Westmoreland Law Journal

VOLUME 94

CONTAINING

Decisions of the Courts of Westmoreland County, Pennsylvania

Editor
GERALD W. YANITY, ESQUIRE

Case Editors
David A. Colecchia, Esquire
Charles J. Dangelo, Esquire
Melissa Guiddy, Esquire
Daniel C. Hudock, Esquire
Justin P. Schantz, Esquire

2012

TABLE OF CASES REPORTED

TABLE OF CASES REPORTED

WELLS FARGO BANK, N.A., as Trustee for Option One Mortgage Loan Trust 2007-5 Asset-Backed Certificates, Series 2007-5, Plaintiff
V.
JOANN HOLLOWAY, Trustee under Declaration of Revocable Living Trust dated 7/25/2003, as The Holloway Family Trust
and
JOHN HOLLOWAY, Trustee under Declaration of Revocable Living Trust dated 7/25/2003, as The Holloway Family Trust, Defendants

PRETRIAL PROCEDURE

Process Defects and Objections As To; Service of Legal Papers Other Than Original Process; Requests for Admission

1. Plaintiff's failure to serve the scheduling order for argument on its motion for summary judgment was not fatal because the Court subsequently served the scheduling order on Defendants and counsel appeared, responded to the motion, and advocated on Defendants' behalf.

2. Service of papers other than original process is complete upon mailing.

3. Plaintiff's service of its admissions was complete upon placing them in the mail to Defendant. Defendant's failure to accept Plaintiff's certified mail was of no import.

4. Defendant's failure to answer Plaintiff's requests for admission for more than a year after service required the Court to deem the admissions to be admitted.

MORTGAGES

Plaintiffs; Conditions Precedent

1. The recording of an assignment of the mortgage was not a prerequisite to mortgage assignee having standing to seek enforcement of the mortgage via a mortgage foreclosure action, where assignee averred in its complaint, it was the "legal owner" of the mortgage, thereby indicating it was the holder of the mortgage's note, and prior to the entry of default judgment, as assignee indicated in its complaint it was going to do, an assignment of the mortgage was executed.

2. Mortgage assignee's complaint in foreclosure action sufficiently put mortgagor on notice of assignee's claim with regard to the mortgage; in its complaint, assignee sufficiently set forth the existence and date of the mortgage, the fact that assignee was now the legal owner of the mortgage, thereby indicating it had assumed all the rights and remedies related to the mortgage, and the fact that assignee was seeking to formalize the assignment.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 782 of 2010

Appearances:

Marc S. Weisberg and Brian T. Lamanna,
Philadelphia, and
Dennis Persin,
Greensburg, for the Plaintiff
Donald Blake Moreman,
Greensburg, for the Defendants

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION and ORDER OF COURT

This matter is before the Court on the Plaintiff's Motion for Summary Judgment in a mortgage foreclosure action. Defendants filed a responsive brief, asserting that summary judgment should not be entered. After careful consideration of the record and the applicable law, we find as follows.

The first issue raised by the Defendants is that Plaintiff failed to properly serve the Defendants with a copy of the scheduling Order for oral argument on the Second Motion for Summary Judgment. Westmoreland County local Rule W1035.2(a)(1)(d) states:

> Within three (3) days of receipt of the Scheduling Order from the judge assigned to the case, the moving party shall serve copies of the Motion for Summary Judgment, the Scheduling Order and Brief on every other party or attorney of record.

Although Plaintiff asserts that it served a copy of the Motion on the Defendants on the same day that the Motion was filed in the Prothonotary's Office, the Certificate of Service does not indicate on what date the document was served and refers only to a Motion and Brief. There is no mention of the May 6, 2011, Scheduling Order, and in fact, the Plaintiff failed to serve a copy of the signed Scheduling Order, which set the date and time for oral argument on the Motion on June 13, 2011. When counsel for the Plaintiff failed to appear at oral argument, the matter was rescheduled by an Order issued by this Court on June 16, 2011, rescheduling oral argument for August 23, 2011. Because this Court prepared the new Scheduling Order, this Court assumed the responsibility of serving all parties, by regular U.S. mail, with a copy of the Order. At the oral argument on August 23, 2011, all parties appeared with their respective counsel; and Defendants' counsel filed a brief in opposition to the second Motion for Summary Judgment.

Local Rule W1035.2(a)(3), "Sanctions," states that "Failure of the moving party to comply with the requirements of this rule [requiring the moving party to serve copies of the Order on the opposing party] shall result in the dismissal of the Motion." Based upon this rule, Defendants argue that the Motion should be dismissed because the Plaintiff, as moving party, failed to serve them with a copy of the Scheduling Order.

Plaintiff argues that the holding in *McCreesh v. City of Philadelphia,* 888 A.2d 664 (Pa. 2005), supports its position that the motion cannot be dismissed simply because it failed to send Defendants a copy of the Scheduling Order. In *McCreesh,* the court considered a writ of summons to be valid despite non-compliance with the rules of procedure based upon the fact that the Defendant received actual notice of the writ and, therefore, was not prejudiced. The court relied on Pa.R.C.P. No. 126, which provides:

> "The rules 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 such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties."

In this case the Defendants had actual notice of the August 23, 2011, argument court date, as evidenced by the fact that they hired an attorney who prepared a brief in

opposition to the Motion for Summary Judgment and appeared to represent them in Court at the appointed date and time. Although Plaintiff did not send Defendants a copy of the first scheduling Order, this Court sent them a copy of the second scheduling order. In other words, Defendants were notified that a motion had been filed and were notified of the date and time when argument was scheduled to be heard on that motion. Based upon these facts, we find that Defendants have not been prejudiced by the Plaintiff's inadvertence.

The second issue raised by the Defendants is that discovery is incomplete because Plaintiff failed to respond to their letter requesting documents pertaining to the foreclosure action. We find no merit in this contention.

Attached to the Plaintiff's Motion for Summary Judgment are several supporting documents including the Act 6 and Act 91notices, a copy of the Note, and a detailed loan account history. Furthermore, in a cover letter dated July 13, 2011, sent to Defendants by certified mail, Plaintiff once again delivered copies of "all original documents pertaining to the mortgage" to the Defendant. Based upon our review of the record, we find that there are no outstanding formal or informal discovery requests that remain unanswered by the Plaintiff.

The third issue raised by the Defendants is with respect to the Plaintiff's Requests for Admissions. Plaintiff claims that there are no genuine issues of material fact because Defendants are deemed to have admitted the Request for Admissions when they failed to respond to them within thirty (30) days. Defendant argues that the admissions cannot be deemed admitted because Plaintiff has failed to establish that the Request for Admissions was served on them. In fact, the record reflects that Plaintiff served the Request by both regular U.S. mail and certified mail. The certified mail was returned "unclaimed;" and the record does not indicate that the regular mail was "refused" or "returned" or otherwise undeliverable.

Pa.R.C.P. No. 440(b) provides: "Service by mail of legal papers other than original process is complete upon mailing." Accordingly, under this rule, we deem Defendants to have been served with the Request for Admissions that were sent by regular mail, even though the certified mail was returned "unclaimed."

In addition, Defendants had actual notice of the Request for Admissions (accompanied by a cover letter dated June 1, 2010, directing Defendants to respond to the Request within thirty days) as they were attached to the first Motion For Summary Judgment filed on July 7, 2010. In other words, there is no question that the Defendants were aware of the requested admissions. More than one year later, the Defendants have never responded to the Request for Admissions. Therefore, they may be deemed admitted by the Defendants. Pa.R.C.P. No. 4014(b).

The fourth issue raised by the Defendants is that the Complaint in mortgage foreclosure was filed on February 2, 2010, but that the Plaintiff had no interest in the mortgage until March 2010. The record and the governing case law do not support this argument.

The "Assignment of Mortgage" was filed in the Recorder of Deeds Office as Instrument #201003290010047 on March 29, 2010. The filed document was executed

on March 23, 2010, and indicates that the assignment was effective December 28, 2009.

In *US Bank N.A. v. Mallory,* 982 A.2d 986 (Pa.Super. 2009), the court held that the recording of an assignment of a mortgage was not a prerequisite to the mortgage assignee having standing to seek enforcement of the mortgage by way of a mortgage foreclosure action, where the assignee averred in its complaint that it was the "legal owner" of the mortgage, thereby indicating that it was the holder of the mortgage's note.

Similarly in the case before us, the Complaint avers in paragraph 5 that "[t]he aforesaid mortgage was thereafter assigned by The Loanleaders of America, Inc. to Wells Fargo Bank, N.A. as Trustee for Option One Mortgage Loan Trust 2007-5 Asset-Backed Certificates, Series 2007-5, by Assignment of Mortgage, which will be duly recorded in the Office of Recorder of Westmoreland County." As in *Mallory,* the Complaint sufficiently puts the Defendants on notice of the assignee's claim with regard to the mortgage, thereby indicating that it had assumed all rights and remedies related to the mortgage, and that it would formalize the assignment by recording it in the Recorder of Deeds Office. Based upon the foregoing, we find that the fact that the Complaint was filed before the recording of the assignment has no impact upon the Plaintiff's right to pursue this action.

The fifth and final issue raised by the Defendants is that the company servicing the mortgage, American Home Mortgage Servicing, Inc. ("AHMSI") is not authorized to conduct business in Pennsylvania, as evidenced by the five page state licenses printed from the AHMSI web site. Even if Defendants are correct based upon the information that they have derived from an internet search, we agree with the position of the Plaintiff that 15 Pa.C.S.A. §§4122(a)(7), (8) and (11) permit AHMSI to service the subject mortgage and attempt to collect the debt secured by such mortgage. Under the clear language of subsections (a)(7), (8) and (11) of 15 Pa.C.S.A. §4122, such activities by AHMSI are excluded activities and are not considered "doing business" in this Commonwealth for purposes of the requirement that a foreign corporation be registered in Pennsylvania to maintain an action in the Pennsylvania courts. On this basis, the Defendants argument must fail.

Finding no genuine issues of material fact remaining, we enter the following Order.

ORDER OF COURT

AND NOW, to wit, this 30th day of August, 2011, upon consideration of the Plaintiff's Second *Motion for Summary Judgment*, and based upon the rationale contained in the foregoing Opinion, it is hereby **ORDERED** and **DECREED** that the Motion is **GRANTED**.

FURTHER, in accord with Pa.R.C.P. No. 236(a)(2)(b), the Prothonotary is **DIRECTED** to note in the docket that the individual(s) listed below have been given notice of this Order.

BY THE COURT:
/s/ Richard E. McCormick, Jr., Judge

BRIDGEWAY CAPITAL f/k/a COMMUNITY LOAN FUND OF SOUTHWESTERN PENNSYLVANIA, INC., Plaintiff/Respondent
V.
R. DOUGLAS TAIT, Defendant/Petitioner

JUDGMENTS

Confession of Judgment; Application and Proceedings Thereon; Waiver

1. The procedure for entering a judgment by confession is constitutional.
2. Allegations not included within a Petition to Open and/or Strike a confessed judgment are waived.
3. In determining whether to open a judgment entered by confession, there is no duty upon a creditor in a commercial transaction to disclose or explain the legal consequences of a party's signature to a confession of judgment.
4. In a confession of judgment case, one cannot enter judgment twice upon the same warrant.
5. Because Defendant executed a warrant separate from that of his partner, judgment was not entered twice on the same warrant.
6. The original warrant of attorney executed by Defendant was not made ineffective due to a modification of the parties' underlying agreement because the underlying agreement allowed Plaintiff to modify Defendant's obligation.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 6873 of 2010

Appearances:
J. Michael McCague, Jr.,
Pittsburgh, for the Plaintiff/Respondent
Harry F. Smail, Jr.,
Greensburg, for the Defendant/Petitioner

BY: GARY P. CARUSO, JUDGE

DECISION AND ORDER

This matter is before me as the result of a Petition to Strike/Open and Stay Enforcement of Judgment filed by the Defendant/Petitioner, R. Douglas Tait, (hereinafter "Tait"). He is seeking relief from a judgment entered by confession on September, 22, 2010. Bridgeway Capital f/k/a the Community Loan Fund of Southwestern Pennsylvania, Inc. (hereinafter "Bridgeway") entered judgments on September 22, 2010, pursuant to the warrant of attorney and confession of judgment clause contained in a $150,000.00 Note dated August 26, 2005 wherein Custom Sports Gear, Inc., was the debtor; and pursuant to a warrant of attorney and confession of judgment clause contained in a General Guaranty and Suretyship Agreement wherein Ivan Peacock (hereinafter "Peacock") and Tait were the personal guarantors of the repayment of said Note. In accordance with the following Decision, the Petition to Strike/Open Judgment will be denied.

Bridgeway received a loan application signed by the Petitioner and Ivan Peacock for a loan to their business known as Custom Sports Gear, Inc. This application included a proposed lien on the equipment of the business as collateral. The application also stated that Tait and Peacock would be guarantors of the loan. Tait submitted a personal financial statement in support of the applications request that he be permitted to guaranty the loan. When the loan was closed Tait and Peacock each, while in attendance at the closing, received an explanation of the documents they were signing and each signed an individual General Guaranty and Suretyship Agreement guaranteeing the full amount of the loan. This guarantee was in no way limited to the percentage ownership of either Tait or Peacock in the debtor corporation. Tait, prior to the entry of judgment, never advised anyone that he did not have the capacity to sign the loan or that he did not understand what he had signed. Specifically, he never advised anyone that he expected that his obligation under the personal guaranty would be limited to his percentage of ownership in the debtor corporation. Further, there has been no evidence of the same, except for the self-serving statements of Tait set forth in his filings. Furthermore, Tait has presented no evidence by way of deposition that he did not voluntarily, intelligently and knowingly sign the guaranty allowing the confession of judgment.

It is interesting to note that in contrast to the assertion of Tait that he was mislead by the creditor as to the financial condition of Peacock and his corporation, the Guaranty in question signed by Tait expressly states that "Guarantor acknowledges that Guarantor is fully cognizant of Borrower's financial condition, that Guarantor has access to such information as will enable it to remain informed of such financial condition and that Guarantor will not rely on CLF [the creditor] to provide it with any such information."

In addition paragraph 6 of the Guaranty contains a full integration clause where in the Guarantor "warrants" that there were no other representations to him other than those contained in the writing. This is a clear sign that the written document constitutes the only agreement between the parties.

The original Petition to Open and or Strike the Judgment did not aver that he was mislead by the creditor concerning the existence of the Warrant of Attorney, but rather merely claimed a lack of knowledge on his part of what he had agreed to do. This appears to be a disingenuous claim as Tait himself uses confession of judgment clauses in transactions in which he is the creditor.

It has long been the law that the failure to read a contract before signing it cannot justify failing to comply with the contract. In this case the Warrant of Attorney even appears in bold print immediately above the place where he was to sign the document.

It appears that now for the first time Tait raises as a defense the allegation that Bridgeway is guilty of some fraud in this transaction because Bridgeway had Tait sign a guaranty that did not limit his obligation under the guaranty to his percentage ownership in the debtor corporation. Importantly, and fatally to the Petitioner's current argument, these new allegations were waived as a result of their not being included in the Petition. See Pa.R.C.P. 2959(c). Furthermore, as set forth above, Tait has offered

no evidence that he requested a limited Warrant of Attorney or that Bridgeway was in anyway aware of his unmentioned desire to have his liability limited in any way.

In addition, the averments contained in the Reply to the New Matter of the Respondent are again disingenuous. It is utterly disingenuous for Tait to aver that he is unable to specifically determine what his own conduct was during this transaction. Such responses are to be considered admissions. The failure to admit or deny an allegation is not acceptable when the pleader must know whether the allegation is true or not.

The case cited by the Petitioner, *Swarb v. Lennox,* has no applicability to a commercial transaction where the debtor has substantial net worth. The procedure for entering a judgment by confession has been found to be constitutional. *Jordon v. Fox, Rothschild, O'brien and Frankel,* 20 F. 3rd 1250 (3d. Cir. 1994).

The Petitioner is contending that there was an affirmative duty upon the creditor to disclose to the debtor the consequences of his actions. First of all, there was no failure to disclose since the document clearly sets forth the obligations of the debtor in unambiguous language. Also, there is no duty imposed upon a creditor in a commercial transaction to disclose or explain the legal consequences of Tait's actions as Tait and the creditor are not in a fiduciary relationship and likewise there is no affirmative duty imposed by law on creditors in such situations.

The Petitioner has strenuously argued that the Warrant of Attorney used in this matter had been exhausted prior to the confession of judgment being entered. However, Tait executed a separate Warrant of Attorney which was not the one used to enter judgment against Peacock. Therefore, judgment had not been entered twice on the same warrant.

The Petitioner also argues that original Warrant of Attorney guaranteeing payment of the original Note was no longer effective because the corporate debtor executed a loan modification agreement. However, the Guaranty and Suretyship Agreement signed by Tait in the first instance expressly granted to the creditor the power to create such a modification, thus not affecting the validity of the original Warrant.

The General Guaranty and Suretyship Agreement provided at paragraph 2 the following:

> 2. ...Guarantor unconditionally guarantees to CLF...full and prompt payment when due...of all present and future obligations and liabilities of any and all kinds of Borrower to CLF and of all instruments of any nature evidencing or relating to such obligations and liabilities upon which Borrow or one or more parties and Borrower are or may become liable to CLF,...and howsoever and whenever acquired by CLF...

It also provided at paragraph 4 as follows:

> 4. Guarantor agrees that CLF may, from time to time and as many times a CLF, in its sole discretion, deems appropriate, do any of the following without notice to the Guarantor and without

> adversely affecting the validity or enforceability of the Guaranty... (ii) change ...the terms of indebtedness; (iii) change...the terms of any note,...relating to the Indebtedness... (iv) grant any extension...with respect to the payment to CLF of the Indebtedness..."

In addition it provides at paragraph 5 the following:

> 5. Guarantor hereby unconditionally waives...(c) all other notices to which Guarantor may be entitled but which may legally be waived,... (f) any defense or circumstance which might otherwise constitute a legal or equitable discharge of a guarantor or surety.

