court may not remand for a *de novo* agency hearing." *Id.* (citations omitted).

B. Compensable Injury under the Heart and Lung Act

The Heart and Lung Act is best understood in relation to the Workers' Compensation Act. Workers' compensation "is remedial legislation designed to compensate claimants for earnings loss occasioned by work-related injuries." *Triangle Building Center v. W.C.A.B. (Linch)*, 746 A.2d 1108, 1111 (Pa. 2000). To be more precise, the Workers' Compensation Act permits recovery by an employee when an injury arises in the course of his employment and is causally related thereto. *Penn State University v. W.CA.B. (Smith)*, 15 A.3d 949, 952 (Pa. Cmwlth. 2011) (citing 77 P.S. § 411). "The Workers' Compensation Act is similar to accident insurance, and it seeks to provide compensation commensurate with damage from accidental injury as a fair exchange to the employee for relinquishing every other action against his employer." *Soppick v. Borough of West Conshohocken*, 6 A.3d 22, 26 (Pa. Cmwlth. 2010). But compensation under this statutory scheme is capped at sixty-six and two-thirds percent of the employee's average weekly wage. *City of Erie v. W.C.A.B. (Annunziata)*, 838 A.2d 598, 602-03 (Pa. 2003) (citing 77 P.S. § 511(1)). "The legislature justified this substantial, percentage-based reduction of average weekly pay as an amelioration of potential unfairness to employers." *Id.* at 602. Such was "The Grand Bargain" brokered by the framers of the workers' compensation system. ELLEN RELKIN, *The Demise of the Grand Bargain: Compensation for Injured Workers in the 21st Century*, 69 RUTGERS U. L. REV. 881, 883 (2017).

The Heart and Lung Act is a "materially different" statute, informed by distinct concerns. *Soppick*, 6 A.3d at 25. It applies only to "specified public employees engaged primarily in police work, firefighting, or other jobs involving public safety." *Cunningham v. Pennsylvania State Police*, 507 A.2d 40, 43 (Pa. 1986). Unlike the Workers' Compensation Act, which promotes "humanitarian objectives," the Heart and Lung Act "is intended to serve the interest of the public employer, not the disabled employee, and is based on the theory that the promise of full income to employees in a hazardous industry could serve to attract qualified individuals to professions involving public safety." *Soppick*, 6 A.3d at 26. "The

Heart and Lung Act "was not intended to displace other forms of disability compensation such as [Workers'] Compensation benefits and payments under the Occupational Disease Act, which cover more prolonged or permanent disabilities[,]" and as such, our Supreme Court has "concluded that it was intended to cover only those disabilities where the injured employees were expected to recover and return to their positions in the foreseeable future. *Cunningham*, 507 A.2d at 43-44.[4] "Another significant distinction between the Heart and Lung Act and the Workers' Compensation Act is that the Heart and Lung Act is to be strictly construed." *Annunziata*, 838 A.2d at 603.

The Heart and Lung Act derives its title from the fact that it compensates covered employees for "diseases of the heart and tuberculosis … caused by extreme overexertion in times of stress or danger or by exposure to heat, smoke, fumes or gases, arising directly out of the employment." 53 P.S. § 637(b). But relevant for our purposes, it also covers any temporary disability incurred "in the performance of [the employee's] duties[.]" 53 P.S. § 637(a). During such time as the employee is unable to perform his duties due to the injury, he is entitled to "his full rate of salary, as fixed by ordinance or resolution, until the disability arising therefrom has ceased." 53 P.S. § 637(a). This standard is more demanding than that utilized in the Workers' Compensation Act. *Pennsylvania State Corrections Officers Association v. Department of Corrections*, 235 A.3d 426, 430 (Pa. Cmwlth. 2020).[5]

"The Heart and Lung Act does not define the phrase 'in the performance of his duties." *Colyer v. Pennsylvania State Police*, 644 A.2d 230, 233 (Pa. Cmwlth. 1994). In order to determine whether an injury has occurred in the performance of one's duties pursuant to the Heart and Lung Act, it is necessary to undertake "a case-by-case, fact-sensitive analysis[.]" *Pennsylvania State Corrections Officers Association*, 235 A.3d at 430. "[T]he dispositive inquiry to determine if an officer was injured in the performance of his duties is whether the officer was engaging in an obligatory task, conduct, service, or function that arose from his or her position as a [police] officer as a result of which an injury occurred[.]" *McLaughlin v. Pennsylvania State Police*, 742 A.2d 254, 257 (Pa. Cmwlth. 1999). "This does not mean only those duties unique to police officers such as making arrests, investigating crimes, etc. … Instead, the phrase includes any duties assigned to a police officer." *Id.* at 258-59.

Prior appellate cases have distilled several considerations relevant to the analysis. "Unlike coverage under the Workers' Compensation Act, the site of the injury is completely irrelevant when determining an officer's entitlement to Heart and Lung Act benefits[.]" *Allen v. Pennsylvania State Police*, 678 A.2d 436, 439 (Pa. Cmwlth. 1996) (footnote omitted). Also, "[e]xcluded from consideration is the degree of hazard involved." *Justice v. Department of Public Welfare*, 829 A.2d 415, 417 (Pa. Cmwlth. 2003) (citing *Colyer*, 644 A.2d 230). While an officer's status as on or off-duty is "not dispositive of whether an injury occurred in the performance of duties, it is certainly one factor to be considered" for "[w]here an officer is on duty, it is more likely that an injury which occurs is one that occurs in the performance of

[4] In contrast, the Workers' Compensation Act "provides compensation for both temporary and permanent disabilities[.]" *Rodgers v. Pennsylvania State Police*, 759 A.2d 424, 429 (Pa. Cmwlth. 2000).

[5] "[U]nlike 'wages' contemplated by the Workers' Compensation Act," the term "salary" as used in Section 637(a) of the Heart and Lung Act "does not include vacations and overtime." *Annunziata*, 838 A.2d at 603 (internal quotation marks and brackets omitted). "Therefore, although the [Heart and Lung Act] Act grants full compensation and continuation of employee benefits to eligible employees, and thus in one sense is more generous towards injured employees than the Workers' Compensation Act, its scope is in fact much narrower." *Allen v. Pennsylvania State Police*, 678 A.2d 436, 438 (Pa. Cmwlth. 1996).

his duties in contrast to where an officer is not on duty and an injury occurs." *McLaughlin*, 742 A.2d at 258 n.2. "Conversely, … even though a police officer is not on paid duty, so long as he is injured while performing police duties, he is entitled to benefits pursuant to the Act." *Id.* at 256.

Although an officer simply at rest between assignments, yet "nonetheless at the ready," is still performing official duties, he ceases to do so the moment he deviates from those duties in order to perform a "personal mission," that is, an act "of personal convenience" with "no connection to his obligations" as a police officer. *Mitchell v. Pennsylvania State Police*, 727 A.2d 1196, 1198-99 (Pa. Cmwlth. 1999); *see also Pennsylvania State Corrections Officers Association*, 102 A.3d at 1048-49. This idea is not unlike the concept of a "frolic" common to other areas of the law. *See, e.g., Potter Title & Trust Co. v. Knox*, 113 A.2d 549, 552 (Pa. 1955) (rejecting application of the doctrine of respondeat superior) ("It was an act wholly unauthorized by his employers, — the kind of an act which the law, in one of its rare drolleries, terms a 'frolic' of his own."); *Gibson v. Bruner*, 178 A.2d 145, 148 (Pa. 1961) (holding father could not be held liable for his son's use of his vehicle while intoxicated where there was no evidence to indicate that the father knew the son would be unfit to drive by reason of intoxication) ("Such conduct constituted a substantial deviation from the authorized and permitted use and the record is clear that when the accident occurred [the driver] was clearly on a frolic of his own."). *Mitchell* itself purported to borrow the term "personal mission" from "workers' compensation law parlance[,]" 727 A.2d at 1198, and indeed, there is some older case law, pre-dating the more liberal workers' compensation scheme currently in place,[6] to support this assertion. *See Boal v. State Workmen's Insurance Fund*, 193 A. 341, 343 (Pa. Super. 1937) ("his employment ceased and he was then engaged on a personal mission, which had no relation to the business in which his employer was engaged" and thus "was a matter that was purely personal to him and bore no relation to the duties which he was required to perform.").

It is against this backdrop that the present dispute arises. With these observations in mind, the Court proceeds to examine the question at the heart of this appeal: whether Wierbinski was injured in the performance of his duties.

III. DISCUSSION

A. Preliminary Analysis

Applying the foregoing principles to the facts of this case, Wierbinski is entitled to benefits under the Heart and Lung Act as a result of the injury he sustained on January 27, 2021. To reiterate, the central inquiry is whether Wierbinski was "engaging in an obligatory task, conduct, service, or function" arising from his position as a patrolman when he fell on the ice. *McLaughlin*, 742 A.2d at 257. The Court notes that Wierbinski was undeniably on-duty at the time of his injury, having just begun his shift roughly 15 minutes before, although this fact, alone, does not resolve the question. *Id.* at 258 n.2. Wierbinski's uncontroverted testimony, however, reveals not simply that he was on-duty at the time of his injury, but that he was on patrol.

[6] "As originally enacted in 1915 The Pennsylvania Workmen's Compensation Act provided benefits only for injury or death resulting from an 'accident' in the course of employment." *Pawlosky v. W.C.A.B.*, 525 A.2d 1204, 1208 (Pa. 1987). "In 1972 The Pennsylvania Workmen's Compensation Act underwent extensive amendment." *Id.* "[T]he legislature in 1972 provided a concept of 'injury' broad enough in its scope to encompass all work-related harm to an employee[.]" *Id.* at 1209.

When asked whether he was on patrol while in the Starbucks, Wierbinski testified "Yes. I mean, I always consider myself on patrol when I am in uniform out in public, because I'm always open to the public or to calls. Tr., p. 11. He clarified that he is "[a]bsolutely" permitted to get coffee while on patrol, and indeed, "they encourage it." Tr., p. 11. He noted, "[y]ou get into establishments, you are seen by the public, you are accessible by the public. And you deter crime just by your mere presence being in these establishments." Tr., p. 11. He testified that officers are permitted to eat meals and use the restroom while on patrol, "but you may not actually receive your meal or even get to finish it because you are open to calls at all times." Tr. pp. 11-12. He further stated that while in the Starbucks, he was accessible by radio and would have acted if he had observed a breach of the peace, a crime being committed, or if an emergency had arisen while he was in the coffee shop. Tr., p. 13. He recalled how the area around the intersection of Fifth and State Street was historically "a high nuisance crime area … especially when McDonalds was there[,]" but that even after the McDonald's was torn down, panhandling continued, as well as "people just harassing people inside establishments." Tr., p. 12. He explained that in the past "I would go into Starbucks and sit and have my coffee. And the baristas would often tell me that they appreciate me being in there just as crime deterrent. And [they] asked for special attentions at openings and closings." Tr. p. 12.

Cross-examination did not cast doubt upon the veracity of these claims. Wierbinski admitted that while there is coffee at the station, he typically stops to get a caffeinated beverage away from the station after roll call:

> Not at Starbucks all the time. It really depends. Sometimes I will go to McDonalds at the drive-thru. I like to go into places, because I like to interact a little bit when I can. I like people to see me. So, I go to Country Fair. Just different places, it varies.

Tr., p. 34. The thrust of cross-examination on this point focused on the fact that Wierbinski was not responding to any call when he arrived at Starbucks, nor when leaving it, a fact he readily admitted, but Wierbinski reiterated that he was nonetheless on patrol throughout this time. Tr. pp. 36-38. On redirect, he confirmed that he is considered on patrol the moment he leaves the station. Tr., p. 39.

It cannot be reasonably denied that patrolling is an obligatory task, service, or function of a patrolman. As *McLaughlin* makes clear, the phrase "in the performance of his duties" in the Heart and Lung Act "does not mean only those duties unique to police officers such as making arrests, investigating crimes, etc. … Instead, the phrase includes any duties assigned to a police officer." *McLaughlin*, 742 A.2d at 258-59 (emphasis added). Patrolling is undoubtedly an assigned task of a patrolman — his *raison d'être* if you will — and the record confirms that Wierbinski was assigned on patrol at the time that he was injured. It is therefore of no moment that Wierbinski was not specifically responding to a call or observable threat when he entered the Starbucks.

As such, the only way it could be shown that Wierbinski was not injured in the performance of his duties is by showing that Wierbinski deviated from his patrol by embarking on a personal mission of personal convenience having no connection to his obligations as a patrolman, *Mitchell*, 727 A.2d at 1198-99, but once again, the undisputed evidence does

not bear this out. Wierbinski stated that he was not only permitted, but actively encouraged, to eat and drink at establishments while on duty in order to deter crime in the area. Thus, while there is a "personal convenience" aspect to his presence there, it cannot be said it has "no connection to his obligations," as the case law requires, because he is simultaneously performing a law enforcement function, namely deterring crime. It is telling that while Wierbinski is on patrol in these establishments, his law enforcement duties trump his personal needs, meaning he "may not actually receive [his] meal or even get to finish it because [he is] open to calls at all times." Tr. p. 12.

There was no evidence presented at the hearing to suggest that the act of getting a coffee somehow suspends an officer's patrol as a matter of Department policy. Quite the opposite; as just explained, Wierbinski testified that it is actively encouraged. Tr. p. 11. The City could offer nothing to rebut this assertion, such as a guideline, regulation, collective bargaining agreement, or even the testimony of an administrator within the Department, and Wierbinski confirmed that the collective bargaining agreement is "vague" and does not speak to the question. Tr., p. 45. In short, there is insufficient evidence to suggest that Wierbinski was on a personal mission as that term-of-art is defined by our case law; at best, his motives were mixed, partly personal and partly official, but that does not mean it had "no connection" to his official duties. *Mitchell*, 727 A.2d at 1199.

Even assuming, *arguendo*, that Wierbinski's appearance in the Starbucks did constitute a purely personal mission, that mission was already complete at the time of his injury. Wierbinski testified that when he slipped he was heading "[b]ack to [his] marked cruiser, which was parked on the street." Tr., p. 10. That brings this case squarely within the fact-pattern of *McLaughlin*. In that case, a state police officer suspended his patrol to take a lunch break at a restaurant as permitted by field regulation. *McLaughlin*, 742 A.2d at 255. After finishing his meal, he exited the restaurant and headed toward his patrol car, but fell and broke his arm before he reached it. *Id.* The State Police denied his claim for Heart and Lung Act benefits and the agency commissioner affirmed that decision, finding the officer was not injured in the performance of his duties. *Id.* On appeal, the Pennsylvania State Police argued the officer was at lunch, and therefore, was not acting in the performance of his duties when he was injured. *Id.* at 259. The Commonwealth Court disagreed with this "factual description of events[,]" instead noting that "McLaughlin was not at lunch at the time of the injury; he had finished lunch." *Id.* The Court explained:

> McLaughlin testified that he had finished eating his lunch. *Id.* The significance of this fact is that according to FR 1–2.27 members who are on continuous duty shall be permitted to suspend patrol or other assigned activity for the purpose of consuming one meal "during their tour of duty ... but only for such period of time as is reasonable or necessary and not to exceed thirty minutes." (emphasis added). According to McLaughlin's testimony, he had finished "consuming [his] one meal." Thus the period of time which was necessary for consuming that one meal was over and thus pursuant to the language of FR 1–2.27, so was the suspension of McLaughlin's patrol. As he testified, he was supervising the patrols and was going back out on the road to do so. R.R. at 8a. As the period of suspension of his assigned activity was over, he was duty bound to return to his patrolling. Having finished his lunch, his patrol was no longer suspended and he

had an obligation as a police officer to resume that patrol. In attempting to perform this duty, he, of necessity, had to go to and reenter his patrol car. In attempting to do so, he tripped and injured himself. Hence, McLaughlin did not injure himself while at lunch as the PSP erroneously contend; rather, he injured himself in attempting to fulfill his duty to go back out on patrol after having completed his lunch. Thus, the Commissioner erred in concluding that McLaughlin was not entitled to benefits under the Act. As McLaughlin sustained injuries in the performance of his duty in his capacity as a police officer to go out on patrol, he is entitled to benefits pursuant to the Act.

Id.

So too here. Wierbinski had already picked up his latte and was heading back to his police cruiser to continue his patrol, a task he was obligated to perform. Unlike in McLaughlin, there is no evidence here of regulations or other pertinent guidelines speaking to Wierbinski's authority to take such a break, but neither is there any evidence that to suggest that Wierbinski's actions constituted a suspension of his patrol, as was the case with the lunch-break field regulation in *McLaughlin*. Tr. p. 45. And even if he did suspend his patrol by leaving his vehicle in order to pick up the latte, his personal mission was complete by the time that he fell. In recommencing his duties, "he, of necessity, had to go to and reenter his patrol car." *McLaughlin*, 742 A.2d at 259. Under this version of events, Wierbinski did not injure himself while getting coffee; he injured himself in attempting to fulfill his duty to go back out on patrol after having completed his errand. *Id.* Accordingly, even assuming Wierbinski's trip to Starbucks had no connection to his official duties, *McLaughlin* controls, and he is therefore entitled to benefits under the Heart and Lung Act.

B. Error of the Hearing Examiner

The hearing examiner below reached a contrary conclusion. Of course, arbiters of legal disputes can, and often do, reach different conclusions as to the law and facts, as well as the application of the law to those facts. But in the context of this statutory appeal of the hearing examiner's decision, this Court, as is often said, sits as "a court of review, not of first view." *Thacker v. Tennessee Valley Authority*, 139 S.Ct. 1435, 1443 (2019). As discussed more fully in Section II(A), *supra*, in this case, that means that this Court, even if it would independently reach a different result, must affirm the hearing examiner's decision unless it rests upon an error of law or necessary factual findings unsupported by substantial evidence. *See* 2 Pa.C.S. § 754(b).

Begin with the facts. Wierbinski does not challenge the sufficiency of the evidence supporting the hearing examiner's factual findings, and for good reason, as these facts are uncontroverted. The only person to testify at the hearing was Wierbinski himself, and cross-examination did not impeach his account, nor did any of the exhibits offered into evidence. Essentially, there were no credibility issues or conflicting testimony to be resolved by the hearing examiner, and this Court would have no basis to question the veracity of the hearing examiner's factual findings even if it had the authority do so. Instead, the only issue meaningfully in dispute in this litigation has always been whether Wierbinski was injured in the performance of his duties. This involves an application of the law (such as it is) to the facts (such as they are).

The hearing examiner did make certain factual findings relevant to this question. He found that

"[b]ased on Officer Wierbinski's testimony, and in the absence of any evidence to the contrary, Officer Wierbinski was 'on duty' as a patrolman at the time of his injury." Decision of the Adjudicator (Decision), p. 2. He further found that Wierbinski's injury occurred "[a]fter exiting the coffee shop and while walking across the sidewalk toward his cruiser[.]" Decision, p. 1.

As to the law, the hearing examiner evinced a thorough understanding of the appellate case law interpreting the Heart and Lung Act, in particular, those cases construing the phrase "in the performance of his duties." 53 P.S. § 637(a). He surveyed several relevant cases and their holdings, including *Mitchell, Coyler, Allen,* as well as *McCommons v. Pennsylvania State Police*, 645 A.2d 333 (Pa. Cmwlth. 1994), *Donnini v. Pennsylvania State Police*, 707 A.2d 591 (Pa. Cmwlth. 1998), *Lee v. Pennsylvania State Police*, 707 A.2d 595 (Pa. Cmwlth. 1998), and most notably, *McLaughlin*. Furthermore, he correctly observed that "the *McLaughlin* case and the case sub judice are very similar to one another." Decision, p. 9.

Where the hearing examiner and this Court part ways, however, is in the application of the law to the facts. While finding *McLaughlin* to be analogous, the hearing examiner nevertheless concluded that "[t]he decision of the *McLaughlin* court is not in accord with the decisions upon which it relied in making its decision." Decision, p. 7. He understood those cases to stand for the following:

> In *Mitchell*, the police officer was denied benefits because he was on a "personal mission" to warm up his personal car when he was injured. *Donnini* was an off-duty officer, in civilian clothing, who was granted Heart and Lung benefits because he was injured as a result of an event which triggered an official police response, namely, the apprehension of a drive-away criminal; in other words, he was injured in the performance of his duties as a police officer. *Coyler* was granted benefits because he was mentally injured as a result of his participation in an internal affairs investigation of himself, while *McCommons* was denied benefits because he was injured while on route to a joint grievance committee meeting with his union, a personal undertaking and not at all connected with the performance of his duties as a police officer. In *Allen*, the police officer was washing his hands in the state police locker room, and in *Lee*, the officer was injured in a vehicular accident on his way to work. Both *Lee* and *Allen* were denied benefits because neither were injured in the performance of their duties as police officers.

Decision, pp. 8-9. He read *McLaughlin* as deviating from these principles:

> Police officers and patrolmen get in and out of their police cruisers and walk to and from their police cruisers on a routine basis day in and day out. Certainly the Act contemplated a difference between an injury which occurs in the context of performing a police duty, and an injury which occurs in the context of performing an act which is not precisely as a police officer. *McLaughlin*, at 258. A police officer injured while getting in or out of or walking to and from his cruiser are sustained in the performance of the officer's duties where the police officer is responding to a call, investigating a crime scene, patrolling a neighborhood or in pursuit of a suspect. But injuries sustained by a police officer are not injuries sustained in the performance of the officer's duties as a police officer when the police officer is getting in or out of or walking to and from his cruiser to get

> a cup of coffee, to stop at a restaurant, pick up a pack of cigarettes or make a purchase at a convenience store. Clearly the context in which the injury occurs is important to determining whether the police officer was engaged in police duties at the time he was getting in or out of or walking to or from his police cruiser.

Decision, pp. 7-8. By this reasoning, the hearing examiner concluded that "going back out on patrol is not the performance of a police duty as that term is understood under the Act." Decision, p. 7 (internal quotation marks omitted). He then purported to correct the holding in *McLaughlin* and apply his reimagined holding to the factually analogous case at bar:

> Both officers were "on duty" at the time of their injuries, both sustained injuries which, for workers' compensation purposes, arose in the course of their employment. But neither sustained injuries in the performance of their duties "precisely as police officers." *McLaughlin*, at 258. McLaughlin was injured after he stopped for lunch, and Wierbinski was injured after he stopped for coffee.

Decision, p. 9.

Accepting the hearing examiner's findings of fact, this Court nonetheless holds that the hearing examiner erred as a matter of law in refusing to apply *McLaughlin*'s understanding of the phrase "injured in the performance of his duties" to those facts. On one level, the hearing examiner's claim that *McLaughlin* is "not in accord with the decisions upon which it relied" belies the careful review of prior case law undertaken by the *McLaughlin* Court. In holding "that the dispositive inquiry is whether the officer suffered an injury as a result of engaging in an obligatory task, conduct, service, or function that arose precisely from his or her position as a State Police officer[,]" the Court cited favorably to several cases, including *Colyer* and *McCommons*. *McLaughlin*, 742 A.2d 257. It recognized that two cases, *Allen* and *Lee*, "appear somewhat not in accord with the foregoing principles." *Id.* at 258. But the Court ultimately distinguished these cases, noting "[i]n both *Allen* and *Lee*, it is beyond cavil that the officers had a duty to come to work for their scheduled shifts properly attired and in a timely fashion. However, in both cases, notwithstanding this duty, we concluded that they were not entitled to benefits pursuant to the Act" because:

> the phrase "in the performance of his duties' means officers' duties in their capacities precisely as police officers. In other words, **an off-duty officer's obligation to show up on time to work and be properly prepared to undertake one's tasks is not a duty arising from their capacity as police officers but rather a general duty of every employee** and, as such, not within the meaning of the statutory language of the Act … We find that construing the statutory phrase, "in the performance of his duties" to exclude those activities necessary to arrive at work on time and in appropriate attire gives effect to the narrow construction we are mandated to give to the statutory language … Thus, *Allen* and *Lee* are indeed in accord with the general principle distilled above that "in the performance of his duties" means in the performance of his duties which arise from his capacity as a police officer.

Id. (emphasis added). Having distinguished the line of cases dealing with off-duty officers, the Court went on to conclude that:

> Having finished his lunch, his patrol was no longer suspended and **he had an obligation as a police officer to resume that patrol. In attempting to perform this duty, he, of necessity, had to go to and reenter his patrol car.** In attempting to do so, he tripped and injured himself … As McLaughlin sustained injuries in the performance of his duty in his capacity as a police officer to go out on patrol, he is entitled to benefits pursuant to the Act.

Id. (emphasis added).

The hearing examiner obviously disagreed with this logic. He favored a more context-specific approach in "determining whether the police officer was engaged in police duties at the time he was getting in or out of or walking to or from his police cruiser[,]" eschewing any bright-line rule. Decision, p. 8. Applying this approach, he disagreed with *McLaughlin* that the act of walking to a patrol vehicle is performing in a capacity precisely as a police officer, although the hearing examiner appeared to agree that the patrol itself would be an action taken in performance of one's duties. *See* Decision, p. 8 (citing "patrolling a neighborhood" as an example of an action taken in performance of one's duties). The hearing examiner's disagreement with *McLaughlin* thus centers on the narrow factual scenario in which an on-duty officer is injured while walking to his patrol vehicle in order to begin his patrol.[7]

There is some persuasive allure to the hearing examiner's reasoning; after all, *McLaughlin* was not a unanimous decision.[8] Perhaps the dissent too believed that the ruling was "not in accord with the decisions upon which it relied" or that "injuries sustained by a police officer are not injuries sustained in the performance of the officer's duties as a police officer when the police officer is getting in or out of or walking to and from his cruiser to get a cup of coffee, to stop at a restaurant, pick up a pack of cigarettes or make a purchase at a convenience store." Decision, pp. 7-8.[9] But the dissenting view was just that, the dissenting view.

Reasonable minds may differ as to whether the *McLaughlin* Court or the hearing examiner has the better argument, and this Court expresses no opinion on the matter one way or the other. But in finding *McLaughlin* to be factually analogous, yet refusing to apply that

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[7] It is unclear whether the hearing examiner found that Wierbinski was on a "personal mission" pursuant to *Mitchell* when he entered the Starbucks. His analogy of ordering a cup of coffee to eating at a restaurant, buying a pack of cigarettes, or making a purchase at a convenience store arguably suggests that he did, although he may be simply drawing a contrast to the more traditional duties of police officers referenced immediately before. It is a dubious proposition, however, whether such a factual finding would be supported by substantial evidence given that Wierbinski testified that he was not only on duty, but on patrol, while in the Starbucks, and the City of Erie could offer no evidence similar to the field regulation offered in *McLaughlin*, despite the hearing examiner properly inquiring as to the existence of "any guidelines or regulations, or even [a] collective bargaining agreement" to that effect. Tr., p. 45. Even assuming that the hearing examiner could, and did, find that Wierbinski was returning to patrol from a personal mission when he fell, *McLaughlin* remains on point as he, by necessity, had to reenter his patrol cruiser in order to recommence his patrol. The City of Erie argues that the lack of field regulation, or something akin to it, creates a meaningful distinction between *McLaughlin* and this case. The Court addresses the merits of that argument in Section III(C), pp. 25-26, *infra*.

[8] Senior Judge Jiuliante dissented without opinion.