In addition the modification was not material as it only extended the time for payment by extending the maturity date to November 1, 2012. The interest rate remained the same as well as the monthly payment amount. The modification reflected the amount due as of July 25, 2006 as $138,162.69 plus accrued interest in the amount of $1,865.20. Thus, the modification was not substantially different from the original note.

ORDER

And now this 14th day of October, 2011, in accordance with the foregoing Decision, it is hereby Ordered and Decreed that the Petition to Strike/Open is denied.

BY THE COURT:
/s/ Gary P. Caruso, Judge

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF
TRANSPORTATION, BUREAU OF DRIVER LICENSING
V.
NATHAN FORISH, Defendant

MOTOR VEHICLES

Suspension of Driver's License; Major Motor Vehicle Violations; Accelerated Rehabilitative Disposition

Defendant's appeal of suspension of his driver's license must be dismissed because his acceptance of Accelerated Rehabilitative Disposition for an earlier serious traffic offense is construed as an offense for purposes of license suspension requirement for habitual offenders.

CRIMINAL LAW

Jurisdiction of Judges; Nolle Pross Order; Accelerated Rehabilitative Disposition; Entry of Nunc Pro Tunc Order Under Certain Conditions

1. Except as otherwise provided by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed.

2. Court's 30-day period to modify or rescind an order is jurisdictional, and cannot be waived by the parties.

3. Court has broad discretion to enter a *nunc pro tunc* order, but only under certain circumstances; including interlocutory orders, where equity compels an unusual departure from the general rule, where there is a finding of fraud or other compelling circumstances, to correct an illegal sentence or other mistakes, or to correct mistakes of the clerk or other officers of the court, inadvertences of counsel, or to supply omissions in the record.

4. Entry of a *nunc pro tunc* order, even where consented to by an assistant district attorney, was not supported where there was no evidence of fraud, inadvertency or mistake.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 4006 of 2011

Appearances:

Ryan J. Kammerer,
Pittsburgh, for the Commonwealth of Pennsylvania Department of Transportation, Bureau of Driver Licensing

James M. Fox,
Latrobe, for the Defendant

BY: DANIEL J. ACKERMAN, SENIOR JUDGE

DECISION AND ORDER

On May 19, 2011, the Department of Transportation notified Nathan Forish that his operator's license was being suspended for a period of five years pursuant to 75 Pa. C.S.A. Section 1542(D), for being a habitual offender. Mr. Forish appealed his suspension. The suspension was based upon the assertion that Mr. Forish had accumulated three major motor vehicle violations within a five year period, those being: Fleeing and eluding (75 Pa. C.S.A. Section 3733(a)), for which he, upon

agreement, was placed into the ARD program on November 29, 2007 for a two year period of probation; and two subsequent guilty pleas for driving under the influence of alcohol (75 Pa. C.S.A. Section 3802), entered July 30, 2010 and April 27, 2011. His license suspension appeal was heard on September 9, 2011.

He contends that the 2007 ARD should not be counted in determining his status because the underlying fleeing and eluding charge, at No. CP-65-CR-4209-2007, was *nolle prossed* by a June 30, 2011 court order (Ex.l), entered by the presiding judge who had placed him into the ARD program, and, who thereafter modified this order with another (Ex.2), on September 9, 2011, the same day as his license suspension appeal hearing. The intent of the latter order was to make the *nolle pross* retroactive, *nunc pro tunc* (perhaps to December 11, 2009, the date of record on which the ARD proceedings were closed, though the order makes no reference to a particular time or event). For the reasons which follow, Mr. Forish's appeal will be dismissed.

Two issues have been raised. One is jurisdictional; that is, did the judge who placed Mr. Forish on ARD retain jurisdiction to enter the *nolle pross* order of June 30, 2011, and the *nunc pro tunc* order of September 9, 2011. The other is the legal consequence, if any, of such orders upon the suspension.

"Except as otherwise provided by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such orders has been taken or allowed." 42 Pa.C.S.A. Section 5505. The docket of the criminal court (Ex. "B") reflects that Mr. Forish's ARD was completed and the case status was "closed" on December 11, 2009. In considering this statute our courts have declared that the 30 day period is "jurisdictional and cannot be waived by the parties". *Municipal Counsel of the Municipality of Monroeville v. Kluko,* 517 A.2d 223, 225 (Pa Comwlth. 1986); *Maurice A. Nurnberg & Associates v. Coyne,* 920 A.2d 967, 979 n.7 (Pa. Comwlth. 2007). The earliest order on which Mr. Forish relies was entered eighteen months after the case in which he was granted ARD was terminated.

The argument that a court has broad discretion to enter a *nunc pro tunc* order, notwithstanding the passage of the 30 days delineated in Section 5505, has it limits. Our appellate courts have recognized certain limited circumstances where the passage of 30 days will not preclude subsequent modification of an order. The most obvious is that the 30 day jurisdictional limit does not apply to interlocutory orders. *Key Automotive Equipment v. Abernathy,* 616 A.2d 1126 (Pa. Super. 1994); *Commonwealth v. McMillian,* 545 A.2d 301, 305 (Pa. Super. 1988). An order entered eighteen months after the case has been closed however cannot be considered interlocutory, nor does Mr. Forish make such an argument.

Courts may enter an order *nunc pro tunc* beyond the 30 day period after a final order, as Mr. Forish contends, but only in discrete instances where equity compels an unusual departure from the general rule. For example: Where there is a finding of fraud or other compelling circumstances, *Commonwealth v. Sheppard,* 539 A.2d 1333 (Pa. Super. 1988); or to correct an illegal sentence or other obvious and patent mistakes in the court's orders, *Commonwealth v. Ward,* 489 A.2d 809, 812 (Pa. Super. 1985); or to correct mistakes of the clerk or other officers of the court, inadvertences of counsel, or to supply omissions in the record. *Manack v. Sandlin,* 812 A.2d 676, 680 (Pa Super. 2002).

In *Kluko,* at 225, the Commonwealth Court observed that its review of the record was restricted because there was no evidence of inadvertency or mistake to support the modifying order entered beyond the 30 day limit. Such is the case here. The *nunc pro tunc* order contains no reasons for its execution other than it was consented to by an assistant district attorney, and, as we have already seen, consent of the parties is insufficient to create jurisdiction. This deficiency is further compounded by the fact that the *nunc pro tunc* order was not preceded by a petition alleging, or testimony suggesting, any equitable or compelling circumstances which would justify the order. If a court undertakes to enlarge time limits imposed by rule or statute, based upon equitable considerations, there should be something in the record from which the court's motivation may be inferred. On the present record, Section 5505 is applicable and the court did not have jurisdiction to enter its last two orders.

However, even with jurisdiction, the appeal would warrant dismissal, based upon the reasoning in *Lihota v. Commonwealth, Department of Transportation, Bureau of Driver Licensing,* 811 A.2d 1117 (Pa. Comwlth. 2002). There the licensee was suspended as a habitual offender for five years. Like Mr. Forish, he had consented to an ARD disposition of the initial charge, but violated the terms of his probation through subsequent offenses and his ARD was revoked. When he proceeded to trial on the underlying charge for which he had entered the ARD program he was acquitted. Thereafter he challenged his five year suspension; arguing that due to his acquittal the initial charge and the ARD should be excluded in tallying the three offenses needed for habitual offender status. The court however held that 75 Pa. C.S.A. Section 1542 requires only acceptance into ARD for the offense to be scored as a conviction, and events following acceptance of ARD, including a subsequent acquittal, have no impact upon the status of an ARD acceptance as an offense under the statute. The holding is a strict interpretation of the statute, which provides:

"Accelerated Rehabilitative Disposition as an offense—Acceptance of Accelerated Rehabilitative Disposition for any offense enumerated in subsection (b) [relating to serious traffic offenses] *shall be construed as an offense for the purpose of this section." 75 Pa. C.S.A. Section 1542(C).*

The only departure from this interpretation is found in *Poborski v. Commonwealth, Department of Transportation, Bureau of Driver Licensing,* 964 A.2d 66 (2009). There an exception was made for a licensee who had accepted ARD, changed his mind, and successively petitioned the court to withdraw from the program. However these are not the facts in Mr. Forish's case.

ORDER

And now, this 13th day of November, 2011, the appeal of Nathan Forish from the suspension of his operator's license pursuant to 75 Pa. C.S.A. Section 1542D is dismissed.

BY THE COURT:
/s/ Daniel J. Ackerman, Senior Judge

Blank Page

IN RE: Estate of BRUNO FERRARI, JR., Deceased

ESTATES

Injunctive Relief; Enforcement of Sales Agreement; Objection to Sale of Estate Property; Right of Court to Set Aside Contract Made by Personal Representative for Fraud, Accident or Mistake

1. A Court cannot interfere with the enforcement of a sales agreement made by an estate's personal representative, for the sale of estate property, unless the Court finds the existence of either fraud or a mistake.

2. In determining the enforcement of a sales agreement, it is not the job of the Court to consider the adequacy of the consideration.

FRAUD

Burden of Proof to Set Aside Contract Made by Personal Representative of Estate

1. Fraud must be proven by clear and convincing evidence.

2. Because Petitioner failed to provide evidence supporting fraud or mistake, the Court denied Petitioner's Petition seeking to enjoin the sale.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION
No. 65-09-0882

Appearances:

Robert King,
Greensburg, for the Petitioner
Denis P. Zuzik,
Greensburg, for the Respondent
Donald J. Snyder, Jr.,
Latrobe, for Mark J. Gera

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION and ORDER OF COURT

This matter is before the Court on Petitioner's Petition for Injunction that seeks to enjoin the Administrator of the Estate of Bruno Ferrari, Jr., from selling real property to Mark J. Gera (hereinafter "Gera").

By way of background, Gloria Ferrari and Bruno Ferrari were husband and wife. Under the terms of Bruno's Will, all of his estate was bequeathed and devised to Gloria should she survive him, which she did: Bruno died on November 4, 2008, and Gloria died on January 24, 2009. During the course of the administration of Bruno's estate, Bruno Wayne Ferrari (hereinafter "Wayne"), as Administrator, entered into an agreement to sell real property that was individually owned by Bruno to Gera for the purchase price of $121,000. Petitioner is the Administratrix of the Estate of Gloria E. Ferrari, and seeks to enjoin this sale under section 3360 of the Probate, Estates and Fiduciaries Code, contending that the agreed upon price is far less than the property's actual value and that the contract was entered into as a result of either fraud or mis-

take.

A hearing was held on April 11, 2011, at which the following evidence was presented. Ronald R. Davies, a certified residential appraiser, valued the property on July 11, 2009, at $208,000 for the purpose of filing the Inventory and the Pennsylvania Inheritance Tax Return. By letter dated October 13, 2009, Attorney Zuzik, counsel for the Estate of Bruno Ferrari, confirmed that it was the desire of the Estate of Gloria Ferrari that the property be sold. Likewise, in a March 11, 2010, letter from Attorney Ciarimboli, attorney for Gloria's estate, to Attorney Zuzik, Ciarimboli confirmed that liquidity of the assets is necessary to pay fees and expenses of administration.

Some time in late 2009 or early 2010, Wayne received an oral offer from David Herrholtz to purchase the property for $100,000. After consulting with counsel, this offer was rejected. Thereafter, Wayne received a written offer from William Henry on February 3, 2010, to purchase the property for $115,000. This offer prompted Wayne and his wife to offer $115,000 to purchase the property themselves. In correspondence between the attorneys, Attorney Ciarimboli agreed that the appraisal setting the fair market value of the property at $208,000 "may have been grossly overstated," and that his client had no objection to Wayne's purchase of the property for $115,000.

Wayne, due to his dual roles as both fiduciary/seller and prospective buyer, prepared a Petition for Approval of Sale of Real Estate that he intended to present to the Court to authorize the sale of the property to him and his wife. In support of the Petition, he hired Mark Gera to appraise the value of the property, as required by section 12.10(b) of the Orphans' Court Rules.

Henry, by letter dated January 20, 2011, increased his offer to $120,000. Petitioner, by letter dated January 21, 2011, objected to the sale of the property to Wayne, contending that the property had not been exposed to sale on the open market and that no current appraisals were obtained to support the purchase price. When counsel advised Wayne that they would have to match Henry's offer in order for the Court to approve the sale, Wayne and his wife decided to abandon their effort to purchase the property.

On January 27, 2011, Wayne, in his capacity as Administrator, entered into a Sales Agreement with Gera, accepting his offer to purchase the property for $121,000. Petitioner objects to the sale of the property at this price and filed the within Petition for injunctive relief.

Section 3360 of the Probate Estates and Fiduciaries Code provides:

> When a personal representative shall make a contract not requiring approval of court, or when the court shall approve a contract of a personal representative requiring approval of the court, neither inadequacy of consideration, nor the receipt of an offer to deal on other terms shall, except as otherwise agreed by the parties, relieve the personal representative of the obligation to perform his contract or shall constitute ground for any court to set aside the contract, or to

> refuse to enforce it by specific performance or otherwise: Provided, That this subsection shall not affect or change the inherent *right of the court to set aside a contract for fraud, accident or mistake*. ..."

Applying this statute, this Court cannot interfere with the enforcement of the sales agreement unless we find the existence of either fraud or a mistake. After careful consideration given to the evidence presented and the briefs of counsel, we cannot find a reason to enjoin this sale.

Initially, we recognize that it is not our job to consider the adequacy of the consideration. In this instance, the property was appraised at $208,000 when the inheritance tax return was prepared and it was appraised at $250,000 on April 3, 2011, by the expert who was presented by the Petitioner as a witness at the hearing. However, there is also no dispute that the Administrator received three unsolicited offers that led two attorneys involved in this case to conclude that a valuation in the $100,000 - $120,000 range was a more realistic value for this property. Wayne was aware of these offers and the opinions of counsel. In addition, when Wayne expressed his desire to purchase the property for a price in this range, his offer was met with approval. Furthermore, the correspondence between the attorneys indicates that the parties understood that this property would need to be sold for liquidity.

Both Gera and Wayne testified that neither of them had or have any arrangement that Wayne will accede to "special rights" in the property if Gera purchases it.

As Respondent suggests, "fraud must be proven by clear and convincing evidence." *Tudor Insurance Co. v. Township of Stowe,* 697 A.2d 1010 (1997). After thoughtful review of all of the circumstances that preceded Wayne's entering into this agreement of sale, we find that the record is devoid of any evidence to support a finding of fraud or mistake in the creation of this sales contract.

Accordingly, we enter the following order.

ORDER OF COURT

AND NOW, to wit, this 8th day of July, 2011, it is hereby **ORDERED** and **DECREED** that the *Petition for Preliminary Injunction* is **DENIED**.

BY THE COURT:
/s/ Richard E. McCormick, Jr., Judge

Blank Page

R.W., Plaintiff
V.
T.K., Defendant

DOMESTIC RELATIONS

Petition to Enforce; College Expenses; Oral Agreement; Subject Matter Jurisdiction

1. The court lacked subject matter jurisdiction to address a petition to enforce an alleged oral agreement for payment of college expenses that occurred outside the marital relationship of the parties.

2. Plaintiff was not precluded from seeking to enforce the alleged oral agreement in a breach of contract action filed with the civil court.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLAVANIA
CIVIL ACTION–LAW
No. 32 of 1998-D

Appearances:
Kenneth Horoho,
Pittsburgh, for the Plaintiff
Margaret Tremba,
Greensburg, for the Defendant

BY: MICHELE G. BONONI, JUDGE

OPINION

This case comes before the Court on Plaintiff's Petition to Enforce Agreement Relating to College Education Expenses and Defendant's Motion to Dismiss. For the reasons stated herein, Defendant's Motion is GRANTED and Plaintiff's Petition is DISMISSED. The Defendant also filed Preliminary Objections to Plaintiff's Petition. For reasons set forth herein, it is unnecessary for the Court to address the Defendant's Preliminary Objections.

FACTS

The parties are the biological parents of one child, A. K., (hereinafter "adult son") born on April 11, 1990. The parties were married on April 28, 1990. At some point, the parties separated and on January 7, 1998, they entered into a Property Settlement Agreement (hereinafter "PSA") which resolved equitable distribution, support, and other property issues. Plaintiff and Defendant were divorced by decree dated May 8, 1998.

The parties' adult son graduated from high school in June of 2009 and started his college education at Penn State University, Altoona campus in the fall of 2009.

On April 26, 2011, Plaintiff filed her Petition to Enforce Agreement based on an alleged oral agreement she made with the Defendant regarding their adult son's college tuition and expenses. Defendant then filed Preliminary Objections and a Motion to Dismiss on May 6, 2011

DISCUSSION

To enforce an agreement between the parties, the court must find that it has subject matter jurisdiction. 23 Pa. C. S. A. §3105. Section 3105 states in relevant part:

> (a) Enforcement.—A party to an agreement regarding matters within the jurisdiction of the court under this part, whether or not the agreement has been merged or incorporated into the decree, may utilize a remedy or sanction set forth in this part to enforce the agreement to the same extent as though the agreement had been an order of court except as provided to the contrary in the agreement.

23 Pa. C. S. A. §3105(a). Title 23 section 3104 sets forth the bases of jurisdiction. Subsection (a) states:

> (a) Jurisdiction.—The courts shall have original jurisdiction in cases of divorce and for the annulment of void or voidable marriages and shall determine, in conjunction with any decree granting a divorce or annulment, the following matters, if raised in the pleadings, and issue appropriate decrees or orders with reference thereto, and may retain continuing jurisdiction thereof:
>
> (1) The determination and disposition of property rights and interests between spouses, including any rights created by any antenuptial, postnuptial or separation agreement and including the partition of property held as tenants by the entireties or otherwise and any accounting between them, and the order of any spousal support, alimony, alimony pendente lite, counsel fees or costs authorized by law.
>
> (2) The future care, custody and visitation rights as to children of the marriage or purported marriage.
>
> (3) Any support or assistance which shall be paid for the benefit of any children of the marriage or purported marriage.
>
> (4) Any property settlement involving any of the matters set forth in paragraphs (1), (2) and (3) as submitted by the parties.
>
> (5) Any other matters pertaining to the marriage and divorce or annulment authorized by law and which fairly and expeditiously may be determined and disposed of in such action.

23 Pa. C. S. A. §3104(a).

Plaintiff alleged that the parties had made an oral agreement that they would split their son's post-graduation expenses. Plaintiff asserts that she agreed to pay the first two years of the adult son's college education and expenses and that Defendant agreed to pay the second half of their son's college education and expenses. In support of her assertion, Plaintiff presented the Court with an email[1] which was entitled "A's Health Costs for the Year." The email states:

---

[1] Plaintiff offered the email as evidence of the alleged oral agreement.

> Hi-I appreciate the information and updates. As we discussed, it is my understanding that you are handling the first two years of A's post-graduation expenses. I will be handling his expenses at the start of his Junior year, and presumably will be providing insurance coverage at that time as well.
>
> Since my support obligation terminated June 4, I'll pay my share to that point. I am also assuming that you will be claiming him on your taxes for 2009 and 2010. I'll begin claiming him again in 2011 and 2012, once I have qualifying post-secondary expenses. Likewise, I've told A that he'll need to figure out how to work the holidays, since the custody order isn't really applicable any longer.
>
> When I talked with A regarding his school needs, he said he probably wouldn't know until he actually moved in, but I'll see if there is anything he wants/needs from my house.

This email was sent from Defendant at ********@aol.com to Plaintiff at *******@comcast.net. The email is alleged to have been sent on July 9, 2009.

Plaintiff alleges that for the 2009-2010 and 2010-2011 school years she paid tuition, housing, meal plans, books, health insurance, out-of-pocket medical expenses, cell phone, household goods and products, additional food, clothing, all transportation to and from school and automobile insurance.

In November 2010, Plaintiff claims that Defendant announced that he would not be financing any of the adult son's schooling. Plaintiff asserts that his failure to pay any of these expenses is a breach of their oral agreement.

In response to Plaintiff's Petition, Defendant filed a Motion to Dismiss. Defendant's position is that this Court lacks jurisdiction to address Plaintiff's Petition because it was: (1) filed under the existing divorce docket number, (2) it was not an issue raised in the pleadings, and (3) the PSA does not address the issue. Additionally, Defendant points out that the alleged oral agreement was not reached until 2009.

In support of his position, Defendant asserts that the PSA that the parties entered into prior to the issuance of their divorce decree addressed the issue of child support. In accordance with the fifth (5th) article of the PSA, Defendant was obligated to pay $334.00 per month to support his son.[2] Defendant further avers that the eleventh (11th) article, specifically paragraph five (5), addresses modification and waiver of any of the provisions in the PSA. It states:

> A modification or waiver of any of the provisions of this Agreement shall be effective only if made in writing and executed with the same formality as this Agreement.

The law of this Commonwealth is very clear that the Court cannot enforce an agreement between the parties without having subject matter jurisdiction. To establish subject matter jurisdiction, the Court must find that the issue has been raised in the

---

[2] Defendant's support obligation was terminated by Order of Court dated June 4, 2009.

pleadings. Once it is determined that the issue was raised in the pleadings, the Court must find that the issue falls under one of the five categories enumerated in the statute.

In the instant case, the issue of post-graduate expenses for the parties' adult son was not raised in the original pleadings. Additionally, Plaintiff concedes in her Petition that, "The issue of payment for A's undergraduate education and other associated expenses was not addressed in the parties' Property Settlement Agreement…" Lastly, the alleged oral agreement between the parties was entered into in 2009, approximately eleven (11) years after the parties' executed their PSA and their divorce decree was entered.

For the above stated reasons, the Court finds that it lacks subject matter jurisdiction to address Plaintiff's Petition for Enforcement. Additionally, the Court finds that the alleged oral agreement occurred outside the marital relationship of the parties and therefore is not appropriately filed as a Petition to Enforce. However, the Court notes that this Opinion does not preclude Plaintiff from seeking to enforce the alleged oral agreement in a breach of contract action filed with the civil court. Due to the Court's lack of jurisdiction, it will refrain from addressing any additional arguments advanced by the parties.

CONCLUSION

Based on the above, Defendant's Motion to Dismiss is granted and Plaintiff's Petition to Enforce is dismissed. As previously stated, Defendant's Preliminary Objections will not be addressed.

ACCORDINGLY, THE COURT ENTERS THE FOLLOWING ORDER.

ORDER OF COURT

AND NOW, to wit, this 6th day of June, 2011, for reasons set forth in the accompanying Opinion, it is hereby ORDERED and DECREED that Plaintiff's Petition to Enforce is DISMISSED.

It is further ORDERED that Defendant's Motion to Dismiss is GRANTED and the Court declines to address Defendant's Preliminary Objections as they are rendered moot.

BY THE COURT:
/s/ Michele G. Bononi, Judge

C.S.L., Plaintiff
V.
P.A.L., Defendant

DOMESTIC RELATIONS

Petition for Special Relief; Marriage Settlement Agreement; Profit Sharing Plan

1. When a party has failed to comply with the terms of a marital settlement agreement, the court is authorized to order the transfer or sale of any property in order to facilitate compliance with the agreement and to award counsel fees.

2. ERISA specifically contemplates the utilization of certain pension plans as a means to pay marital property obligations to a former spouse.

3. Where Husband has failed to comply with the marriage settlement agreement and failed to pay counsel fees, alimony, interest on unpaid alimony, and life insurance premiums, the court ordered a total of $41,885.35 distributed to Wife from Husband's entitlements in a profit sharing plan.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLAVANIA
CIVIL ACTION–LAW (DIVORCE)
No. 1962 of 2007-D

Appearances:

H. Gervase Fajt, Jr.,
Greensburg, for the Plaintiff

P.A.L.,
Pro Se

BY: CHRISTOPHER A. FELICIANI, JUDGE

OPINION AND ORDER OF COURT

This matter is before the court presently pursuant to a Petition for Special Relief filed on behalf of the Plaintiff, C.S.L. (hereinafter "Wife.") The parties in this case were formerly married, with the marriage ending in divorce in June of 2010. On May 20, 2010, prior to the entry of the final divorce decree, the parties entered into a Marriage Settlement Agreement, which was incorporated into the Divorce Decree for purposes of enforcement only. On or about August 25, 2010, counsel for Wife filed a Petition alleging, *inter alia,* that Defendant (hereinafter "Husband") failed to abide by the terms of the Marriage Settlement Agreement and failed to perform certain obligations under the agreement. On September 1, 2010, counsel for the Wife filed an Amended Petition alleging similar allegations of noncompliance. A hearing on the Amended Petition occurred before the undersigned on October 8, 2010. After the hearing, the court entered an Order which compelled Husband to comply with the Marriage Settlement Agreement; pay interest on unpaid alimony bring current all past due payments on Husband's Acacia Life Insurance Policy and reimburse Wife for premium payments she made on the Life Insurance Policy.

Wife now alleges that Husband has failed to comply with the Marriage Settlement Agreement and with the December 1, 2010 Order of Court. In particular, Wife alleges that Husband failed to pay counsel fees, alimony, interest on unpaid alimony, and life

insurance premiums. Wife further alleges that she should be entitled to counsel fees incurred as a result of preparing and presenting the Petition now before the court and incurred as a result of the failure to comply with the December 1, 2010 Order of Court. Wife seeks an Order that would direct her counsel to prepare a qualified domestic relations order (QDRO)[1] to distribute to her the total sum of $41,885.35 out of Husband's entitlements in the Surgical Neuromonitoring Associates, Inc. Profit Sharing Plan. The $41,885.35 figure is based on the following:

Counsel fees to be paid per 12/1/10 Order of Court	$ 1757.50
Alimony due per 12/1/10 Order of Court	$ 4524.00
Interest on unpaid alimony due per 12/1/10 Order of Court	$ 271.00
Premiums due on Acacia life insurance policy due per 12/1/10 Order of Court	$ 2029.45
Alimony due per para. 12 of the parties' marriage settlement agreement	$12,921.45
Counsel fees due per para. 18 of the parties' marriage settlement agreement	$ 750.00
Premiums due on Acacia life insurance policy per Para. 5 of the parties' marriage settlement agreement (11/10/10 to 7/20/11)	$ 3671.01
Interest on unpaid alimony from 10/13/10 to 7/20/11 due per 12/1/10 Order of Court	$ 278.09
costs and expenses incurred to enforce the 12/1/10 Order and the marriage settlement agreement	$ 3561.41

To that total sum of $29,764.35 is added the sum of $11,208.00 in additional federal taxes owed and $913.00 in state taxes owed, as testified to by Eric Elia Bononi, C.P.A. Mr. Bononi testified that the increase in income to Wife would result in additional taxes owed, based upon increased income to her and upon a 10% penalty since Wife is under 59 ½ years of age. The Court found that Mr. Bononi's testimony was credible and his opinions given with the requisite degree of certainty.

Wife's counsel submits that the case *Richardson v. Richardson,* 774 A.2d 1267 (Pa. Super. 2001), is controlling on the issue of whether the court has authority to attach the pension for purposes of enforcing obligations created by a marriage settlement agreement. *Richardson* involved an appeal to the Superior Court from an Order of Court dated May 22, 2000, entered as a result of contempt proceedings after Husband and Wife divorced in a bifurcated divorce proceeding. A special master had held a hearing and issued a recommendation on economic issues. The trial court then adopted the recommendation and issued an Order. *Id*. at 1268. The order awarded Wife, *inter*

[1] A qualified domestic relations order is a domestic relations order which permits an alternate payee to receive all or a portion of the benefits payable to a participant under the pension plan. To be qualified, the order must contain certain required information and cannot change the amount or form of plan benefits. *Prol v. Prol,* 935 A.2d 547 (2007).

alia, sixty percent of Husband's DuPont Savings and Investment Plan (SIP); sixty percent of that part of Husband's pension that had been acquired during the marriage, three years coverage of medical insurance, and $2750 per month in alimony for an indefinite period, modifiable and terminable upon a substantial change in circumstances. *Id*. The SIP division and the award regarding Husband's pension required the court to issue a QDRO. Husband, however, had failed to sign the QDRO in the lower proceedings. His failure persisted through the time of the appeal.

As a result of Husband's failure to comply with the Order, and as a result of a dispute over the disposition of other marital real property, Wife filed a petition for contempt and special relief, wherein she alleged that Husband was about to leave his employment at DuPont, and that instead of pension benefits, he would receive a "buy-out." Wife requested that the court freeze the SIP and pension funds until he signed the QDRO. *Id*. at 1268-1269. Husband did leave his employment, and paid alimony and medical insurance until the medical insurance coverage lapsed. The court entered an Order on December 22, 1997, which required the parties to proceed with equitable distribution and to sign the QDROs, as had been previously ordered. Wife then brought another petition for contempt and enforcement of the prior orders. After a hearing, the court found Husband in contempt, issued a bench warrant for his arrest, and sentenced him to six months in prison or until such time as he paid arrearages in alimony and complied with orders relating to the QDROs. Husband was also ordered to pay Wife's medical expenses of $16,000.00 and counsel fees in the amount of $2000.00. *Id*. at 1269. Husband failed to comply, and another contempt hearing was scheduled for May 17, 2000. The court entered an order on May 22, 2000, directing that Wife should receive 100% of the present value of the DuPont retirement pension,[2] provided the sum did not exceed $243,467.23.[3] Husband was to sign the QDRO within ten days of the date of the Order, or the Prothonotary was authorized to sign on behalf of him.

In *Richardson,* Husband argued that the only part of the DuPont pension which could be attached for support was that which was earned prior to separation. Husband cited another case, *Hollman v. Hollman,* 515 Pa. 288, 528 A.2d 145 (1987) for the proposition that money placed in a pension fund is money that the family defers spending until a later time. Husband argued that because he had remarried as soon as the divorce was final, the portion of the pension earned after remarriage should be saved for the benefit of his new wife and any children of the marriage. *Id*. at 1269.

The Superior Court disagreed with Husband and affirmed the trial court's Order. The Court noted that the Divorce Code grants trial courts broad power to enforce equitable distribution orders and to provide remedies in the event of failure to comply with orders of equitable distribution. Judge Beck noted that Section 3502(e) of the Divorce Code provides specifically that the court may order the transfer or sale of any property required to comply with the court's order. The non-marital portion of the

---

[2] Husband had liquidated the SIP, and Wife received no funds from it. *Id*. at note 6.

[3] In the event that the present value of the pension was less than $243,467.23, the difference between the value of the pension as of the date of implementation of the QDRO and the $243,457.23 was to be entered as a judgment against the Husband. *Id*. at 1269.

pension allocated to Wife was awarded to effectuate the support award that Husband had not paid. Any prohibition in the Employee Retirement Income Security Act (ERISA)[4] from alienation and assignment of pension funds was noted to have been intended to protect the participant from his own financial improvidence, rather than to have been intended to alter support obligations. *Id*. at 1270.

In the case presently before the court, counsel proposes to have the court issue a QDRO that would make available funds, not only for the payment of support, but also for the payment of attorney's fees, alimony, interest on alimony and reimbursement for Wife's payment of life insurance premiums, as well as taxes and penalties. Thus, the case differs from *Richardson* in that *Richardson* did not involve the payment of attorney's fees, taxes and penalties, and other items from the sums of money made available through the QDRO. In addition, in *Richardson*, the sums made available through the QDRO were not allocated to Wife in equitable distribution, but rather "under the court's equitable powers to effectuate the support award that [Husband] was paying." *Richardson* at 1270. In the instant case, the sums to be paid are to be paid pursuant to terms of the parties' marriage settlement agreement, entered into freely by the parties.

The provisions of Section 3502(e) of the Divorce Code set forth the powers of the court when a party has failed to comply with the terms of an agreement, as in the instant case. Such powers include the power to order the transfer or sale of any property in order to facilitate compliance with a marriage settlement agreement and the power to award counsel fees, among other things. 23 Pa. C.S. § 3502(e). *Richardson* makes clear that a court may attach the non-marital portion of a pension and award it to a spouse in equitable distribution when the non-marital portion is used for the purposes of support of a former spouse. However, the question in the instant case is whether a court may order attachment of a pension and award of the same to a spouse in equitable distribution when the portion of the pension is to be used for the purposes of property distribution, counsel fees and other damages incurred as a result of a spouse's failure to comply with a marriage settlement agreement.

In the case presently before the court, the court notes that although ERISA contains a proscription against the alienation and assignment of benefits, ERISA provides an exception for benefits payable pursuant to a QDRO. *See* 29 U.S.C.A. §1056(d)(3). Further, Section 1056, defines a "domestic relations order" as encompassing "any judgment, decree, or order (including approval of a property settlement agreement) which – (I) relates to the provision of . . . alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant. . ." 29 U.S.C.A. §1056(d)(1)(B)(ii). Thus, ERISA contemplates the use of a QDRO as a means of effecting distribution of marital property to a former spouse. This court also notes that the Court in *Richardson* found that the purpose of the proscription in ERISA on alienation and assignment of pension funds is "to protect the participant from his . . . own financial improvidence," rather than to alter support obligations. *Richardson*

[4] Under ERISA, as a general rule, pension plans must provide that benefits under the plans may not be alienated or assigned. *See* 29 U.S.C.A. Section 1056(d)(1). However, benefits can be attached pursuant to a qualified domestic relations order issued by a state court. 29 U.S.C.A. Section 1056(d)(3).

at 1270.

To permit Husband in the case presently before the court to avoid the property distribution obligations that he has freely undertaken in the parties' marriage settlement agreement is contrary to the purpose of Pennsylvania's Divorce Code to effectuate economic justice as to the parties. Moreover, ERISA specifically contemplates the utilization of certain pension plans as a means to pay marital property obligations to a former spouse. The counsel fees requested in the instant case were incurred as the result of Husband's own failure to comply with the agreement that he freely and voluntarily entered into, and the risk of incurring such fees is specifically acknowledged by the parties in their Marriage Settlement Agreement. (Marriage Settlement Agreement of May 20, 2010, at para. 22).[5] Husband in the instant case has failed to appear before the court and has failed to raise any grounds for excluding the award of counsel fees or other non-support items from the sums to be made available by QDRO. In addition, the issuance of a QDRO that provides for payment of the items requested by Wife comports with the notion that ERISA supports the use of a QDRO to effect fair property distribution. This notion is even more applicable in a case such as the instant one, wherein the court's creation of the QDRO as a source of payment for the requested funds was made necessary only by Husband's failure to comply with the marriage settlement agreement that he freely and voluntarily agreed to.

Therefore, the court enters the following Order:

ORDER OF COURT

AND NOW, to wit, this 4th day of November, 2011, based upon the reasoning set forth in the foregoing opinion, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Plaintiff's Petition filed August 9, 2011 is hereby GRANTED;

2. Plaintiff's counsel shall prepare a qualified domestic relations order which shall provide that the sum of $41,885.35 shall be distributed from Defendant's entitlements in the Surgical Neuromonitoring Associates, Inc. Profit Sharing Plan to Petitioner as an Alternate Payee and shall submit the same to the undersigned for approval.

3. Defendant shall execute the aforementioned QDRO within ten (10) days of presentation. In the event that the Defendant fails to properly execute the QDRO within ten (10) days, the Westmoreland County Prothonotary shall be authorized to execute the QDRO on his behalf.

BY THE COURT:
/s/ Christopher A. Feliciani, Judge

[5] Paragraph 22 provides as follows: "***Enforcement Expense:*** In the event Wife or Husband default in the performance of any of the terms, provisions or obligations set forth in this Agreement and it becomes necessary to institute legal proceedings to effectuate the performance of any provision of this Agreement, then the party found to be in default shall pay all expenses including the other party's reasonable attorney's fees incurred in connection with such enforcement proceedings."

Blank Page

MARK FERRY AUCTIONEERS, INC., a Pennsylvania Corporation,
and HARTLAND MACHINERY COMPANY, INC.,
a Pennsylvania Corporation, Plaintiffs
V.
LAWRENCE NEWMAN, Individually, and CAROLINE NEWMAN, Individually,
and t/d/b/a BRIAR CLIFF FINANCIAL SERVICES, a Fictitious Name, Defendants

SALES

Implied Warranty of Title, Language Necessary to Exclude Such Warranty

1. In every sale the Uniform Commercial Code includes an implied warranty of title.

2. The Uniform Commercial Code's implied warranty of title may only be excluded by specific language or circumstances that give the buyer reason to know the person selling an item does not claim title in himself or that he purports to sell only such right or title as he or a third person might have.