[9] The Court observes that *McLaughlin* did not hold that an officer walking into a restaurant to begin his lunch was acting in the performance of his duties, only that an officer walking out of a restaurant after finishing his regulation-permitted lunch was performing his duties, precisely because his patrol was no longer suspended and because it was necessary to reenter the vehicle in order to recommence his patrol.

precedent — instead refashioning the holding to say something that it did not — the hearing examiner defied the longstanding principle of *stare decisis* at the heart of our common law judicial system. And that brings us to the crux of this case, the error upon which this appeal turns, for on a more fundamental level, the hearing examiner erred not because he disagreed with *McLaughlin* as a matter of first principles, but because he failed to dutifully apply that decision in spite of his misgivings as to the soundness of its rationale.

"*Stare decisis* is a principle as old as the common law itself. The phrase derives from the Latin maxim '*stare decisis et non quieta movere,*' which means to stand by the thing decided and not disturb the calm." *Commonwealth v. Alexander*, 243 A.3d 177, 195 (Pa. 2020) (citations and internal quotation marks omitted). "The doctrine of *stare decisis* maintains that for purposes of certainty and stability in the law, 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." *In re Angeles Roca First Judicial District Philadelphia County*, 173 A.3d 1176, 1187 (Pa. 2017) (citation and internal quotation marks omitted).

"Respecting *stare decisis* means sticking to some wrong decisions." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015). It "reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Id.* (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997)) (internal quotation marks omitted). In doing so, it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Alexander*, 243 A.3d at 196 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

"As the mountain of decisions overturned by courts every year would suggest, *stare decisis* is not an inexorable command[.]" *Commonwealth v. Mason*, 247 A.3d 1070, 1091 (Pa. 2021) (Wecht, J., dissenting) (citation and internal quotation marks omitted); *see also Flagiello v. Pennsylvania Hospital*, 208 A.2d 193, 209 (Pa. 1965) (Roberts, J., concurring) ("The principle of stare decisis is more a stabilizing anchor than a permanent deadweight."). We refer to this deferential, but not quite absolute, form of *stare decisis* — whereby a court, with special justification, may overrule its own precedent — as horizontal *stare decisis*. *See* Black's Law Dictionary (11th ed. 2019) (defining horizontal *stare decisis* as "[t]he doctrine that a court, esp. an appellate court, must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself."); *see also McGrath v. Bureau of Professional and Occupational Affairs, State Board of Nursing*, 173 A.3d 656, 661 n.7 (Pa. 2017) (noting that "[a]lthough *stare decisis* applies as a general policy in Pennsylvania courts, … an *en banc* panel of an intermediate court is authorized to overrule a three-judge panel decision of the same court.")

On the other hand, "[i]t is a fundamental precept of our judicial system that a lower tribunal may not disregard the standards articulated by a higher court." *Commonwealth v. Randolph*, 718 A.2d 1242, 1245 (Pa. 1998) (admonishing the Superior Court for its "cavalier disregard" of precedent, "motivated not by the facts of [the] case, but instead by [its] steadfast disagreement with [the Supreme] Court's rationale[.]"). This unyielding form of *stare decisis* is known as vertical *stare decisis*, and it is sacrosanct. *See* Black's Law Dictionary (11th ed. 2019) (defining vertical *stare decisis* as "[t]he doctrine that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction."); *see also Walnut*

Street Associates, Inc. v. Brokerage Concepts, Inc., 20 A.3d 468, 480 (Pa. 2011) (holding lower tribunal "duty-bound" to effectuate law from higher court); *Ramos v. Louisiana*, 140 S.Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part) ("vertical *stare decisis* is absolute, as it must be in a hierarchical system[.]"); *Payne v. Taslimi*, 998 F.3d 648, 654 (4th Cir. 2021) ("as an inferior court, the Supreme Court's precedents do constrain us. In looking up to the Supreme Court, we may not weigh the same factors used by the Supreme Court to evaluate its own precedents in deciding whether to follow their guidance. We must simply apply their commands.") (citations omitted).

If a precedent is to be overturned, then that ruling must come from the Court that originally rendered the decision, or a higher court, but never a lower one. In this case, that means if *McLaughlin* is to be overruled, "the pronouncement must come from the Commonwealth Court sitting *en banc*, our Supreme Court, or better yet, the General Assembly." *Lay v. County of Erie Tax Claim Bureau*, 2022 WL 610120, *5 (Pa. Cmwlth. 2022) (unpublished) (quoting Trial Court Opinion, p. 56 (Erie Co. 2021) (Piccinini, J.)); *see also Commonwealth v. Johnson*, 107 A.3d 52, 74 n.12 (Pa. 2014) (noting "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and [the General Assembly] remains free to alter what we have done.") (citation and internal quotation marks omitted).

While a determination as to whether an officer is injured in the performance of his duties is necessarily "fact-sensitive" and should be made on a "case-by-case" basis, *Pennsylvania State Corrections Officers Association*, 235 A.3d at 430, where the factfinder makes specific factual findings, and those findings neatly align with the facts of a higher precedential case, stare decisis mandates that a lower tribunal apply the holding, regardless of whether the jurist finds its rationale unpersuasive. As our Supreme Court was in *Randolph*, this Court is "troubled, to say the least, by the [hearing examiner's] cavalier disregard of the [*McLaughlin*] standard, which appears to be motivated not by the facts of this case, but instead by [his] steadfast disagreement with [the Commonwealth] Court's rationale set forth therein." *Randolph*, 718 A.2d at 1245.

The hearing examiner, as is this Court, is "obligated to apply and not evade" published Commonwealth Court decisions. *Id.* In evading *McLaughlin*, the hearing examiner ignored foundational principles of *stare decisis*, and therefore, committed an error of law. What is more, given the hearing examiner's factual findings, and his explicit analogy of the facts in this case to those in *McLaughlin*, that error was undeniably dispositive as to the outcome below. It logically follows from this error of law that this Court is not obligated to affirm the hearing examiner's decision pursuant to Section 754(b) of the Local Agency Law.

C. Counterarguments of the City of Erie

The City of Erie offers several reasons why the hearing examiner's ruling should nonetheless be affirmed. None are persuasive. The City contends that the hearing examiner's decision is not subject to reversal considering the claimant's burden of proof and the standard of review on appeal. Post-Argument Br., p. 7. As the Court made clear in the preceding section, it recognizes the deferential standard of review, but all the same finds that the hearing examiner regrettably committed an error of law, and as a result, Section 754(b) does not compel affirmance. The City obfuscates the real issue meriting reversal, claiming "there has been no argument that [the hearing examiner] did not follow the law in rendering his

decision, either from a substantive or procedural standpoint. The only potential argument that Officer Wierbinski can raise to support the reversal of the claim is that [the hearing examiner] did not render a decision based upon necessary findings of fact." Post-Argument Br., p. 8. However, Wierbinski does not mince words in asserting that the hearing examiner did not properly apply *McLaughlin*, and *McLaughlin* is undeniably law. Thus, the hearing examiner's failure to apply *McLaughlin* to a factually analogous case is a textbook example of a failure to adhere to *stare decisis*, *i.e.* an error of law.

As to the burden of proof below, as this Court has reiterated, Wierbinski was the only party to offer relevant evidence as to the question presented in this case (recall much of the facts were already stipulated to), and the City of Erie did not meaningfully impeach his testimony or offer documentary evidence or witnesses of its own to contradict his assertions. There is consequently no merit to the City's contention that Wierbinski did not satisfy his burden of proof as evinced by the hearing examiner's own findings of fact.

Next, the City asserts that *McLaughlin* "is not on point with the pending claim" and "is also not binding precedent." Post-Argument Br., p. 4. The City frames Wierbinski's argument as relying solely on the fact that he was on-duty and in uniform at the time he was injured, a contention, it argues, *McLaughlin* does not support. Post-Argument Br., p. 4. *McLaughlin* does, indeed, reject the proposition that an officer's on-duty status, alone, is sufficient to entitle that officer to benefits under the Heart and Lung Act, 742 A.2d at 258 n.2, but this argument misapprehends the nature of Wierbinski's claims. Wierbinski's argument rests on the fact that he was not only on-duty, but on patrol, at the time of his injury. And even if Wierbinski is technically mistaken in his belief that he remained on patrol during his brief venture into Starbucks, that detour had ended by the time he fell on the ice while making his way back to the police cruiser, bringing the fact-pattern precisely within *McLaughlin*'s holding.

The City further contends that the lack of a field regulation expressly permitting the coffee run factually distinguishes this case from *McLaughlin*, but this is a distinction without a difference for a finding that a jaunt to Starbucks was regulation-permitted or not does not change the fact that it was completed by the time Wierbinski fell, and that he was walking to the police cruiser when he was injured, an action which, "of necessity," had to precede his reentry into the vehicle in order to continue or recommence his patrol. *Id.* at 259. Critically, *McLaughlin* found the fact that the trooper had finished eating his lunch to have "significance," not the field regulation itself. *Id.* The field regulation was merely evidence in support of the consequential fact that the suspension of duties was complete, at which point, the officer "was duty bound to return to his patrolling." *Id.*

While some language in the opinion, taken out of context, may appear to lend credence to the City's position, *see id.* at 258 n.2 ("Trooper McLauglin's returning to his patrol car, after he finished his lunch was pursuant to a police duty imposed upon him by FR 1–2.27[.]"), it is clear from the remainder of the analysis that the officer's duty to return to his patrol vehicle was implied from his general "obligation as a police officer to resume that patrol[,]" which itself was premised on the conclusion that the patrol was no longer suspended, as revealed by the regulation. *Id.* at 259.[10] Here Wierbinski too undoubtedly had a general obligation

[10] It appears that the express terms of the field regulation in *McLaughlin* only detailed how long the lunch suspension would last: "for such period of time as is reasonable or necessary and not to exceed thirty minutes." *McLaughlin*, 742 A.2d at 259.

to return to his patrol, assuming it was even suspended in the first place, which is precisely what he was attempting to do at the time he was injured.[11]

In the absence of a field regulation, other evidence could have been conceivably offered which would have led to the same factual finding, and thus, the same conclusion of law. Here, although there is no regulation speaking to the propriety of suspensions of patrol, the hearing examiner apparently found that Wierbinski had, in fact, finished any such suspension (if, indeed, he found any suspension occurred at all); otherwise, his focus would have been on *Mitchell*, not *McLaughlin*, and the hearing examiner would have had no need to recast the holding in *McLaughlin* the way he did. Thus, the hearing examiner's own factual findings belie the City's attempts to distinguish *McLaughlin* on the absence of a field regulation.[12]

The Court need not belabor an analysis of the City's ancillary argument that *McLaughlin* is not binding precedent. It is well-settled that a published opinion of the Commonwealth Court remains binding on subsequent three-judge panels and lower courts unless there is intervening precedent compelling a different result. *DeGrossi v. Commonwealth, Department of Transportation, Bureau of Driver Licensing*, 174 A.3d 1187, 1191 (Pa. Cmwlth. 2017). The City offers no such intervening precedent and the Court is aware of none. Contrary to the City's assertion, the Commonwealth Court continues to cite favorably to *McLaughlin*. *See, e.g., Justice*, 829 A.2d 415, 416; *Pennsylvania State Corrections Officers Association*, 235 A.3d 426, 431.

At oral argument the City further maintained that the hearing examiner "did not rely on *McLaughlin per se*," but actually relied on cases like *Lee*, *Allen*, and *Colyer*. Although the hearing examiner did discuss *Lee*, *Allen*, and *Colyer*, believing that *McLaughlin* was "not in accord" with those earlier cases, he ultimately relied upon *McLaughlin* (or more accurately, his revised version of it) to resolve the case, as the last page of his decision makes clear. *See* Decision, p. 9 ("the *McLaughlin* case and the case sub judice are very similar to one another … neither sustained injuries in the performance of their duties 'precisely as police officers.' … McLaughlin was injured after he stopped for lunch, and Wierbinski was injured after he stopped for a cup of coffee. Accordingly, the decision of the City of Erie is hereby AFFIRMED[.]"). Moreover, had he not read those earlier precedents without the gloss of later cases like *McLaughlin*, then he would have erred for a different reason since "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).

In a similar vein, the City argues that *Lee* and *Allen* are more analogous to the facts of this case. But *Lee* and *Allen* dealt with injuries sustained by officers who were not yet on duty, and so, have little bearing on a case such as this, as *McLaughlin* noted. The City (and the hearing examiner) may well draw an analogy with the present scenario to the fact that "an off-duty officer's obligation to show up on time to work and be properly prepared to undertake one's tasks is not a duty arising from their capacity as police officers but rather a general duty of every employee and, as such, not within the meaning of the statutory

[11] In light of Wierbinski's uncontroverted testimony that he remained on patrol at all times, the absence of a regulation suspending patrol in these circumstances actually hurts the City's position.

[12] Even if the City were correct in its claim that *McLaughlin* is distinguishable, this would result not in an affirmance, but a remand for the hearing examiner to clarify whether he finds that Wierbinski was on a personal mission pursuant to *Mitchell*.

language of the Act." *McLaughlin*, 742 A.2d at 258. But *McLaughlin* rejected this argument, and understandably so, since a duty to return to a vehicle to begin a patrol is not "a general duty of every employee[.]" *Id.*

Moving on, the City argues that Wierbinski "was injured on a 'personal mission,' i.e., the purchase of a latte, for his own pleasure." Post-Argument Br., p. 4. As such, it argues *Mitchell* should control rather than *McLaughlin*. But just as in *McLaughlin*, the City's reliance on Mitchell is "unfounded" as Wierbinski "was duty bound to return to his car and resume patrolling" if he was even off patrol at all. *McLaughlin*, 742 A.2d at 259-60. Moreover, there are insufficient factual findings from the hearing examiner below to definitively rely on *Mitchell* as it is unclear whether he found Wierbinski was on such a personal mission.

The City also finds support in *Justice v. Department of Public Welfare*. There the Commonwealth Court "decline[d] the invitation" to follow *McLaughlin* because "McLaughlin was injured while on duty, returning to his official vehicle after completing a regulation-permitted mid-shift meal." *Justice*, 829 A.2d at 418. The City places great emphasis on the "regulation-permitted mid-shift meal" distinction, Post-Argument Br., p. 6, but the City omits the next sentence of the opinion, which clarifies that the distinguishing feature is that "[c]laimant here was not yet on duty." *Justice*, 829 A.2d at 418. This is confirmed by the nature of the preceding paragraph as well, discussing *Allen* and the relevance of an officer's "on-duty/off-duty status" to the analysis. *Id.* at 417-18. *Justice* thus comports with the distinction made in *McLaughlin* of the *Allen* and *Lee* line of cases, of which *Justice* is a continuation. As such, *Justice* does not support the City's position.

Putting case law aside, the City suggests that reading the Heart and Lung Act too broadly would render the Workers' Compensation Act superfluous as it applies to firefighting and police work. Not so. Given the Workers' Compensation Act's more liberal construction and the distinctive inquiries applicable under each statute, it is doubtful that an analysis regarding whether a particular injury arose in the course of employment or arose in the performance of one's duties will always yield the same result, although there may well be substantial overlap.[13]

While it is true that "[l]aws which apply to the same persons or things or the same class of persons or things are in *pari materia* and, as such, should be read together where reasonably possible[,]" *DeForte v. Borough of Worthington*, 212 A.3d 1018, 1022 (Pa. 2019); *see also* 1 Pa.C.S. § 1932 (directing that statutes in *pari materia* shall be read together as one statute), it is not apparent that the relevant class of persons are the same in each Act. Although both statutes could be said to apply broadly to workers or workers injured on-the-job, the Heart and Lung Act applies only to enumerated classes of individuals. *See Jones v. County of Washington*, 725 A.2d 255, 256 (Pa. Cmwlth. 1999). And even if the applicable standards

[13] For instance, under the Workers' Compensation Act, "pertinent case law establishes that, typically, a claimant who is at lunch and sustains an injury off of the employer's premises is not acting in furtherance of the employer's business" while "employees who remain on an employer's premises for their lunch break and sustain an injury are generally considered to be in furtherance of the employer's business, unless the activity they are engaged in was so wholly foreign to their employment." *Smith*, 15 A.3d at 953. Yet the analysis in *McLaughlin* properly focused on whether the claimant's patrol — the duty to which he had been assigned — was suspended because "the site of the injury is completely irrelevant when determining an officer's entitlement to Heart and Lung Act benefits;" *Allen*, 678 A.2d at 439, instead, the relevant question is whether the claimant was "engaging in an obligatory task, conduct, service, or function that arose from his or her position as a" police officer when the injury occurred. *McLaughlin*, 742, A.2d at 257.

under the two statutes will lead to the same result in most cases, total coverage under the Heart and Lung Act necessarily will not subsume total coverage under the Workers' Compensation Act as the Heart and Lung Act only compensates for temporary disability, and so, "was not intended to displace other forms of disability compensation such as [Workers'] Compensation benefits and payments under the Occupational Disease Act, which cover more prolonged or permanent disabilities." *Cunningham*, 507 A.2d at 43-44.[14] The two Acts therefore retain their distinctive purposes within Pennsylvania's comprehensive statutory scheme for dealing with occupational injury and disease.

The City further cautioned at oral argument that the holding in *McLaughlin* is "unorthodox" in light of the "spirit" of the Heart and Lung Act and represents a "rogue case." It maintains that the spirit of the Heart and Lung Act necessitates that the phrase "in the performance of his duties" be interpreted to mean duties performed as a "community service" and accompanied by a "heightened chance of being injured." It warns as a matter of policy that ruling in Wierbinski's favor would result in a "broad finding across all factual scenarios" that would "eradicate the need for a workers' compensation option for uniformed service." Such a result, it contends, was certainly not the intention of the General Assembly in enacting the Heart and Lung Act.

From the outset, the Court observes that "[w]hen 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). Even so, assuming the phrase "injured in the performance of his duties" is ambiguous as a matter of law, this Court does not interpret the phrase on a blank slate, but is bound by principles of *stare decisis* to apply the holding in *McLaughlin*, which both this Court and the hearing examiner agree is factually analogous to the case at bar. *See* Section III(B), *supra*. Principles of *stare decisis* apply with particular force here given *McLaughlin* interprets a statute, and critics of the ruling can take their objections to Harrisburg where the General Assembly can correct any mistake that it sees. *Kimble*, 576 U.S. at 456. As such, the policy considerations outlined by the City are better addressed to the legislative, not the judicial branch. And while the *en banc* Commonwealth Court or our Supreme Court remain free to revisit *McLaughlin*, this Court most certainly is not. *Randolph*, 718 A.2d at 1245.

Moreover, is not apparent that the parade of horribles identified by the City will come to pass if this Court rules in Wierbinski's favor. After all, *McLaughlin* has been the law in this Commonwealth for over 22 years, and the sky has not yet fallen on police departments faced with Heart and Lung Act claims. Nor is it a particularly surprising result if a majority of Heart and Lung Act claims prove meritorious, as one would expect on-duty officers to spend a majority of their time performing their duties, duties which, at all times, remain inherently dangerous.

The City would read the operative phrase to encompass only duties that are especially dangerous or life-threatening — for instance, the actual pursuit and apprehension of a suspect — as opposed to mere patrol for suspicious behavior. As the Commonwealth Court concluded

[14] The same is also true of Act 534, applicable to "state workers in positions at institutions considered more dangerous than normal[,]" such as state prisons or mental hospitals. *Lynch v. Commonwealth*, --- A.3d ----, 2022 WL 1274783, *4 (Pa. Cmwlth. 2022) (noting "[s]ignificantly, Act 534 benefits are intended to supplement, not replace, workers' compensation and occupational disease benefits.") (citation internal quotation marks omitted). "Act 534 is similar in "purpose and construction" to the Heart and Lung Act. *Id.* at *5.

in *Colyer*, however, the City's "interpretation assumes language not contained in the statute, contradicting the requirement that this statute be strictly construed. Such an interpretation would lead to unjust results, eliminating countless members whose assignments, whether permanent or temporary, are not innately hazardous, despite the plain language of the Act[,]" which contains no qualification of the sort. *Colyer*, 644 A.2d at 234. "Surely the [City] would not have us hold that only assignments typically deemed hazardous are essential to the community." *Id.* If it would, then it presumably takes umbrage not only with *McLaughlin*, but with *Colyer* as well.[15]

Doubtless, our Supreme Court has described the purpose of the Heart and Lung Act as "to make more attractive to competent persons service in the police and fire departments of our municipalities" in light of the "hazardous" nature of the duties they perform, for "[t]he prospect of uninterrupted income during periods of disability well may attract qualified persons to these vocations[.]" *Kurtz v. City of Erie*, 133 A.2d 172, 177 (Pa. 1957) (citation omitted). However, "[t]he statute's plain language generally provides the best indication of legislative intent[,]" *A.S. v. Pennsylvania State Police*, 143 A.3d 896, 903 (Pa. 2016) (citation omitted), and the language in the Heart and Lung Act provides benefits for covered employees if they are injured in the performance of their duties, not if they are "injured in the performance of hazardous duties.[16] In that sense, *Colyer* correctly focused not on some generalized notion

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[15] Despite *Colyer*'s lack of support (to put it mildly) for the City's position, at oral argument the City argued that the Commonwealth Court's holding in *Colyer* is actually in accord with its more narrow reading of the Heart and Lung Act because, although the ethics investigation against the claimant in *Colyer* — which the Court found he was duty-bound to participate in, and which ultimately led to his diagnosis of major depression — does not, in the City's view, qualify as an injury in performance of one's duty, the investigation was nonetheless predicated upon what it considers to be the performance of a duty, namely, the earlier investigation of a murder (albeit one in which the claimant allegedly tampered with evidence). It follows, or so the City contends, that the Commonwealth Court was correct to conclude that the claimant in *Colyer* was entitled to Heart and Lung benefits, although for the wrong reasons. The City further claims the present case is factually distinguishable from *Colyer* in this regard because Wierbinski's stop at the coffee shop was not predicated upon the performance of his duties, such as responding to a call at the Starbucks. While the holding of *Colyer* may be squared with the City's position, it certainly does not comport with its rationale, which was premised on the reasoning that the claimant had a "duty to participate in the investigation" itself, not the earlier murder investigation. *Colyer*, 644 A.2d at 233.

There is a strong jurisprudential basis for the proposition that this Court is not bound by the rationale, but merely by the conclusion or holding of a precedential case. *See Pennsylvania Independent Oil & Gas Association v. Commonwealth, Department of Environmental Protection*, 146 A.3d 820, 827 (Pa. Cmwlth. 2016) (en banc) (Brobson, J.) ("Pennsylvania generally follows the rule of *stare decisis*, under which "a conclusion reached in one matter should be applied to future substantially similar matters … *Stare decisis*, the decision of the court, forms the precedent; it is the court's judgment that controls … It follows that, although the *rationes decidendi* are extremely important in determining how courts arrive at their decisions, they should not be confused with actual precedents, *qua* precedents. We follow the doctrine of *stare decisis*, not *stare rationes decidendi*.") (quoting RUGGERO J. ALDISERT, *The Judicial Process: Readings, Materials and Cases* 818 (1976)) (other citation omitted; emphasis in original). This position is not without its detractors. *See Ramos*, 140 S.Ct. at 1404 (Opinion of Gorsuch, J., joined Ginsburg J. and Breyer, J.) (It is usually a judicial decision's reasoning — its *ratio decidendi* — that allows it to have life and effect in the disposition of future cases."); F. SCHAUER, *Precedent, in Routledge Companion to Philosophy of Law* 129 (A. Marmor ed. 2012) ("[T]he traditional answer to the question of what is a precedent is that subsequent cases falling within the *ratio decidendi* — or rationale — of the precedent case are controlled by that case").

Even assuming that this Court is bound only by the holding, and not the rationale of *Colyer*, the Court finds its analysis concerning the plain language of the Heart and Lung Act to be persuasive, and in any event, this Court is nevertheless bound by the Commonwealth Court's holding in *McLaughlin*, which cannot be reconciled with the City's position here today.

[16] The City's argument would have more persuasive force in construing the other provision of the Heart and Lung Act not at issue here, pertaining to "diseases of the heart and tuberculosis … caused by extreme overexertion in *times of stress or danger* or by exposure to heat, smoke, fumes or gases, arising directly out of the employment." 53 P.S. § 637(b) (emphasis added). Where, as here, the General Assembly "includes particular language in one section of a statute but omits it in another section of the same Act, we generally take the choice to be deliberate." *Badgerow v. Walters*, 142 S.Ct. 1310, 1318 (2022); *see also Doe v. Franklin County*, 174 A.3d 593, 608 (Pa. 2017); *Thompson v. Thompson*, 23 A.3d 1272 (Pa. 2020) ("although one is admonished to listen attentively to what a statute says; one must also listen attentively to what it does not say.") (citation and internal quotation marks omitted).

of legislative intent, but on the specific language before it, and in hard cases, "[w]hen 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, and all persons are entitled to its benefit." *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1737 (2020). Thus, the City's reliance on legislative purpose cannot hold the weight it would place on it.

In the end, because the hearing examiner committed an error of law, an error which proved to be dispositive to his analysis, this Court need not affirm his decision pursuant to Section 754(b) of the Local Agency Law, nor would it be appropriate to do so. The City's counterarguments cannot change this inescapable conclusion.

D. Disposition on Appeal

In the event that an agency adjudication is not affirmed, Section 754(b) directs that "the court may enter any order authorized by 42 Pa.C.S. § 706." 2 Pa.C.S. § 754. Section 706 of the Judicial Code, in turn, states that "[a]n appellate court may affirm, modify, vacate, set aside or reverse any order brought before it for review, and may remand the matter and direct the entry of such appropriate order, or require such further proceedings to be had as may be just under the circumstances." 42 Pa.C.S. § 706. Section 701 of the Judicial Code further clarifies that the provision applies "to all courts of this Commonwealth, including the courts of common pleas when sitting as appellate courts." 42 Pa.C.S. § 701.

Here, the Court finds error in one of the hearing examiner's conclusions of law, that is, his "inference on a question of law, made as a result of a factual showing[.]" Black's Law Dictionary (11th ed. 2019). The Commonwealth Court has held "[n]owhere in Section 754 is the reviewing court given general authority to make its own findings of fact and conclusions of law when the local agency has developed a full and complete record but omitted making its findings of fact and conclusions of law." *Society Created to Reduce Urban Blight v. Zoning Board of Adjustment, City of Philadelphia,* 804 A.2d 147, 150 (Pa. Cmwlth. 2002) (emphasis added). If the dispositive question had been whether Wierbinski was on a "personal mission" pursuant to *Mitchell* when he entered the Starbucks, then there would be stronger case for remand, for although the evidence appears uncontroverted that Wierbinski was on patrol at the time, it is unclear from the hearing examiner's written Decision if he indeed drew such a conclusion, whether supported by substantial evidence or not.

In any event, regardless of his findings and conclusions on that point, he unmistakably found that "[b]ased on Officer Wierbinski's testimony, and in the absence of any evidence to the contrary, Officer Wierbinski was 'on duty' as a patrolman at the time of his injury" and furthermore, that Officer Wierbinski was injured "[a]fter exiting the coffee shop and while walking across the sidewalk toward his cruiser[.]" Decision, pp. 1-2. He then concluded that "the *McLaughlin* case and the case sub judice are very similar to one another." Decision, p. 9. As such, he did not omit making findings of fact and conclusions of law concerning the *McLaughlin* scenario, *i.e.*, an on-duty officer returning to his patrol vehicle in order to recommence his patrol; he merely refused to apply the holding in *McLaughlin* to the analogous facts that he found, resulting in an erroneous conclusion as to the law.