3. The language "quit claim bill of sale" is insufficient to exclude the Uniform Commercial Code's implied warranty of title.

FRAUD

Nature of Fraud; Materiality; Measure of Damages for Fraud

1. "Fraud" consists of anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or innuendo, by speech or silence, word of mouth, or look or gesture.

2. A fraud can occur through a material misrepresentation that need not be in the form of a positive assertion but can be in the nature of any artifice by which a person is deceived to his disadvantage.

3. Fraud may occur through false and misleading statements or by concealment of that which should have been disclosed, which deceives another and causes them to act upon that deceit to their detriment.

4. A misrepresentation is material, for purposes of determining fraud, when it is of such a character that if it had not been made, transaction would not have been entered into.

5. In Pennsylvania in an action based upon fraud the measure of damages is actual loss.

EXEMPLARY DAMAGES

Discretion of the Court; Factors Governing an Award

1. The decision to award exemplary damages is within the sound discretion of the Court.

2. Exemplary damages are proper when the act which creates actual damages also imports insult or outrage and is committed with a view to oppress or is done in contempt of plaintiff's rights.

3. Fraudulent misrepresentation by itself is sufficient to uphold an award of punitive damages because of the state of mind rendering it fraudulent.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 786 of 2010

Appearances:

B. Patrick Costello,
Greensburg, for the Plaintiffs
Kenneth J. Yarsky, II,
Pittsburgh, for the Defendants

BY: GARY P. CARUSO, JUDGE

DECISION AND ORDER/VERDICT

This matter is before the Court for disposition as the result of a non-jury trial. Having heard such oral testimony as the parties chose to introduce and examined the pertinent exhibits and reviewed both transcribed trial testimony and deposition testimony and heard oral arguments and considered written submissions, I make the following findings based upon the credible evidence and the reasonable inferences to be drawn there from. I make these findings by a preponderance of the evidence.

The plaintiffs are two Pennsylvania corporations in the business of conducting auctions. The defendants do business as Briar Cliff Financial Services (hereinafter "Briarcliff"). Briarcliff is in the business of making commercial loans and acting as a loan broker for commercial loans. The plaintiffs and defendants have been conducting their respective businesses for many years.

In December of 2004 PNC Bank National Association (hereinafter "PNC") made a loan to persons known as John and Margaret Pahlman. The purpose of the loan was to fund the purchase of a business known as High Tech Tools, Inc. As security for this loan and to perfect a security interest in said property, PNC filed a UCC-1 Financing Statement on January 24, 2005. In this Financing Statement the following was set forth as the collateral: "...all of the debtor's equipment...and all additions and accessions thereto, substitutions therefore and replacements thereof, in each case whether now existing or hereafter acquired or arising and wherever located." On August 24, 2009 PNC filed a continuation of this original Financing Statement and indicated thereon that the collateral had not changed. On January 24, 2005 PNC filed another UCC-1 Financing Statement wherein the collateral was listed as follows: "...all assets of the Debtor, of every kind and nature now existing and hereafter acquired and arising and wherever located, including without limitation... goods, inventory. ...and all additions and accessions thereto, substitutions therefore and replacements thereof." On August 24, 2009 PNC filed a continuation of this original Financing Statement and indicated thereon that the collateral had not changed. In addition on January 24, 2005 PNC filed another UCC-1 Financing Statement listing as collateral the same items as set forth immediately above in the previously mentioned Financing Statement. On August 24, 2009 PNC filed a continuation of this original Financing Statement and indicated thereon that the collateral had not changed. On January 24, 2005 PNC filed yet another UCC-1 Financing Statement wherein it listed as collateral "all of the Debtor's equipment ...and all additions and accessions thereto, substitutions therefore and replacements thereof, in each case whether now existing or hereafter acquired or arising and wherever located." On August 24, 2009 PNC filed a continuation of this original Financing Statement and indicated thereon that the collateral had not changed.[1]

On or about August 10, 2006, the defendants, Lawrence and Caroline Newman t/d/b/a Briar Cliff Financial Services (hereinafter "Newman or Briar Cliff') made a loan to John W. Pahlman and Margaret R. Pahlman, husband and wife, and High Tech

[1] This items are admitted into evidence as Ex. M in accordance with my order from the bench during the trial that the plaintiff would be given an opportunity to have these matters properly certified by the Department of State in accordance with 42 Pa. C.S.A. §6103.

Tools, Inc., in the amount of $185,000.00 to finance the purchase of real estate at 3162 Leechburg Road, Lower Burrell, Pennsylvania. This loan was secured by a Mortgage and Security Agreement. The machine shop equipment was also collateral for this loan and a security interest was perfected in this equipment by the filing of a UCC-l Financing Statement. The UCC-1 Financing Statement filed by Newman also covered after acquired property, therefore, Newman knew that this was a common element of financing statements and did know or should have known that the financing statements of PNC also covered after acquired property. Given the description of the collateral in the PNC Financing Statements the security interest of Newman would obviously be subordinate to the security interests held by PNC.

The Pahlman's became delinquent on their loans from PNC and the defendants.

On September 1, 2009 Newman sent a very telling e-mail to PNC wherein he states: "I would be happy to meet with your representative at that time to discuss removal of your equipment." The representative was one Andrew Comly, an auctioneer from the Philadelphia area that was hired by PNC to do appraisals and conduct auctions. Now, Newman says he did this because he did not know what equipment was subject to the lien of PNC. It does, however, show that Newman knew that PNC had at least some interest to some of the property in question. Newman should have given this information to Dean Gearhart of Hartland Machinery Company, Inc., (hereinafter "Gearhart") at the time he was negotiating the sale of the equipment, that will later be discussed, rather than leading Gearhart to believe, by his words and actions, that he owned all of the property on the list set forth on Exhibit BB and that it was not subject to the lien of PNC.

Newman's argument that he believed he was selling equipment that he owned free of the lien of PNC is specious, given that he admits, at the very least, that he did not know which equipment PNC had a lien upon. Thus, he knew or should have known that he very well may have been selling equipment subject to the lien of PNC. He had all of this knowledge but did not share it with Gearhart.

On September 11, 2009 Mr. Newman telephoned Mark Ferry, of the Plaintiff Mark Ferry Auctioneers, Inc., (hereinafter "Ferry") and told him that he (Mr. Newman) owned a building at 3162 Leechburg Road in Lower Burrell. He also represented that he was a secured party with regard to all of the personal property in the building and that he had taken it back by default. Mr. Newman wanted the equipment removed from the building as soon as possible so that he could do something with the building. In addition, Mr. Newman asked Mr. Ferry if he was interested in auctioning off the equipment for Briar Cliff Financial. This would lead a reasonable person to believe that Newman was the sole entity with the power to sell the property and have it removed from the building. However, Mr. Pahlman has testified, and I do find that, Lawrence Newman, at that time, had knowledge "that PNC was the sole owner of all t h e equipment that was in that building and he had no right to it whatsoever." (See Pahlman Depo. P. 20 lns. 6-12.) In addition Mr. Pahlman had provided all of his finan-c i a l information to Newman at the time Newman was considering the loan request of

Pahlman in 2006 and this information would have included information concerning the loan with PNC. At the time Newman made the loan to Pahlman, Pahlman gave him a list of the equipment in the building. This was the same list that Newman gave to Gearhart at the time he negotiated the sale of the equipment to Gearhart. Newman knew of the PNC loan and the fact that PNC had a security interest in all the property on the premises and any after acquired property. Therefore, he knew that any lien that he had the property on the list provided to him by Pahlman and then later provided by him to Gearhart was not a first lien, but subordinate to that of PNC. Thus, he knew that the equipment on that list could not be sold to Gearhart without satisfying the PNC security interest.

In connection with the proposed sale of the equipment in the building, Mr. Ferry advised Mr. Newman that he would first have to inspect the property. On September 11, 2009 Mr. Ferry inspected the equipment, tools and inventory that were to be auctioned. Mr. Ferry was going out of town and since this was a specialized industry he would contact someone he knew who would better be able to conduct an auction of this type of equipment. On Monday September 14, 2009 Ferry telephoned Newman and advised him that Dean Gearhart of the plaintiff Hartland Machinery Company, Inc., (hereinafter "Gearhart") would be the best person suited to conduct this auction. Then on Wednesday September 16, 2009 Newman telephoned Ferry three times. During those calls Newman asked Ferry if he or Dean Gearhart were interested in purchasing the equipment. Newman emphasized during these calls that he was interested in getting the equipment out of his building as soon as possible. On the third call to Ferry that day he asked that Gearhart contact him. Then, either on the 17th or 18th of September Newman telephoned Gearhart. He wanted Gearhart to look over the equipment. Newman gave Gearhart the phone number of the realtor handling the sale of the property, a Mr. Kristoff. Gearhart made an appointment with Kristoff to look at the equipment.

When Mr. Gearhart had spoken to Newman they discussed the possible purchase of the equipment by Gearhart. On September 21, 2009, Newman sent to Gearhart, at the request of Gearhart, a list of the equipment that was to be purchased by Gearhart. (See Exhibit BB) This is the same list that Pahlman had originally given to Newman and Newman knew that this equipment was subject to the lien of PNC.

On September 25, 2009, Gearhart and Newman reached an agreement that Gearhart would purchase the equipment for $25,000.00. During this conversation Newman made the comment that by next Tuesday (September 29, 2009) things would be cleared up and Newman would be able to sell the property. This is another representation by Newman that could reasonably have led Gearhart to believe that the equipment was not subject to any other liens, just as Newman had previously led him to believe. Gearhart, however, did express some concern over the ownership of the property in question and Newman told Gearhart to contact his attorney, John Straka. Gearhart then sent an e-mail that has been entered into the record as Ex. B. In that e-mail Gearhart very succinctly ask that Attorney Straka provide proof that Newman is the "sole" and "rightful" owner of the assets of High Tech Tool, Inc., "and that there are no additional

liens or encumbrances against these assets."

In his response Attorney Straka informed Gearhart that "The owner is an individual named Pahlman, who has filed bankruptcy." He then went on to state that "Larry has a first mortgage against his building and is secured against the equipment via a properly filed UCC-l Financing Statement." Now, as far as the statement goes it is a true statement, but did not answer the question asked by Gearhart concerning the equipment. Gearhart wanted an assurance that there were no other additional liens or encumbrances against these assets. This inquiry was not answered directly but was answered in an ambiguous and misleading way. Given the direct inquiry of Gearhart and the nature of the response of Straka it would have been reasonable for Gearhart to conclude that the UCC-l Financing Statement held by Newman was the only one on the equipment. This we know was not accurate and furthermore, Newman knew that this was not accurate. It is interesting to note that Newman was copied on this e-mail but took no action to clear up the ambiguity created by the response of Attorney Straka. Furthermore, the interpretation of Straka's response by Gearhart was reasonable given the fact that Newman had previously stated that he had taken back the equipment on default and wanted the equipment removed from the building as soon as possible. In addition, the remaining portion of the response of Attorney Straka in the e-mail of September 25th further reinforced the interpretation of Gearhart that no one had a superior claim to the equipment than that of Newman. Attorney Straka went on to state that "Through his counsel, Ronald Roteman, Mr. Pahlman has consented to Larry retaining as auctioneer to dispose of these assets. I have notified the bankruptcy trustee, Jim Walsh, of our intention to proceed with the auction of the equipment, and he has raised no objection....". Attorney Straka on September 25, 2009, also forwarded to Gearhart an e-mail, Ex. A, he had sent September 22, 2009 to jwalsh, rroteman, bkgroup, marques williams@pnc and LRNewman. It is important to note that at this time Gearhart had no knowledge of who Marques Williams was or what, if any, relationship he had to any transaction concerning this equipment. A reading of this e-mail, in my opinion, would not have informed Gearhart that PNC had a superior lien on the equipment. This is particularly true when considering the statement of Attorney Straka in that e-mail that "Accordingly, he [Newman] intends to contract with an auctioneer as soon as possible to sell that equipment ***free of any liens claims or encumbrances***." (emphasis by the court) When you consider that statement along with the response of Straka in the September 25th e-mail and the previous statement of Newman that the equipment has been taken back on default and he wanted it removed as soon as possible, it is no wonder that Gearhart was mislead. In that same e-mail of September 22nd Attorney Straka informed the recipients that the property at 3162 Leechburg Road and Newman's mortgage on that "property was the subject of a consent motion for relief from automatic stay to be heard next Tuesday." This would have been further misleading to Gearhart and would have reinforced his belief and reliance on Newman's previous statement that, in essence, things would-be cleared up by "next Tuesday" and he could sell the equipment. In reality however the proceeding scheduled before the bankruptcy court for that "Tuesday" was only for the purpose of obtaining a relief from stay for the real estate. (See Ex. H — the Order granting relief

from stay dated Tuesday September 29, 2009.)

Although Newman and Gearhart reached an agreement on the purchase price on September 25, 2009, Newman advised Gearhart they could not close on the sale of the equipment until after September 29, 2009 because there had to be some action by the bankruptcy court. Such a statement would reasonably lead Gearhart to believe that after the hearing on the 29th Newman could then sell the equipment free and clear. However, this was not true because the hearing on the 29th only dealt with releasing real estate from the stay in bankruptcy. What is so disappointing is that at every opportunity there was for clarification the defendant and his counsel chose obfuscation.

The sale of the equipment actually took place on October 5, 2009. Gearhart was in Florida at the time and was too ill to return home to attend a closing of the transaction. However, because Newman was anxious to close, Gearhart agreed that his secretary could handle the closing and would use a signature stamp on all documents that were to be signed by Gearhart. Newman went to the office of Gearhart and dealt with Dori Stone, Gearhart's secretary. Newman produced what was entitled a "Quit Claim Bill of Sale". Dori did read the document to Gearhart, but Gearhart was unaware of the significance of the language contained therein. The language contained in the body of the Quit Claim Bill of Sale would not have informed Gearhart that Newman owned any less of an interest in the equipment than he had led Gearhart to believe he owned. This is because the language is as follow: "...all the right, title and interest of the seller, if any, in and to any and all machinery, equipment, parts, or other items of tangible personal property enumerated on Ex. A...which is owned by the Seller and...is now located in...3162 Leechburg Road, Lower Burrell, Pa. 15068." This type of language, even though the title to the document was "Quit Claim Bill of Sale", is insufficient to exclude the warranty of title in 13 Pa. C.S.A. §2312 (a) (2) that the goods were being delivered "free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge." This is because §2312 (b) requires that such a warranty can only be excluded by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have. *Sunseri v. RKO-Stanley Warner Theatres, Inc.,* 374 A2d. 1372 (Pa. Super. 1977) The language of the Quit Claim Bill of Sale did not specifically exclude any warranty of title and further the surrounding factual circumstances created by the conduct of the defendant and the ambiguous language of the Quit Claim Bill of Sale were such as would lead a reasonable person to believe that the interest being sold was that which had previously been represented to be as good and marketable title free of any prior security interests.

The fact that Newman chose to give Gearhart a "Quit Claim Bill of Sale" is further evidence that Newman was aware that he did not own the property in question free and clear, but rather he knew it was subject to the lien of PNC.

Thereafter, Gearhart went about to prepare for the auction expending various sums to advertise the auction. Gearhart printed flyers to advertise the sale. Jeanine Ferry took pictures of all the equipment that was to be sold. They advertised the sale in the Tribune Review Newspaper.

Then on or about Saturday, November 7, 2009 Pahlman stopped by the building where the equipment was located because he had heard that there was to be an auction of equipment there. When Pahlman went into the building he saw Gearhart and spoke to him about what he was going to do. Gearhart told him that Newman had agreed that they could conduct an auction of the equipment located in the building. At that point Pahlman looked at Gearhart like he was crazy and said to Gearhart "how can Larry Newman auction it off when he doesn't own it. It all belonged to PNC and PNC has first liens on it..." Gearhart contacted Ferry and told him that he felt they had been duped. Ferry then contacted Attorney Costello to determine what to do. It was decided that they should cancel the sale. They sent out notices to the effect that the sale had been cancelled.

Thereafter, on or about November 11, 2009 Andrew Comly, the representative of PNC Bank arrived at the building because he heard there were plans for an auction. While at the building he met with Gearhart. Andrew Comly advised Gearhart that PNC had a first security interest in the equipment that was to be auctioned by Gearhart. This conclusion was reached based upon the description of collateral that appeared in the Financing Statements that were filed in 2004. It was then decided by Comly and those in authority at PNC Bank that it would be in the best interest of PNC to have Gearhart proceed with the sale, but do so on behalf of PNC.

Once this had been decided Gearhart sent out notices that the sale was no longer cancelled and that it would take place as scheduled on November 19, 2009.

From all of the evidence presented I find that the damages suffered by Gearhart were the proximate result of a misrepresentation by the defendant and Gearhart's justifiable reliance upon a factual situation intentionally created by the defendant through his words and actions and those of his attorney. The evidence in this case supports my finding that the defendant in conjunction with statements made by his attorney caused damages to the plaintiff Gearhart as the proximate result of Gearhart's justifiable and detrimental reliance upon a factual situation that the defendant misrepresented to him. It must be remembered that "fraud" consists of anything calculated to deceive, whether by a single act or combination, or by a suppression of the truth, whether it be by direct falsehood or innuendo, by speech or silence, or word of mouth. *Delahanty v. First Pennsylvania Bank, N.A.* 464 A.2d 1243 (Pa. Super. 1983) A "fraud" can occur through a material misrepresentation that need not be in the form of a positive assertion but can be in the nature of any artifice by which a person is deceived to his disadvantage and may be by false or misleading statements or by concealment of that which should have been disclosed, which deceives another and causes them to act upon that deceit to his detriment. *Id.* A misrepresentation is material when it is of such a character that if not made then the transaction would not have been entered into. *Id.* In this matter, if Gearhart would have known that Newman did not have a first lien priority he would not have agreed to purchase the equipment.

The sale was held November 19, 2009. As a result of the auction there was realized the sum of $57,157.50 from the total bids. In accordance with the agreement that Gearhart had with PNC he was paid $5,715.75, that being 10% of the total bids.

In preparation for the auction Gearhart incurred expenses of $9,067.70. Of this amount he was reimbursed the sum of $6000.00 by PNC. Therefore he was out of pocket $3,067.71 for his expenses. In addition he was out of pocket the $25,000.00 he paid Newman for the purchase of the equipment. The total out of pocket loss by Gearhart was $28,067.71 less the $5,715.75 he was paid by PNC or $22,351.96.

If the damages are calculated on the profit lost by Gearhart in this transaction that amount would be $28,089.80. This amount is calculated by taking the total proceeds from the sale of $57,157.50 and subtracting the total expenses of the sale of $9,067.70 and also subtracting the $25,000.00 paid for the equipment in the first instance.

Under Pennsylvania law, in an action based upon fraud, the measure of damages is "actual loss". *Kaufman v. Mellon National Bank & Trust Co.,* 366 F.2d 326 (3rd Cir. 1966). Because the sale was actually conducted it is possible to determine that the actual profit that the plaintiff lost as a result of the fraudulent misrepresentation was $23,089.80.

The next issue to determine with regard to the matter of damages is whether or not punitive damages should be awarded. This is within the discretion of the court. The question is whether I find that there has been sufficiently aggravated conduct contrary to the plaintiffs' interests, involving bad motive or reckless indifference, to justify the special sanction of punitive damages. Such damages are appropriate and proper when the act which creates the actual damages also imports insult or out rage and is committed with a view to oppress or is done in contempt of the plaintiff's rights. *Delahanty* supra. Fraudulent misrepresentation by itself is sufficient to uphold an award of punitive damages because of the state of mind rendering it fraudulent. *Id*. Mr. Newman is obviously oblivious to the concept of fair dealing in contractual matters. The conduct, in addition to the fraudulent misrepresentation, which is most reprehensible and worthy of punitive damages, and which best illuminates the bad motive of the defendant, is the defendant's inability, or even refusal, to recognize his responsibility to return the money that was paid by Gearhart when Newman knew he could not fulfill his portion of his agreement. This was so because even when it became clear to him that he did not have a first lien on the property sold to Gearhart he insists on keeping the purchase price.

Therefore, I will award the amount of $5,000.00 in punitive damages to the plaintiff.

The award in this case will be made only to the plaintiff Gearhart, as Gearhart was the only party in a contractual relationship with the defendant. It is true that Gearhart and Ferry had a separate contract on how they would split the profits; however that is a matter for them to resolve apart from this court's decision.

I find that the matter of damages requested pursuant to the Unfair Trade Practices and Consumer Protection Law can be dealt with summarily because the act is not designed to apply to the nature of this transaction which was a commercial transaction between a corporation and a Financial Services Company. Therefore, the request for damages pursuant to this Act is denied.

ORDER/VERDICT

And now this 18th of October, 2011, is accordance with the foregoing it is hereby Ordered and Decreed that it is the verdict of this court that I find in favor of the Plaintiff, Hartland Machinery Company, Inc., and against the Defendants, Lawrence Newman and Caroline Newman, individually and t/d/b/a Briar Cliff Financial Services, A Fictitious Name, in the amount of $23,089.80 in compensatory damages and $5,000.00 in punitive damages.

BY THE COURT:
/s/ Gary P. Caruso, Judge

Blank Page

J.A.D., Plaintiff
V.
J.J.L., Defendant

CHILD CUSTODY

Intrastate Child Custody; Initial Jurisdiction; Continuing Exclusive Jurisdiction

1. In determining jurisdiction over intrastate child custody between separate county courts, a Court is bound to employ the same standards it would apply when determining the jurisdiction of courts between differing states.

2. When a custody complaint is filed within a county, that county's courts have continuing exclusive jurisdiction over the child custody case until either a court of this Commonwealth determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent, have a significant connection with said county and that substantial evidence is no longer available in said county concerning the child's care, protection, training, and personal relationships; or a court of this Commonwealth or a court of another state determines that the child, the child's parents and any person acting as a parent, do not presently reside within said county.

3. The filing of a custody complaint within Westmoreland County gave its courts both initial jurisdiction and continuing exclusive jurisdiction over the parties' custody dispute.

4. However, because mother and the child moved to Erie County and father moved to McKean County, the Westmoreland County Court of Common Pleas lost its continuing exclusive jurisdiction over the parties' custody dispute.

5. Although Westmoreland County, due to subsequent custody complaint filed by the mother, had jurisdiction to make an initial custody determination, it still lacked jurisdiction to make any custody determination because the parties established by court order continuing exclusive jurisdiction in McKean County, Pa.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW (CUSTODY)
No. 1096 of 2009-D

Appearances:
Linda L. Whalen,
Greensburg, for the Plaintiff
Gregory A. Henry,
Bradford, Pa., for the Defendant

BY: CHRISTOPHER A. FELICIANI, JUDGE

OPINION AND ORDER OF COURT

The instant case is before the court for the disposition of Plaintiff's Petition to Accept and Modify Custody Order and Defendant's Preliminary Objections alleging lack of jurisdiction and improper venue filed pursuant to Pa. R.C.P. 1915.5.

The parties to the instant case were never married, but are the parents of one child, A.L. born 4/1/07. A custody proceeding was commenced at the above number and term on or about June 9, 2010 in Westmoreland County. The case proceeded, and the court entered a custody order of court dated July 31, 2009. Subsequently, on or about January 31, 2010, the Plaintiff relocated to Erie, Pennsylvania. This court entered an

Order of February 26, 2010, which transferred jurisdiction to McKean County, Pennsylvania upon Father's Petition requesting the Court of Common Pleas of Westmoreland County to transfer jurisdiction based on inconvenient forum. In the Petition, Father alleged, *inter alia,* that Father had resided in McKean County since November of 2008, and that Mother and the child had relocated to Erie, Pennsylvania in January of 2010.

The Plaintiff has filed a Petition to Accept and Modify Custody Order alleging, *inter alia,* that Mother resides in Murrysville, Westmoreland County (having moved back on February 10, 2011), that Father continues to reside in McKean County, and that Mother intends to remain in Westmoreland County into the future. The Plaintiff's Petition alleges further that the child sees numerous medical providers Murrysville, at Children's Hospital in Pittsburgh, and in Monroeville, Pennsylvania. The Petition alleges additionally that the current custody schedule is inappropriate, for the reason that the child will start school in fall of 2011, and for the additional reason that Father's actions and failures to act are having a detrimental effect on the child. The Plaintiff's Petition suggests that the child's primary contacts and information about the child are all located in Westmoreland County, and that therefore it is appropriate for the court to accept jurisdiction, schedule a custody conference for the purpose of modifying the current schedule, and enter an order to address any necessary further relief.

The Defendant has filed Preliminary Objections and a memorandum in support of preliminary objections, opposing the entry of the order requested by the Plaintiff. The Defendant cites to 23 Pa. C.S.A. Section 5471 and 5422, and argues that Westmoreland County does not have jurisdiction to entertain the Plaintiff's Petition because: (1) Section 5422 no longer confers exclusive, continuing jurisdiction to Westmoreland County; (2) McKean County has exclusive, continuing jurisdiction pursuant to Title 23 Pa. C.S.A. Section 5422 and the 2/26/10 Order of Court; (3) McKean County has not declined to exercise jurisdiction pursuant to 23 Pa. C.S.A. Section 5421; (4) McKean County would have jurisdiction under the criteria specified in Title 23, Pa. C.S.A. Section 5421, and finally, because McKean County is now the home county of the child.

Based upon the provisions of Pennsylvania law set forth below, this court finds that Westmoreland County no longer has jurisdiction in the instant case, and therefore sustains the Preliminary Objections filed by the Defendant and denies the Petition presented by the Plaintiff. The court's analysis and citation to relevant law are as follows:

23 Pa. C.S.A. Section 5471 provides:

> § 5471. Intrastate application
>
> The provisions of this chapter allocating jurisdiction and functions between and among courts of different states shall also allocate jurisdiction and functions between and among the courts of common pleas of this Commonwealth.

23 Pa. C.S.A. § 5471

In addition, 23 Pa. C.S.A. Section 5422 provides:

> **(a) General rule.--**Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth which has made a child custody determination consistent with section 5421 (relating to initial child custody jurisdiction) or 5423 (relating to jurisdiction to modify determination) has exclusive, continuing jurisdiction over the determination until:
>
> (1) a court of this Commonwealth determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this Commonwealth and that substantial evidence is no longer available in this Commonwealth concerning the child's care, protection, training and personal relationships; or
>
> (2) a court of this Commonwealth or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this Commonwealth.
>
> **(b) Modification where court does not have exclusive, continuing jurisdiction.--**A court of this Commonwealth which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under section 5421.

23 Pa. C.S.A. Section 5422.

Westmoreland County had originally made a child custody determination consistent with Section 5421 (relating to initial child custody jurisdiction) when the child and Mother resided in Westmoreland County. Thus, pursuant to Section 5422(a), Westmoreland County has continuing exclusive jurisdiction until certain events occur, as outlined in subparagraphs (a)(1) and (a)(2). In fact, events as set forth in subparagraph (a)(2) occurred and resulted in this court relinquishing jurisdiction to the Court of Common Pleas of McKean County, Pennsylvania, by Order of Court dated January 26, 2010.

What remains for the court to decide, however, is whether the provisions of paragraph (b) of Section 5422 apply to allow modification of a custody order when the court does not have exclusive, continuing jurisdiction, but where the court has jurisdiction to make an initial determination under Section 5421. On or about January 17, 2012, the Plaintiff filed a Motion to Transfer Jurisdiction, in the Court of Common Pleas of McKean County, requesting that the custody matter be transferred back to Westmoreland County. The McKean County Courts have not yet addressed Plaintiff's motion, however, it is pending consideration there. Counsel for the Plaintiff argues that the child has spent 37 months in Westmoreland County and that Westmoreland County is the "home state" of the child. Per the Plaintiff's reading of the statute, these facts support this court's exercise of jurisdiction.

The court disagrees with Plaintiff's analysis and finds the comment to 23 Pa. C.S.A. Section 5422 helpful in making its determination. The comment provides:

> "Exclusive, continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as parents leave the state, the non-custodial parent returns. As subsection (b) provides, once a state has lost exclusive, continuing jurisdiction, it can modify its own determination only if it has jurisdiction under the standards of section 201 (section 5421). If another state acquires exclusive continuing jurisdiction under this section, then its orders cannot be modified ***even if*** this state has once again become the home state of the child."

23 Pa. C.S.A. Section 5422, cmt. 2. (Emphasis added).

In the instant case, the Honorable Judge John H. Pavlock of the Court of Common Pleas of McKean County entered an Order dated April 28, 2010 addressing custody of the child. The Court of Common Pleas of McKean County, therefore, then acquired exclusive continuing jurisdiction. Judge Pavlock aptly noted in the 4/28/10 Order of Court that "the filing of the present Petition results in the Court [of McKean County] having acquired jurisdiction over the question of custody of this child." Because jurisdiction lies properly in McKean County, this Court sustains the Defendant's Preliminary Objections, and no further action will be taken with regard to Plaintiff's Motion for Modification of Custody at this time.

It should be noted that the Plaintiff's Motion to Transfer Jurisdiction remains pending in McKean County. Pursuant to 23 Pa. C.S.A. Section 5427, the Court of Common Pleas of McKean County may decline to exercise jurisdiction based on the doctrine of *forum non conveniens*. The *forum non conveniens* analysis is necessarily different from the jurisdictional analysis presently before the court. This court must adhere to the rules as they relate to jurisdiction, and must defer to the discretion of the presiding judge in McKean County to make a determination as to whether the case is appropriate for transfer back to Westmoreland County, based upon the factors enumerated in 23 Pa. C.S.A. Section 5427.

Accordingly, this court enters the following Order:

ORDER OF COURT

AND NOW, to wit, this 24th day of January, 2012, upon consideration of the Plaintiff's Petition to Accept and Modify Custody Order, and the Defendant's Preliminary Objections and Memorandum in Opposition to Plaintiff's Petition to Accept and Modify Custody Order, and supporting documents, and, based upon the foregoing analysis, it is hereby ORDERED, ADJUDGED and DECREED that the Defendant's Preliminary Objections are hereby SUSTAINED. This court will await further disposition of the Motion for Transfer pursuant to 23 Pa. C.S.A. Section 5427, currently pending in the Court of Common Pleas of McKean County.

BY THE COURT:
/s/ Christopher A. Feliciani, Judge

HARRY M. SHOUP and HARRIET L. SHOUP, husband and wife, Plaintiffs
V.
DAVID HOLZER, t/d/b/a FAIRMONT BUILDERS, INC., Defendant

PARTIES

Permissive Joinder and Effect Thereof

1. A Plaintiff may join as a Defendant persons against whom the Plaintiff asserts any right to relief jointly, severally, separately or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact affecting the liabilities of all such parties will arise in the action.

2. A Plaintiff asserting a cause of action *ex contractu* may join all persons whom they allege to be liable by reason of the breach of the contractual obligation without regard to the capacity in which they may be liable.

3. At any stage of the action, the Court may join a person who could have been joined in the action and it may stay all proceedings until such person is joined.

4. The trial of action where parties joined or were joined under Pa.R.C.P. 2229 shall be conducted as if independent actions between such parties were consolidated for trial.

5. Joinder of parties in any action shall not affect the procedural rights which each party possessed if sued separately, and the verdicts and judgments entered therein shall be joint, several, or separate according to the nature of the right or liability determined therein.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 10009 of 2008

Appearances:
Harry M. Shoup,
Pro Se
Harriet L. Shoup,
Pro Se
Monte Rabner,
Pittsburgh, for the Defendant

BY: GARY P. CARUSO, PRESIDENT JUDGE

DECISION AND ORDER

This matter is before me on the plaintiffs' Motion for Joinder of Additional Defendants and for the Imposition of Sanctions.

The complaint in this matter was filed on September 9, 2008. It was filed by Attorney Susan Williams on the plaintiffs' behalf. The named defendant in the complaint is Davis Holzer, t/d/b/a Fairmont Builders, Inc.[1] The complaint was served on October 8, 2008 on the defendant. Preliminary Objections were filed by the defendant on Nov. 9, 2008. In these objections the defendant claimed that this matter had to go to arbitration by the terms of the contract. However, on May 4, 2009 the

[1] By order of this court David Holzer as an individual was removed as a defendant in this case and the case is proceeding against Fairmont Builder, Inc.

defendant filed an Answer and New Matter. The New Matter also claimed that the matter should go to arbitration. A Reply to the New Matter was filed on July 22, 2009. Throughout 2010 the matter was continued from the trial list by motions of both plaintiffs' and defendant's counsel on various occasions. On June 16, 2010 I entered an Order compelling the defendant to answer interrogatories and the request for production of documents within 20 days.

On September 14, 2010 a Board of Arbitrators entered an award for the defendant. On October 12, 2010 the plaintiff filed an appeal from the award of the Board of Arbitrators. Thereafter, this matter was placed on the July 2011 trial list by my Order. At the request of plaintiffs' counsel this matter was continued from that trial list. On December 9, 2011 I entered an Order directing the plaintiffs establish a date certain for inspection of the roof in question. On that same date I entered an Order allowing Attorney Williams to withdraw her appearance on behalf of the plaintiff. On January 9th, 2012 I entered an Order continuing the trial to the next available trial term because the inspection of the roof had not yet taken place. On January 20, 2012 I entered an Order setting the date of January 28, 2012 for the inspection and directed that $500.00 would be taxed as costs in this matter for the necessity of defense counsel seeking this Order. Also on that date I entered an Order stating that David Holzer was dismissed as a defendant because there is no evidence that he was a party to the contract. I also said in the Order that the plaintiffs could attempt to pierce the corporate veil at the time of trial.

The matter was placed on the February/March trial list. On February 17, 2012 the plaintiff presented a Motion to allow joinder of additional defendants in this matter and for the imposition of sanctions. In this motion the plaintiff avers that at a deposition that was taken on October 30, 2009 it was disclosed that Christopher Dugan worked for David Holzer; and that Max Clawson was sent by David Holzer to inspect the damage to the window trim; and that John George Cafasso subcontracted the installation of the roof; and that Victor Boytos and Bart Andres subcontracted the installation of the windows and the window trim. Now, in February of 2012, the plaintiff wants to join John George Cafasso and Victor Boytos and Bart Andres as defendants in the breach of contract claim that he is making in this action.

Pennsylvania Rule of Civil Procedure 2229 (b) provides that a plaintiff may join as a defendant persons against whom the plaintiff asserts any right to relief jointly, severally, separately or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact affecting the liabilities of all such persons will arise in the action. Rule 2229 (d) provides that if the plaintiff is asserting a cause of action ex contractu they may join as a defendant all persons alleged to be liable to the plaintiff on or by reason of the breach of the contractual obligation without regard to the capacity in which they may be liable.

Rule 2232 (c) provides that at any stage of the action the court may join a person who could have been joined in the action and I may stay all proceedings until such person has been joined.

Rule 2231 (c) of the Pa. R.C.P. provides that the trial of an action in which parties have joined or have been joined under Rule 2229 shall be conducted as if independent

actions between such parties had been consolidated for trial. Pa. R.C.P. 2231 (d) provides that the joinder of parties in any action shall not affect the procedural rights whish each party would have if sued separately, and the verdicts and judgments entered therein shall be joint, several or separate according to the nature of the right or liability therein determined.

However, the power granted by these rules is necessarily limited by the statute of limitations. A person cannot be joined as a plaintiff, regardless of how indispensible they may be if the statute would bar the plaintiff from bringing an independent suit. Just be cause I would permit a party to be joined does not mean that the joined defendant cannot raise the statute of limitations as a defense. In the present case there may be some question as to whether the "discovery rule" would allow the joinder of a defendant discovered in October of 2009. If the "discovery rule" does not apply it appears that the statute of limitations may have run against any other persons claimed to be liable on the contract which allegedly was entered into on October, 15, 2007, as the statute of limitations is four years on an action based upon a contract.