Under such circumstances the Court need not remand to the hearing examiner to engage in a meaningless exercise of applying the correct holding to facts he already found. The facts have already been determined. The holding in *McLaughlin* is clear, and there is but one conclusion that may be reasonably drawn applying *McLaughlin* to these facts: Wierbinski was

injured in the performance of his duties because he was on-duty, his activity at the Starbucks was complete, and he, by necessity, needed to return to his police cruiser in order to continue or recommence his patrol, whatever the case may be. The only reasonable conclusion of law that can be drawn in light of *McLaughlin* is that Wierbinski is entitled to compensation under the Heart and Lung Act for the temporary injuries he sustained on January 27, 2021. As such, this Court now reverses the contrary decision of the hearing examiner.

Nor do the parties suggest that there remain any unresolved factual issues relating to the amount of benefits to which Wierbinski is entitled under the Heart and Lung Act that would require remand to the hearing examiner for further proceedings consistent with this Opinion. *See Colyer*, 644 A.2d 234 (holding remand to Commissioner was necessary to determine amount of award due since the agency's factual findings on this issue were not supported by substantial evidence). Wierbinski's salary does not appear to be in dispute, and uncontroverted evidence was presented that Wierbinski did not "finish the day" on January 27, 2021, that thereafter, he was "approximately off seven days[,]" returning to light duty on February 4, 2021, and that his last day on the job prior to surgery was March 23, 2021. Tr., pp. 28-29. The parties also agree that he returned to work on June 21, 2021. Pet.'s Post-Argument Br. in Supp. of Granting Pet. for Review, p. 7; Post-Argument Brief for the City of Erie, p. 2. Determining Wierbinski's benefit amount thus involves a simple mathematical calculation by the City of Erie. Remand for appropriate factual findings is therefore unnecessary.

IV. CONCLUSION

This appeal highlights several contradistinctions: contrasting laws, contrasting interpretations of the law, and contrasting applications of the law to the facts of this case. One distinction that cannot be drawn, however, is to the facts of the Commonwealth Court's prior precedential decision in *McLaughlin*, as the hearing examiner below correctly observed. That ruling held that an on-duty patrolman engages in an obligatory task, conduct, service, or function arising from his position as a police officer — that is, he performs his duties precisely as a police officer — when he walks to his patrol car to resume his patrol because he, of necessity, must enter the vehicle in order to do so. Because the facts in this case and in *McLaughlin* "are substantially the same," the hearing examiner was "duty-bound" to apply that holding here. *In re Angeles Roca*, 173 A.3d at 1187; *Walnut Street Associates*, 20 A.3d at 480. But since *McLaughlin*'s rationale contradicted the hearing examiner's own understanding of the law, he instead chose to rewrite *McLaughlin* rather than apply it. In doing so, he contravened basic principles of *stare decisis*, and therefore, committed an error of law in denying Wierbinski benefits under the Heart and Lung Act. The decision of the hearing examiner is accordingly reversed.

It is so ordered.

BY THE COURT
/s/ **MARSHALL J. PICCININI, Judge**

ANGELA HUSTED and JON HUSTED, Plaintiff
v.
JOSEPH J. DOMBKOWSKI, Defendant

JON HUSTED, Plaintiff
v.
JOSEPH J. DOMBKOWSKI, Defendant

CIVIL PROCEDURE / PLEADINGS / COMPLAINT / AMENDMENT

A motion to amend a pleading is addressed to the sound discretion of the trial court. In exercising its discretion, a trial court should liberally allow amendments so as to permit cases to be decided on the merits. However, the discretion is not unfettered; an amendment should not be permitted where it will present an entirely new cause of action or unfairly surprise or prejudice the opposing party

CIVIL PROCEDURE / PLEADINGS / COMPLAINT / AMENDMENT

Pennsylvania Rule of Civil Procedure 1033(a) permits amendments to the pleadings at any time, even if the amendment gives rise to a new cause of action or defense. However, a proposed amendment may be denied if would unfairly prejudice the opposing party or create a new cause of action after the expiration of the statute of limitations.

CIVIL PROCEDURE / PLEADINGS / COMPLAINT / AMENDMENT / PUNITIVE DAMAGES

A demand for punitive damages is incidental to the underlying claim and therefore the motion to amend complaint does not seek to add a new claim after the statute of limitations has run.

DAMAGES / PUNITIVE / SUFFICIENCY OF PLEADING

The complaint alleges that Defendant negligently operated his vehicle in several ways, including operating it when he knew he was sleep-deprived and ultimately falling asleep at the wheel. Therefore, the complaint did assert facts that the Defendant knew (or should have known) that the fatigue he was experiencing that day would cause him to fall asleep and thus render him "unfit to operate a motor vehicle." A jury could infer that the Defendant's actions in choosing to drive when he knew that he was tired and sleep-deprived rose to the level of reckless indifference which would allow jurors to award punitive damages.

CIVIL PROCEDURE / PLEADINGS / COMPLAINT / AMENDMENT

Nothing about the nature or the timing of the amendment to include a claim for punitive damages prejudices the Defendant or his ability to present a defense. Defendant has been aware of Plaintiffs' claims that Defendant was negligent for falling asleep while driving and deciding to operate a motor vehicle while he was tired. The motion to amend was made well in advance of trial, and Defendant will have sufficient notice and time to prepare.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW
No.: Consolidated at 11966 - 2019

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW
No.: Consolidated at 11966 - 2019

Appearances: Craig A. Markham, Esq., Attorney for Plaintiffs
Joanna K. Budde, Esq., Attorney for Defendant

OPINION

Ridge, J., June 9, 2022

This matter comes before the Court on Plaintiffs' Motion to Amend Complaint to seek punitive damages against Defendant Joseph J. Dombkowski. After considering the briefs and oral arguments for all parties, the Court will grant the Motion for the reasons that follow.

I. FACTUAL AND PROCEDURAL HISTORY

This personal injury action arises out of a motor vehicle accident that occurred on August 9, 2017. It is alleged that Defendant Joseph J. Dombkowski (Dombkowski) was driving his vehicle westbound on West 38th Street at approximately 4:15 p.m. when he swerved across the center line and collided with Plaintiffs' eastbound vehicle, causing it to roll over. Plaintiffs Angela Husted and Jon Husted (her son) were the occupants of the Husted vehicle and allegedly suffered injuries as result of the incident. Plaintiffs initiated these actions by writs of summons on July 23, 2019 and August 6, 2019 and filed their Complaint on February 11, 2020.[1] The Complaint alleges that Defendant was negligent, among other reasons, for falling asleep while operating his motor vehicle and in [o]perating his motor vehicle while suffering from fatigue, sleep deprivation or other conditions which he knew or should have known would cause him to be unfit to operate a motor vehicle." Complaint at ¶ 10(g). Plaintiffs Angela Husted and Jon Husted (her son) brought claims against Dombkowski to recover for damages they allegedly incurred as a result of the motor vehicle accident. Jon Husted (the husband of Angela Husted) brought a claim against Dombkowski for loss of consortium.

The Plaintiffs filed this Motion to Amend Complaint and Brief in Support seeking to pursue punitive damages based upon facts adduced during discovery. Defendant filed a Brief in Opposition to the Motion. Oral Argument was heard on April 28, 2022, at which time all parties were represented by counsel.

II. STANDARD OF REVIEW

A motion to amend a pleading is addressed to the sound discretion of the trial court. In exercising its discretion, a trial court should liberally allow amendments so as to permit cases to be decided on the merits. However, the discretion is not unfettered; an amendment should not be permitted where it will present an entirely new cause of action or unfairly surprise or

[1] Plaintiffs Angela Husted and Jon Husted, husband and wife, initiated their suit on July 23, 2019 at Erie County Docket No. 11966-2019. The suit brought by Jon Husted, their adult son, was filed at Erie County Docket No. 12106-2019 on August 6, 2019. By agreement of all parties, the two cases were consolidated on January 28, 2020. A single Complaint raising all of the Plaintiffs' claims was filed on February 11, 2020.

prejudice the opposing party. *See Sejpal v. Corson, Mitchell, Tomhave & McKinley, M.D.'S., Inc.*, 665 A.2d 1198 (Pa. Super. 1995).

III. DISCUSSION

Pennsylvania Rule of Civil Procedure 1033(a) permits amendments to the pleadings at any time, even if the amendment gives rise to a new cause of action or defense. However, a proposed amendment may be denied if would unfairly prejudice the opposing party or create a new cause of action after the expiration of the statute of limitations.

> A new cause of action does not exist if plaintiff's amendment merely adds to or amplifies the original complaint or if the original complaint states a cause of action showing that the plaintiff has a legal right to recover what is claimed in the subsequent complaint. A new cause of action does arise, however, if the amendment proposes a different theory or a different kind of negligence than the one previously raised or if the operative facts supporting the claim are changed.

Daley v. John Wanamaker, Inc., 464 A.2d 355, 361 (Pa. Super. 1983)(citations omitted).

In this case, Plaintiffs are seeking to add a demand for punitive damages based upon testimony given by Defendant Dombkowski at his deposition. In the case of *Daley v. John Wanamaker, Inc., supra*, the plaintiff in an action for trespass, assault and battery, defamation, and false imprisonment moved to amend her complaint to add a claim for punitive damages. Her request was made shortly before trial and more than one year after the statute of limitations had expired. The court granted the motion, noting that the demand for punitive damages was incidental to the underlying claim and therefore did not seek to add a new claim after the statute of limitations had run.

A similar situation is presented here. Plaintiffs' Complaint alleges that Defendant negligently operated his vehicle in several ways, including operating it when he knew he was sleep-deprived and ultimately falling asleep at the wheel. Therefore, the Complaint did assert facts that the Defendant knew (or should have known) that the fatigue he was experiencing that day would cause him to fall asleep and thus render him "unfit to operate a motor vehicle." Complaint at ¶ 10(g).

At his deposition, Defendant Dombkowski testified that he had been out late the night before the accident, and he had only slept for two to four hours before attending a day-long high school athletic event. *See* Plaintiffs' Mot. to Amend Cmplt., Ex. A, Depo. of Joseph J. Dombkowski, Nov. 10, 2021 at 10 & 13. Defendant further testified that he dosed off while driving and woke up when he collided with the other vehicle. *See id.* at 17 -18. Additionally, Dombkowski stated that, "Well, when I was driving on 38th, I started feeling tired. And I just — like I just dosed off while I was driving." *Id.* at 15.

It is within the Court's discretion to allow amendments to the pleadings. The Court does not find that the statute of limitations precludes this amendment. The proposed amendment does not add a new claim or a new theory; it simply seeks to recover for punitive damages based upon the actions alleged in the Complaint. A jury could infer that the Defendant's actions in choosing to drive when he knew that he was tired and sleep-deprived rose to the level of reckless indifference which would allow jurors to award punitive damages.

Additionally, nothing about the nature or the timing of the amendment prejudices the

Defendant or his ability to present a defense. Defendant has been aware of Plaintiffs' claims that Defendant was negligent for falling asleep while driving and deciding to operate a motor vehicle while he was tired. This Motion was made well in advance of trial, and Defendant will have sufficient notice and time to prepare.

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs' Motion to Amend Complaint is granted. An appropriate Order follows.

ORDER

AND NOW to-wit, this 9th day of June 2022, upon consideration of Plaintiffs' Motion to Amend Complaint, and for the reasons set forth in the accompanying Opinion, it is hereby ORDERED, ADJUDGED, and DECREED that the Motion to Amend Complaint is GRANTED. Plaintiffs are permitted to amend their Complaint to seek recovery of punitive damages against Defendant.

BY THE COURT:
/s/ **David Ridge, Judge**

ROBERT WEISENBACH
v.
PROJECT VERITAS, JAMES O'KEEFE, III, and RICHARD ALEXANDER HOPKINS

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS / JURISDICTION

When preliminary objections raise a question of subject matter jurisdiction, the trial court's function is to determine whether the law will bar recovery due to a lack of subject matter jurisdiction.

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS / JURISDICTION

A challenge to subject matter jurisdiction is of the sort that cannot be determined from facts of record; instead, the party raising the objection bears the burden to demonstrate the absence of jurisdiction, and only upon the presentation of evidence supporting the jurisdictional challenge does the burden shift to the party asserting jurisdiction.

JURISDICTION / STATUTORY PROVISIONS

The Federal Tort Claims Act, designed primarily to remove the sovereign immunity of the United States from suits in tort, gives federal district courts exclusive jurisdiction over claims against the United States for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of federal employees acting within the scope of their employment.

JURISDICTION / STATUTORY PROVISIONS

Under the Westfall Act, which grants federal employees absolute immunity from claims arising out of acts they undertake in the course of their official duties, when a federal employee is sued for wrongful or negligent conduct, the Attorney General is empowered to certify that the employee was acting within the scope of his office or employment when the incident occurred, at which time the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee.

AGENCY / EMPLOYMENT

Individuals act within the scope of their employment when they engage in tasks which are clearly incidental to their employer's business, meaning they are subordinate to or pertinent to accomplishing the ultimate objective of their employer, even if those acts are not specifically authorized by the employer; however, employees who embark upon personal expeditions to accomplish purely personal errands do not act within the scope of their employment, even if technically on-duty at the time.

TORTS / DEFAMATION

Defamation is a communication which tends to harm an individual's reputation so as to lower him or her in the estimation of the community or deter third persons from associating or dealing with him or her.

TORTS / INTENTIONAL TORTS

The tort of concerted tortious activity is essentially a civil aiding and abetting action under which one is liable for harm resulting to a third person from the tortious activity of another if he either: (1) does a tortious act in concert with the other or pursuant to a common

design with him; (2) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself; or (3) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS

In evaluating the legal sufficiency of a complaint, the court must accept as true all well-pleaded, material, and relevant facts alleged in the pleading and every inference that is fairly deducible from those facts.

CIVIL PROCEDURE / PLEADINGS / PRELIMINARY OBJECTIONS / TORTS /DEFAMATION

In a defamation action, when ruling on preliminary objections in the nature of a demurrer, the question is whether a non-defamatory interpretation is the only reasonable one.

CONSTITUTIONAL LAW / TORTS / DEFAMATION

The First Amendment to the United States Constitution prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

CONSTITUTIONAL LAW / TORTS / DEFAMATION

Actual malice does not mean ill will or malice in the ordinary sense of the term, and so, cannot be shown simply by virtue of the fact a media defendant published material to increase its profits, or failed to investigate before publishing, even when a reasonably prudent person would have done so; rather, actual malice requires at a minimum that statements be made with a reckless disregard for the truth, that is, the defendant must have made the false publication with a high degree of awareness of probable falsity, or must have entertained serious doubts as to the truth of his publication.

CONSTITUTIONAL LAW / TORTS / DEFAMATION / EVIDENCE

While even an extreme departure from professional standards, without more, will not support a finding of actual malice, a plaintiff is nonetheless entitled to prove a defendant's state of mind through circumstantial evidence, and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry.

CONSTITUTIONAL LAW / TORTS / DEFAMATION / PLEADINGS

Factual allegations, taken together, may be sufficiently plausible to support an inference of actual malice, even if certain allegations, standing alone, would not.

CONSTITUTIONAL LAW / TORTS / DEFAMATION / EVIDENCE / PLEADINGS

While a court is not bound to accept as true averments in a complaint which are in conflict with documentary exhibits attached to it, an evaluation of exhibits or attachments which are testimonial in nature would inherently involve an assessment of the credibility of the statements included therein, and therefore, is a matter properly left to the finder of fact.

CONSTITUTIONAL LAW / TORTS / DEFAMATION / PLEADINGS / PRELIMINARY OBJECTIONS

While courts must ensure that only truly meritorious defamation lawsuits are allowed to proceed, lest exposure to monetary liability chill the exercise of political debate that is the foundation of our constitutional republic, courts must also be mindful of the deferential standard of review through which they must assess whether particular claims appear meritorious on demurrer.

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
TRIAL DIVISION – CIVIL
No. 10819 of 2021

Appearances: David Kennedy Houck, Esq., Attorney for Plaintiff, Robert Weisenbach
John Langford, Esq., *pro hac vice*, Attorney for Plaintiff, Robert Weisenbach
Linda A. Kerns, Esq., Attorney for Defendants, Project Veritas and James O'Keefe, III
Benjamin T. Barr, Esq., *pro hac vice*, Attorney for Defendants, Project Veritas and James O'Keefe, III
Matthew L. Minsky, Esq., Attorney for Defendant, Richard Alexander Hopkins

OPINION OF THE COURT

Piccinini, J., July 15, 2022

Project Veritas is a non-profit media organization founded by James O'Keefe, III. On November 5, 2020, just two days after the November 3, 2020, presidential election, it published a story claiming to have uncovered a voter fraud scheme orchestrated out of the United States Postal Service General Mail Facility in Erie, Pennsylvania. Specifically, the article and accompanying video alleged that Erie Postmaster, Robert Weisenbach, directed the backdating of mail-in ballots in order to sway the outcome of the presidential election in favor of candidate Joseph Biden. Amended Complaint (Am. Compl.), ¶ 1. The report relied upon an anonymous whistleblower, later revealed to be Richard Hopkins, a postal employee who claimed he overhead a conversation between Weisenbach and another supervisor. Hopkins stated that Weisenbach's motive for backdating mail-in ballots was that he was a "Trump hater," although, in reality, Weisenbach was a supporter of President Donald Trump and voted for him on election day. Am. Compl. ¶¶ 58, 70.

In the days that followed, Project Veritas posted two more video interviews with Hopkins where he repeated his false claims, the latter after it was reported by news outlets that Hopkins had recanted his earlier allegations when confronted by postal inspectors, although Hopkins later claimed that recantation was coerced. The story soon gained traction among those amplifying claims of voter fraud, including President Trump himself. Am. Compl. ¶ 6. Weisenbach was forced to leave Erie for a time after personal details, including his address, were discovered and disseminated by readers of the Project Veritas stories. Project Veritas nonetheless maintains that the stories were investigated and published consistent with standards of "professional, ethical and responsible journalism." Oral Argument Transcript (Tr.), p. 48.

Weisenbach disagrees. He brings this lawsuit against Hopkins, Project Veritas, and O'Keefe, alleging claims of defamation and concerted tortious activity. Defendants now seek to dismiss the claims before discovery has even begun by filing Preliminary Objections to Weisenbach's First Amended Complaint. That parties frame the action in broad terms as implicating competing ideals lying at the heart of our republic. Weisenbach argues that the stories were "not investigative journalism[,]" but rather "targeted character assassination aimed at undermining faith in the United States Postal Service and the results of the 2020 Presidential election" having "no place in our country." Am. Compl. ¶¶ 10-11. Defendants contend that this case raises fundamental concerns regarding freedom of the press, and that,

pursuant to the First Amendment to the United States Constitution, we rely not on judges or juries to root out pernicious speech, but on competition in an uninhibited marketplace of ideas where the truth will ultimately prevail. Tr, p. 45.

Whatever the merits of these lofty assertions, the Court's task today in reviewing Defendants' Preliminary Objections is much more modest. First, the Court must decide whether it lacks subject matter jurisdiction over the claims against Hopkins in light of the Federal Tort Claims Act, which vests federal courts with exclusive jurisdiction over actions brought against federal employees who cause injury while acting within the scope of their employment. Second, in assessing Defendants' Objections in the nature of demurrers, the Court must simply determine "whether, on the facts averred, the law says with certainty that no recovery is possible." *Bruno v. Erie Ins. Co.*, 106 A.3d 48, 56 (Pa. 2014). For the reasons that follow, the Court answers both of those questions in the negative and consequently overrules Defendants' Preliminary Objections to the First Amended Complaint.

I. BACKGROUND

Because this matter comes to the Court on preliminary objections in the nature of demurrers,[1] the alleged facts are recounted simply as they appear in Plaintiff's First Amended Complaint. *Connor v. Archdiocese of Philadelphia*, 975 A.2d 1084, 1085-86 (Pa. 2009). In 2019, Pennsylvania enacted legislation commonly known as Act 77, allowing, for the first time in the Commonwealth's history, no-excuse mail-in voting for all qualified voters. Am. Compl. ¶ 20. Because Democratic voters are statistically more likely to utilize mail-in voting procedures than their Republican counterparts, political analysts have identified a phenomenon dubbed the "Red Mirage", whereby early vote counts may appear inaccurately skewed toward Republican candidates before a sufficient number of mail-in ballots are counted. Am. Compl. ¶ 27. In the lead-up to the 2020 presidential election, some commentators predicted just such a "Red Mirage" would occur in those states that permit mail-in voting, like Pennsylvania, leading to a scenario in which President Trump would obtain an early lead in the polls in those states, declare victory, subsequently claim "something sinister" was afoot if votes began to inure to candidate Biden's favor, and ultimately attempt to disenfranchise those voters who had utilized mail-in ballots in order to keep the White House. Am. Compl. ¶¶ 27-28 (citing Tom McCarthy, *'Red Mirage': The 'Insidious' Scenario if Trump Declares an Early Victory*, Guardian (Oct. 30, 2020)). Project Veritas was keenly aware of this possibility as well. As early as 2019, in an effort codenamed "Diamond Dog," it sought to erode confidence in mail-in voting systems by publishing stories claiming to document instances of illegal "ballot harvesting," that is, the unauthorized collection of mail-in ballots from other voters. Am. Compl. ¶¶ 24-25.[2]

As it happens, the Amended Complaint alleges that on the night of the 2020 presidential election a "Red Mirage" did manifest, with President Trump finding himself up by 700,000 votes on the evening of November 3rd, but running behind candidate Biden in the vote count as the hours and days wore on. Am. Compl. ¶ 29. As predicted, President Trump

[1] Hopkins also raises a Preliminary Objection as to subject matter jurisdiction under Pa.R.C.P. 1028(a)(1). However, for reasons explained more fully in Part II, *infra*, his objection in this regard is the functional equivalent of a demurrer since he asks the Court to assess the Objection based solely upon the averments set forth in the Amended Complaint.

[2] For instance, Act 77 requires that "the elector shall send [the securely sealed envelope containing a ballot] by mail, postage prepaid, except where franked, or deliver it in person to said county board of election." 25 P.S. § 3150.16.

claimed that "widespread election fraud was to blame for the impossible reversal of fortune." Am. Compl. ¶ 30. In the midst of President Trump's protestations, Project Veritas pushed forward with its "Diamond Dog" initiative, including through the solicitation of potential sources willing to come forward with claims of election fraud. Am. Compl. ¶ 74. For instance, on November 4, 2020, it published a story in which a postal worker in Michigan claimed that mail carriers there were being instructed to segregate mail-in ballot envelopes received after the November 3rd election so that they could be fraudulently hand-marked as being received on election day. Am. Compl. ¶ 38.

Then, on November 5, 2020, Project Veritas published the first in a series of stories related to the claims at the center of this dispute. The piece relied on an anonymous whistleblower working at the General Mail Facility in Erie, Pennsylvania. Am. Compl. ¶ 39. In particular, it alleged a scheme to illegally backdate mail-in ballots based upon a conversation the whistleblower overheard between the local postmaster and an office supervisor. Am. Compl. ¶¶ 39, 44. In the edited telephonic interview conducted by James O'Keefe, published across all of Project Veritas' media platforms, and accompanied by the hashtag "#MailFraud," the whistleblower explained that he was "able to hear" the postmaster tell the supervisor that they had "messed up yesterday" because they "postmarked one of the ballots the fourth instead of the third." Am. Compl. ¶¶ 40-41, 45. When asked by O'Keefe why the postmaster was upset, the whistleblower answered "because, well he's honest to God, he's actually a Trump hater." Am. Compl. ¶ 46.

During the interview, O'Keefe refers to Weisenbach as "Rob, the postmaster," at which time an image of Weisenabach appears in the video and remains for the duration of O'Keefe's exchange with the whistleblower, captioned "Robert E Weisenbach Jr". Am. Compl. ¶¶ 46-48. The video also includes a brief clip from a phone exchange between O'Keefe and Weisenbach in which Weisenbach responds to the allegations by calling them "untrue" and explaining "I don't talk to reporters like you[,]" before ending the call. Am. Compl. ¶ 48. An article accompanying the video asserts that, according to the whistleblower, "the supervisors and postmasters are coordinating with other postal facilities during their daily conference calls with the district leadership[.]" Am. Compl. ¶¶ 49, 51. The article also quotes the whistleblower as saying that the backdating was done surreptitiously "after all the carriers leave[.]" Am. Compl. ¶ 53.

The following day, November 6, 2020, O'Keefe continued to amplify the story, tweeting: "The fraud is happening as we speak … they are going to be collecting and backdating ballots in Pennsylvania tomorrow according to our whistleblower." Am. Compl. ¶ 54. That same day, Project Veritas also posted a new video with the whistleblower in which his identity is revealed as Richard Hopkins. Am. Compl. ¶¶ 79, 81. As part of the story, Project Veritas also produced an affidavit signed by Hopkins, which it drafted, attesting to the veracity of his claims. Am. Compl. ¶¶ 83-84. On November 7, 2020, Weisenbach, issued his only public statement on the matter through a Facebook post, categorically denying the allegations. Am. Compl. ¶ 91.

Unsurprisingly, the Postal Service's Office of Inspector General was eager to speak to Hopkins about his claims too. Am. Compl. ¶ 76. In an initial interview conducted on November 6, 2020, Hopkins relayed to postal inspectors his allegations concerning an illegal backdating scheme in Erie. Am. Compl. ¶¶ 76-78. However, when interviewed a second time, on November 9, 2020, Hopkins appeared to walk back some of his earlier statements. Am. Compl. ¶ 92. Hopkins, unbeknownst to the postal inspectors for the duration, recorded the interview, a roughly 2-hour portion of which was later published by Project Veritas. Am. Compl. ¶¶ 93, 95.

In the interview, Hopkins states that the only thing he could specifically recall was that he overheard Weisenbach and the supervisor "saying something about the markings being on the third. One was the fourth. That's it." Am. Compl. ¶ 96. He further clarified that his recollection of the conversation was "based on [his] assumption of what [he] could hear[,]" and he further acknowledged that "I didn't specifically hear the whole story. I just heard a part of it. And I could have missed a lot of it." Am. Compl. ¶ 96. When it was suggested by one of the inspectors that "[t]he reality is, you've heard words and you assumed what they were saying[,]" he responded "[m]y mind probably added the rest." Am. Compl. ¶ 96. Hopkins further explained to postal inspectors that Project Veritas had told him not to speak to any other media company until Project Veritas had vetted them to assure they would not write "a bad story[,]" and that O'Keefe and Project Veritas helped him set up a GoFundMe account in case "[he] lost [his] job or something went haywire[.]" Am. Compl. ¶ 97. When asked whether he would continue to swear to certain portions of the affidavit he had previously signed with Project Veritas, he stated, "[a]t this point, no[.]" Am. Compl. ¶ 96. With the help of postal inspectors, Hopkins then signed a revised affidavit retracting many of the assertions in his previous one on the understanding that doing so would "save [his] ass[.]" Am. Compl. ¶¶ 97-98.

The following day, November 10, 2020, new media outlets, including the *Washington Post*, published stories reporting that Hopkins had recanted his prior claims. Am. Compl. ¶¶ 101-02. That same day, the United States Postal Service informed Hopkins that he was being placed on unpaid administrative leave for "endangering his own personal welfare and/or the welfare of his co-workers[.]" Am. Compl. ¶ 103. Hours later, Hopkins responded by posting a YouTube video referencing the *Washington Post* article, denying he had recanted his previous allegations, and promising that viewers would "find out tomorrow" what really happened during his interview with postal inspectors. Am. Compl. ¶¶ 105-06.