I will grant a continuance to the plaintiff and stay this matter until such time that the plaintiff has filed and served a complaint to join as defendants John George Cafasso and Victor Boytos and Bart Andres. This order will be entered without prejudice to the original defendant and/or the newly joined defendants to challenge such joinder on the basis of the statute of limitations or any other appropriate ground. I will also order that the plaintiff to receive more detailed responses to the interrogatories they have served upon the defendant and to receive more detailed responses to the request for production of documents served upon the defendant.

I will therefore enter the following Order.

ORDER

And now this 21st day of February, 2012, in accordance with the foregoing it is hereby Ordered and Decreed as follows:

1. The Motion for Joinder of Additional Defendants is granted and this action is stayed until such time that the plaintiff has filed and served a complaint to join as defendants John George Cafasso and Victor Boytos and Bart Andres. This order is entered without prejudice to the original defendant and/or the newly joined defendants to challenge such joinder on the basis of the statute of limitations or any other appropriate ground.
2. The Motion for Continuance is granted and this matter is removed from the trial list.
3. The Motion for Sanctions is denied. It is Ordered however that the current defendant serve upon the plaintiffs more detailed answers to interrogatories and responses to request for production of documents within twenty (20) days.

BY THE COURT:

Blank Page

IN RE: ESTATE OF WALTER KOWALCZYK, DECEASED

ESTATES

Enforcement of Judgments Obtained During Lifetime Against Decedent's Estate; Filing of Notice of Claim by Judgment Creditor; Revival of Judgment Against Decedent; Validity of Claim for Payment

1. Where Executrix acknowledged claimant's claim against decedent, but asserted that she is not obligated to satisfy the judgment because it was more than five years old at decedent's death, claim nevertheless remains valid.

2. Claimant would have had to revive its judgment within one year after death of decedent in order for the judgment to have remained a lien on the decedent's real estate.

3. Although claimant may have lost its lien on the decedent's real estate for failure to revive the judgment in time, as a judgment it remains and on it an execution may issue.

4. Probate, Estates and Fiduciaries Code specifically holds that nothing within the code shall be construed as impairing any lien or charge on real or personal estate of the decedent which existed at his death.

5. Inability of Executrix to locate judgment holder or verify the validity of judgment does not invalidate the existence of the claim for payment or the lien on decedent's personal estate where Executrix concedes that she had written notice of the judgment.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION
No. 65-10-0873

Appearances:
Candice D. Holsinger,
Wilmerding, for the Estate
Edward Stock,
Jenkintown, for the Claimant, MarLyn Financial Services, LLC

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION AND ORDER OF COURT

This matter is before the Court after Claimant filed a Notice of Claim pursuant to section 3532 of the Probate, Estates and Fiduciaries Code (hereinafter "PEF Code"), 20 Pa.C.S.A. § 3532. The relevant facts underlying this matter are as follows.

Claimant, MarLyn Financial Services, LLC, obtained a judgment against the decedent during his lifetime in the amount of $8,131.00 on February 2, 2004. The judgment was docketed in the Westmoreland County Prothonotary's Office on December 6, 2005. The decedent died on April 16, 2010.

At the time of his death, the decedent owned real estate in Westmoreland County. The Executrix entered into an agreement of sale with a third party to sell the real estate. Incident to the real estate transfer transaction, a title insurance company who handled the closing discovered Claimant's outstanding judgment when they conducted a title search. Two days prior to the closing on March 31, 2011, the Executrix was advised that judgment had been entered against the decedent on or about December 6, 2005,

based on a transcript from the district justice of a default judgment entered on February 2, 2004. (See Exhibit D attached to Petition for Distribution.) The Deed transferring the property from the Estate to the third-party buyer was recorded on April 5, 2011, and the title insurance company escrowed a sum of money to cover Claimant's judgment.

The Executrix filed a First and Final Account (on October 3, 2011) and a Petition for Distribution/Statement of Proposed Distribution Pursuant to Pa.O.C. Rule 6.9 (on November 1, 2011). In each of these documents, the Executrix acknowledges Claimant's claim but she asserts that she is not obligated to satisfy the judgment because it was more than five years old at the decedent's death and "no additional claim has been made for more than one year after the last full advertisement of the estate." (See Verification attached the First and Final Account, dated September 28, 2011, and Paragraph 14 of the Petition for Distribution.) The Claimant filed a Notice of Claim on November 18, 2011, and a Response/Exception to Petition for Distribution/Statement of Proposed Distribution Pursuant to Pa.O.C. Rule 6.9, seeking payment of the outstanding judgment prior to distribution of the estate to the beneficiary. This Court scheduled a hearing on the issues raised, which was held on January 24, 2012, at which time counsel made arguments and were then directed to file written memoranda of law.

Section 3382 of the PEF Code states:

> Any judgment which at the decedent's death was a lien on real estate then owned by him or on real estate which he had conveyed by deed not recorded during his life shall continue to bind the real estate for five years from the inception or last revival of the lien or for one year from the decedent's death, whichever shall be longer, although the judgment be not revived after his death. During this period, the judgment shall rank according to its priority at the time of death, and after this period, it shall not continue to be a lien on the real estate, unless revived. Any judgment against the decedent which is a lien on real estate aliened by him may be revived by an action of scire facias brought against the decedent, but before any judgment shall be entered thereon, the personal representative shall be made a party defendant and served with process in the action.

20 Pa.C.S. § 3382.

Based upon this rule, Claimant would have had to revive the judgment by April 15, 2011, which is one year after the death of the decedent, in order for the judgment to have remained a lien on the real estate. This it did not do.

Although Claimant may have lost its lien on the real estate because the judgment was not revived in time, "as a judgment it remains and on it an execution may issue." *Second National Bank of Altoona v. Faber,* 2 A.2d 747, 749 (Pa. 1938).[1] Under the PEF

[1] Under 42 Pa.C.S.A. § 5529, an execution against personal property must be issued within 20 years after the entry of the judgment upon which the execution is to be issued.

Code, Subchapter E, "Claims; Charges; Rights of Creditors," section 3381 specifically holds that "[n]othing in this title shall be construed as impairing any lien or charge on real or personal estate of the decedent which existed at his death." The judgment held by Claimant, which was a charge against his personal estate, clearly existed at the time of decedent's death. The Executrix concedes that she had written notice of the judgment two days prior to the real estate closing on March 31, 2011, based upon the copy of the transcript from the district justice of the default judgment entered on February 2, 2004. The fact that she was unable to locate the judgment holder or verify the validity of the judgment does not invalidate the existence of the claim for payment or the lien on the decedent's personal estate or the obligation to pay this debt. As the court in *Miller v. Hawkins,* 205 A.2d 429, 438 (Pa. 1964), held:

> Section 732 of the Fiduciaries Act of 1949 was intended as a statute of repose of claims of non-diligent creditors and not as a statute whereby legitimate claims, the existence of which both the personal representative and his counsel had acknowledged, could be outlawed.

In other words, the spirit of the law serves to protect a personal representative who is innocently unaware of a claim, from personal liability; but it does not support depriving a creditor, of whom a personal representative is aware, from being rightfully paid.

Accordingly, based upon the foregoing, we find that the Respondent has timely presented a claim against the Estate, and the following Order will be entered.

ORDER OF COURT

AND NOW, this 9th day of March, 2012, based upon the rationale contained in the foregoing Opinion, it is hereby ORDERED and DECREED that the debt to MarLyn Financial Services, LLC, as evidenced by the judgment docketed at Westmoreland County 05RV09448, be paid from the assets in the estate, and that the Executrix file an amended Petition for Distribution, Statement of Proposed Distribution Pursuant to PA.O.C. Rule 6.9.

BY THE COURT:
/s/ Richard E. McCormick, Jr., Judge

Blank Page

COMMONWEALTH OF PENNSYLVANIA
V.
ROLAND A. JESSEE, Defendant

CRIMINAL LAW

Pretrial Proceedings; Discharge of Accused

1. When charges are dismissed or withdrawn at, or prior to a preliminary hearing, the attorney for the Commonwealth, may reinstitute the charges by approving, in writing, the refiling of a complaint with the issuing authority who dismissed or permitted the withdrawal of the charges.

2. Following the refiling of a complaint, if the attorney for the Commonwealth determines that the preliminary hearing should be conducted by a different issuing authority, the attorney shall file a Rule 132 motion with the clerk of courts requesting that the president judge, or a judge designated by the president judge, assign a different issuing authority to conduct the preliminary hearing. The motion shall set forth the reasons for requesting a different issuing authority.

3. Since a magistrate's dismissal of criminal charges due to failure to establish a prima facie case is unappealable, the Commonwealth's only recourse is the refiling of the charges.

4. The Commonwealth must still re-file the charges prior to the expiration of the statute of limitations and may not reinstitute the charges in order to harass the defendant or if the refiling will prejudice the defendant.

COURTS

Establishment, Organization, and Procedure; Places and Times of Holding Court; Designation or Assignment of Judges

1. Assignment of a different issuing authority is appropriate when an error of law has been made by the magistrate in finding that the Commonwealth did not establish a prima facie case.

2. An issuing authority may be temporarily assigned to serve another magisterial district in order to ensure fair and impartial proceedings.

3. Where there is no showing of partiality on the part of the issuing authority who sits in the magisterial district in which venue lies, the president judge abuses his or her discretion by granting a motion for the temporary assignment of issuing authority to serve in that district.

ANTITRUST AND TRADE REGULATION

Offenses and Prosecutions; Offenses; In General

1. A person commits the offense of home improvement fraud if, with intent to defraud or injure anyone or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor receives any advance payment for performing home improvement services or providing home improvement materials and fails to perform or provide such services or materials when specified in the contract taking into account any force majeure or unforeseen labor strike that would extend the time frame or unless extended by agreement with the owner and fails to return the payment received for such services or materials which were not provided by that date.

2. Magisterial District Judge did not commit an error of law when home improvement fraud requires a written contract.

3. A person commits deceptive or fraudulent business practices if, in the course of business, the person sells, offers or exposes for sale, or delivers less than the represented quantity of any commodity or service.

4. A person is guilty of theft if he intentionally obtains or withholds property of another by deception.

5. Additional charges of deceptive or fraudulent business practices and theft by deception involved different elements than the charge of home improvement fraud previously presented to magisterial district judge, causing there to be no reason that Commonwealth could not file the new complaint before same magisterial district judge.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 1134 MD 2011

Appearances:
Michael Pacek, Assistant District Attorney,
Westmoreland County, for the Commonwealth
Michael Ferguson,
Latrobe, for the Defendant

BY: JOHN E. BLAHOVEC, JUDGE

OPINION AND ORDER OF COURT

The above captioned case is before the Court for disposition of the Commonwealth's Motion to Refile Criminal Complaint. The history of this case indicates that the Commonwealth charged Mr. Jessee with one count of home improvement fraud in violation of 73 P.S. §517.8(a)(2) by criminal complaint dated September 8, 2011. A preliminary hearing was held on this criminal complaint before Magisterial District Judge Michael Mahady on November 7, 2011 and MDJ Mahady dismissed the charge.

On December 21, 2011 the Commonwealth filed the Motion to Refile Criminal Complaint with this Court and this Court ordered a hearing on the Motion. The Commonwealth is seeking to file a new criminal complaint against Mr. Jessee and it is requesting permission to file the new complaint before a different magistrate. The Defendant does not argue against the refilling of the criminal complaint; however, he argues that it should be re-filed before MDJ Mahady.

Before this Court on January 17, 2012, and in its motion, the Commonwealth argued that MDJ Mahady dismissed the charge finding that the Commonwealth did not establish that there was a contract between Mr. Jessee and the alleged victim; that no crime had been committed; and that he did not believe that the same facts would result in a successful civil action. MDJ Mahady also indicated that the applicable statute required a written document. The Commonwealth believes that MDJ Mahady erred in his ruling. No record from the preliminary haring was provided to this Court for review.

Rule 544 of the Pennsylvania Rules of Criminal Procedure allow for the refilling of a criminal complaint and the Rule indicates as follows:

(A) When charges are dismissed or withdrawn at, or prior to a preliminary hearing, the attorney for the Commonwealth may reinstitute the charges by approving, in writing, the refilling of a complaint with the issuing authority who dismissed or permitted the withdrawal of the charges.

(B) Following the refilling of a complaint pursuant to paragraph (A), if the attorney for the Commonwealth determines that the

> preliminary hearing should be conducted by a different issuing authority, the attorney shall file a Rule 132 motion with the clerk of courts requesting that the president judge, or a judge designate by the president judge, assign a different issuing authority to conduct the preliminary hearing. The motion shall set forth the reasons for requesting a different issuing authority.

Pa.R.Crim.P., Rule 544, 42 Pa.C.S.A. Since a magistrate's dismissal of criminal charges due to failure to establish a prima facie case is unappealable, the Commonwealth's only recourse is the refilling of charges. *Commonwealth v. Carbo,* 822 A.2d 60, 64 (Pa. Super. 2003). Despite Rule 544, the Commonwealth still must re-file the charges prior to the expiration of the statute of limitations and may not reinstitute the charges in order to harass the defendant or if the refilling will prejudice the defendant. *Id*.; Pa.R.Crim.P., Rule 544, Explanatory Comment.

> "[W]here the Commonwealth refiles charges, the judicial officer must make an independent determination of whether the Commonwealth can establish a *prima facie* case. However, if the Commonwealth merely indicates that it will present the same evidence that it presented at the preliminary hearing, the judicial officer may deny the petition for rearrest. The court also noted that such a determination 'does not preclude the Commonwealth from seeking a review by another judicial officer, empowered to hold preliminary hearings."

Id. (citations omitted). Assignment of a different issuing authority is appropriate when an error of law has been made by the magistrate in finding that the Commonwealth did not establish a prima facie case. *Singletary,* 803 A.2d 769, 776 (Pa. Super. 2002). It is noted that the Commonwealth has not attempted, pursuant to Rule 544(a), to re-file the criminal complaint before MDJ Mahady and thus MDJ Mahady has not refused to accept the new filing.

The Commonwealth instead contends that MDJ Mahady made an "error in law" when he determined that the applicable statute required a "written" contract. The original criminal complaint alleged home improvement fraud in violation of 73 P.S. §517.8(a)(2). This section states as follows:

> (a) A person commits the offense of home improvement fraud if, with intent to defraud or injure anyone or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor:
>
> (2) receives any advance payment for performing home improvement services or providing home improvement materials and fails to perform or provide such services or materials when ***specified in the contract*** taking into account any force majeure or unforeseen labor strike that would extend the time frame or unless extended by agreement with the owner and fails to return the payment received for such services or materials which were not provided by that date;

73 P.S. §517.8(a)(2) (emphasis added). The Commonwealth contends that the statute does not require a written contract and in support thereof references §517.8(a)(1) which states

> (a) A person commits the offense of home improvement fraud if, with intent to defraud or injure anyone or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor:
>
> (1) makes a false or misleading statement to induce, encourage or solicit a person to enter into ***any written or oral agreement*** for home improvement services or provision of home improvement materials or to justify an increase in the previously agreed upon price;

73 P.S. §517.8(a)(l). Section 517.8(a)(1) specifically states "any written or oral agreement" but §517.8(a)(2) states "when specified in the contract." "When specified in the contract" *implies* a written document. The language of the above sections are clearly different and each section addresses a different offense/fraud. Also, the statute indicates that home improvement contracts must be in writing to be valid and enforceable against the owner and the owner must be provided a copy. 73 P.S. §517.7. The Statute also prohibits the acceptance of money before the contract is signed. 73 P.S. §517.9. "Home Improvement Contract" is defined as

> "An agreement between a contractor, subcontractor or salesperson and an owner for the performance of a home improvement which includes all agreements for labor, services and materials to be furnished and performed ***under the contract***.

73 P.S. §517.2 (emphasis added). The definition itself implies a detail writing of some sort. Based on the legislature's choice of language, this Court cannot find that MDJ Mahady made an "error of law."

The Commonwealth also contends that a different magistrate should be assigned because MDJ Mahady indicated that the Commonwealth's evidence would not even establish a civil action. An issuing authority may be temporarily assigned

> "to serve another magisterial district in order to insure fair and impartial proceedings, and only upon an abuse of discretion will an appellate court reverse. Where there is no showing of partiality on the part of the issuing authority who sits in the magisterial district in which venue lies, the president judge abuses his or her discretion by granting a motion for the temporary assignment of issuing authority to serve in that district."

Commonwealth v. Kline, 555 A.2d 892, 894 (Pa. 1989). This Court has been provided no evidence of impartiality on the part of MDJ Mahady. No record from the preliminary hearing was provided to this Court. No testimony was provided to this Court in support of the Commonwealth's contention.

Also, the Commonwealth indicates that it intends to include two additional charges when the criminal complaint is re-filed. The additional charges are deceptive or fraudulent business practices in violation 18 Pa.C.S.A. §4107(a)(2) and theft by deception in violation of 18 Pa.C.S.A. §3922(a). A person commits deceptive or fraudulent business practices "if, in the course of business, the person sells, offers or exposes for sale, or delivers less than the represented quantity of any commodity or service." 18 Pa.C.S.A. §4107(a)(2). "A person is guilty of theft if he intentionally obtains or withholds property of another by deception." 18 Pa.C.S.A. §3922(a).

These additional offenses have different elements then the charge of home improvement fraud. And these additional offenses were not previously presented to MDJ Mahady to consider. Thus this Court sees no reason why the Commonwealth cannot file the new criminal complaint before MDJ Mahady.

Accordingly the following Order will be entered.

ORDER OF COURT

AND NOW, to wit, this 26th day of January, 2012, for the reasons set forth in the foregoing Opinion, IT IS HEREBY ORDERED AND DECREED Commonwealth's motion to re-file the criminal complaint before a different issuing authority is denied. If the Commonwealth wishes to re-file the criminal complaint it must file said complaint before Magisterial District Judge Mike Mahady.

BY THE COURT:
/s/ John E. Blahovec, Judge

Blank Page

BARRY LHORMER, an adult individual, and
LHORMER REAL ESTATE AGENCY, Plaintiffs
V.
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION, et al., Defendants

MUNICIPAL LAW

Torts; Sovereign Immunity; Highway Exception; Drainage; Surface Water; Flooding

1. The Commonwealth has enacted an exception to sovereign immunity for dangerous conditions of the highways.

2. A city is not liable to a property owner for increased flow of surface water over or on to his property that arises from changes produced by the opening of streets or the building of houses in the ordinary and regular course of expansion of the city.

3. Summary judgment may only be granted where there are no genuine issues of material fact.

4. Questions of fact existed regarding ownership of catch basins and drains, control of drainage facilities on the roadways, and whether pooling of water on the roadway is the result of natural water flows or negligent conduct.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 428 of 2010

Appearances:
Bernard P. Matthews,
Greensburg, for the Plaintiffs
Henry J. Salvi,
Pittsburgh, for the Defendants

BY: GARY P. CARUSO, JUDGE

DECISION AND ORDER

This matter is before me as the result of a Motion for Summary Judgment filed on behalf of the Commonwealth of Pennsylvania, Department of Transportation, (hereinafter PennDot). Penn Dot claims it is entitled to a summary judgment because it is immune from suit in this matter based upon sovereign immunity. This is an action for property damage that allegedly occurred as the result of a continual sewer backup, flooding, ponding and inadequate draining of storm water, sewer water and raw sewage. The plaintiffs claim that these conditions are directly caused by the manner of maintenance by PennDot of Otterman Street in the City of Greensburg, which is under the jurisdiction of PennDot.[1] Thus, the exception to sovereign immunity that would apply is 42 Pa. C.S. 5110 (a)(4) which in pertinent part states that an action shall not be barred and the defense of sovereign immunity shall not be raised to claims for damages caused by a dangerous condition of highways under the jurisdiction of Commonwealth agencies.

[1] PennDot owns and maintains the surface of Otterman Street in the area where the problem exists. Therefore, Otterman Street is a highway under the jurisdiction of PennDot.

The plaintiffs own property along Otterman street in the City of Greensburg. It is claimed that PennDot was aware of a history of flooding and infiltration of sewage and storm water on the subject property before June 17, 2009. They further claim that PennDot, despite its knowledge of the problems, did nothing to resolve the problem.

PennDot claims that, because it did not own the sanitary/storm sewer lines in question under the subject highway, it does not have a duty to the plaintiffs. They further claim that it has no liability because there is no cause of action at common law for flooding caused to property in an urban area as the result of the alleged inadequacy of drainage systems on the land of another. *LaForm v. Bethlehem Twp.,* 499 A.2d 1373 (Pa. Super. 1985). PennDot further contends that there is no exception to sovereign immunity in this case because it does not own or maintain the combined storm water/sanitary sewer system with the City of Greensburg, and does not own or maintain any of the drainage facilities under Otterman Street in proximity to the Plaintiffs' property.

The *LaForm* case involved the issue of the liability of a municipality for storm water runoff that flows out of the municipality into a lower lying municipality and then contributes to a dangerous condition which injures a third person. It has been held that a city will not be liable to a property owner for the increased flow of surface water over or onto his property, arising merely from the changes in the character of the surface produced by the opening of streets, building of houses, etc., in the ordinary and regular course of expansion of the city. This is because the city has the right to the natural, proper and profitable use of his own land, and if in the course of such use ***without negligence,*** unavoidable loss, is brought upon a property owner it will not be remedied. This concept has been applied to the development of cities. *Carr v. Northern Liberties,* 35 Pa. 324.

The question in the case before me is whether PennDot was negligent in allowing the accumulation of water to such a level on the surface of Otterman street to cause ponding and then subsequent flooding on the property of the plaintiffs. There are many facts that remain in dispute with regard to this issue. What we do know is that PennDot owns and maintains Otterman street and is responsible for the surface of the highway between the curb lines. This would arguably include the catch basins and inlets on the surface of the roadway. These allegedly are not operating properly and allow ponding of water on the surface of the roadway that floods the property of the plaintiffs.

There are also questions of fact that remain to be determined regarding the control of the drainage facilities on the roadway. There is testimony that the control is at least shared because if the Greensburg Water Authority wishes to expand or build additional inlets in the street they must obtain permission from PennDot.

In addition there are questions of fact that remain concerning whether the pooling of the water on the surface of Otterman Street is the result of the natural flow of water over improved urban property, or the result of some negligent conduct on the part of PennDot, particularly the height of the road surface compared to the curbing along the street that allegedly contributes to the pooling of water at a location that then allows water to flow onto the plaintiffs' property.

Once these factual determinations are made it can then be determined whether sovereign immunity applies. This is because a summary judgment may only be granted after the pleadings are closed and whenever there are no genuine issues of material fact that are material to the cause of action which could be established by additional discovery or expert report, or if after discovery the defendant has failed to produce evidence of facts essential to the defense which in a jury trial would require the issues to be submitted to a jury. Pa. R.C.P. 1035.2 Furthermore, in resolving a motion for summary judgment I must examine the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Such a judgment should only be granted in cases that are clear and free from doubt.

Given this standard, because there are issues of fact to be determined and because the inability of the plaintiffs to prove their case is not clear and free from doubt, it would be inappropriate to grant the Motion for Summary Judgment of PennDot. Therefore, I will enter the following Order.

ORDER

And now this 5th day of October 2011, in accordance with the foregoing Decision, it is hereby Ordered and Decreed that the Motion for Summary Judgment is denied.

BY THE COURT:
/s/ Gary P. Caruso, Judge

Blank Page

DONEGAL MUTUAL INSURANCE COMPANY, Plaintiff
V.
KIMBERLY SMITH, MATTHEW GARLAND, and NATHAN SMITH, Defendants

INSURANCE

Uninsured Motorist Coverage; Exclusions; Use; Owner's Permission; Ambiguous; Declaratory Judgment

1. In a declaratory judgment action involving the interpretation of an insurance contract, the court is required to give effect to the plain language of the contract.

2. If the language of the insurance contract is not clear, it is construed in favor of the insured.

3. The insurance contract contained an exclusion, which provided that uninsured motorist coverage is unavailable to any insured who is injured using a vehicle without the permission of the owner.

4. Because Defendant Garland was injured while riding as a passenger, Garland was not a "user" of the vehicle.

5. The term "use" in the "non-permissive use" exclusion of the insurance policy is ambiguous.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION – LAW
No. 620 of 2010

Appearances:

Scott Millhouse,
Pittsburgh, for the Plaintiff
Mark Bennett,
Pittsburgh, for the Defendants Kimberly Smith and Matthew Garland
Nathan Smith,
Pro Se

BY: GARY P. CARUSO, PRESIDENT JUDGE

DECISION AND ORDER

This matter is before the Court on a Motion for Summary Judgment filed by Plaintiff, Donegal Mutual Insurance Company ("Donegal").

Pennsylvania Rule of Civil Procedure 1035.2 governs the standard of review in determining a motion for summary judgment. The rule states that after the relevant pleadings are closed, within such time as not to unreasonably delay trial, a party may move for summary judgment in whole or in part as a matter of law when there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. In resolving a motion for summary judgment, the court must examine the record in the light most favorable to the non-moving party and all doubts to the existence of a genuine issue of material fact must be resolved against the moving party. *Jones v. SEPTA,* 565 Pa. 211, 772 A.2d 435, 438 (2001). Summary judgment will be granted only in those cases that are free and clear from doubt. *Marks v. Tasman,* 527 Pa. 132, 589 A.2d 205, 206 (1991).

In the present case the Defendant Matthew Garland sustained injuries as a result of an October 21, 2007 motor vehicle accident in which he was injured while a passenger in a vehicle driven by the Defendant Nathan Smith. Mr. Smith lost control of the vehicle and it left the roadway and collided with numerous pine trees and a utility pole. Matthew Garland sustained serious injuries as a result of the accident. The vehicle was owned by James Dzambo, Jr. and was being operated by Mr. Smith without Mr. Dzambo's permission.

On that date, Defendant Kimberly Smith, the mother of Matthew Garland, was insured under a policy of insurance issued by Plaintiff Donegal. Kimberly Smith elected uninsured motorist benefits and paid a premium for this coverage. A request was made for uninsured motorist benefits on behalf of Matthew Garland as a result of the injuries he sustained in the accident. Donegal denied the request for uninsured motorist benefits because they alleged that Matthew Garland and Nathan Smith were using the vehicle without permission at the time of the accident. Donegal commenced the instant action, seeking a judgment that the damages resulting from the accident are not covered because of exclusion under the policy for using a vehicle without the permission of the owner. This exclusion provides:

> EXCLUSIONS
>
> B. We do not provide Uninsured Motorists Coverage for "bodily injury" sustained by any "insured":
>
> 3. Using a vehicle without the permission of the owner.

Defendant Matthew Garland maintains that he was not "using" the vehicle because he was not driving the vehicle at the time of the crash and therefore the exclusion is not applicable to the case herein. Furthermore, Matthew Garland submits that the Pennsylvania Superior Court held in *Erie Insurance Exchange v. Lowry,* 941 A.2d 1270 (Pa. Super. 2008) that the term "use" in a "non-permissive use" exclusion is ambiguous and where ambiguity exists in the interpretation of language in an insurance policy, the ambiguity must be construed in favor of insurance coverage.

Donegal maintains the term "use" does not require operation of the vehicle, and is interpreted to include an occupant or passenger. *Nationwide Mutual Insurance Company v. Cummings,* 652 A.2d 1338 (Pa. Super. 1994). Donegal asserts Matthew Garland was "using" the automobile by employing it for its intended purpose, transportation. Donegal argues Matthew Garland not only knew that the car in which he was riding was stolen, but he helped steal it and, at times, even drove it. Donegal asserts Mr. Garland's active conduct establishes his "use" of the vehicle, as that term was interpreted in *Nationwide*. Accordingly, Donegal argues Mr. Garland is excluded from recovering uninsured motorists benefits because the injuries were sustained when Garland was using a vehicle without the owner's permission.

In a declaratory judgment action, where the interpretation of an insurance policy controls, the Court is required to give effect to the plain language of the contract. If the language is not clear, it is construed in favor of the insured, but where the language of the contract is clear and unambiguous, a court is required to give effect to that language. *Jaskula v. Essex Ins. Co.,* 900 A.2d 931, 933 (Pa. Super. 2006). In determin-

ing whether an ambiguity exists, the court may consider "whether alternative or more precise language, if used, would have put the matter beyond reasonable question." *County of Delaware v. J.P. Mascaro & Sons, Inc*. 830 A.2d 587, 591 (Pa.Super.2003).

In *Belser v. Rockwood Casualty Insurance Co.,* 791 A.2d 1216 (Pa. Super. 2002), the Pennsylvania Superior Court held that a contractor was not a "user" of a dump truck, even though contractor's employee had been guiding the dump truck at the time the truck came into contact with power lines and the driver was electrocuted, and thus the contractor was not an insured under the commercial automobile policy that extended coverage to "users" of the dump truck. The Court stated that our Supreme Court has cautioned that the word "use" does not have unlimited meanings, and must be considered within the setting in which it is employed. *Erie Ins. Exchange v. Transamerica Ins. Co.,* 516 Pa. 574, 533 A.2d 1363, 1367 (1987). In the *Belser* case, the relevant context was that of a motor vehicle being driven by a competent adult from one place to another. In this context, "use" was defined as "a method or manner of employing or applying something." Webster's Ninth New Collegiate Dictionary (1983) at 1299. The Court stated that the method or manner of employing a vehicle is t o
physically operate it. The contractor's employee was not physically operating the truck at the time of the accident; therefore, contractor was not a "user" of the truck.

Applying *Belser* to the instant case, even though Defendant Garland drove the car prior to the accident, he was not driving at the time of the accident. Since he was not physically operating the vehicle at the time of the accident, he should not be considered a "user" of the vehicle. Furthermore, the insurance policy does not define "use" or "using". However, the policy does provide a definition for the term "occupying." According to the policy, "occupying" means "in, upon, getting in, on, out or off." The policy's definition of "occupying" does not state that "occupying" means "using." If Donegal intended the relevant exclusion to be triggered if an individual otherwise covered by the policy sustained bodily injury while "occupying" a vehicle without the owner's permission, then Donegal should have utilized the word "occupying" in the exclusion or should have explicitly defined "occupying" as being interchangeable with "using." Donegal chose not to do so. I am typically is not inclined to favor one who knowingly converts the property of another. However, the language of the policy exclusion is not clear and such ambiguity must be resolved in favor of the claimant. Plaintiff Donegal in drafting the "non-permissive use" exclusion, could have utilized more precise language, such as "occupied", if it intended to preclude coverage under the facts of this case. Instead, Donegal employed the ambiguous term "using" and chose not to define that term. The case law cited requiring the resolution of an ambiguity in favor of insured, does not make an exception for an insured passenger who may not be an innocent occupant in the vehicle. Further, the policy of insurance does not exclude from coverage passengers that may not be innocent occupants of the vehicle.

In the instant case, the term "use" in the "non-permissive use" exclusion is ambiguous. In such circumstances, I must conclude that the contractual language is not clear and, where ambiguity exists in the interpretation of language in an insurance

policy, the ambiguity must be construed in favor of the insured. Viewing the record evidence the Court concludes that Plaintiff Donegal has not satisfied its burden in moving for summary judgment. As such, its Motion for Summary Judgment is denied.

ORDER OF COURT

AND NOW, this 1st day of February, 2012, upon consideration of Plaintiff Donegal Mutual Insurance Company's Motion for Summary Judgment and any responses filed thereto, it is hereby ORDERED and DECREED that said Motion is DENIED.

BY THE COURT:
/s/ Gary P. Caruso, President Judge

IN RE: ESTATE OF MARCUS W. BORTZ, DECEASED

ESTATES

Intestate Share of Surviving Spouse; Willful and Malicious Desertion of Decedent's Spouse; Desertion of Spouse and Forfeit of Right to Intestate Share of Decedent's Estate

1. A spouse who, for one year or upwards previous to the death of the other spouse, has willfully neglected or refused to perform the duty to support the other spouse, or who for one year or upwards has willfully and maliciously deserted the other spouse, shall have no right or interest in the real or personal estate of the other spouse.

2. Desertion of a spouse is "without cause or consent" where there is evidence that (1) the spouse intended to desert; (2) the separation was non-consensual; and (3) the deserting spouse did not have legal cause to do so.

3. Spouse's separation from decedent was consensual and was not "desertion" which would disqualify her from receiving share of decedent's estate, where decedent suffered physical symptoms from a debilitating disease and her home conditions in Florida were better suited for her disabilities than the meager living conditions available to her at decedent's home, where decedent was unavailable to act as her caretaker.

4. Ongoing distant, yet continuous relationship between decedent and spouse, evidenced by telephone calls, love notes, gifts, and other tokens of affection, are evidence confirming their special relationship as husband and wife, and therefore spouse did not "desert" decedent and is entitled to take an intestate share of decedent's estate as his surviving spouse.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION
No. 65-10-1863

Appearances:

L. Christian DeDiana and William J. McCabe,
Greensburg, for the Petitioner
Nancy L. Harris,
Greensburg, for the Interested Parties
Kim Ross Houser,
Greensburg, for the Respondent
Jon M. Lewis,
Greensburg, for the Estate

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION AND ORDER OF COURT

This matter is before the Court to determine whether a surviving spouse is entitled to inherit the estate of her deceased husband under the intestacy laws of the Commonwealth when she has lived separate and apart from her husband for more than one year prior to his death. The Petitioner, Decedent's sister, Irma J. McDivitt, and two additional interested parties, Deborah Zawelensky and Mary Lou Dudzinsky (both possible intestate heirs), argue that Marguerite Bortz, the Decedent's surviving spouse, willfully and maliciously deserted the Decedent and refused to return to their marital

home after a reconciliation, thereby forfeiting her right to an intestate share of his estate.

Section 2106(a) of the Probate, Estates and Fiduciaries Code, 20 Pa.C.S.A. § 2106(a) provides:

> A spouse who, for one year or upwards previous to the death of the other spouse, has willfully neglected or refused to perform the duty to support the other spouse, or who for one year or upwards has willfully and maliciously deserted the other spouse, shall have no right or interest under this chapter in the real or personal estate of the other spouse.

The Pennsylvania appellate court has held that a desertion is "without cause or consent" if there is evidence that 1) the spouse intended to desert; 2) the separation was non-consensual; and 3) the deserting spouse did not have legal cause to do so. *Fisher Estate,* 276 A.2d 516, 519-20 (Pa. 1971). We view the evidence with these basic legal principles in mind.

In support of their respective positions, the parties presented the following facts. The Decedent, Marcus W. Bortz, and Marguerite were married in 1962, and moved into the family farmhouse with Marcus's parents and sister on the Bortz farm in Loyalhanna Township. About three years into the marriage, Marguerite and Marcus's mother had a disagreement, and as a result of the discord, Marguerite, with Marcus's consent, moved to Florida to live with her parents. She agreed to return to Pennsylvania to reside with her husband only if he secured a home for them that was not located on her in-laws' property. Marcus found a home to rent in Saltsburg, Marguerite returned to Pennsylvania, and they lived together there for eleven years.

Eventually, the difficulties with her in-laws appeared to have subsided, and Marcus and Marguerite moved into a house trailer on the family farm, where they lived together for another eight years. However, in 1984, after being confronted by his wife, Marcus admitted to engaging in an extra-marital affair. In response to learning of this indiscretion, once again, Marguerite moved to Florida to live with her family.

A few months after she returned to Florida, Marcus apologized to Marguerite and told her that he had terminated his relationship with the other woman. She forgave him, but, as a result of the continuing tension in her relationship with her mother-in-law, she said that she would not return to live with him in Pennsylvania until his parents both died.

Although the initial separation in 1984 was indisputably consensual, and Marguerite had good cause to return to the comfort of her parent's home upon discovering her husband's betrayal, the Petitioner argues that Marguerite deserted Marcus when she did not return to Pennsylvania to live with him in 1999, when his mother died, despite their agreement.

Marguerite and Marcus never lived together for any period of time thereafter; however, they maintained a distantly intimate, and somewhat secretive, relationship. Ronald McDivitt, Marcus's nephew, who worked closely with Marcus on the family

farm, said that Marcus never spoke about his wife. Ronald stated that he had not heard from Marguerite since 1984, and that he was unaware of his uncle having any contact with her. Likewise, John Kachonik, Marcus's brother-in-law, said that Marcus never talked about his family life. In fact, when Marcus died, his family, believing that Marcus had divorced Marguerite years ago, made no effort to notify her and did not name her as a surviving spouse in his obituary.