On November 11, 2020, Project Veritas published a video interview with Hopkins and accompanying article where he claimed he was "coerced" into recanting, that postal inspectors had "grill[ed] the Hell out of [him,]" and that he "just got played." Am. Compl. ¶¶ 110-11. When asked by O'Keefe whether he stood by his original claims that the "postmaster, Rob Weisenbach, directed your co-workers to pick up ballots" and that he "heard Weisenbach tell a supervisor, they were back dating the ballots to make it appear they'd been collected on November 3[,]" Hopkins responded unequivocally "Yes." Am. Compl. ¶ 113. Hopkins also encouraged other postal workers to come forward with their stories because "Veritas has got your back." Am. Compl. ¶ 114.

Project Veritas's stories alleging voter fraud at the General Mail Facility in Erie garnered national attention. Am. Compl. ¶ 119. On November 6, 2020, the Trump Campaign obtained a copy of the affidavit Hopkins had executed with Project Veritas' help and circulated it for publication. Am. Compl. ¶ 120. On November 7, 2020, Senator Lindsey Graham, Chairman of the Senate Judiciary Committee, called upon the Attorney General to launch an investigation. Am. Compl. ¶ 121. On November 9, 2020, Attorney General William Barr authorized the Department of Justice to investigate meritorious claims of "election irregularities." Am. Compl. ¶ 122. An ensuing lawsuits by the Trump Campaign in federal court even cited to the November 5, 2020, Project Veritas story as evidence in support of its voter fraud allegations. Am. Compl. ¶ 123.

Closer to home, the stories had an immediate impact on Weisenbach and his family.

Am. Compl. ¶ 125. By mid-afternoon on November 5, 2020, internet trolls had already discovered and released Weisenbach's personal contact information and home address. Am. Compl. ¶ 126. Within hours, Weisenbach had to close or disguise all of his social media accounts. Am. Compl. ¶ 128. He began to receive hate email and threats, in addition to numerous correspondence from Fox News, *The Wall Street Journal*, Reuters, the Associated Press, CNN, and the *Washington Times*, to which he was directed by the Postal Service not to respond. Am. Compl. ¶ 129.

On November 6, 2020, after Weisenbach was interviewed by postal inspectors himself, it was determined, for his own safety and that of his family, that they should leave the area immediately and shelter-in-place at a hotel. Am. Compl. ¶¶ 130-31. He arrived home that day around 3:00 p.m., escorted by a postal inspector, but within moments of pulling into his driveway, an unknown man approached, yelling belligerently. Am. Compl. ¶¶ 131-32. When Weisenbach exited his vehicle, he noticed the assailant was carrying a cell phone in one hand and had the other inside his coat pocket. Am. Compl. ¶ 132. Weisenbach took refuge by hiding the backseat of another family vehicle where he called his supervisor. Am. Compl. ¶ 132.

Meanwhile, the postal inspector escorting Weisenbach approached the driveway with the window down and advised the assailant to leave the property immediately, which resulted in the individual moving from the driveway onto the street behind Weisenbach's vehicle, all the while continuing to demand that Weisenbach exit the vehicle so that they could talk. Am. Compl. ¶ 134. A few minutes later, Weisenbach's neighbor, a Pennsylvania State Police Trooper, advised the unknown man to leave the area, but the assailant did not do so. Am. Compl. ¶ 135. Eventually, Millcreek Police arrived on the scene, sealed off the street, and exited their vehicles with guns drawn. Am. Compl. ¶ 136. The police searched the assailant and his vehicle, the postal inspector and his vehicle, and removed Weisenbach from his vehicle at gunpoint, where he was placed on the ground and searched. Am. Compl. ¶ 136. The unknown assailant was ultimately released and warned by police not to return. Am. Compl. ¶ 137. Weisenbach left the incident "[b]ewildered, shaken, and fearing for the safety and welfare of his life and his family[.]" Am. Compl. ¶ 138.

Although Wiesenbach and his wife hurriedly packed and left Erie, neighbors later revealed that a black Jeep SUV with two visible occupants, later determined from its New Jersey license plates to belong to Project Veritas, was surveilling the home. Am. Compl. ¶¶ 138-39. Project Veritas continued to harass Weisenbach through the winter, and published an ambush attempt at an interview with Weisenbach on February 23, 2021. Am. Compl. ¶ 140. Weisenbach remains anxious over being confronted by members of the community concerning these allegations and "is grateful that a mask worn to protect himself against COVID-19 also obscures his face" while running errands. Am. Compl. ¶ 141.

As for Hopkins, the GoFundMe page rapidly generated over $130,000.00 in proceeds, but the account was suspended and the donations returned shortly after it was reported that he had recanted. Am. Compl. ¶¶ 143-44. Hopkins subsequently set up a separate account on an alternative crowdfunding website, GiveSendGo, which amassed a value of $236,000.00 after O'Keefe encouraged Project Veritas readers to donate to the account. Am. Compl. ¶¶ 145-47. Hopkins was ultimately let go from his position with the United States Postal Service, collected the windfall from the donations on the GiveSendGo account, and thereafter "absconded, at least temporarily, to West Virginia." Am. Compl. ¶ 148.

The United States Postal Service Office of Inspector General Report, released on February 3, 2021, concluded that "Hopkins acknowledged that he had no evidence of any backdated presidential ballots and could not recall any specific words said by the Postmaster or Supervisor." Am. Compl. ¶ 149. It further found that "[b]oth the interview of the Erie County Election Supervisor and the physical examination of ballots produced no evidence of any backdated presidential ballots at the Erie, PA Post Office." Am. Compl. ¶ 149. For his part, Weisenbach asserts that there was no scheme to illegally backdate ballots, that he did not personally backdate any ballots, nor did he instruct his employees to do so, and that neither he nor anyone in the Erie General Mail Facility were coordinating with other postal facilities to backdate ballots. Am. Compl. ¶¶ 56-57, 59-64, 87-89.[3] Neither was Weisenbach a "Trump hater" or otherwise motivated by political bias against President Trump; to the contrary, he was "a registered Republican and Trump supporter who voted for the incumbent on Election Day." Am. Compl. ¶¶ 58, 70.

Weisenbach responded by filing the instant action on April 22, 2021. Thereafter Defendants filed Preliminary Objections to the Complaint, but those Objections became moot when this Court granted Weisenbach leave to amend his pleading. On August 16, 2021, Weisenbach filed the operative First Amended Complaint containing three counts: Defamation and/or Defamation Per Se against Defendant Hopkins (Count I); Defamation and/or Defamation Per Se against Defendants Project Veritas and James O'Keefe, III (Count II); and Substantial Assistance/Concerted Tortious Activity against all three Defendants (Count III). Defendants once again filed Preliminary Objections to the Amended Complaint, along with accompanying briefs, and this Court subsequently held oral argument on the Objections. Upon careful consideration of the pleadings, briefs, and arguments of the parties, the Court now overrules the Preliminary Objections to Weisenbach's First Amended Complaint.

II. JURISDICTION OVER CLAIMS AGAINST DEFENDANT HOPKINS

The Court begins by addressing Defendant Hopkins' challenge to this Court's subject matter jurisdiction over the claims levied against him. "Subject matter jurisdiction relates to the competency of a court to hear and decide the type of controversy presented." *Turner v. Estate of Baird*, 270 A.3d 556, 560 (Pa. Super. 2022). "When preliminary objections raise a question of subject matter jurisdiction, the trial court's function is to determine whether the law will bar recovery due to a lack of subject matter jurisdiction." *Community College of Philadelphia v. Faculty and Staff Federation of Community College of Philadelphia*, 205 A.3d 425, 430 n.5 (Pa. Cmwlth. 2019) (citation, internal quotation marks, and brackets omitted).

Hopkins raises this challenge under the aegis of Pennsylvania Rule of Civil Procedure 1028(a)(1), permitting preliminary objections on the basis of "lack of jurisdiction over the subject matter of the action[.]" Pa.R.C.P. 1028(a)(1). As our Superior Court has explained:

[3] Moreover, any segregation of mail-in ballots collected after 8:00 p.m. on November 3, 2020, but before 5:00 p.m. on November 6, 2020, would have been consistent with the Pennsylvania Supreme Court's recent ruling allowing such ballots to be counted, subject to United States Supreme Court's November 6, 2020, directive to keep those ballots segregated while it considered a challenge to the Pennsylvania Supreme Court's decision. Am. Compl. ¶¶ 22-23, 90; *see also Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345 (Sept. 17, Pa. 2020); Republican Party of Pennsylvania. v. Boockvar*, --- S.Ct. ---, 2020 WL 6536912 (Mem.) (U.S. Nov. 6, 2020) (Alito, J., in chambers).

> Pursuant to Pa.R.C.P. 1028(a), two distinct classifications of preliminary objections exist: objections that directly challenge the adequacy of the pleading, *i.e.*, subparagraphs (a)(2), (3), and (4); and objections that raise challenges that transcend the four corners of the pleading. While the former may be determined by the factual averments of record, like [a] demurrer … the latter, such as [a] jurisdictional assertion, requires discovery and evidentiary support.

Murray v. American Lafrance, LLC, 234 A.3d 782, 788 (Pa. Super. 2020) (en banc). A challenge to subject matter jurisdiction "is of the sort that cannot be determined from facts of record." *Pennsylvania Independent Oil & Gas Association v. Pennsylvania One Call System, Inc.*, 245 A.3d 362, 366 (Pa. Cmwlth. 2021) (citation and internal quotation marks omitted). "The [party raising the objection] bears the burden to demonstrate the absence of jurisdiction, and only upon the presentation of evidence supporting the jurisdictional challenge does the burden shift to the [party asserting jurisdiction]." *Id.* The Court may "consider evidence by depositions or otherwise[,]" Pa.R.C.P. 1028(c)(2), including "affidavits or other competent evidence." *Pennsylvania Independent Oil & Gas Association*, 245 A.3d at 366. The "mere allegation that the court lacks jurisdiction is insufficient to shift the burden[.]" *Id.* In considering a challenge to jurisdiction, a court "considers the evidence in the light most favorable to the non-moving party." *Murray*, 234 A.3d at 788.[4]

Here, Hopkins argues that "Plaintiff's Amended Complaint, by its very text, proves that this Court does not have jurisdiction over his claims." Hopkins's Prelim Obj., ¶ 7. He stresses that he "is not requesting that this Court make a ruling on the merits [of his jurisdictional claim]. Rather, [he] moves this Court for a jurisdictional determination as to whether the Postmaster has alleged sufficient facts to avail [himself] of this Court's subject matter jurisdiction." Hopkins' Prelim Obj. ¶ 54; *see also* Tr., p. 12 ("at this point in the proceeding we're just simply asking for the Court to look at the pleadings[.]").[5] The upshot is that the

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[4] It is unclear whether, in light of Rule 1028(a)(1), a party challenging jurisdiction by preliminary objection can properly raise its objection in the form of a demurrer challenging the legal sufficiency of the pleading pursuant to subparagraph (a)(4), although there is some tacit support for this proposition. *See Mallory v. Norfolk Southern Railway Co.*, 266 A.3d 542, 560 (Pa. 2021), cert. granted, --- S.Ct. ---, 2022 WL 1205835 (Mem) (U.S. Apr. 25, 2022) (reviewing preliminary objection as to personal jurisdiction as a challenge in the nature of a demurrer). While Hopkins' challenge may sound in demurrer, he does not formally couch his objection as a challenge to the legal sufficiency of the Amended Complaint under subparagraph (a)(4) — on the contrary, he expressly labels the challenge as an Objection under subparagraph (a)(1) — nor does he ever refer to his jurisdictional challenge as a demurrer. Accordingly, the Court treats the Objection as a challenge under subparagraph (a)(1), subject to the attendant burden-shifting evidentiary framework. As the Court observes below, however, Hopkins' challenge under subparagraph (a)(1) more or less operates as a demurrer due to that fact that he limits his argument to consideration of the four corners of the Amended Complaint.

[5] Perhaps this is due to the fact that Hopkins understands the applicable standard to be that Weisenbach must make a "*prima facie* showing" of jurisdiction based upon "the face of the Amended Complaint[.]" Memorandum of Law in Supp. of Hopkins' Prelim Obj., p. 6. He derives this test from *CNA v. United States*, 535 F.3d 132 (3rd Cir. 2008), which reasoned that "when faced with a jurisdictional issue that is intertwined with the merits of a claim, district courts must demand less in the way of jurisdictional proof than would be appropriate at a trial stage." *Id.* at 144 (citation and internal quotation marks omitted). "By requiring less of a factual showing than would be required to succeed at trial, district courts ensure that they do not prematurely grant Rule 12(b)(1) motions to dismiss claims in which jurisdiction is intertwined with the merits and could be established, along with the merits, given the benefit of discovery." *Id.* at 145. But as the preceding passage reveals, the Third Circuit's analysis naturally turned on its understanding of Federal Rule of Civil Procedure 12(b)(1). It does not appear that the Third Circuit's *prima facie* rule relating to federal Rule 12(b)(1) can be fully reconciled with Pennsylvania Rule of Civil Procedure 1028(a)(1) in this regard, particularly the case law's emphasis on evidentiary burden shifting and the admonition that such challenges cannot be determined purely from facts of record. Thus, Hopkins' attempt to graft the Third Circuit's *prima facie* standard onto his present Objection proves not only unpersuasive, but untenable, in light of applicable Pennsylvania appellate jurisprudence that is binding on this Court.

Amended Complaint itself is the only piece of evidence proffered by Hopkins for purposes of his initial evidentiary burden to establish a lack of jurisdiction. When coupled with the fact that the Court must consider that document in the light most favorable to Weisenbach, *Murray*, 234 A.3d at 788, his Objection as to subject matter jurisdiction functions, for all intents and purposes, as a challenge in the nature of a demurrer. Although the Court arguably has the inherent authority to order additional evidence be taken by deposition or otherwise to supplement the record on the jurisdictional question, given Hopkins' emphatic, self-imposed stance that his jurisdictional argument be limited to the four corners of the Amended Complaint, the Court will hold Hopkins to his request.

With this threshold matter resolved, the Court now turns to the merits of Hopkins' jurisdictional Objection. Hopkins contends that, pursuant to the Federal Tort Claims Act, federal courts (rather than state courts, such as this one) have exclusive subject matter jurisdiction over Weisenbach's claims of defamation and tortious conspiracy against him. This is so, he says, because the Amended Complaint makes clear that he was acting within the scope of his employment when he allegedly made the defamatory statements. Memorandum of Law in Supp. of Hopkins' Prelim Obj., p. 1. Before digging deeper into Hopkins' argument, it is necessary to review the contours of the Federal Tort Claims Act.

Enacted in 1946, the Federal Tort Claims Act, "was designed primarily to remove the sovereign immunity of the United States from suits in tort." *Levin v. United States*, 568 U.S. 503, 506 (2013) (citation and internal quotation marks omitted). "The Act gives federal district courts exclusive jurisdiction over claims against the United States for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of federal employees acting within the scope of their employment." *Id.* (quoting 28 U.S.C. § 1346(b)(1)). Additionally, the Act makes it more difficult to sue an employee individually by including a judgment bar, which precludes a plaintiff who receives a judgment against the United States government under the Act, favorable or not, from proceeding "with a suit against an individual employee based on the same underlying facts." *Simmons v. Himmelreich*, 578 U.S. 621, 625 (2016). "The Act thus opened a new path to relief (suits against the United States) while narrowing the earlier one (suits against employees)." *Brownback v. King*, 141 S.Ct. 740, 746 (2021).

Working in tandem with the Federal Tort Claims Act, "[t]he Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." *Osborn v. Haley*, 549 U.S. 225, 229 (2007). "Importantly, Westfall Act immunity is not self-executing, that is, a federal employee does not receive absolute immunity from torts committed within the scope of his employment until the scope of employment certification is made." *Stein v. United States*, 2021 WL 4895338, *3 (S.D. Ill. 2021) (citation and internal quotation marks omitted). To that end, "[w]hen a federal employee is sued for wrongful or negligent conduct, the [Westfall] Act empowers the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." *Osborn*, 549 U.S. at 229-230. "Upon the Attorney General's certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee." *Id.* at 230. "These certification and substitution procedures are measures "designed to immunize covered federal employees not simply from liability, but from suit." *Id.* at 238.

From the outset, the parties disagree about the way in which a federal court exercises jurisdiction over such a claim. Hopkins argues Section 1346(b)(1) of the Federal Tort Claims Act vests federal courts with sole authority to consider claims brought against postal employees who cause injury while acting within the scope of their employment *ab initio*, thereby stripping state courts of jurisdiction to consider the same. Memorandum of Law in Supp. of Hopkins' Prelim Obj., p. 8.[6] Weisenbach responds that the Federal Tort Claims Act merely provides a federal employee who has been sued the opportunity to seek to have the case converted into an action against the United States by asking the Attorney General to certify that the employee was acting within the scope of his or her employment. Pl.'s Br. in Opp. to Hopkins' Prelim. Obj., p. 17. But "[u]nless and until Hopkins obtains a certification that he was acting within the scope of his employment when he repeatedly defamed Plaintiff," the Federal Tort Claim Act "does not kick in." Pl.'s Br. in Opp. to Hopkins Prelim. Obj., p. 18 (quoting *Sullivan v. Freeman*, 944 F.2d 334, 337 (7th Cir. 1991) (Posner, J.) (internal quotation marks omitted)).

When Congress wants to deprive state courts of jurisdiction to hear certain claims, it has an "easy way to do so" by inserting an exclusive federal jurisdiction provision into the statute. *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S.Ct. 1061, 1070 (2018). That appears to be what Congress did here. Section 1346(b)(1) of the Federal Tort Claims Act directs:

> Subject to the provisions of chapter 171 of this title, **the district courts**, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, **shall have exclusive jurisdiction** of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

[6] Hopkins relies on an unpublished case, *Holz v. Reese*, 2016 WL 2908455 (Pa. Super. 2016) (unpublished), where the Pennsylvania Superior Court held the trial court properly dismissed a case against various federal prison officials because "Congress has divested it of subject matter jurisdiction" through Section 1346(b)(1) of the Federal Tort Claims Act Id. at *3. Weisenbach challenges the propriety of Hopkins' reliance on the case as it was decided prior to May 2, 2019. Tr. pp. 24-25. It is true that Pennsylvania Rule of Appellate Procedure 126 only expressly allows a party to cite to "an unpublished non-precedential memorandum decision of the Superior Court filed after May 1, 2019[,]" and the internal operating procedures of the Superior Court provides that "[a]n unpublished memorandum decision filed prior to May 2, 2019, shall not be relied upon or cited by a Court or a party in any other action or proceeding[.]" Pa.R.A.P. 126(b)(1); 210 Pa. Code § 65.37. It is doubtful, however, whether either the Rules of Appellate Procedure or the internal operating procedure of the Superior Court are binding in this Court. The Court does note that as of April 1, 2022, newly promulgated Rule of Civil Procedure 242 directs that "[c]itation of authorities in matters subject to these rules shall be in accordance with Pa.R.A.P. 126." Pa.R.C.P. 242. This mandate is undoubtedly binding on parties presenting argument before courts of common pleas, but since that Rule was not in effect, either at the time of briefing or oral argument, the Court will not preclude Hopkins from relying on *Holz* for its persuasive value. Truth be told though, *Holz* does not factor significantly into the Court's analysis. The Court ultimately agrees with its treatment of Section 1346(b)(1) as a jurisdiction stripping provision, but finds that the case is factually distinguishable as the pleading here does not establish that Hopkins was acting within the scope of his employment when the injury occurred.

28 U.S.C. § 1346(b)(1) (emphasis added). On the other hand, a distinct, albeit related, provision of the Westfall Act, Section 2679(d), affords federal employees absolute immunity from suit for claims arising out of acts done in the course of their employment, and provides a procedure for removing a case involving such an employee to federal court, where the United States government is substituted as a party defendant. Weisenbach cites to *Thompson v. Wheeler*, 898 F.2d 406 (3rd Cir. 1990) for the proposition that, pursuant to Section 2679(d):

> [J]urisdiction lies only after the Attorney General certifies that the federal [employee] was acting within the scope of his employment. The possibility that such certification might issue does not automatically divest a state court of subject matter jurisdiction. To the contrary, in enacting section 2679, Congress anticipated that suits initially would be brought in state court.

Thompson, 898 F.2d at 409 n.2.

The Court notes that federal case law is less than clear on the interplay between the exclusive federal jurisdiction provision of Section 1346(b) of the Federal Tort Claims Act and the federal employee immunity and attendant removal provisions of Section 2679(d) of the Westfall Act. *See James v. United States Postal Service*, 484 F.Supp.3d 1, 4 (D.D.C. 2020) ("Because the FTCA endows federal district courts with exclusive jurisdiction over claims thereunder, the D.C. Superior Court could not have had subject matter jurisdiction over Plaintiff's claims."); *Kennedy v. Paul*, 2013 WL 5435183, *4 (D. Conn. 2013) ("The Superior Court did not have jurisdiction to hear HGC's apportionment complaint against the Coast Guard Defendants because section 1346(b)(1) gives exclusive jurisdiction over those claims to the federal district court.") (rejecting reliance on *Thompson* because "jurisdiction is usually determined at the time the case is filed and subsequent events cannot destroy it."); *Houston v. United States Postal Service*, 823 F.2d 896, 903 (5th Cir. 1987) ("The state courts have no jurisdiction to hear even properly exhausted tort claims against the United States."); *but see Stein*, 2021 WL 4895338, *3 ("Were the Court to accept the United States' position, the United States could avoid all liability in removed FTCA claims by timely invoking the doctrine of derivative jurisdiction in every case removed under the Westfall Act. Under its view, no tort suit begun in state court against an individual could survive removal under the Westfall Act, for in every one of those cases, the state court would not have had subject matter jurisdiction over what turned out to be an FTCA claim. This is inconsistent with Congress's clear desire to provide just compensation — in a federal forum — for those injured by the negligence of federal employees." (citation omitted; emphasis in original)).

In any event, this Court need not decide whether it would lack jurisdiction over such a claim from the start, as Hopkins suggests, or whether it would be deprived of jurisdiction only upon Westfall Act certification, as Weisenbach argues, for even assuming, without deciding, that Hopkins is correct that Section 1346(b) would divest this Court of jurisdiction over such a claim *ab initio*, he still fails to show that the claims alleged here fall within the parameters of Section 1346(b)(1). Under that provision, federal courts have exclusive jurisdiction not in every case, but only in a specific class of cases: those involving injury or loss caused by government employees acting within the scope of their office or employment. The Amended Complaint suggests that Hopkins was acting outside the scope of his employment when he

made the alleged defamatory remarks.

Hopkins contends that a fair reading of the Amended Complaint (which, recall, is the only evidence he offers in support of his Objection) reveals a *de facto* Federal Tort Claims Act action by alleging injury stemming from Hopkins' employment as a postal worker. Hopkins's Prelim Obj., ¶ 13. In assessing whether Weisenbach's claims fall within the purview of the Federal Tort Claims Act, Hopkins suggests that "this Court should juxtapose the pleadings with Pennsylvania's law on *respondeat superior*[,]" relying on *CNA v. United States*, 535 F.3d 132 (3rd Cir. 2008). There, the Third Circuit, itself relying on the Restatement (Second) of Agency adopted by Pennsylvania courts applied the following test to determine whether the employee acted within the scope of his employment for purposes of the Federal Tort Claims Act: "conduct is within the scope of employment if, but only if: (a) it is the kind the employee is employed to perform; (b) it occurs substantially within the authorized time and space limits; and (c) it is actuated, at least in part, by a purpose to serve the master." *Id.* at 147 (citations, internal quotation marks, brackets, and parenthetical omitted).

Hopkins also refers the Court to Comment e of Restatement (Second) of Agency, which states that "[i]t may be found to be within the scope of employment of a person managing a business to accuse another of wrongful conduct or to report to others the supposed wrongful conduct of an employee or other person." Restatement (Second) of Agency § 247, cmt e (1958). He further highlights the Restatement's observation that "[a] servant having a duty to make such reports either to his employer or to others … may subject his employer to liability for his untruthful statements constituting defamation because made in excess of a privilege to speak, *if he speaks in connection with his employment and with a purpose to serve it.*" Restatement (Second) of Agency § 247, cmt e (1958) (emphasis added). With these sources in mind, Hopkins argues that "[i]t is apparent, on the face of the Amended Complaint, that [his] alleged defamatory statements to Project Veritas and the OIG investigators are within the scope of his employment with the U.S. Postal Service." Hopkins' Prelim. Obj., ¶ 19. But this Hopkins cannot show, even applying his proposed test.

First, while his statements to postal inspectors may well fall within the scope of his employment, none of those statements actually underlie Weisenbach's claims for defamation or concerted tortious activity.[7] Instead, it is alleged that Hopkins made defamatory statements to Project Veritas, which in turn, published and amplified his defamatory statements to the world. And while his alleged recantation on November 9th may be relevant to an actual malice inquiry, it is not a statement Weisenbach claims constitutes defamation itself. Quite the opposite; Weisenbach suggests his recantation was the closest he came to admitting the truth. In short, whether or not Hopkins' statements to investigators were within the scope of his employment are wholly irrelevant to the analysis of whether the defamation and concerted tortious activity claims lodged against Hopkins are cognizable under the Federal Tort Claims Act.

That leaves the three interviews Hopkins gave to O'Keefe that were later incorporated into the November 5, 6, and 11th stories posted by Project Veritas. Hopkins argues that his statements to the media, i.e. Project Veritas, fell "well within the scope of his employment"

[7] Hopkins relies on Paragraph 78 of the Amended Complaint, which avers that "HOPKINS repeated his false claims to the investigators[.]" Am. Compl. ¶ 78. But the fact that Hopkins repeated or otherwise communicated his allegedly false claims to investigators does not mean they form part of Weisenbach's case for defamation or concerted tortious activity.

because he was "integrally involved with the mail ballot process." Hopkins Prelim. Obj. ¶¶ 24-25. But the mere fact that one speaks about his employment does not mean that speech was made "in connection with his employment" or "with a purpose to serve it." Restatement (Second) of Agency § 247, cmt e. If that were the case, a firefighter or school teacher returning home from work after a busy day and relaying to their families the events of the day would be acting within the scope of their employment simply by virtue of the fact that the content of their conversation relates to matters "integrally involved with" firefighting or teaching. As Weisenbach points out, "Hopkins wasn't hired by the postal service to speak on behalf of the postal service. He was hired to deliver the mail." Tr., p. 20. It thus cannot be reasonably claimed that Hopkins' statements to Project Veritas were either "the kind the employee is employed to perform" or that it occurred "substantially within the authorized time and space limits" of his employment. *CNA*, 535 F.3d at 147.

Instead, Hopkins appears to rely on the third category, claiming that his whistleblower activity was "actuated, at least in part, by a purpose to serve the master." *Id.* He contends the *U.S. Postal Service's Employee and Labor Relations Manual* imposed a duty on him to report the wrongful conduct he believed was occurring, as did the oath he swore to support and defend the United States Constitution. Hopkins Prelim. Obj. ¶¶ 30-33. He asserts this duty extended not merely to internal reporting, but to reports to news media, like Project Veritas, as well. Hopkins Prelim. Obj. ¶ 36.

Setting aside the fact that the Manual was neither entered into evidence for purposes of these Objections, nor referenced in the Amended Complaint, the Manual, at most, insulates an employee who discloses information they believe evinces a violation from reprisal. Hopkins Prelim. Obj. ¶ 32 (citing Manual, Section 666.18). That hardly means the disclosure itself was made in connection with his employment or with a purpose to serve it, particularly where, as here, it is averred that the disclosure was made with knowledge of its falsity or reckless disregard for the truth. Am. Compl. ¶¶ 65, 166.[8] Nor is the Constitution of the United States, or an oath to support it, furthered by false and self-serving statements, as these are alleged to be.[9]

Hopkins argues that his public comments, particularly his third interview where he denied having recanted his earlier statements, were incidental to post office business in order to correct misinformation. Prelim. Obj. ¶ 40 (citing *Shuman v. Weber*, 419 A.2d 169, 173 (Pa. Super. 1980) (It is not necessary … that the acts be specifically authorized by the master to fall within the scope of employment; it is sufficient if they are clearly incidental to the master's business[.]")). However, the Amended Complaint refutes the assertion that Hopkins' motive was to serve the United States Postal Service. Rather, drawing all reasonable inferences in Weisenbach's favor, the Amended Complaint suggests that Hopkins was driven by financial gain and a desire to cast doubt upon the legitimacy of the election and the integrity of his employer. Am. Compl. ¶ 10. This allegation is more akin to sabotage than service.

Hopkins insists that certain images in the Amended Complaint, including one purportedly depicting him delivering mail in uniform while speaking to O'Keefe, show he was in the

[8] Hopkins also cites to Section 665.3 of the *Manual*, requiring postal employees to cooperate in any postal investigation, but as the Court has already explained, Hopkins statements to postal inspectors do not form the basis of Weisenbach's defamation and concerted tortious activity claims.

[9] Moreover, a government employee's oath to support and defend the Constitution does not operate as a freestanding grant of authority. As such, Hopkins cannot use his oath as a basis to expand the scope of his employment beyond that which he is already authorized or obligated to do.

course of conducting his duties at the time he made the alleged defamatory statements. Hopkins' Prelim. Obj. ¶¶ 26-27. First and foremost, it is not at all clear that the pictures depict what Hopkins says they do, but even if they do, it does not follow that Hopkins was necessarily acting in performance of his duties when he made the alleged defamatory remarks simply virtue of the fact that he was on-duty at the time. To be "incidental to the master's business," as the case law cited by Hopkins uses that term, the act must be "subordinate to" or "pertinent to accomplishing the ultimate objective of his employer[.]" *Weber*, 419 A.2d at 173. A "personal expedition" that is "embarked upon" to accomplish "personal errands" is not. *Id.* Reading the Amended Complaint in the light most favorable to Weisenbach, Hopkins' communications with Project Veritas were not pertinent to accomplishing his ultimate objective of delivering the mail, but more in the nature of a personal errand. That Hopkins may have been wearing his uniform at the time he gave the interviews does not preclude the possibility that he deviated from his postal service duties in order to speak with O'Keefe over the phone. In any event, it certainly cannot be said that Hopkins was speaking in connection with his employment and with a purpose to serve it when he gave his third interview to O'Keefe after being put on administrative leave. Am. Compl. ¶¶ 103, 109.

Taking a step back from the minutiae of Hopkins' jurisdictional argument for a moment, the conclusion that this Court has subject matter jurisdiction over the claims against Hopkins makes sense. Weisenbach is neither directly nor indirectly attempting to bring a suit against the United States government or the United States Postal Service for injury to his reputation. He brings the claims against Hopkins in his personal capacity. Recall that Hopkins is accused of assassinating the character of the Postal Service as well. Am. Compl. ¶ 10. The Postal Service and Weisenbach are thus both victims of the same tort, at least as Weisenbach sees it. And neither would it make sense to say that the Postal Service was acting in concert with O'Keefe and Project Veritas in attempting to undermine its own credibility. In this way, Hopkins' jurisdictional claim is really an effort to rewrite the narrative set forth in the Amended Complaint.

Alternatively, but relatedly, Hopkins argues that Weisenbach "cannot establish a viable claim for relief in state court against a federal employee unless he explicitly avers in the complaint that the alleged defamatory statements occurred outside the employee's federal employment." Hopkins' Prelim. Obj. ¶ 63 (emphasis deleted). That Weisenbach does not explicitly state that Hopkins was acting outside the scope of his employment is of no moment, however, where, as here, the facts allege as much. Under our fact-pleading system, there are no "magic words" carrying talismanic significance that must averred in order to plead a particular set of facts. Tr., 20; *see also Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A.2d 695, 706 (Pa. Super. 2000) ("Our focus is not on the use of magic words rather the adequacy of the complaint must be judged by examination of the facts pled, and not of the conclusions of law that accompany them." (citation and internal quotation marks omitted)); *DeFrancesco v. Western Pennsylvania Water Co.*, 453 A.2d 595, 597 n.5 (Pa. 1982) ("It is not to magic words, but to the essence of the underlying claims, we look in determining where jurisdiction properly lies.").

Pennsylvania Rule of Civil Procedure 1019(a) simply requires a pleading to set forth "in a concise and summary form" the "material facts on which a cause of action or defense is based[.]" Pa.R.C.P. 1019(a). To that end, "[a] complaint must apprise the defendant of the

nature and extent of the plaintiff's claim so that the defendant has notice of what the plaintiff intends to prove at trial and may prepare to meet such proof with his own evidence." *Discover Bank v. Stucka*, 33 A.3d 82, 86-87 (Pa. Super. 2011) (citation and internal quotation marks omitted). While the Amended Complaint may not expressly conclude that Weisenbach was acting outside the scope of his employment when he made the defamatory statements, the voluminous facts set forth in the pleading all suggest that he was. Only a strained and unnatural reading of the facts could lead to the conclusion that he was acting within the scope of his employment when he made the allegedly defamatory statements. And while Hopkins may vigorously dispute those facts, his concern is best addressed by denial of the allegations in an answer to the Amended Complaint, not through Preliminary Objections.

Hopkins relies on *Sharpless v. Summers*, 2001 WL 118960 (E.D. Pa. 2001) and *Brown v. Wetzel*, 179 A.3d 1161 (Pa. Cmwlth. 2018), but both of those cases involved lawsuits against government officials where the facts readily suggested the defendants were acting within the scope of their employment when the alleged injury occurred. In *Sharpless*, for instance, the court found the contention that a defendant "defamed and libeled Plaintiff among his co-workers and the general public" to be "remarkable[,]" especially given the contrary averment that "[a]t all times relevant hereto, Defendants were acting by and through their agents, employees, and representatives who were authorized and acting within the course and scope of their employment[.]" *Sharpless*, 2001 WL 118960 at *4. Here, Weisenbach never suggests, let alone expressly states, that Hopkins was acting within the scope of his employment.

Likewise, in *Brown*, "Inmates filed the Complaint alleging that, as a result of DOC's administration failing to act on the knowledge of the existence of asbestos within the facility, one or more inmates were exposed to asbestos at some point between October 2014 and March 2016 while being confined at SCI–Rockview." *Brown*, 179 A.3d 1164. Relevant to a fraud claim, one of those inmates, Lamar Brown, alleged that certain DOC employees named as defendants "falsified allegations in their grievance and grievance appeal responses to inmates' grievances and grievance appeals[.]" *Id.* at 1167 (internal brackets omitted). The Plaintiff maintained "that because those individuals violated the Ethics Code, they were not acting within the scope of their employment." The court concluded that because "Brown did not allege" that the DOC employees "were acting outside the scope of their employment, the trial court properly sustained the preliminary objection to Brown's fraud claim based on sovereign immunity." *Id.*

Unlike the allegedly false statements Hopkins provided to Project Veritas here, the filing of a grievance or a response to a grievance is the kind of act one would expect to be performed in the course of one's employment as a prison official. Conversely, one would not expect DOC employees to respond to grievances made by inmates when they are not working. Thus, without more (such as an express averment that the employees were acting outside the scope of their employment when they made the allegedly false statements) the complaint failed to set forth material facts from which it could be discerned that the employees were acting outside the scope of their employment.

Critically, neither *Sharpless* nor *Brown* espouses the broad rule posited by Hopkins that a plaintiff has an affirmative obligation to specifically state that a defendant was acting outside the scope of his or her employment to avoid bringing the case within the jurisdictional orbit of the Federal Tort Claims Act. In both cases, the material facts set forth in the pleading simply

did not suggest that the defendants were acting outside the scope of their employment when the injury occurred. In Weisenbach's Amended Complaint the opposite is true: the material facts, especially when read in the light most favorable to Weisenbach, strongly suggest that Hopkins was acting in a capacity wholly unrelated or incidental to his employment as a postal worker when he communicated allegedly false allegations about backdated ballots to O'Keefe and Project Veritas. To require Weisenbach to conclusory state as much using particular language or a specific phraseology would be repetitive of the facts already alleged, would unnecessarily elevate form over substance, and is neither required by the Pennsylvania Rules of Civil Procedure nor our case law.

Finally, Hopkins contends that if "this Court determines that the pleadings indicate [Hopkins] was acting *within* the scope of his employment, it should also dismiss the Amended Complaint for failure to exhaust administrative remedies." Hopkins Prelim. Obj. ¶ 56. The administrative remedy to which he refers, found in Chapter 171 of Title 28, is Section 2675(a), which directs that a "[a]n action shall not be instituted upon a claim against the United States for money damages ... unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a). Hopkins relies on *White-Squire v. U.S. Postal Service*, 592 F.3d 453 (3rd Cir. 2010) and its holding that the sum certain requirement of 2675(b) is jurisdictional, and therefore, deprives a federal district court of subject matter jurisdiction over a sum certain claim which is not first presented to the appropriate agency. *Id.* at 457-58.

The Court observes that *White-Squire*'s holding that Section 2675 presents a jurisdictional bar has been cast into doubt by a string of decisions from the United States Supreme Court, which has since "endeavored to bring some discipline to use of the jurisdictional label." *Boechler, P.C. v. Commissioner of Internal Revenue*, 142 S.Ct. 1493, 1497 (2022) (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (internal quotation marks omitted)); *see also United States v. Wong*, 575 U.S. 402 410 (2015) (holding Federal Tort Claims Act's time bars are non-jurisdictional and therefore subject to equitable tolling) ("we have made plain that most time bars are nonjurisdictional."). *White-Squire*'s holding that Section 2675 is jurisdictional was premised on the fact that the text of Section 1346 expressly "tethered" its grant of exclusive jurisdiction to federal district courts to the procedures set forth in Chapter 171. *White-Squire*, 592 F.3d at 457. Nevertheless, at least one federal court of appeals has disapproved of the Third Circuit's analysis. *See Copen v. United States*, 3 F.4th 875, 882 (6th Cir. 2021) ("The reference to chapter 171 in § 1346(b) is simply not clear enough to turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle." (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 147 (2012) (internal quotation marks omitted))).

In any event, this Court need not decide whether *White-Squire*'s analysis continues to carry persuasive force in light of intervening precedent, for even assuming that the administrative exhaustion requirement is jurisdictional, such that a litigant's failure to exhaust those remedies would deprive this Court of subject matter jurisdiction, the administrative remedies referenced in Section 2675 are completely inapplicable to Weisenbach's claims. Section 2675 provides in relevant part that:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government **while acting within the scope of his office or employment**, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C. 2675(a). This verbiage directly tracks the language in the exclusive jurisdictional grant to federal courts found in Section 1346(b)(1). Because the substantive scope of these provisions are coterminous, the agency exhaustion requirement of Section 2675 will, in effect, only ever apply to an action over which federal courts properly have exclusive jurisdiction under Section 1346(b)(1). A state court considering a claim to which Section 2675(a) would apply on its face would already be deprived of subject matter jurisdiction under Section 1346(b)(1).

White-Squire thus stands for the proposition that the failure to present the claim to the appropriate federal agency under Section 2675(a) precludes federal courts from exercising jurisdiction where they otherwise would have statutory authority to do so under Section 1346(b)(1). Because both provisions are only applicable to actions against federal government employees acting within the scope of their employment, neither have any bearing on a case, such as this, where the employee is alleged to have acted outside the scope of his employment when he caused the injury. Put another way, a determination that an employee was acting outside the scope of his employment when he caused the alleged injury resolves the jurisdictional question under both Sections 2675(a) and 1346(b)(1). In this case, Weisenbach was not required to present the claim to the Postal Service before heading to court because it was not, in actuality, a grievance against the Postal Service, but rather, against Hopkins in his individual capacity.

In sum, the Amended Complaint does not assert claims against Hopkins for injury he allegedly caused while acting within the scope of his employment as a U.S. postal worker, and as a result, the Federal Tort Claims Act does not deprive this Court of subject matter jurisdiction to adjudicate the claims against him. Hopkins has therefore failed to meet his evidentiary burden to demonstrate the absence of jurisdiction. *Independent Oil & Gas Association*, 245 A.3d at 366. With that, the Court proceeds to consider the Preliminary Objections in the nature of demurrers.

III. DEMURRER: DEFAMATION AND CONCERTED TORTIOUS ACTIVITY

Defendants Project Veritas and O'Keefe raise Preliminary Objections in the nature of demurrers asserting Weisenbach has not sufficiently pled the elements of a claim for defamation against them in Count II or a claim for substantial assistance, *i.e.*, concerted tortious activity, in Count III. *See* Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, pp. 4-9, 15-16. "The question presented in a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible." *Bruno*, 106 A.3d at 56. "A demurrer tests the legal sufficiency of the complaint. For the purpose of evaluating the legal sufficiency of the challenged pleading, the court must accept as true all well-pleaded, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts." *Commonwealth by Shapiro v. UPMC*, 208 A.3d 898,

908-09 (Pa. 2019) (citations and internal quotation marks omitted).

"Defamation is a communication which tends to harm an individual's reputation so as to lower him or her in the estimation of the community or deter third persons from associating or dealing with him or her." *Coleman v. Ogden Newspapers, Inc.*, 142 A.3d 898, 904 (Pa. Super. 2016) (citation omitted). Pennsylvania's "Uniform Single Publication Act sets forth the elements of a *prima facie* defamation case[.]" *Castellani v. Scranton Times, L.P.*, 124 A.3d 1229, 1240-41 (Pa. 2015). Those elements include: (1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged occasion. 42 Pa.C.S. § 8343(a).

Pennsylvania also recognizes the tort of concerted tortious conduct, which is essentially a civil aiding and abetting action. *Sovereign Bank v. Valentino*, 914 A.2d 415, 421 (Pa. Super. 2006). In this regard, "[o]ur Supreme Court adopted section 876 of the Restatement (Second) of Torts as the law of this Commonwealth." *Grimm v. Grimm*, 149 A.3d 77, 88 (Pa. Super. 2016) (citing *Skipworth by Williams v. Lead Industries Association, Inc.*, 690 A.2d 169, 174-175 (Pa. 1997)). Under Section 876 of the Restatement, one is liable for harm resulting to a third person from the tortious activity of another if he either: (1) does a tortious act in concert with the other or pursuant to a common design with him; (2) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself; or (3) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person. Restatement (Second) of Torts § 876 (1979). "[C]oncerted tortious action requires the secondary actor to have knowledge of the primary actor's tortious actions or the primary actor's tortious act must be foreseeable to the secondary actor." *Marion v. Bryn Mawr Trust Co.*, 253 A.3d 682, 690 (Pa. Super. 2021) (citation omitted), *appeal granted in part*, 264 A.3d 336 (Pa. 2021).

Beginning with the challenge to Count II, Project Veritas and O'Keefe contend that Weisenbach has failed to adequately plead "the defamatory character of the communications in controversy and any third party understanding of it." Memorandum of Law in Supp. of Prelim. Obj. of Project Veritas and James O'Keefe, III, p. 5. "A communication may be considered defamatory if it tends to harm the reputation of another so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her." *Kuwait & Gulf Link Transport Co. v. Doe*, 216 A.3d 1074, 1085 (Pa. Super. 2019) (quoting *Bell v. Mayview State Hosp.*, 853 A.2d 1058, 1062 (Pa. Super. 2004)). "Further, in determining whether a statement is capable of defamatory meaning, a court must view the statement in context. The nature of the audience is a critical factor in determining whether a statement is capable of defamatory meaning." *Id.* (citations omitted). Finally, [i]n determining whether a statement is capable of defamatory meaning, the trial court must also ascertain whether the statement constitutes an opinion … [as] generally, only statements of fact, rather than mere expressions of opinion, are actionable under Pennsylvania's defamation law." *Id.* at 1085-86 (citations omitted).

Neither can the procedural posture of this case be ignored. Precisely because the Court must accept as true all well-pleaded material allegations in the Amended Complaint, as well as all inferences reasonably deducible therefrom, *Commonwealth v. Monsanto Co.*, 269 A.3d

623, 635 (Pa. Cmwlth. 2021), "[w]hen ruling on preliminary objections in the nature of a demurrer, the question is whether a nondefamatory interpretation is the only reasonable one. Unless the court is certain the communication is incapable of bearing a defamatory meaning a demurrer challenging the sufficiency of the complaint should be overruled." *Zartman v. Lehigh County Humane Society*, 482 A.2d 266, 269 (Pa. Super. 1984) (internal quotation marks, ellipsis, and brackets omitted; emphasis in original). "When the language is capable of both innocent and defamatory interpretations, it is for a jury to decide if the recipient understood the defamatory implications." *Menkowitz v. Peerless Publications, Inc.*, 211 A.3d 797, 802 (Pa. 2019).

Weisenbach points to numerous allegations in the Amended Complaint capable of defamatory meaning in paragraphs 39-75, 79-90, 108-118, and 163. Pl.'s Br. in Opp. to Prelim. Obj. of Defs. Project Veritas and O'Keefe, p. 8. Relative to the first story published on November 5, 2020, they include the reports that Weisenbach ordered ballots received from the fourth through the sixth be backdated to the third, that Hopkins overheard Weisenbach tell another supervisor that they "messed up" because they postmarked one of the ballots for the fourth, Hopkins' statement that Weisenbach was upset because he was a "Trump hater," and O'Keefe's assertion that they had "multiple sources" for the story. Pl.'s Br. in Opp. to Prelim. Obj. of Defs. Project Veritas and O'Keefe, p. 6 (citing Am. Compl. ¶¶ 39-40, 45-46, & 48). Weisenbach further contends that the title of the story itself ("Nov. 3 Postmark Voter Fraud Scheme") is defamatory, as are the hashtags and tweets used to promote the story, including "#MailFraud," "BREAKING: Pennsylvania @USPS Whistleblower Exposes Anti-Trump Postmaster's Illegal Order To Back-Date Ballots," "@USPS workers are being ordered by their postmasters to ILLEGALLY BACK DATE ballots to November 3rd … THIS IS CORRUPTION," and "The fraud is happening as we speak … they are going to be collecting and backdating ballots in Pennsylvania tomorrow according to our whistleblower." Pl.'s Br. in Opp. to Prelim. Obj. of Defs. Project Veritas and O'Keefe, p. 6 (citing Am. Coml. ¶¶ 41, 54, & Exs. 6, 27-29).

As for the second story published on November 6, 2020, Weisenbach argues that the interview and accompanying affidavit drafted by Project Veritas "contain many of the same defamatory statements," including the allegations that Weisenbach and a supervisor discussed how they had backdated all but one of the ballots collected on November 4th, Hopkins' attestation that Weisenbach had ordered him and his co-workers to continue to pick up ballots through Friday, November 6, 2020, and to give those ballots to Weisenbach "presumably so they could be backdated," and O'Keefe's amplification of the story through the hashtag "#BlackDateGate." Pl.'s Br. in Opp. to Prelim. Obj. of Defs. Project Veritas and O'Keefe, p. 6-7 (citing Am. Compl. ¶¶ 80, 82, 84). Finally, as to the third article and video published on November 11th, after Hopkins' supposed recantation, Weisenbach notes that Project Veritas and O'Keefe reprised many of the same falsehoods, including the statements made in his original defamatory affidavit and O'Keefe's remarks during the interview denying that Hopkins had recanted and vouching for his character. Pl.'s Br. in Opp. to Prelim. Obj. of Defs. Project Veritas and O'Keefe, p. 7 (citing Am. Compl. ¶¶ 96, 108-18, 113, 116).

On the whole, the Court agrees that the statements Weisenbach identifies are capable of defamatory meaning as a matter of law. While a few of the alleged statements, such as O'Keefe's comment during the third interview that Hopkins "did not recant his story … despite the

incredible pressure for him to call himself a liar," are arguably expressions of opinion,[10] the lion's share constitute concrete factual assertions which Weisenbach avers are simply untrue. This includes the central allegation underlying the stories: that Weisenbach illegally ordered the backdating of ballots received on November 4th, 5th, and 6th, so as to make it appear as though the ballots were received by election day. This also includes the allegation that Weisenbach was motivated to illegally backdate ballots out of a hatred for President Trump. Although an individual's political preferences may be often kept private, this does not necessarily mean it is not "provable as false" such that it is a protected expression of opinion. *Krajewski v. Gusoff*, 53 A.3d 793, 803 (Pa. Super. 2012) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990)). Indeed, the Amended Complaint contains two pictures: one of Weisenbach holding a "Trump: Make America Great Again" flag and another of him wearing a "Trump 2020" face mask, evincing the provable falsity of Weisenbach's supposed animosity toward President Trump. Am. Compl. ¶ 70. Thus, by and large, the defamatory statements alleged in the Amended Complaint do not consist of editorial commentary concerning supposed mail fraud at the Erie General Mail Facility or opinion as to the courageousness of the whistleblower, but provably false accusations levied against Weisenbach that he personally directed that mail-in ballots received through November 6, 2020, be backdated to the 3rd, and that he did so because he was a "Trump hater."

Furthermore, the Amended Complaint sufficiently avers that the statements tended to harm Weisenbach's reputation so as to lower him in the estimation of the community or to deter third parties from associating or dealing with him. The Amended Complaint alleges that the false publicity brought on by the publications resulted in an unknown assailant angrily confronting Weisenbach in his driveway, he and his wife having to leave Erie for a time to ensure their safety, and his wearing a face mask while running errands in the community, not merely to protect against COVID-19, but to obscure his face. Am. Compl. ¶¶ 125-38, 141. The Amended Complaint therefore alleges that he was exposed to hatred, contempt, and ridicule by virtue of his tarnished reputation. *Tucker v. Philadelphia Daily News*, 848 A.2d 113, 125 (Pa. 2004) (quoting *Schnabel v. Meredith*, 107 A.2d 860, 862 (Pa. 1954)). That is enough to survive a demurrer as to the defamatory character of the statements underlying Count II.

Project Veritas and O'Keefe respond that the Weisenbach merely "offers speculation designed to punish Veritas' reporting about the statements of a postal worker." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 5. Similarly, they assert Weisenbach "fails to provide this Court with identifiable, actionable defamatory communications." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas

[10] Whether Hopkins, in fact, recanted his earlier allegations is hotly contested by the parties. Whether O'Keefe statement is capable of defamatory meaning, in turn, depends upon whether his statement was a "subjective interpretation, or opinion, of" this provable fact, *Parano v. O'Connor*, 641 A.2d 607, 609 (Pa. Super. 1994) (holding comments that plaintiff was "adversarial, less than helpful, and uncooperative" to be expressions of opinion), or alternatively, whether his statement was an opinion based upon his subjective misunderstanding of the facts. *Kuwait*, 216 A.3d at 1087 (holding legal opinion based on misunderstanding of the facts is not itself sufficient for an action of defamation, "no matter how unjustified and unreasonable the opinion may be or how derogatory it is." (citations and internal quotation marks omitted)). Moreover, in limited circumstances, "[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Id.* at 1086 (quoting Restatement (Second) of Torts § 566). Given the Court's finding that the vast majority of the allegations do not constitute expressions of opinion, it is not necessary to decide whether O'Keefe's statement is properly characterized as an expression of opinion, or if so, whether it may be reasonably inferred from the face of the pleading that O'Keefe was aware of any undisclosed facts concerning Hopkins' supposed recantation.

and O'Keefe, p. 9. But as just explained, the crux of Weisenbach's case centers around the allegations that Project Veritas published (and then republished twice over) false claims that he ordered the backdating of mail-in ballots and that he did so because he was a "Trump hater." Weisenbach's vigorous averments in this regard do not waiver on the precipice of mere speculation.

They similarly contend that the "closest specification of an allegedly defamatory communication" is found in paragraph 37, which avers that beginning November 4, 2020, Project Veritas and O'Keefe "began to press a narrative" that "USPS workers were backdating ballots in order to sway the election to former Vice President Biden." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 5-6; Am. Compl. ¶ 37. But they insist that "a discussion about backdating ballots … is precisely what Richard Hopkins overheard and then communicated to Project Veritas." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 6. They argue that "[a]s responsible journalists" they were entitled to "take a reasoned assessment of the facts they have collected and pronounce their opinion about it." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 6. But as the Court has explained, while portions of the published stories may contain editorial elements, the core of Weisenbach's claim rests upon Project Veritas and O'Keefe's reporting and amplification of allegedly false facts, namely, that Weisenbach ordered the backdating of mail-in ballots and that he was a "Trump hater." Drawing all reasonable inferences from the Amended Complaint in Weisenbach's favor, that reporting was not couched as opinion, but as unadorned fact.

Likewise, Project Veritas and O'Keefe argue that the Amended Complaint fails to sufficiently allege an action for defamation *per se* because the statements made by them concerning fraud or backdating are protected statements of conversational meaning, properly characterized as opinion or hyperbole, such as when someone identifies an excessive charge as "fraud" or "extortion." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 6-7.[11] But once again, this argument obfuscates the distinction between a journalist's reporting of facts and his or her expressions of opinion concerning those facts. And once again, Project Veritas and O'Keefe fail to draw all reasonable inferences from the Amended Complaint in Weisenbach's favor, as the Court must. When the averments are read in that light, it becomes clear that Weisenbach alleges that Project Veritas was not using figurative language when it accused Weisenbach of orchestrating a voter fraud scheme.

At oral argument, counsel for Project Veritas and O'Keefe noted that some courts in defamation cases have held that posts on social media are more likely to include hyperbolic or "loose figurative language" as opposed to literal "criminal imputation." Tr. p. 56. This is in keeping with longstanding admonitions that "in determining whether a statement is capable of defamatory meaning, a court must view the statement in context" and "[t]he nature of the audience is a critical factor in determining whether a statement is capable of defamatory

[11] As the parties appear to use that term, "a communication which ascribes to another conduct, character, or a condition that would adversely affect his fitness for the proper conduct of his business, trade, or profession, is defamatory *per se*." *Pelagatti v. Cohen*, 536 A.2d 1337, 1345 (Pa. Super. 1987); *but see Agriss v. Roadway Express, Inc.*, 483 A.2d 456, 469 (Pa. Super. 1984) (abandoning distinction for purposes of actionability between libels which are defamatory on their face and libels which are defamatory through extrinsic facts and circumstances) ("The import of 'per se' in a defamation case is a problem that has kept Pennsylvania courts going in circles for generations … nowadays 'per se' is used so inconsistently and incoherently in the defamation context that any lawyer or judge about to use it should pause and replace it with the English words it is intended to stand for.").

meaning." *Kuwait*, 216 A.3d at 1085. That statements made on Facebook or Twitter are more likely to be exaggerated than those in the *New England Journal of Medicine* should come as a surprise to no one, but at the risk of sounding monotonous, Project Veritas and O'Keefe's reliance on context overlooks the fact that at this stage the Court must confine its analysis to the averments in the Amended Complaint, drawing all reasonable inferences in Weisenbach's favor. Read in that context, the claims of voter fraud in the stories, and even in the social media posts, are properly characterized as literal factual allegations, not loose figurative language.

Finally, Project Veritas and O'Keefe maintain that Wiesenbach misunderstands the Pennsylvania Supreme Court's decision in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Sept. 17, Pa. 2020) to mean that ballots postmarked by November 6, 2020, "were legally cast and required to be counted" when in reality that decision "merely permitted a three-day extension of the received-by deadline solely to allow for the tabulation of ballots" postmarked by 8:00 p.m. on November 3, 2020. Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 8 (quoting Am. Compl. ¶¶ 88-90; citing *Boockvar*, 238 A.3d at 371-72). This fact, they claim, refutes Weisenbach's assertion in Paragraph 90 of the Amended Complaint that they "knew or had reason to know that any reports of ballot segregation expressly comported with Pennsylvania law." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 9 (quoting Am. Compl. ¶ 90). Rather, they assert that precisely because the *Boockvar* decision did not allow for the backdating of ballots, O'Keefe could reasonably reach the conclusion that "something illegal" or "something shady" was afoot that warranted further discussion. Tr., p. 70.

While it is true that the Amended Complaint appears to misconstrue the holding in *Boockvar*, and while the *Boockvar* decision certainly did not condone mail-in ballot backdating, subsequent guidance issued by the Pennsylvania Department of State did require the segregation of ballots as the United States Supreme Court's November 6, 2020, Order in the then-pending appeal made clear. *See Republican Party of Pennsylvania. v. Boockvar*, --- S.Ct. ---, 2020 WL 6536912 (Mem.) (U.S. Nov. 6, 2020) (Alito, J., in chambers) ("All county boards of election [are] hereby ordered, pending further order of the Court, to comply with the following guidance provided by the Secretary of the Commonwealth on October 28 and November 1, namely: (1) that all ballots received by mail after 8:00 p.m. on November 3 be segregated and kept in a secure, safe and sealed container separate from other voted ballots; and (2) that all such ballots, if counted, be counted separately." (citation and internal quotation marks omitted)).

Thus, by virtue of the *Boockvar* case and the resulting guidance from the Pennsylvania Department of State, the central thrust of the averment in Paragraph 90 remains plausible: that O'Keefe knew or had reason to know that the ballot segregation procedures described by Hopkins complied with Pennsylvania law. And while a factfinder may ultimately conclude that, these legal developments notwithstanding, O'Keefe legitimately believed something nefarious was happening at the Erie General Mail Facility based on Hopkins' statements, a factfinder may just as easily reach the opposite conclusion.

We are not at the factfinding stage yet however. "When ruling on a demurrer, a court must confine its analysis to the complaint." *Monsanto*, 269 A.3d at 635 (emphasis omitted). Drawing all reasonable inferences in Weisenbach's favor, the publicly-known ballot segregation procedures should have given pause to O'Keefe before publishing the stories. On the other

hand, any claim that O'Keefe was not aware of the ballot segregation procedures does not necessarily help him either as it could tend to show that he and the Project Veritas team failed to do their due diligence in investigating mail-in ballot collection procedures. Moreover, (and perhaps most importantly) even if the Court were to disregard Paragraphs 88 through 90 in light of Weisenbach's misunderstanding concerning the *Boockvar* decision, there is still ample factual averments to support his claims of defamation in the remaining 204 paragraphs of the Amended Complaint. As such, Project Veritas and O'Keefe's reliance on Weisenbach's misstatement of the *Boockvar* decision is not enough to sustain their demurrer. Likewise, the Court rejects Project Veritas and O'Keefe's suggestion that the misstatement impacts the sufficiency of the Amended Complaint. Tr., pp. 70-71.

That leaves Project Veritas and O'keefe's demurrer as to Count III, relating to concerted tortious activity. In large part, their demurrer rests on the same arguments as in Count II. *See* Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 16 ("For the same reasons that Weisenbach's claim of defamation fails, so too does his claim of substantial assistance."). In turn, for the same reasons that Project Veritas and O'Keefe's challenge to Count II fails, so too does their challenge to Count III. The Court briefly pauses to address a challenge to Count III not addressed elsewhere in this Opinion. Project Veritas and O'Keefe argue that "[w]here news publishers publish the accounts of an insider and play no part in any illegal interception of material, they are immune from claims raised against the inside source." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 16 (citing *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001)). They contend that the Amended Complaint merely "suggests a loose conspiracy between Hopkins, Veritas, and O'Keefe to defame him, but nowhere alleges any facts to show that Veritas or O'Keefe defamed Weisenbach or induced Hopkins to defame him." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 16.

This is simply not an accurate description of the factual allegations in the Amended Complaint. Weisenbach ardently avers that Project Veritas and O'Keefe defamed him by publishing the November 5th, November 6th, and November 11th stories. They further allege, as part of its Diamond Dog initiative, that Project Veritas "solicited" Hopkins' account. Am. Compl. ¶ 74. While Project Veritas may dispute this averment, the Court must accept it as true at this juncture. Furthermore, Count III indicates a laundry list of ways in which Project Veritas and O'Keefe substantially assisted Hopkins, including through encouragement to come forward, the drafting of the affidavit, instructions on how to profit from the crowdfunding account, keeping lawyers on retainer to defend Hopkins, and consulting with Hopkins on a daily basis, all with the common goal of defaming Weisenbach. Am. Compl. ¶ 202. In short, Count III sufficiently alleges that all three Defendants aided or abetted each other in a tortious scheme to defame Weisenbach, *Valentino*, 914 A.2d at 421, and that they did so with knowledge of each other's tortious conduct, or at the very least, that the other Defendants' tortious acts were reasonably foreseeable. *Bryn Mawr Trust Co.*, 253 A.3d at 690.

As such, this is not an inside source case. *See Bartnicki*, 532 U.S. at 525. ("First, respondents played no part in the illegal interception. Rather, they found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception. Second, their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else."). Here, it

is not alleged that Project Veritas published information that was illegally intercepted by an inside source. Rather, Weisenbach alleges that both Project Veritas and Hopkins engaged in concerted "character assassination" against him with the larger aim of "undermining public faith in the United States Postal Service and the results of the 2020 Presidential election." Am. Compl. ¶ 10. Project Veritas and O'Keefe's reliance on this line of cases is therefore misguided.

Accordingly, the demurrer as to Count III is overruled. As to Project Veritas and O'Keefe's demurrer as to Count II (as well as Hopkins' demurrer as to Count I), all that remains to be adjudicated is the Defendants' claims that the First Amendment bars recovery under the facts alleged pursuant to the "rigorous, if not impossible," to satisfy actual malice standard, applicable to defamation actions brought by public officials. *Manning v. WPXI*, 886 A.2d 1137, 1144 (Pa. Super. 2005). This presents a closer question than the challenges considered thus far.

IV. DEMURRER: ACTUAL MALICE

The First Amendment to the United States Constitution, applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides, in relevant part, that "Congress shall make no law … abridging the freedom of speech, or of the press[.]" U.S. CONST. amend. 1. "At the founding, the freedom of the press generally meant the government could not impose prior restraints preventing individuals from publishing what they wished. But none of that meant publishers could defame people, ruining careers or lives, without consequence. Rather, those exercising the freedom of the press had a responsibility to try to get the facts right — or, like anyone else, answer in tort for the injuries they caused." *Berisha v. Lawson*, 141 S.Ct. 2424, 2426 (2021) (Gorsuch, J., dissenting from denial of certiorari). "This was the accepted view in this Nation for more than two centuries." *Id.* (quoting *Herbert v. Lando*, 441 U.S. 153 (1979) (internal quotation marks and brackets omitted).

The legal landscape changed dramatically in the 1960s when the United States Supreme Court decided *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). There, the Court held that the First Amendment to the United States Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80 (internal quotation marks omitted). The Court reasoned that a tort regime "compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in amount — leads to a comparable self-censorship." *Id.* at 279 (internal quotation marks omitted). "Under such a rule," the Court continued, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Id.* Such a standard "dampens the vigor and limits the variety of public debate" and therefore "is inconsistent with the First and Fourteenth Amendments." *Id.*

The decision rests upon "the principle that debate on public issues should be uninhibited, robust, and wide-open," *Id.* at 270, and that "[o]ur profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of breathing space so that protected speech is not discouraged." *Harte-Hanks Communications Inc., v. Connaughton*, 491 U.S. 657, 686 (1989) (citations and

internal quotation marks omitted). In order to prevent a chilling effect on protected speech, it is consequently necessary to tolerate "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times*, 376 U.S. at 270. The upshot is that *New York Times* and its progeny extends "a measure of strategic protection to defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

Here, the parties contest whether Weisenbach is a public official for purposes of the *New York Times* actual malice standard.[12] Defendants can identify only two relevant cases, neither of which are binding on this Court, and one of which predates *New York Times* itself. *See Knipe v. Procher*, 75 Pa. D. & C. 420, 421 (Montgomery Co. 1950) (Forrest, J.) ("A postmaster is a public official and as such is bound to exercise his judgment for the public benefit[.]"); *Silbowitz v. Lepper*, 32 A.D.2d 520, 299 N.Y.S.2d 564 (N.Y. App. Div. 1969) ("the plaintiff, a supervisor and senior administrator of the Peck Slip Station of the City of New York Post Office Department, is to be considered a public official within the purview of the *New York Times Co. v. Sullivan*[.]"). In any event, the Court need not decide today whether Weisenbach is a public official for purposes of *New York Times v. Sullivan* because even assuming, without deciding, that he is, the Court holds that Weisenbach has sufficiently plead actual malice on the part of all Defendants.[13]

Actual malice, and in particular, its reckless disregard component, "cannot be fully encompassed in one infallible definition." *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968). It does not mean "ill will or malice in the ordinary sense of the term," and so, cannot be shown simply "by virtue of the fact the media defendant published the material to increase its profits, or the failure to investigate before publishing, even when a reasonably prudent person would have done so, although the purposeful avoidance of the truth is in a different category." *Joseph v. Scranton Times, L.P.*, 129 A.3d 404, 436-37 (Pa. 2015) (citing *Harte-Hanks*, 491 U.S. at 666-92). "Rather, actual malice requires at a minimum that statements were made with a reckless disregard for the truth. That is, the defendant must have made the false publication with a high degree of awareness of probable falsity, or must have entertained serious doubts as to the truth of his publication." *Id.* at 437 (citations, internal quotation marks, brackets, and ellipsis omitted).

In this case, Weisenbach points to three categories of averments in the Amended Complaint

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[12] Even if he is not a public official, Project Veritas and O'Keefe alternatively claim Weisenbach is a limited purpose public figure — another category of plaintiff subject to the actual malice standard — because he voluntarily injected himself into the controversy by accepting the job of postmaster. Prelim. Obj. of Def.s' Project Veritas and James O'Keefe, III, ¶ 19 (citing *American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania*, 923 A.2d 389 (Pa. 2007)); Memorandum of Law in Supp. of Prelim. Obj. of Defs. Project Veritas and O'Keefe, p. 11; Tr., pp. 75-76. The Court does not reach this argument.

[13] Weisenbach argues that he is not required to aver facts in support of his allegation that the Defendants acted with actual malice because actual malice is a state of mind, which under Pa.R.C.P. 1019(b), may be pled generally. Tr., p. 90. Because the Court nonetheless finds that Weisenbach has pled sufficient facts to support his contention of actual malice as to all Defendants, the Court need not address this argument. The Court observes, however, that appellate courts in the federal system, another fact-pleading jurisdiction, appear to have overwhelmingly rejected Weisenbach's position. *See Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013) ("States of mind may be pleaded generally, but a plaintiff still must point to details sufficient to render a claim plausible."); *Biro v. Conde Nast*, 807 F.3d 541 (2nd Cir. 2015) ("a public-figure plaintiff must plead plausible grounds to infer actual malice by alleging enough facts to raise a reasonable expectation that discovery will reveal evidence of" actual malice.") (citation, internal quotation marks, and brackets omitted); *Michel v. NYP Holdings, Inc.*, 816 F.3d 686 (11th Cir. 2016) (noting "after *Iqbal* and *Twombly*, every circuit that has considered the matter has applied the *Iqbal/Twombly* standard and held that a defamation suit may be dismissed for failure to state a claim where the plaintiff has not pled facts sufficient to give rise to a reasonable inference of actual malice.").

which he argues lead to the conclusion that Project Veritas and O'Keefe acted with actual malice: (1) fabrication and serious doubts as to the truth; (2) intentional avoidance of the truth and inherent improbability; and (3) preconceived narrative and ulterior motive. Pl.'s Br. in Opp. to Prelim. Obj. of Defs. Project Veritas and O'Keefe, pp. 12-22. In a similar vein, Weisenbach offers three categories of averments which he suggests lead to the conclusion that Hopkins acted with actual malice: (1) fabrication and serious doubts as to the truth; (2) intentional avoidance of the truth; and (3) financial motive. Pl.'s Br. in Opp. to Prelim. Obj. of Def. Hopkins, pp. 5-13. Weisenbach submits that even if none of these factors, standing alone, would be sufficient to establish actual malice by clear and convincing evidence,[14] the totality of these factors would be. Tr., pp. 118-19. The Court agrees.

Beginning with Project Veritas and O'Keefe, Weisenbach avers that the media Defendants took a tendentious approach with Hopkins, drafting his affidavit, encouraging him to solicit donations, helping him set up crowdsourcing accounts, flying him to New York for an interview, and retaining legal counsel on his behalf. Am. Coml. ¶¶ 83, 97, 100, 202; *see also US Dominion, Inc., v. Powell*, 554 F.Supp.3d 42, 60 (D.D.C. 2021) ("there is no rule that a defendant cannot act in reckless disregard of the truth when relying on sworn affidavits — especially sworn affidavits that the defendant had a role in creating."). They falsely stated in their first story that they had "multiple sources" to corroborate Hopkins' claims. Am. Coml. ¶ 48. Later, after reviewing the recording where Hopkins stated "I didn't specifically hear the whole story. I just heard part of it. And I could have missed a lot of it. … My mind probably added the rest[,]" Am. Coml. ¶ 96, they doubled down and republished the allegedly defamatory statements. Am. Coml. ¶¶ 108-18. Even after the Postal Service Inspector General issued a final report on February 3, 2021, concluding there was "no evidence" to support Hopkins claims, Project Veritas refused to retract their story. Am. Coml. ¶¶ 149, 154; *see also Castellani*, 124 A.3d at 1242 ("the existence of actual malice may be shown in many ways, including [by] direct or circumstantial competent evidence of prior or subsequent

[14] Hopkins and Weisenbach dispute whether a plaintiff must plead actual malice by clear and convincing evidence at this stage. Hopkins cites to *Tucker*, which considered in the context of a demurrer on motion for judgment on the pleadings "whether a reasonable jury could conclude by clear and convincing evidence that Appellant-newspapers printed statements they knew were false or printed them with reckless disregard of their falsity." *Tucker*, 848 A.2d at 131. Our intermediate appellate courts, relying on *Tucker*, have arrived at the same conclusion as Hopkins. *See Jones v. City of Philadelphia*, 893 A.2d 837, 844 (Pa. Cmwlth. 2006) ("A plaintiff must plead sufficient facts such that a jury could eventually conclude, by clear and convincing evidence, that the statements at issue were false."). Weisenbach argues that a later case, *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899, 905 (Pa. 2007), "disavow[s] th[e] notion that this heightened clear and convincing standard should apply before a jury trial." Tr. pp. 147-48. Weaver, however, merely clarified that an "independent review of evidence," as required under United States Supreme Court precedent, is "an assessment made by appellate courts only after the jury has made findings of fact," and so, was inapplicable in the context of a motion for summary judgment. *Weaver*, 926 A.2d at 908 (emphasis in original). It did not address a pleading standard, as the Court did in Tucker.

To be sure, a party opposing demurrer need not present any evidence; he or she simply must point to sufficient factual allegations in the pleading. But because a plaintiff must ultimately prove actual malice by clear and convincing evidence at trial, it naturally follows that a plaintiff must plead sufficient facts in a complaint, which, if credited by a factfinder, could ultimately satisfy that heightened evidentiary standard. *See Biro v. Conde Nast*, 963 F.Supp.2d 255, 288 (S.D. N.Y. 2013) ("missing from the complaint are any factual allegations suggesting that Biro could plausibly demonstrate by clear and convincing evidence that the New Yorker Defendants published the four allegedly defamatory statements with actual malice[.]"). This is of particular importance in the actual malice context where some evidence, standing alone, (such as the failure to investigate or an ulterior motive to publish) may not be sufficient, yet, may nonetheless be relevant to determining whether a defendant purposely avoided the truth. *Harte-Hanks*, 491 U.S. at 692. Thus, in order to survive demurrer, Weisenbach must show that he has pled sufficient facts such that a jury could eventually conclude, by clear and convincing evidence, that the statements at issue were made or published with actual malice. *Jones*, 893 A.2d at 844.

defamations, and subsequent statements of the defendant" and "republications, retractions, and refusals to retract are similar in that they are subsequent acts which can be relevant to the determination of previous states of mind." (quoting *Herbert*, 441 U.S. at 164 n. 12 and *Weaver*, 926 A.2d at 906)). Taken together, these facts, if ultimately proven, could be credited as circumstantial evidence that Project Veritas and O'Keefe fabricated evidence to bolster their story, or at least harbored serious doubts as to the truth of Hopkins' claims.

Similarly, there are facts in the Amended Complaint tending to show that Project Veritas and O'Keefe may have intentionally avoided the truth in light of the inherent improbability of the claims, particularly after it appeared that Hopkins backed down from some of his earlier allegations in his November 9th interview with postal inspectors. Weisenbach maintains that "[a]t that point, there were indisputably obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Pl.'s Br. in Opp. to Prelim. Obj. of Defs. Project Veritas and O'Keefe, p. 18 (quoting *Norton v. Glenn*, 860 A.2d 48, 55 (Pa. 2004) (internal quotation marks omitted)). Drawing all reasonable inferences in Weisenbach's favor, the Court cannot say that this averment does not support Weisenbach's claim that Project Veritas and O'Keefe's decision to publish the third story was the "product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [Hopkins'] charges." *Harte-Hanks*, 491 U.S. at 692.

Additionally, the Court agrees that Weisenbach provides sufficient averments in his Amended Complaint to show that Project Veritas and O'Keefe had an ulterior motive for publishing the stories. Specifically, it is alleged that Project Veritas was engaged in an initiative codenamed "Diamond Dog" to "erode confidence in the security of mail-in voting[.]" Am. Coml. ¶ 24. This included the publishing of stories purporting to document instances of illegal "ballot harvesting." Am. Coml. ¶ 25. It is suggested in the Amended Complaint that the aspersions cast upon mail-in voting systems by these stories would ultimately lend credibility to later allegations of voter fraud in the event of a "Red-Mirage" during the 2020 presidential election. Am. Compl. ¶¶ 27-28. Even more telling, Weisenbach avers that Project Veritas and O'Keefe specifically solicited Hopkins and others to come forward with claims of voter fraud. Am. Compl. ¶ 74. And while Project Veritas and O'Keefe vehemently dispute these allegations, the Court must accept all well-pleaded facts as true for purposes of this demurrer. *Monsanto*, 269 A.3d at 635. Such "evidence that a defendant conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story is evidence of actual malice, and may often prove to be quite powerful evidence." *Harris v. City of Seattle*, 152 Fed. App'x. 565, 568 (9th Cir. 2005) (unpublished) (quoting RODNEY A. SMOLLA, 1 LAW OF DEFAMATION, § 3:71 (2005)).

Accepting all of these averments as true — the specific allegations pertaining to fabrication and the doubts Project Veritas and O'Keefe entertained as to the veracity of Hopkins' claims; the averments suggesting they deliberately avoided the truth by failing to further investigate Hopkins' claims, especially after he admitted to postal inspectors his claims were largely the product of his imagination; and the averments suggesting an ulterior motive for publishing the story — Weisenbach has pled sufficient facts such that a jury could eventually conclude by clear and convincing evidence that the alleged defamatory statements were published with actual malice.

Project Veritas and O'Keefe stress that the failure to investigate alone is not enough to

show actual malice, Tr., pp. 48, 60, 78, and on this point they are correct. *See McCafferty v. Newsweek Media Group, Ltd.*, 955 F.3d 352, 359 (3rd Cir. 2020) ("even an extreme departure from professional standards, without more, will not support a finding of actual malice." (quoting *Tucker v. Fischbein*, 237 F.3d 275, 286 (3d Cir. 2001) (Alito, J.))). But precisely because "[a]ctual malice focuses on the defendant's attitude towards the truth," *DeMary v. Latrobe Printing and Publishing Co.*, 762 A.2d 758, 764 (Pa. Super. 2000), "a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry." *Harte-Hanks*, 491 U.S. at 668 (citations omitted). Thus, it cannot be said that the averments concerning the care exercised by Project Veritas in investigating the claims are irrelevant to the actual malice inquiry.

As Project Veritas and O'Keefe concede, the case law they reference merely stands for the proposition that the "failure to investigate doesn't meet the actual malice standard … [b]y itself." Tr. p. 78. Here, Weisenbach avers far more than the mere failure to adequately investigate. He alleges that Project Veritas and O'Keefe fabricated evidence, that they must have harbored serious doubts as to the veracity of Hopkins' claims in light of their inherent improbability, and that they had an ulterior motive for publishing the stories. Weisenbach's additional allegation that Project Veritas and O'Keefe deliberately avoided the truth by failing to further investigate Hopkins' claims is but one piece in a mosaic of averments, which together, constitute his case for actual malice. *See Gilmore v. Jones*, 370 F.Supp.3d 630, 673 (W.D. Va. 2019) ("Although neither the pursuit of a preconceived narrative nor a failure to observe journalistic standards is alone ultimately enough to establish actual malice, Gilmore's factual allegations, taken together, are sufficiently plausible to support an inference that Creighton published statements about him with actual malice."). Taken together, the totality of the averments in Weisenbach's Amended Complaint support the conclusion that Project Veritas and O'Keefe acted with actual malice. Project Veritas and O'Keefe would read the averments in piecemeal to determine if they individually constitute evidence of actual malice, but such a myopic approach to analyzing a pleading on demurrer is inconsistent with Pennsylvania case law, which confirms that complaints must be read "as a whole[.]" *Village of Camelback Property Owners Association, Inc. v. Carr*, 538 A.2d 528, 464, 465 (Pa. Super. 1988).

Project Veritas and O'Keefe also assert that Weisenbach's theory of actual malice is contradicted by some of its other averments, including the fact that they attempted to interview Weisenbach as the events unfolded and the fact that they candidly published Hopkins' recording of his interview with postal inspectors where he allegedly recanted. Prelim. Obj. of Defs. Project Veritas and James O'Keefe, III, ¶¶ 27-28. It is true that while the Court must draw all reasonable inferences in Weisenbach's favor, it must nonetheless evaluate the entire pleading, including those averments which are not necessarily favorable to Weisenbach. *See Commonwealth v. Chambers*, 188 A.3d 400, 412 n.7 (Pa. 2018) ("Although our standard of review requires us to view the evidence in the light most favorable to the Commonwealth as verdict winner, we are required as well to consider and evaluate the entire record, including those facts at trial that do not fall in the Commonwealth's favor."). But in this case, whether the supposed contradictions identified by Project Veritas and O'Keefe actually do contradict other averments largely depends upon one's perspective.

Weisenbach's perspective is that those contradictory events are not as Project Veritas and O'Keefe would make them out to be. For instance, as to the recording posted by Project Veritas, Weisenbach alleges that roughly one hour of audio is missing, begging the question "what happened to the other sixty-plus (60+) minutes of audio?" Am. Compl., ¶ 95. Likewise, Weisenbach does not view the fact that his brief denial of the claims was included in the first video as a saving grace for the media Defendants since he was simultaneously being portrayed as the perpetrator of an "invidious election fraud scheme[,]" Am. Compl. ¶ 40, suggesting to viewers that his denial was not credible. Because the supposedly conflicting averments are susceptible to an interpretation that comports with Weisenbach's other averments, the Court must accept this version of events on demurrer.

Project Veritas and O'Keefe also emphasize that "in the heat of an election" their reporting "had to be done quickly." Memorandum of Law in Supp. of Prelim. Obj. by Defs. Project Veritas and O'Keefe, p. 6. They contend that these facts present something of a "unique situation" where trying to find sources wiling to corroborate Hopkins' testimony in a 12 to 16-hour period would have been extremely difficult. Tr. pp. 50-51. While this narrative, if credited, may be sufficient to show that Project Veritas and O'Keefe did not act with reckless disregard for the truth, it is not the narrative detailed in the Amended Complaint, which is the only one that matters for present purposes.

The case against Hopkins is more straightforward. His decision to come forward to Project Veritas with claims of an illegal backdating scheme when he later admitted that he "could have missed a lot" of the conversation and that his "mind probably added the rest[,]" itself, is enough to suggest he entertained serious doubts as to the truth of his claims. Am. Coml. ¶ 96. Moreover, nowhere in the Amended Complaint is it alleged that Hopkins attempted to corroborate or verify whether Weisenbach had ordered the backdating of mail-in ballots either with coworkers or his supervisors, from which it could be reasonably inferred that he was intentionally avoiding the truth. Finally, Weisenbach has pled the existence of a financial motive to becoming a "whistleblower" based upon the significant windfall he stood to gain from crowdfunding sources set up with the help of Project Veritas. Am. Compl. ¶¶ 143-48. These are sufficient facts from which a reasonable factfinder could conclude by clear and convincing evidence that Hopkins acted with actual malice when he made the allegedly defamatory statements.

Hopkins argues that certain averments in the Amended Complaint — in particular the allegation that Hopkins recanted his earlier claims during his November 9, 2020, interview with postal inspectors and the allegation that he never confided what he believed he had heard to another coworker — are belied by the attachments and links referenced in the Amended Complaint. Hopkins' Reply Br., pp. 4-11. Most notably, Hopkins argues that the link to the recording Hopkins made of his interview with postal inspectors reveals that he was "putting two and two together" based on directions he received to continue collecting mail-in ballots, which he honestly believed was illegal. Hopkins' Reply Br., p. 6 (citing Am. Compl. ¶95, n.25, at 46:45-47:04). This good-faith mistake, he asserts, does not amount to actual malice. Hopkins' Reply Br., p. 6. He also points to portions of the interview where he states that he communicated what he heard to a coworker named Zonya, who referred him to "a different person to contact," although he was "already thinking Project Veritas because [he had] heard about them." Hopkins Reply Br., p. 9 (citing Am. Compl. ¶ 95 n. 25 at 1:00:52-1:01:25).

Based on these comments made during the course of the interview, Hopkins argues that "[w]hile it is true that in considering a demurrer to preliminary objections, all well-pleaded allegations must be accepted as true, a court is not bound to accept as true any averments in a complaint which are in conflict with exhibits attached to it." Tr., p. 32 (quoting *Baravordeh v. Borough Council of Prospect Park*, 699 A.2d 789, 791 (Pa. Cmwlth. 1997)).

The rule referenced by Hopkins has its origins in the area of contract disputes, but even the earliest cases espousing the principle recognized it applies only in a particular subset of cases, namely those "where the contention arises solely upon the meaning of the indenture in its bearing upon the contract, and that must be ascertained by applying to its language the ordinary rules of interpretation." *Kaufmann v. Kaufmann*, 70 A. 956, 958 (Pa. 1909) (quoting *Dillon v. Barnard*, 88 U.S. 430, 437 (1874)). This is in contrast, for example, to cases involving "a bill to set aside or reform the contract as not expressing the actual intention of the parties." *Id.*[15] The question of whether a particular statement is probative of actual malice is more analogous to this latter scenario dealing with the intent of the parties because an evaluation of actual malice necessarily involves an inquiry into an individual's "subjective awareness of probable falsity[.]" *Gertz*, 418 U.S. at 335 n. 6.

The precedents cited by Hopkins in support of the rule's application in this case all appear related to written documents, which on their face, directly refuted averments in a pleading, as do the other cases encountered by the Court during the course of its own research. *See Baravordeh*, 699 A.2d at 79 ("the Resolution, on its face, states otherwise."); *Framlau Corp. v. Delaware County*, 299 A.2d 335, 338 (Pa. Super. 1972) ("Where any inconsistency exists between the allegations of a complaint and a written instrument, to-wit, the contract documents in this case, the latter will prevail[.]"); *Schuylkill Products, Inc., v. H. Rupert & Sons, Inc.*, 451 A.2d 229, 233 (Pa. Super. 1982) (performance bond); *see also Lawrence v. Pennsylvania Department of Corrections*, 941 A.2d 70, 73 (Pa. Cmwlth. 2007) (sentencing order); *Philmar Mid-Atlantic, Inc., v York Street Associates II*, 566 A.2d 1253, 1254 (Pa. Super. 1989) (letter of intent); *Cohen v. Carol*, 35 A.2d 92, 93 (Pa. Super. 1943) (letter in lieu of formal agreement of sale).

The linked attachment here is of a different ilk. It consists not of a written legal instrument or formal declaration, but a lengthy interview, sometimes adversarial in nature, concerning a contested series of events. It is thus more akin to testimony than a typical documentary exhibit. Accepting Hopkins' invitation to consider the recording, which more resembles testimony given at a deposition, would imbue these Preliminary Objections with the flavor of summary judgment. In that distinct procedural context, however, it is well-established in this Commonwealth that "[t]estimonial affidavits of the moving party 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 is still a matter for the factfinder." *DeArmitt v. New York Life Ins. Co.*, 73 A.3d 578, 595 (Pa. Super. 2013) (quoting *Penn Center House, Inc. v. Hoffman*, 553 A.2d 900, 903 (Pa. 1989) (internal quotation marks and brackets omitted)); *see also Woodford v. Insurance Department*, 243 A.3d 60, 69 (Pa. 2020) ("We

[15] By definition, such a claim cannot be resolved without reference to evidence from beyond the four corners of the written agreement. *See Voracek v. Crown Castle USA Inc.*, 907 A.2d 1105, 1107 (Pa. Super. 2006) ("extrinsic evidence is admissible for the purpose of showing that by reason of mistake, fraud or accident, the written instrument does not express the actual intention of the parties.").

have consistently adhered to the *Nanty-Glo* rule since 1932." (internal quotation marks and brackets omitted)); *Borough of Nanty-Glo v. American Surety Co. of New York*, 163 A. 523 (Pa. 1932) ("However clear and indisputable may be the proof when it depends on oral testimony, it is nevertheless the province of the jury to decide … as to the law applicable to the facts[.]").

As the case law concerning the *Nanty-Glo* rule makes clear, Pennsylvania draws a distinction between evidence which is documentary, on the one hand, and evidence which is testimonial, on the other. *Penn Center House*, 553 A.2d at 903. The *Nanty-Glo* rule, which only applies to testimonial evidence, is premised on two concerns, the first being "that the determination of whether a witness is credible is a matter properly left to the finder of fact" and the second a "belief in the efficacy of cross-examination as a means of attacking the credibility of a witness." *Woodford*, 243 A.3d at 69 (quoting J. PALMER LOCKHARD, *Summary Judgment in Pennsylvania: Time for Another Look at Credibility Issues*, 35 DUQ. L. REV. 625, 629 (1997)).

Those same concerns which animate *Nanty-Glo* are equally applicable to testimonial attachments or exhibits, including the recording at issue here. At trial, a factfinder would be free to believe or disbelieve any of the statements made by Hopkins during the interview. Similarly, future cross-examination of Hopkins or others may ultimately impact the credibility of those statements. Notably, Weisenbach suggests that the recording may have been spliced, and that roughly an hour of audio is missing, Am. Compl. ¶ 95, yet without cross-examination on this point, or at the very least, further discovery, the Court could effectively be granting demurrer based upon unreliable conflicting evidence. That is not to say the rule has no application in the defamation context, *see Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 704 (11th Cir. 2016) (averment that defendants conducted no investigation prior to reporting allegedly defamatory statements contradicted by article, attached as an exhibit, indicating "that the reporters spoke with, consulted, or otherwise reached out to a Foundation insider, event organizers, the founder of the Foundation, the venue, the Foundation's website, and state charity records."), but its application must be limited to exhibits or attachments which are truly documentary in nature, in other words, those exhibits whose meaning may "be ascertained by applying to its language the ordinary rules of interpretation." *Kaufmann*, 70 A. at 958.[16]

Hopkins further protests that he was never put on notice that Weisenbach contended his claims were false, and as such, the republication of his defamatory statements cannot be treated as evidence of reckless disregard for the truth, relying on *Weaver*. Tr., pp. 151-53. In *Weaver*, our Supreme Court cited the Restatement (Second) of Torts for the proposition that "[r]epublication of a statement *after the defendant has been notified that the plaintiff contends that it is false and defamatory* may be treated as evidence of reckless disregard." *Weaver*, 926 A.2d at 905 (quoting he Restatement (Second) of Torts § 580A, cmt. d (2006)) (emphasis added). *Weaver* accordingly went on to hold "that where a publisher is on notice that the statement may be false, republication of an alleged defamatory comment may be used as evidence of the defendant's state of mind and actual malice in regard to the prior publication because the second publication tends to indicate a disregard for the truth that

[16] Moreover, even if the Court were required to consider the recording (which it has reviewed), this interview simply represents Hopkins' then-explanation of the allegations. It is not extrinsic evidence that proves an absence of actual malice for purposes of preliminary objections.

may have been present at the time of the initial publication." *Castellani*, 124 A.3d at 1235.

In Hopkins' case, we are not faced with a publisher who proceeds to republish a story after being confronted with evidence undermining its veracity, but with the source for the story itself, who would be in a position to know whether he had reason to seriously doubt the veracity of his own claims from the beginning. The thrust of Weisenbach's claim is that Hopkins harmed him when he participated in the initial story, although his ongoing concerted activity with Project Veritas and O'Keefe in republishing those claims may have further tarnished his reputation. But even ignoring the republication of subsequent stories and his involvement in those interviews, there is still sufficient evidence that Hopkins acted with actual malice stemming from the averments related to the first story, which suggest Hopkins intentionally avoided the truth in coming forward with his claims in the first place and had an incentivizing financial motive for doing so. Hopkins' reliance on *Weaver* is therefore inapposite.[17]

More fundamentally, Defendants argue that where the substance of the alleged defamatory statements pertain to issues of self-governance and election integrity, "where First Amendment protection is at its zenith[,]" allowing this case to go forward would have a chilling effect on publishers fearing similar lawsuits. Tr., p. 46. Project Veritas and O'Keefe invoke the United States Supreme Court's decision in *Gertz*, which began its discussion by observing that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz*, 418 U.S. at 339-40. They omit the following, equally significant, passage located a few lines below: "The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." *Id.* at 341. The constitutional deck is not all stacked to one side. "Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury." *Id.* at 342. In this way, *New York Times* and its progeny strike a careful balance between the standards of journalistic integrity that a pluralistic society dedicated to the free exchange of ideas must tolerate, and that which it need not.[18] Weisenbach sufficiently avers that this case falls within the latter category. The difficulty may come in eventually proving subjective knowledge of falsity or probable falsity by clear and convincing evidence, but our concern on demurrer is simply whether or not they have properly pled actual malice.

To be sure, even at this early stage in litigation, "courts must ensure that only truly meritorious defamation lawsuits are allowed to proceed, lest exposure to monetary liability chill the exercise of political debate that is the foundation of our constitutional republic."

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[17] In any event, drawing all reasonable inferences in Weisenbach's favor, the Amended Complaint suggests that all Defendants would have been put on notice that the accusations were false by virtue of Weisenbach's comment to Project Veritas that the allegations were untrue, presented as part of the original story. Am Compl. ¶ 48.

[18] Some have questioned whether the *New York Times* standard strikes a correct balance in today's technology-driven world, but this criticism does not inure to the Defendants' benefit. *See Berisha*, 141 S.Ct. at 2427, 2428 (Gorsuch, J., dissenting from denial of certiorari) ("In 1964, the Court may have seen the actual malice standard as necessary to ensure that dissenting or critical voices are not crowded out of public debate. But if that justification had force in a world with comparatively few platforms for speech, it's less obvious what force it has in a world in which everyone carries a soapbox in their hands … What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable.").

Rogers v. Mroz, 502 P.3d 986, 989 (Ariz. 2022). But this Court must also be mindful of the deferential standard of review through which it must assess whether a particular claim appears meritorious on demurrer. Discovery has not officially begun, and the Defendants have yet to even file answers to the accusation lodged against them. The Court's review of the Amended Complaint today is necessarily one-sided; it looks only to the narrative presented in the pleading, and the Court assumes, as it must, that every material fact alleged therein is true. There will be time to test the mettle of these claims through the presentation of evidence and adversarial inquiry, but that day is not today. Ever mindful of the chill that lawsuits such as this may have on our press freedoms, the Court nonetheless holds that Weisenbach has pled sufficient facts as to all three Defendants to withstand their demurrers. For now, "the balance between the needs of the press and the individual's claim to compensation for wrongful injury" weighs in favor of the Plaintiff. *Gertz*, 418 U.S. at 343. Defendants' demurrers to Counts I and II are consequently overruled.

V. CONCLUSION

It is apparent that the parties perceive the events of the days following the 2020 presidential election through wildly different lenses. Today's Opinion recounts those days through the eyes of Robert Weisenbach. As he sees it, Richard Hopkins was acting well outside the scope of his employment when he supplied false claims of mail-in ballot backdating to Project Veritas, and so, jurisdiction over the claims now levied against him does not lie exclusively in federal court pursuant to the Federal Tort Claims Act. Likewise, Weisenbach's averments are legally sufficient to make out claims of defamation and concerted tortious activity against all Defendants, even under the demanding actual malice standard. Whether Weisenbach will be able to offer adequate evidence to support his claims, and whether a jury would ultimately be willing to credit such evidence after hearing both sides of the story, remains to be seen. For now, it is enough to hold that the averments set forth in the Amended Complaint are sufficient as a matter of law to permit the action to proceed to discovery, where the truth of these claims can begin to be tested in the crucible of our adversarial system.

Accordingly, and for the foregoing reasons, Defendants' Preliminary Objections to Plaintiff's First Amended Complaint are overruled.

It is so ordered.

BY THE COURT:
/s/ **Marshall J. Piccinini, Judge**

IN THE INTEREST OF J.W., JR., A MINOR APPEAL OF S.R., MOTHER AS TO ORDER CHANGING PERMANENCY GOAL

INFANTS / DEPENDENCY / APPEAL AND REVIEW

When reviewing an order regarding the change of placement goal of a dependent child pursuant to the Juvenile Act, the Superior Court's standard of review is abuse of discretion. *In re B.S.*, 861 A.2d 974, 976 (Pa. Super. 2004).

INFANTS / DEPENDENCY / APPEAL AND REVIEW

The Superior Court is bound by the facts as found by the trial court if those facts are supported by the record. *In re K.J.*, 27 A.3d 236, 241 (Pa. Super. 2011).

INFANTS / DEPENDENCY / APPEAL AND REVIEW / DISCRETION OF LOWER COURT

The Superior Court must determine that the lower court's judgment was manifestly unreasonable, that the lower court did not apply the law, or that the lower court's action was a result of partiality, prejudice, bias, or ill will, as shown by the record. *In re N.C.*, 909 A.2d 818, 822-23 (Pa. Super. 2006).

INFANTS / DEPENDENCY / DISPOSITION OF DEPENDENT CHILD

The focus of all dependency proceedings, including goal change proceedings, is on the safety, permanency, and well-being of the child; the child's best interest must take precedence over all other considerations. *In re A.K.*, 936 A.2d 528, 534 (Pa. Super. 2007).

INFANTS / DEPENDENCY / DISPOSITION OF DEPENDENT CHILD

At the dependency review hearing, the trial court must consider, *inter alia*, the continuing necessity for appropriateness of the child's placement, and the appropriateness and feasibility of the child's current placement goal. 42 Pa.C.S.A. § 6351(f)(1)(4).

INFANTS / DISPOSITION OF DEPENDENT CHILD

If reunification is not in the child's best interest, the trial court may determine that adoption is the appropriate permanency goal. 42 Pa.C.S.A. § 6351(f.1)(2).

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
JUVENILE DIVISION – DEPENDENCY
CP-25-DP-0000206-2021
No. 509 WDA 2022

Appearances: Anthony G. Vendetti, Esquire, Erie County Office of Children and Youth Solicitor
W. Charles Sacco, Esquire, for Appellant S.R., Mother
Christine Fuhrman Konzel, Esquire, Guardian Ad Litem for the Minor Child

1925(a) OPINION

Trucilla, J., June 1, 2022

This matter is before the Court upon the appeal of S.R. (hereinafter "Appellant" and/or "Mother"), the mother of J.W., Jr., (born August 2020), challenging this Court's decision to change the permanency goal from Reunification to Adoption. For the reasons set forth below, the instant appeal should be dismissed.

PROCEDURAL AND FACTUAL HISTORY

This matter involves the adjudication of dependency for one (1) minor child, J.W., Jr. born in August of 2020. Appellant is the biological mother of the child. The child's father is J.W., Sr., and is not a party to the present appeal.[1] An Emergency Protective Order was issued for the detention of J.W., Jr. on September 22, 2021. Subsequently, a formal adjudication of dependency was rendered on October 22, 2021. The dispositional goal of reunification was also established on October 22, 2021. Initially, Appellant was represented by Krista Ott, Esquire, however, she is currently represented by W. Charles Sacco, Esquire, who has brought the current appeal. Father was represented by Steven M. Srnka, Esquire. The child is currently represented by Guardian ad Litem ("GAL") Christine Fuhrman Konzel, Esquire.

J.W., Jr. became involved informally with the Erie County Office of Children and Youth ("the Agency") at the time of his birth in August 2020 due to Mother's lack of stable housing and Mother's positive test for marijuana (THC) at the time of the child's birth. *See* Recommendation for Shelter Care, 09/28/2021. The child also tested positive for THC at birth. *Id.* Consequently, the Agency offered Mother ongoing services, but Mother failed to utilize those services. Regrettably, the child was again exposed to the Juvenile Dependency system in 2021 due to Mother's lack of progress and out of concern for the child. On September 22, 2021, it was reported to the Agency that Appellant still did not have stable housing and was again abusing alcohol and marijuana. *See* Application for Emergency Protective Order, 09/22/2021. Father had a history of using crack cocaine. *Id*. Throughout this time, Father failed to appear for hearings despite receiving notice. *See* Recommendation for Shelter Care, 09/28/2021. Mother admitted to having a substance abuse history involving K2 (synthetic marijuana), cocaine, and THC. *Id.* As indicated above, Mother used THC during her pregnancy, as the child was born exposed to THC. *Id.*

Based on these and other facts, an Emergency Protective Order was issued by the Court on September 22, 2021. In the Order, the Court found that removal of the minor child was necessary for the welfare and best interest of the child. *See* Emergency Protective Order, 09/22/2021. Also, "[d]ue to the emergency nature of the removal and safety consideration of the child, any lack of services to prevent removal were reasonable." *Id.* Consequently, J.W., Jr. was placed in the temporary protective physical and legal custody of the Agency and placed in a foster home as there was no viable family or kinship resource.

On September 24, 2021, the Agency filed a Dependency Petition alleging the child was a Dependent Child pursuant to 42 Pa.C.S.A. §6302. *See* Dependency Petition, 09/24/2021. The Agency averred J.W., Jr. was without proper parental care or control and alleged the following:

> The Agency has concerns regarding [Mother]'s substance abuse. [Mother] has admitted to using marijuana and tested positive for THC and alcohol on August 24, 2021. She has a substance abuse history including K2, cocaine, and THC. The minor child was born exposed to THC.

[1] Father has not challenged the change of goal to adoption, and therefore Appellant's claim is not dependent on Father. Father has been uninvolved in J.W., Jr.'s life.

> [Mother] has unstable housing and has been homeless multiple times since the child's birth. [Mother] is currently residing with her brother and his paramour. The Agency has observed signs of drug use from [Mother]'s brother and he and his paramour have a history with the Agency. [Mother] often leaves the child in the care of her brother and his paramour. Additionally, the home is not suitable for children. There are doors not attached to the hinges and wood shavings and dust throughout the home. The upstairs bathroom is unusable and there are holes in the floor covered up by wood. [Mother] has unstable and untreated mental health. She is diagnosed with Bipolar Disorder, Cannabis Related Disorder, Major Depressive/Single Episode/Severe with Psychotic Features, Episodic Mood Disorders, and Anxiety.
>
> It is averred that [Mother] has an extensive history with the agency. She has four (4) children that were removed from her care and her parental rights were involuntarily terminated in November 2019. ***The children were removed for similar circumstances such as unstable housing, substance abuse and unstable mental health.*** *(emphasis added).*

See Dependency Petition, 09/24/2021.

In the Dependency Petition, the Agency motioned for a finding of aggravated circumstances and averred the following:

> [T]hat it would be contrary to the welfare, safety and health of the child to remain under the care of [parents].
>
> [T]hat reasonable efforts were made to prevent the placement of the child. The Mother has been open with the Agency since October of 2020 and has made minimal progress. She has been provided resources to locate stable housing and has not been participating in D&A and mental health services.
>
> The Child is born to a parent, [Mother], whose parental rights with regard to another child have been involuntarily terminated under 23 Pa. C.S.A. §2511 (relating to grounds for involuntary termination) within three years immediately preceding the date of birth of the child and conduct of the parent poses a risk to the health, safety or welfare of the child.

See Dependency Petition, 09/24/2021 at 4-5.

In support of their Petition and assertions of aggravated circumstances against Mother, the Agency attached four (4) Decrees dated November 12, 2019, and signed by Senior Judge Shad Connelly terminating Mother's rights to four (4) children. *See Id.* at Exhibit A.

Consequently, on September 28, 2021, a Shelter Care Hearing pursuant to 42 Pa.C.S.A. § 6332 was held before the Juvenile Hearing Master, Carrie Munsee, Esquire. *See* Master's Recommendation for Shelter Care and Order, September 28, 2021. Mother was present and represented by Attorney Ott. *Id.* The Master noted that Father did not appear at the hearing and recognized that Mother had an active Protection from Abuse Order against him.[2] *Id.*

[2] Mother's PFA against Putative Father expired in November 2021.

The Master found sufficient evidence was presented to establish it was not in the child's best interest to remain in the home of Mother. *Id.* Therefore, she recommended that the child remain in the foster home. *Id.*

To support her findings, Master Munsee received testimony from the Agency caseworkers Danielle Lubak and Sandra Tate and Mother. *Id.* Mother contested the Agency's request for continued temporary foster care. *Id.* The Agency called Ms. Lubak who testified that Mother and child have been "opened with ongoing Agency services" since October 2020. *Id.* Ms. Lubak indicated the Agency provided Mother with services from the day of the child's birth because the child was born exposed to THC. *Id.* The child was not removed at birth, but the Agency remained involved due to "… [M]other's positive test for drug use at the time of the child's birth." *Id.* Ms. Lubak stated she became involved with Mother on September 21, 2021, after the Agency was again made aware of Mother's unstable housing and her continued drug and alcohol use in front of the child. *Id.* In fact, out of concern for the safety of the child, Ms. Lubak attempted to see the child, but Mother refused to let her. *Id.* Ms. Lubak had concerns for Mother's current housing because it was actually the home of Mother's brother and his paramour. *Id.* Ms. Lubak was "…not able to determine the sleeping arrangements and noted the house was very unfinished, [was] currently being worked on, and there were several safety hazards such as wood shavings, electrical concerns, and so forth with the structure." *Id.*

Agency Caseworker Sandra Tate gave testimony regarding Mother's unsafe housing. Ms. Tate stated there was no electricity in the upstairs area where Mother was staying with child and that there were exposed wires in the stairway. *Id.* In her findings, Master Munsee noted: "Ms. Tate indicated that throughout her involvement with her, [Mother] has denied the need for any services." *Id.* at 2. Ms. Tate stated there was a significant concern for domestic violence between the child's mother and father. *Id.* Mother had been told numerous times the process of obtaining a PFA and only obtained one "…when [Father] pulled a gun on [Mother] and pointed it at her head." *Id.* Ms. Tate further testified that: "[Mother] is argumentative about marijuana being her mental health medication, though she is not prescribed marijuana. [Mother] ha[d] very recently re-engaged with mental health counseling after significant prompting by Ms. Tate." *Id.* Information at the hearing also revealed that Mother also was arrested in July 2021 for public intoxication and "acted aggressively towards the police" and "made statements that she didn't know where her child was." *Id.* Master Munsee wrote: "Upon conclusion of the testimony, the child's GAL was in agreement with continued temporary Agency care." *Id.*

Following the recommendation from Master Munsee, which was adopted by the Court on September 28, 2021, an Adjudication Hearing was held on October 22, 2021, before the undersigned. *See* Order of Adjudication and Disposition, 10/26/2021. At the hearing, Mother was present and represented by Attorney Ott. *Id.* Father did not appear and was not represented by counsel. *Id.* Mother stipulated to the allegations of dependency.[3] *Id.* Based on Mother's agreement to the contents of the Dependency Petition and with the concurring agreement of the Guardian Ad Litem, the Court found that clear and convincing testimony existed to adjudicate the child dependent pursuant to 42 Pa. C.S.A. § 6302(1), (10). *Id.* Additionally,

[3] The allegations of dependency were set forth against Mother in the Agency's Petition for Dependency. *See* Dependency Petition, 09/24/2021.

pursuant to Pa.R.J.P. 1705 and 42 Pa.C.S.A. §6341(c.1), the Court additionally determined that aggravated circumstances existed against Mother due to the involuntary termination of Mother's parental rights to four (4) of her other children in November 2019. *Id. See also* Dependency Petition, 09/24/2021 at Exhibit A.

Based on the facts set forth in the Dependency Petition and established at the hearing, Mother was ordered to:

> Refrain from the use of drugs and/or alcohol and submit to a random urinalysis testing through the Esper Treatment Center; participate in a drug and alcohol assessment and follow through with recommendations and demonstrate skills learned; and continue to participate in mental health services and follow all recommendations. Mother shall undergo a new mental health assessment if deemed necessary by the provider.

See Order of Adjudication and Disposition, 10/26/2021 at p. 3.

The Court established J.W., Jr.'s permanent placement goal as reunification with Mother and/or Father and scheduled a five (5) month Permanency Review Hearing for March 30, 2022, to allow both parents sufficient time to work on the treatment plan and demonstrate compliance. *Id.* at 2, 5.

On March 2, 2022, prior to the Permanency Review Hearing, the Agency filed a Motion to Change Permanency Goal from Reunification to Adoption. In support of their motion, the Agency alleged Mother had been substantially non-compliant with her court-ordered treatment plan, Mother had her rights terminated to four (4) other children, and she had extensive prior involvement with the Agency which revealed non-compliance, therefore, the goal change was ultimately in the best interest of the child. *See* Motion to Change Permanency Goal, 03/02/2022 at ¶¶6-7. The Agency further averred that Father was currently back in Erie County Prison and had very little contact with the Agency and was also substantially non-compliant and not a viable reunification resource for the child. *Id.* at ¶8.

The Court conducted a Permanency Review Hearing and Change of Goal Hearing on March 30, 2022, and concluded that Mother and Father were substantially non-compliant. *See* Permanency Review Order, 04/05/2022. At the Change of Goal/Review Hearing, Appellant appeared and was represented by Attorney Sacco. Father was present and represented by Steven M. Srnka, Esquire. The child's GAL, Attorney Konzel, was also present. Representing the Agency were Agency Solicitor Attorney Vendetti and Agency caseworker Sandra Tate. Before the hearing, the Court received a Court Summary prepared by the Agency, a letter from Mother, a Stairways Behavioral Health assessment for Mother, a police report from 541 West 2nd Street,[4] and a genetic report which confirmed J.W., Sr., to be the biological father of the child. N.T., 03/30/2022 at 4-5. The Court made these documents part of the record without objection by the parties. *See Id.*; *see also*, Court Summary, 03/30/2022. Initially, the Court noted, "…that the child in this matter was born exposed to THC marijuana [a]nd Mother present[ed] with aggravated circumstances as there was a prior involuntary termination…" *Id.* The Agency noted that Father has been non-compliant, even during the period where he was not incarcerated while the case was open. *Id.* at 5-6. The Agency provided Father with a treatment plan and he did not comply. *Id.* at 6.

[4] The report involved a domestic violence situation that occurred between Mother and her boyfriend, Mr. William "Ty" Tyrone Brewington.

The Court then addressed Mother's letter written to the Court and made it part of the record. In her letter, Mother "…professes that she wants to prove that she can be a functioning Mother for the return of this child to her. And that she should not be judged for her prior actions and that this time she's sincere that she no longer drinks alcohol." *Id.* After addressing Mother's letter, the Court stated that the court summary shows Mother has not been compliant with any aspect of the Court ordered treatment plan. *Id.* The Court continued and stated, Mother also had not visited with her child in five (5) months due to her "no-show" positive urine test results.[5] *Id.* Prior to this hearing, Mother claimed to have a medical marijuana card but had never provided it to the Court or to the Agency. *Id.* at 7. However, at the hearing, Mother supplied the Court with her medical marijuana card. *Id.* Mother obtained the card on February 8, 2022, and it is valid for one (1) year. *Id.* Despite having a medical marijuana card and understanding that not appearing at a drug test would be considered a positive test result resulting in missed visits with the child, Mother did not start attending her drug screens until March 2022. *Id.*

At the review hearing, the Court first received testimony from Agency caseworker, Ms. Sandra Tate. Ms. Tate provided the Court with Mother's updated urinalysis reports. Ms. Tate stated:

> We have 3/1/22 positive for THC, we didn't receive it until 3/8. 3/4 positive for marijuana, received 3/11. 3/8 positive for marijuana THC received on 3/15. 3/10 positive for THC received on 3/16. 3/11 no show. 3/16 no show. 3/17 positive for THC received 3/23. 3/21 no show. And 3/22 no show.

N.T., 03/30/2022 at 7-8.

The Court acknowledged that since Mother had obtained a medical marijuana card, the urines which were positive for THC would not be considered by the Court against Mother. *Id.* However, the Court took issue with Mother's "no shows" because of her long history of alcohol and/or cocaine use and that these no-shows prevented Mother from having in-person visits with the child. *Id.*

The Court next addressed Mother's mental health. Mother had been diagnosed with Major Depressive Disorder, Cannabis Use Disorder, Cocaine Use Disorder, and Alcohol Use Disorder. *Id.* at 4-5. Ms. Tate confirmed that Mother underwent a mental health assessment, but failed to follow through with medication management. *Id.* at 8. On cross-examination, Ms. Tate acknowledge that although Mother attended sixteen group sessions and four individual appointments, the sessions were virtual. Importantly, Mother's counselor believed that Mother "…was not on pace to really be sincere about her addiction problem." *Id.* at 23. Ms. Tate read the last sentence of Mother's counselor's report which stated: "She was unsuccessfully discharged on 3/11/22 for excessive nonattendance and poor follow through." *Id.*

Next, the Court addressed Mother's housing situation and her inability to keep and maintain safe and stable housing. Regarding her housing, Ms. Tate testified that Mother was residing with Mr. William "Ty" Tyrone Brewington. *See* Court Summary, 03/30/2022; N.T., 03/30/2022

[5] When a parent whose child has been adjudicated dependent fails to appear for a mandated urinalysis, the "no-show" is considered a positive test result. Mother was quite familiar with this process and that her visits were contingent on clean urines. Caseworker Tate had even reviewed this policy with Mother and it was contained in her Treatment Plan.*See N.T.*, 03/30/2022 at 40.

at 23. Next, Ms. Tate offered testimony regarding Mother's involvement in domestic violence. Mother had a prior Protection from Abuse ("PFA") Order against the child's father, J.W., Sr. N.T., 03/30/2022 at 24-25. Now, there is a history of domestic violence between Mother and Mr. Brewington as evidenced by the police report from January 4, 2022. *See* Court Summary at 9. The police report indicated that Mother was out all night partying and while in a vehicle with Mr. Brewington he punched her in the face causing Mother to jump out of a moving car. N.T., 03/30/2022 at 28. Mother interjected and said none of the information in the police report against Mr. Brewington was true and that she "…just lied because [she] was belligerent and drunk." *Id.* at 41. The Court finds Mother's statement to be unpersuasive and incredulous and was made simply to allow her to continue to reside with Mr. Brewington. The Court also learned that Mother is not on the lease and these circumstances again demonstrate that Mother was not compliant in finding safe and stable housing.

When first asked about Mr. Brewington, Mother informed the Agency that Mr. Brewington was her Uber driver. *Id.* at 10. Mother then changed her answer and said she was living with him and they were involved in a relationship. *Id*. The Court asked Ms. Tate if Mr. Brewington's home was a safe and stable home for the child and Ms. Tate stated that it was not. *Id.* Accordingly, Ms. Tate concluded that Mother was not compliant with the requirement that she find safe and stable housing. *Id.* Ms. Tate testified that Mother is not on Mr. Brewington's lease and does not have any legal claim to the property. *Id.* at 28. This further corroborated that Mother had failed to secure safe and stable housing for her children. Ms. Tate confirmed there was a domestic violence report from January 4, 2022, involving Mother and Mr. Brewington. *Id.* at 24. Ms. Tate testified that her concern was for the safety of the child to prevent exposing the child to domestic violence. *Id.* at 25.

Next, Ms. Tate testified that Mother has not maintained employment. *Id.* at 11. Ms. Tate testified that Mother was non-compliant with the Treatment Plan because she failed to participate in an approved parenting plan. Ms. Tate even made referrals for Mother to get her in a parenting program but Mother failed to comply. *Id.* at 11. Mother's participation in a parenting program was paramount because of her prior involuntary terminations ("IVT") of her parental rights. *Id.* At this point, Ms. Tate characterized Mother as non-compliant. *Id.* at 11-12.

Ms. Tate further emphasized that Mother presents with the same issues from 2012 that resulted in her parental rights being terminated. *Id.* at 15. Attorney Vendetti, on behalf of the Agency, asked Ms. Tate: "So again, we have the same issues from 2012, ten years later almost?" *Id.* at 15. Ms. Tate replied, "That is correct." *Id.* Ms. Tate continued her testimony and noted that the child had been placed in a foster home that met the needs of the child. *Id.* Ms. Tate stated that upon the child's placement, he smelled of cigarettes, was fearful of baths, and had high lead levels. *Id.* After his placement, the child's lead levels decreased and reached a safe level, and any prior concerns regarding his well-being had been alleviated. *Id.* Ms. Tate stated the child was surpassing his milestones. *Id.* at 17. Ms. Tate testified that it is in the child's best interest to change the goal to adoption. *Id.*

Attorney Konzel, as the GAL, next asked Ms. Tate the following questions on direct examination:

MS. KONZEL: With regard to mom, because there were aggravated circumstances in this case, because she had other children removed, why did the Agency offer her care in the first place?

MS. TATE: Because I was trying to give her a chance. My Supervisor and I discussed it. I had her prior to…the child being removed. I knew at that point there were concerns, but she was trying. You would think that she would immediately started to do what she needed to do… It's clear she has the domestic violence concerns.

MS. KONZEL: So you basically gave her a break by not proceeding on the aggravated circumstances and gave her these six months to prove herself — or more than that?

THE COURT: Well, Ms. Tate didn't give her the break, I think the Court ---

MS. KONZEL: The Court. I apologize for that, but I'm saying the goal was too —

THE COURT: No. [Ms. Tate] advocated for it and I think, if I can clarify it, I was empathetic too, to her words, because isn't the history of her — even in the letter she just dropped off it sounds good. I mean, and when she's with you she sounds sincere, that's why we started this off. Would this be fair, actions speak louder than words?

MS. TATE: That is correct.

THE COURT: But I think the record should reflect that Ms. Tate went to bat for her and the Court agreed. And we did, out of deference, we wanted reunification to…give her a fair chance to see if it would work.

N.T., 03/30/2022 at 18-19.

Attorney Sacco was next given the opportunity to cross-examine Ms. Tate. Ms. Tate testified to Mother's unsafe living conditions and Mother's inability to follow through on her therapy. *See infra* at 2-4, 7-8. *See* also N.T., 03/30/2022 at 22-28. Ms. Tate was then questioned on Mother's source of income and indicated Mother was receiving social security benefits as a form of income. *Id.* at 29. Mother explained that she receives social security due to a learning disability, anxiety and depression. *Id.* at 31. Mother interrupted Ms. Tate's testimony to state she was not depressed when she had her son, and only developed depression as a result of the Agency removing her son. *Id.* at 31. Mother stated: "When I had my son I wasn't depressed. I was supper [sic] happy. I was enjoying life. Depression came to me once they took my son from me." *Id.* The Court stated: "Well the argument was you were enjoying it too much. [The child] was born exposed to marijuana…" *Id.* Based on Mother's statements the Court felt compelled to depart from Ms. Tate's testimony and asked Mother the following questions:

THE COURT: Why did you smoke marijuana then when you were pregnant?

MOTHER: I have — I have back pain.

THE COURT: There are other medications to take.

MOTHER: And I had depression, and medicine was — it doesn't work for me.

THE COURT: Well, then, you just admitted it. You can't have it both ways. Did you have depression before you had your child? Yes.

MOTHER: When I — yes. Before I had gave birth to my child and —

THE COURT: So you can't say I'm depressed now.

THE COURT: You think your childhood, teenage, and adult depression went away on the birth of your son?

MOTHER: Um — it did.

MOTHER: Just because I get depressed every once and a while doesn't mean I can't raise my son.

N.T., 03/30/2022 at 31-32.

The Court further confronted Mother regarding her marijuana use prior to obtaining a medical marijuana card and asked Mother the following:

THE COURT: You know [marijuana] only stays in your system for 30 days. You're a long-time marijuana smoker. So why didn't you stop on October 26th the day there was a formal adjudication of dependency? You came into this case already having kids taken away from you. Why didn't you just say I'm going to stop and I'll show up in November and I'll show I can be clean.

MS. RODGERS: Like I said, Your Honor — before I was being selfish.

THE COURT: Okay. That's fair. I get that.

MS. RODGERS: I was being very, very selfish and put my hands into God, I finally turned to prayer. I finally turned around to God.

THE COURT: Okay.

N.T., 03/30/2022 at 37-38.

Mother's excuse for her non-compliance was to consistently tell the Court: "I'm selfish." *See Id.* at 37, 40, 41, 42, 50. In fact, the Court confronted Mother about her "no-shows" which are considered a positive test result causing her to miss five (5) months of visits with J.W., Jr. *Id.* at 46. Mother's only response to the court was "I'm selfish." *Id.* Mother again minimized her problems with alcohol by refusing to attend counseling or inpatient treatment at the Gage House because she testified she "didn't need it." *Id.* at 43. Throughout Mother's

testimony, she continually refused to accept she had any problems. Mother not only refused the services for drug and alcohol treatment, she also rejected the offer by Ms. Tate for safe housing at the Mercy Center. *Id.* at 51-52.

Prior to the conclusion of the hearing, the Court received testimony from Father. Father testified that he was scheduled for a probation revocation hearing on April 4, 2022. *Id.* at 54. Father was charged on February 14, 2022, with two counts of Theft by Unlawful Taking — 18 Pa.C.S.A. §3921(a) and one count of Receiving Stolen Property — 18 Pa.C.S.A. 3925(a). Father was incarcerated at the time of the hearing on one count of Terroristic Threats — 18 Pa.C.S.A. §2706(a)(1). *Id.* at 54-55. Father admitted to using drugs and being abusive towards Mother. *Id.* As recognized on the record and premised on Father's current criminal sentence, if Father's supervision is revoked, he foreseeably would face incarceration at a state correctional facility. *Id.*

At the conclusion of the hearing, the Court asked the GAL if her support of the change of goal to adoption had changed and the GAL stated:

> No, Your Honor. This child is one and a half years old. He's been in care since October of last year. When he came to the care of the pre-adoptive family that he's in, he came dirty, he came smelling of smoke, he was fearful of the bathtub…and high levels of led[sic]. That's all indicated in the resource report. With regard to mom, she's lost four other children. There were aggravated circumstances here. Throughout her testimony she's indicating that she won't go back to Stairways. She wasn't doing anything in compliance with the Court's order and she's been through this process years before.
>
> … she was cut a break by not going [directly to adoption] under aggravated circumstances.
>
> Before and even now [Mother] stands here and says she's willing to do this program, Project First Step, but she wasn't willing to do other programs. She wasn't willing to go to Gage House. She wasn't willing to go to Mercy Center, knowing full well that this is what the Court wanted in order for her to get her child back.

N.T., 03/30/2022 at 60-61.

The Court stated:

> I think if anyone understood the need or urgency to comply, it was mother… There is part of me that senses that mother does love her son but then, again, the theme of this case is actions speak louder than words. She was given every opportunity to comply. Ms. Tate could not have been more deferential or assisting and none of that was taken advantage of by Mother.

N.T., 03/30/2022 at 61-62.

The Court summarized Mother's non-compliance as follows:

> So at this point, there is no compliance. And here's a woman who has gone through this before losing four other children…. her parental rights being involuntarily terminated. And then this gets opened back in October, so we've had one review — we've had our first review hearing, and then now we have this, and we haven't seen any progress.

N.T., 03/30/2022 at 11-12.

The Court recognized that the Agency caseworker, Ms. Tate, tried to assist Mother and work with her in order to reunify with the child. However, Mother would not follow through with these services as demonstrated by her lack of commitment to reunification. For example, Ms. Tate brought Mother an application for the Mercy Center for Women, but Mother chose not to follow through. The Court stated: "[Ms. Tate's] efforts have been to really offer her a helping hand or assistance in many of these matters that we found important, parenting plan, the mental health assessments, the living arrangements at Mercy Center, and yet she hasn't taken advantage of your assistance." *Id.* at 13. Ms. Tate testified that she has made herself available to Mother throughout this matter, but Mother fails to follow through despite meeting with Ms. Tate on a monthly basis. *Id.* at 13-14.

Premised on the parents' non-compliance with the Court ordered treatment plan and in the best interest of the child, the Court ruled: "In the best interest of this child and knowing all the reasons I've set forth on this record, the court summary, the other reports, the responses and questions provided here, I'm going to change the goal to adoption." *Id.* The Court's resulting determination to change the goal from reunification to adoption is the subject of the appeal *sub judice*. *See* Permanency Review Order, 04/05/2022.

ISSUE PRESENTED

In Mother's 1925(b) Statement, Appellant asserts a boilerplate claim that: "[t]he Juvenile Court committed an abuse of discretion and/or error of law when it found clear and convincing evidence existed that the current permanency goal of Reunification was no longer feasible and changed the goal directly to Adoption." *See* Concise Statements of Errors Pursuant to Pa.R.A.P. 1925(b). For reasons set forth below, Appellant's claim is devoid of factual or legal merit and should therefore be dismissed.

DISCUSSION

A. Applicable Law

The Court is not required to guess what errors Appellant is raising on appeal. Pursuant to Pa.R.A.P. 1925 (4)(ii), Appellant is to "concisely identify each error that the appellant intends to assert with sufficient detail to identify the issue to be raised for the judge." In Appellant's 1925(b) Statement, Appellant sets forth a boilerplate assertion without reference to specific detail regarding how the Court abused its discretion or how the Court impermissibly relied on improper facts to support its change of goal. Appellant has never challenged any facts or testimony set forth at the hearings in this dependency matter or the documents relied on by the Court to support its findings. Appellant's claim should be considered waived and therefore dismissed due to the blatant use of generic language and failure to provide sufficient detail of the issues to be raised for the Court.

Assuming *arguendo* Appellant's pleading in her 1925(b) Statement is not waived for mere

boilerplate language and vagueness, this court will address the issue below.

The Court notes the relevant standard of review for a change of goal as set forth by the Superior Court of Pennsylvania is as follows:

> We review an order regarding a placement goal of a dependent child under an abuse of discretion standard. *In re B.S.*, 861 A.2d 974, 976 (Pa. Super. 2004). In order to conclude that the trial court abused its discretion, we must determine that the court's judgment was manifestly unreasonable, that the court did not apply the law, or that the court's action was a result of partiality, prejudice, bias or ill will, as shown by the record. *In re N.C.*, 909 A.2d 818, 822-23 (Pa. Super. 2006) (citation and internal quotation marks omitted).
>
> When this Court reviews a trial court's decision to change a permanency goal, we are bound by the facts as found by the trial court if they are supported by the record. *In re K.J.*, 27 A.3d 236, 241 (Pa. Super. 2011). In addition, it is the responsibility of the trial court to evaluate the credibility of the witnesses and resolve any conflicts in the testimony. *In re N.C.*, 909 A.2d 818, 823 (Pa. Super. 2006). Accordingly, the trial court is free to believe all, part, or none of the evidence. *Id.* (citation omitted). Provided the trial court's findings are supported by competent evidence, this Court will affirm, even if the record could also support an opposite result. *In re Adoption of R.J.S.*, 901 A.2d 502, 506 (Pa. Super. 2006) (citation omitted).

In the Interest of H.J., 206 A.3d 22, 25 (Pa. Super. 2019) (internal quotation marks omitted).

Placement of and custody issues pertaining to dependent children are controlled by the Juvenile Act, 42 Pa.C.S.A. §§ 6301, *et seq.* "The policy underlying these statutes is to prevent children from languishing indefinitely in foster care, with its inherent lack of permanency, normalcy, and long-term parental commitment." *In re N.C.*, 909 A.2d 818, 823 (Pa. Super. 2006).

The Juvenile Act authorizes, *inter alia*, a child to be taken into custody pursuant to an Emergency Order by the Court of Common Pleas if the Court makes a finding "that to allow the child to remain in the home is contrary to the welfare of the child." 42 Pa.C.S.A. § 6324(1). If a child is taken into custody by virtue of an Emergency Protective Order, an informal (Shelter Care Hearing) must be held no later than 72 hours later "to determine whether . . . detention or shelter care is required . . . [and] whether to allow the child to remain in the home would be contrary to the welfare of the child . . ." 42 Pa.C.S.A. § 6332(a). Further, "[i]f the child is alleged to be a dependent child, the court or master shall also determine whether reasonable efforts were made to prevent such placement or, in the case of an emergency placement where services were not offered and could not have prevented the necessity of placement, whether this level of effort was reasonable due to the emergency nature of the situation, safety considerations and circumstances of the family." *Id.* If it is determined that the child cannot be released from detention or shelter care, "a [dependency] petition shall be promptly made and presented to the court within 24 hours or the next court business day of the admission of the child to detention or shelter care." 42 Pa.C.S.A. § 6331. A hearing must occur no later than 10 days after the filing of the petition. 42 Pa.C.S.A. § 6335.

After the hearing on the dependency petition, "the court shall make and file its findings as to whether the child is a dependent child." 42 Pa.C.S.A. § 6341(a). The burden of proof to find

a child dependent is clear and convincing evidence. 42 Pa.C.S.A. § 6341(c). After making a finding that the child is dependent, "the court shall proceed immediately or at a postponed hearing, which shall occur not later than 20 days after adjudication if the child has been removed from his home, to make a proper disposition of the case." *Id.* The court may make any disposition of the case "best suited to the safety, protection and physical, mental, and moral welfare of the child." 42 Pa.C.S.A. § 6351(a). This may include remaining with parents/guardians or transferring legal custody to an individual "found by the court to be qualified to receive and care for the child," or transferring legal custody to a qualified public or private agency. *Id.* Prior to removing the child from his or her home, the court must make a finding:

> (1) that continuation of the child in his home would be contrary to the welfare, safety or health of the child; and (2) whether reasonable efforts were made prior to the placement of the child to prevent or eliminate the need for removal of the child from his home, if the child has remained in his home pending such disposition; or (3) if preventive services were not offered due to the necessity for an emergency placement, whether such lack of services was reasonable under the circumstances; or (4) if the court has previously determined pursuant to section 6332 (relating to informal hearing) that reasonable efforts were not made to prevent the initial removal of the child from his home, whether reasonable efforts are under way to make it possible for the child to return home; and (5) if the child has a sibling who is subject to removal from his home, whether reasonable efforts were made prior to the placement of the child to place the siblings together or whether such joint placement is contrary to the safety or well-being of the child or sibling.

42 Pa.C.S.A. § 6351(b).

Following adjudication and disposition hearings as set forth above, the court must conduct regular permanency hearings to review "the permanency plan of the child, the date by which the goal of permanency for the child might be achieved, and whether placement continues to be best suited to the safety, protection and physical, mental and moral welfare of the child." 42 Pa.C.S.A. § 6351(e).

In any permanency review hearing, the Court must consider the statutorily-mandated factors as set forth in 42 Pa.C.S.A. § 6351(f) in determining if the child's permanent placement goal "continues to be best suited to the safety, protection and physical, mental and moral welfare of the child." *Id.* These factors include, inter alia:

> (1) The continuing necessity for and appropriateness of the placement.
> (2) The appropriateness, feasibility and extent of compliance with the permanency plan developed for the child.
> (3) The extent of progress made toward alleviating the circumstances which necessitated the original placement.
> (4) The appropriateness and feasibility of the current placement goal for the child.
> . . .
> (6) Whether the child is safe . . .

Id. Based on the Court's consideration of all relevant evidence presented and the statutory factors at 42 Pa.C.S.A. § 6351(f), the Court must then determine if the child's permanent placement goal will remain the same or change. 42 Pa.C.S.A. § 6351(f.1). Once the Court has made a determination as to the appropriate placement goal, the Court shall issue an order regarding "the continuation, modification or termination of placement or other disposition which is best suited to the safety, protection and physical, mental and moral welfare of the child." 42 Pa.C.S.A. § 6351(g).

When considering a change of the child's permanent placement goal, "**the best interests of the child**, and not the interests of the parent, must guide the trial court, and the parent's rights are secondary." *In re M.T.*, 101 A.3d 1163, 1173 (Pa. Super. 2014) (citing *In re A.K.*, 936 A.2d 528, 532–533 (Pa. Super. 2007)) (*emphasis added*). "The burden is on the Agency to prove the change in goal would be in the child's best interests." *Id.* (citing *In the Interest of M.B.*, 674 A.2d 702, 704 (Pa. Super. 1996).

It is well-settled that "[i]f reunification with the child's parent is not in a child's best interest, the court may determine that Adoption is the appropriate permanency goal." *Interest of H.J.*, 206 A.3d at 25; *see also*, 42 Pa.C.S.A. § 6351(f.1)(2). The Superior Court of Pennsylvania has held that once reasonable efforts have been made to return a child to a parent but those efforts have failed, ". . . the agency must redirect its efforts towards placing the child in an adoptive home." *Interest of H.J.*, 206 A.3d at 25. The placement process ". . . should be completed within 18 months." *Id.* "A child's life simply cannot be put on hold in the hope that the parent will summon the ability to handle the responsibilities of parenting." *Id.* at 25 (citing *In re Adoption of M.E.P.*, 825 A.2d 1266, 1276 (Pa. Super. 2003)). With these rigorous standards in mind, the Court concluded that a change of goal to Adoption was in the minor child's best interest. Support for the Court's finding is found in the discussion to follow.

B. This Court's change of goal to adoption is in J.W., Jr.'s best interest and is overwhelmingly supported by the record.

Initially, the Court notes that Appellant has not challenged the initial removal of the child by Emergency Protective Order pursuant to 42 Pa.C.S.A. § 6324(1). Appellant also does not challenge and, in fact, stipulated to, the Adjudication of the child as a dependent child pursuant to 42 Pa.C.S.A. § 6341(a), (c). *See* Order of Adjudication and Disposition, 10/26/2021. Appellant also did not object to the several documents made part of the record throughout this case and at the Permanency Review Hearings. Therefore, the only challenge in the appeal *sub judice* is whether this Court erred in its determination on March 30, 2022, and abused its discretion to change the goal to adoption. As will be demonstrated, Appellant's claim is without merit and warrants dismissal.

Cognizant of the above statutory mandates and case law, this Court considered the entire facts and circumstances of this matter, including Mother's lengthy ten (10) year history with the Agency, and the findings of aggravated circumstances against Mother, in making its determination that changing the permanency placement goal of J.W., Jr. to adoption was the disposition "best suited to the safety, protection and physical, mental and moral welfare of the child." 42 Pa.C.S.A. § 6351(f.1), (g). The Court's decision was also premised on the factors at 41 Pa. C.S.A. § 6351(f).

The Court concluded that, in the best interest of the child, the placement of the child

continues to be necessary and appropriate. *See* Permanency Review Order, 04/05/2022 at p.1. Further, reasonable efforts were made by the Agency to finalize the children's permanency plans. *Id.* The Agency ensured the child has been receiving regular opportunities to engage in age-appropriate activities. *Id.* Crucially, the Court found that Appellant has not been compliant with the permanency plan, and had not made any progress toward alleviating the circumstances which necessitated the children's original placement. *Id.* In fact, Mother's history indicates that the same reasons which resulted in her parental rights being terminated for four (4) children in November 2019 still exist in the current dependency matter. Specifically, there are ongoing concerns with Appellant's mental health (including bipolar disorder, cannabis-related disorder, major depressive with severe psychotic features, mood disorder, and anxiety), drug use, unstable housing, and parenting skills, including her ability to keep the children safe. Appellant had previously had four (4) children removed from her home in 2019. *Id.*

Mother's non-compliance includes her failure to not follow through with her mental health treatment as evidenced by her discharge from Stairways Behavioral Health for excessive non-attendance. N.T., 03/30/2022 at 23. Mother presents with very serious mental health diagnoses including: Bipolar disorder, Cannabis Related Disorder, Cocaine Related Disorder, Major Depressive/Single Episode/Severe with Psychotic Features, Episodic Mood Disorders, and Anxiety.

Next, there are continued concerns about Appellant's ability to keep the child safe, as illustrated by her unstable living situation. Mother was residing with a man (Mr. Brewington) she was involved in a domestic dispute with and in a residence where she has no legal standing. *Id.* at 28. Mother is not on the lease and the property is exclusively owned by Mr. Brewington. In other words, Mother could be evicted at any time from this residence without legal recourse or claim to stay. Additionally, the Agency had also determined that Mr. Brewington's home is not safe for the child. *Id.* at 10. Mother also had several no-show positive test results and was receiving no drug and alcohol treatment despite her diagnoses of Cocaine Use Disorder and Cannabis Use Disorder.

Consequently, the circumstances which necessitated the placement of the child including Appellant's ability to safely parent the children; her unstable housing; concerns about her mental health; and concerns about her drug and alcohol use, have not been alleviated. Appellant remains in virtually the same position as she was in September 2021, when J.W., Jr. was first removed and adjudicated dependent. The history of Mother's involvement with the Agency would actually suggest Mother remains in the same position as she was back in 2012 when she first became involved with the Agency with her four (4) children resulting in the involuntary termination of her parental rights. Appellant has had plenty of time to demonstrate compliance with the treatment plan but has failed to do so. Appellant throughout her history makes promises that she will comply but then fails. Mother, although well intended, has failed to support her statements by actions and comply with the Court's plan. Mother admitted she was "selfish" and because of her incredulity, the child is left without proper parental care. The Court finds Mother's excuse for non-compliance that she was being "selfish" to be wholly unacceptable and unpersuasive regarding her "renewed" intention to adequately parent J.W., Jr. Mother's prior ten (10) year involvement with the Agency and the resulting termination of her parental rights, armed Mother with a heightened awareness of the severe consequence of non-compliance.

Yet despite this history, Mother nonetheless remains non-compliant.

The collective evidence presented indicates the child is in desperate need of permanency and stability. J.W., Jr. has been in placement for seven (7) months. Mother has demonstrated she is not a reliable resource for Reunification with the child. The Agency's caseworker, Ms. Tate, received a resource family report from the foster family saying J.W., Jr. has established a bond with their family. N.T., 03/30/2022 at 16. The foster home has greatly impacted the child's quality of life. While in Mother's care, J.W., Jr. was diagnosed with high lead levels which have since decreased since being in his foster home. *Id.* Also while with Mother, J.W., Jr. was three (3) immunizations behind on his yearly shots due to several missed doctor appointments. Court Summary, 03/30/2022 at 3. Since being placed in foster care, J.W., Jr. is up to date on all his immunizations. *Id.* The foster home is meeting the minor child's needs and providing him with a safe, stable, and loving home environment.

In consideration of the evidence and testimony presented, the Court found the Agency had met its burden in demonstrating that a goal change to adoption is in the child's best interest. The child's physical and emotional needs are being treated and met. Appellant has failed to "alleviate the circumstances which necessitated the original placement" and has demonstrated, at most, minimal compliance with treatment plans designed to effectuate reunification. *See* 42 Pa.C.S.A. § 6351(f). Mother's lack of any meaningful or even marginal compliance, unfortunately, exposes the harsh reality that Mother is ill-equipped to safely parent the child.

In summation, Mother's lengthy ten (10) year history with the Agency which attempted to address the same concerns voiced by the Agency in this case, her prior IVTs, and her current non-compliance demonstrate the need to change the goal to adoption. Adoption will provide the child with vital permanency and stability to serve his best interest. The child simply cannot wait for Appellant to decide to comply with the treatment plans or "summon the ability to handle the responsibilities of parenting" and for Mother to not be "selfish." *See Interest of H.J.*, 206 A.3d at 25. Mother has simply proven that she is not a reliable reunification resource firmly committed to the exclusive health, safety, and well-being of J.W., Jr. Consequently, the change of goal to adoption is in the child's best interest, and adoption is "best suited to the children's safety, protection, and physical and moral welfare." 42 Pa.C.S.A. § 6351(f.1), (g); *see also, In re N.C.*, 909 A.2d at 823; *In re M.T.*, 101 A.3d at 1177; *Interest of H.J.*, 206 A.3d at 25-27.

Therefore, Appellant's challenge to this Court's determination to change the goal to adoption is without legal or factual support and must be dismissed.

CONCLUSION

For the reasons set forth above, the issue raised by Appellant is without merit. It is therefore respectfully requested that the instant appeal be dismissed.

BY THE COURT:
John J. Trucilla, Administrative Judge