The only person in Marcus's life who heard him say anything about Marguerite after her departure in 1984 was David Sarver, Jr., a boyhood friend. Marcus and David would get together from time to time over the years and during their conversations, Marcus told him that he talked to Marguerite on the phone, and he said that Marguerite suffered with Lyme's disease. He also said that Marcus never had a bad word to say about Marguerite.

Marguerite described their ongoing distant, yet close, relationship. Telephone records from 2008, 2009, and 2010 list numerous phone conversations between Marcus and Marguerite, many of which last for a considerable length of time. For example, in 2008, there were 20 calls over ten months with an average length in duration of almost one hour; and in 2009, there were 15 calls, which each lasting approximately one hour.

They saw one another face-to-face infrequently, and saw one another only a handful of times over the span of twenty-six years. In 1988 and 1990, Marcus visited her in Florida. In 1996, Marguerite returned to Pennsylvania to consult with a physician about Lyme's disease and saw Marcus then. In 2005 and 2006, Marguerite visited Marcus, each time for approximately one week.

Over the years, love notes, numerous gifts and other tokens of affection were exchanged between the parties, clearly evidencing their love for one another and confirming their special relationship as husband and wife. Marcus paid medical insurance premiums for both of them. He paid membership dues to a farmers' association for both of them. He listed Marguerite as his spouse and beneficiary on individual retirement accounts and beneficiary on other investment and bank accounts.

Beginning in 1999, Marcus filed federal income tax returns indicating his marital status as "single." However, his status as a single man was not supported by any of his other financial dealings. Marguerite, to the contrary, declared herself "married but separated" on all but one tax return, and in that instance she explained that the designation of "single" was completed by a tax preparer without her knowledge.

The Petitioner contends that Marguerite selfishly chose to stay in a comfortable home in Florida, willfully refusing to return to the marital home and to the accompanying obligations of life on the Bortz farm. However, Marguerite began to suffer physical symptoms from a debilitating disease as early as 1994, and we can infer from the record established that the home conditions in Florida were better suited for a woman with her disabilities than the meager living conditions available at her husband's home. In addition, Marcus worked two jobs, one of which was the demanding job of a farmer, so his availability to act as her caretaker was limited.

Apart from the brief affair, neither Marcus nor Marguerite had any other intimate, personal relationship with another during the course of their almost 40 year long marriage.

Based upon our careful review of all of the evidence, we find that Marcus's and Marguerite's separation was consensual and that Marguerite did not intend to "desert" her husband, and thereby disavow her vow to be his wife. Marguerite is entitled to take an intestate share of Marcus W. Bortz's estate, as his surviving spouse.

DECREE

AND NOW, to wit, this 22nd day of May, 2012, upon consideration of the *Petition for Declaratory Judgment*, and based upon the rationale contained in the foregoing Opinion, it is hereby **ORDERED** and **DECREED** that Marguerite Bortz is the sole intestate heir of the Decedent, Marcus W. Bortz, under the PEF Code § 2102(1).

BY THE COURT:
/s/ Richard E. McCormick, Jr., Judge

GREGORY R. MOSER and JOAN MOSER, Plaintiffs
V.
NORTH HUNTINGDON TOWNSHIP and JOHN KURPIEWSKI and/or
UNKNOWN AGENTS OF JOHN KURPIEWSKI, Defendants

GOVERNMENTAL IMMUNITY

Political Subdivision Tort Claims Act; Streets Exception to Governmental Immunity; Summary Judgment; Defective Condition of Roadway As Factual Cause of Accident; Sufficiency of Evidence that Roadway Facilitated Accident

1. In order for Motion for Summary Judgment based upon governmental immunity to be denied, Plaintiff must present evidence sufficient to show that a genuine issue of material fact exists; specifically, whether defective condition of roadway was a factual cause of accident as opposed to merely facilitating the accident.

2. Political Subdivision Tort Claims Act grants immunity from suit to local agencies, however such immunity is removed if an injury arises from one of eight exceptions contained in the Act.

3. In order for Plaintiffs' claim to fall under the "Streets" exception to governmental immunity, the road's defective condition cannot be merely a facilitating element to the accident, but rather, must be a cause of the accident or combine with another factor to cause the accident.

4. Reasonable inferences from Plaintiff's testimony raise possibility that deteriorated condition and Defendant's lack of maintenance of roadway could have been a factual cause of the accident, and thus, Motion for Summary Judgment must be denied.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 535 of 2011

Appearances:

Anthony W. DeBernardo, Jr.,
Greensburg, for the Plaintiffs
Rosemary Marchesani,
Pittsburgh, for the Defendant North Huntingdon Township
William R. Haushalter,
Pittsburgh, for the Defendant John Kurpiewski

BY: GARY P. CARUSO, PRESIDENT JUDGE

DECISION

This matter is before me as the result of a Motion for Summary Judgment filed on behalf of the defendant, North Huntingdon Township. The Township claims that they are immune from suit pursuant to the Political Subdivision Tort Claims Act, 42 Pa.C.S.A. §8541. The Plaintiff contends that there are questions of fact remaining that pertain to whether the "Streets" exception pursuant to 42 Pa.C.S.A. §8542(b) applies.

Pennsylvania Rule of Civil Procedure 1035.1:2 governs when a motion for summary judgment will be granted. If there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law, or if the party who bears the burden of proof at trial fails to offer any evidence of facts that would be vital to their

defense or the cause of action itself, summary judgment is proper. However, even though the facts of the case might not be in dispute, if an issue as to the reasonable inferences that can be drawn from these facts arises, summary judgment should be denied.

In the present case, a motorcyclist was riding down a country road. Accepting the facts as true, in the light most favorable to the nonmoving party, the motorcyclist, Mr. Moser, was traveling at or under the speed limit when a Quad Runner ATV, turning onto the country road from behind a garage, startled Mr. Moser causing him to stop suddenly, skid along the road and eventually fall sideways off of the motorcycle.. Mr. Moser avers that due to the defective condition of this country road, he was forced to move toward the center of the road in order to avoid riding over the deterioration. He contends that because he had to drive so near to the center of the road given its defective condition, the defective condition was a factual cause of the accident. He contends that his reaction to the sudden appearance of the Quad Runner would have been different had he not been required to ride so near to the center of the road and that the accident would not have occurred.

In order for the motion for summary judgment to be denied, Mr. Moser has to present evidence sufficient to show that a genuine issue to a material fact exists; specifically, did the defective condition of the road merely facilitate the accident or was the condition of the road a factual cause of the accident.

The Pennsylvania Political Subdivision Tort Claims Act (hereinafter Tort Claims Act), 42 Pa.C.S.A. §8541, grants immunity from certain lawsuits to local agencies or employees of local agencies. 42 Pa.C.S.A. §8541. If, however, an injury arises from one of the eight exceptions contained in the Act, governmental immunity is removed. 42 Pa.C.S.A. §8542(b). In the present case, exception (6), "Streets," may govern the outcome. It reads in part:

> (b) Acts which may impose liability.–The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:
>
> (6) Streets.–
>
> (i) A dangerous condition of streets owned by the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

42 Pa.C.SA §8542(b)(6)(i). In order to fall under the "Streets" exception, the road's defective condition cannot be a facilitating element to the accident. It has to be a cause of the accident, or combine with another factor to actually cause the accident. *See Kiley by Kiley v. City of Phila.,* 537 Pa. 502, 645 A.2d 184 (Pa. 1994). Pursuant to Pa.R.C.P. §1035.1:2 the plaintiff must provide factual evidence to dispute the defendant's

allegations that the defective condition of the road only facilitated the accident. The plaintiff has offered such evidence. This evidence is set forth in Mr. Moser's oral testimony during a deposition and is also presented by was of pictures of the road in question.

First, Mr. Moser's oral deposition is conflicting when asked questions about the relationship between the cause of the accident and the deteriorating road. When first asked by the defendant's counsel if anything on the road's surface had caused him to hit the brakes and start to skid, the plaintiff replied, "Other than the Quad Runner, no." But, when asked another question about the road and the accident, Mr. Moser answers that, "... the road drops off here is when the motorcycle skidded sideways, the front wheel was already down over the edge of where the road dips, and I think that had something to do with it," (meaning the accident); setting forth the idea that the road might have been the reason Mr. Moser's motorcycle ultimately fell over and caused his injuries. In addition, the pictures show that the side of the road and the center of the road were in a deteriorated condition. When the plaintiff is given the benefit of any favorable inference that can be derived from the evidence contained in the pictures, the lack of maintenance of this road could have also been a factual cause of the accident; not merely a facilitation of the accident.

In addition to the evidence provided by Mr. Moser and his counsel, a number of unanswered questions still remain before this court or a fact finder can unequivocally render a proper decision. Some of the essential issues are:

- Was the deterioration of the road a mere facilitation to the accident, or was it a ca use the accident?
- If the road was properly maintained without any defective conditions, could the motorcyclist have safely stopped?
- Could the motorcyclist have passed the Quad Runner safely if the road was properly maintained?
- Did the crowned drop off and the "dip" in the center of the road cause the motorcycle to lose control and fall sideways, or did the sudden slamming of the brakes?
- Did the accident occur because of a combination of the road condition and the oncoming Quad Runner, or was it solely based on the Quad Runner?

Since these questions of fact remain to be decided a summary judgment is improper. The fundamental issue lies in the relationship between the defective road and the accident. Did the deteriorating/defective condition of the road cause the accident, bringing the injury under the streets exception of 42 Pa.C.SA §8542(b)(6)(i), or did the road merely facilitate the accident, imposing governmental immunity under 42 Pa.C.SA §8541? This genuine issue, and the five additional questions raised, should be left for a fact finder to decide. Accordingly, the motion for summary judgment is denied.

ORDER

And now this 1st day of June, 2012, in accordance with the foregoing it is hereby Ordered and Decreed that the Motion for Summary Judgment filed on behalf of North Huntingdon Township is denied.

BY THE COURT:
/s/ Gary P. Caruso, President Judge

DAISUKE KOBAYASHI, an incapacitated person,
by MIKI KOBAYASHI, guardian, Plaintiff
V.
THE ESTATE OF DEBRA ANN HOLLAND, DECEDENT;
THOMAS L. WHITTEN, M.D; and WESTMORELAND PAIN
MANAGEMENT PHARMACY, LLC, Defendants

NEGLIGENCE

Necessity and Existence of Duty; Relationship Between the Parties

1. The imposition of a duty is predicated on the relationship that exists between the parties at the relevant time.

2. In general, the law does not impose affirmative duties absent the existence of some special relationship, be it contractual or otherwise.

3. Where the parties are strangers to each other, such a relationship may be inferred from the general duty imposed on all persons not to place others at risk of harm through their actions.

Necessity and Existence of Duty; Foreseeability

The scope of this duty is limited to those risks which are reasonably foreseeable by the actor in the circumstances of the case.

Actions; Questions for Jury; Duty as a Question of Fact or Law Generally

Only when the question of foreseeability is undeniably clear may a court rule as a matter of law that a particular defendant did not have a duty to a particular plaintiff.

Proximate Cause; Requisites, Definitions and Distinctions; Substantial Factor

1. Pennsylvania has adopted the substantial factor test found in the Restatement (Second) of Torts § 431(a).

2. Under this approach, a legal cause of a plaintiff's injury need not be the sole cause or most direct cause of the injury.

3. So long as the defendant's negligence was a substantial factor in contributing to the plaintiff's harm, the defendant may be liable to the plaintiff.

Actions; Questions for Jury; Proximate Cause; In General

1. Whether a defendant's conduct was a substantial factor in causing plaintiff's injury is ordinarily a question of fact for the jury.

2. The matter may be removed from the jury's consideration only when it is clear that reasonable minds cannot differ on the issue.

3. The court denied defendant doctor's motion for summary judgment when question of fact remained as to whether doctor's treatment was a substantial factor in contributing to plaintiff's harm as a result of his negligence in prescribing a regimen of medication in escalating doses.

JUDGMENTS

On Motion or Summary Proceeding; Grounds for Summary Judgment; Absence of Issue of Fact

1. After the relevant pleadings are closed, within such time as not to unreasonably delay trial, a party may move for summary judgment in whole or in part as a matter of law when there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery.

2. In resolving a motion for summary judgment, the court must examine the record in the light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

3. Summary judgment will be granted only in those cases that are free and clear from doubt.

4. If there are any material facts in dispute, or if the facts can support conflicting inferences, the case is not free from doubt, and summary judgment would be inappropriate.

Editor's note: An opinion on this docket number dated January 15, 2008, was published in 90 W.L.J. 99.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 3549 of 2007

Appearances:
Donald C. Sinclair, II,
Wheeling, W.Va., for the Plaintiff
Kim Ross Houser,
Greensburg, for the Defendant Estate
Steven J. Forry,
Pittsburgh, for the Defendants Whitten and
Westmoreland Pain Management Pharmacy, LLC

BY: GARY P. CARUSO, PRESIDENT JUDGE

DECISION AND ORDER

This matter is before the Court as the result of a Motion for Summary Judgment filed on behalf of Defendant, Thomas L. Whitten, M.D. On August 3, 2005, Debra Holland apparently lost consciousness while operating her 1987 Chevrolet Cavalier, traveling westbound on State Route 30. Her car left the right lane of travel and proceeded onto the berm of State Route 30 and struck Plaintiff Daisuke Kobayashi proceeding in the same direction on his bicycle. The impact caused Plaintiff to become airborne before striking the windshield of Holland's vehicle and falling to the pavement. Plaintiff sustained multiple injuries. Holland was arrested subsequent to the accident and an investigating officer of the Pennsylvania State Police Department obtained voluntary blood and urine samples from Holland, These samples tested positive for marijuana, topiramate, and methadone metabolites.

On May 4, 2007, Plaintiff Miki Kobayashi, guardian of incapacitated person, Daisuke Kobayashi, filed a Complaint naming Defendant Debra Holland. On July 19, 2007, Debra Holland died. On July 23, 2007, Plaintiff filed an Amended Complaint with averments against various healthcare providers including Defendant Dr. Whitten. In the Amended Complaint, Plaintiff alleged that approximately one hour before the automobile accident Ms. Holland received medical treatment from Dr. Whitten. During the course of her consultation it was alleged that Holland lost consciousness at Dr. Whitten's office; nevertheless, she obtained another prescription for methadone from Defendant Whitten and left the office driving her own vehicle.

Plaintiff asserted claims against Defendant Whitten for common law negligence and negligence based upon Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act (hereinafter "Controlled Substance Act") (Count IX); negligence per se for failing to report Ms. Holland to the Department of Transportation (Count X); and Respondeat Superior (Count XI). Defendant Whitten filed Preliminary Objections in the nature of a demurrer to these claims. By Order of January 14, 2008, this Court

granted Defendant Whitten's demurrer with respect to Plaintiff's claim for negligence per se for failing to report Ms. Holland to the Department of Transportation (Count X). This Court denied Defendant Whitten's demurrers to Plaintiff's common law negligence claim and negligence claim premised upon the Controlled Substance Act (Count IX) and the concomitant cause of action based upon Respondeat Superior.

Plaintiff alleges that Dr. Whitten breached his duty to properly diagnose and treat Holland. Plaintiff asserts that Dr. Whitten caused or contributed to a condition in Holland that resulted in the accident having prescribed and/or dispensed multiple medications and/or dosages of medications that would cause Holland to lose consciousness and/or severely inhibit Holland's ability to safely operate a motor vehicle. Plaintiff also alleges that Dr. Whitten failed to comply with the Controlled Substance Act by selling, dispensing or providing a controlled substance to Holland who he had reason to know was a drug dependent person and failing to periodically test Holland to assure that she was not consuming or under the influence of illegal drugs, including marijuana.

Defendant Whitten maintains he is entitled to summary judgment in his favor as to Plaintiff's negligence claims as a matter of law. Defendant Whitten asserts that Pennsylvania courts have expressly declined to find a duty owed to injured plaintiffs such as Mr. Kobayashi on the part of medical care providers of the drivers who allegedly caused such injuries. Defendant refers to *Witthoeft v. Kiskaddon,* 557 Pa. 340, 733 A.2d 623 (1990) (refusing to extend concept of duty and foreseeability to ophthalmologist for injuries to bicyclist in auto accident caused by patient's impaired vision); *Hospodar v. Schick,* 2005 Pa. Super 319, 885 A.2d 986 (2005) (finding no third party liability to allow deceased motorists' estates to recover from driver's physicians, who allegedly knew of, but failed to treat patients' seizure disorder and blackouts); *Crosby v. Sultz,* 405 Pa. Super 527, 592 A.2d 1337 (1991) (finding that a physician had no reason to believe that his patient's ability to drive was impaired by virtue of his controlled diabetes, the court declined to impose upon the physician the burden of determining the possibility that a patient's diabetes may flare up and act as the causal connection to a subsequent accident); and *Heil v. Brown,* 443 Pa. Super. 502, 662 A.2d 669 (1995) (mental health professional owed no duty to protect third parties from conduct of patient who had a psychotic episode and caused an auto accident).

Plaintiff counters that in *DiMarco v. Lynch Homes,* 525 Pa. 558, 583 A.2d 422 (1990), the court held that a physician was liable to a third party where the physician failed to properly advise a patient who had been exposed to a communicable disease and the patient spread the disease to a third party. The duty of the physician in such circumstances extended to the infected patient's sexual partner who was readily identifiable and considered to be within the "foreseeable orbit of risk of harm".

After careful review and consideration, I find the cases cited by Defendant Whitten to be factually distinguishable from this case. In *Witthoeft,* the court declined to find that the ophthalmologist owed a duty to the decedent predicated on principles of foreseeability where the doctor did not cause or aggravate a medical condition that affected the patient's driving. In contrast to *Witthoeft,* in the instant case there is

evidence that Defendant Whitten prescribed a regimen of medications in escalating doses that may have aggravated Holland's medical condition and contributed to Holland's impaired ability to operate a motor vehicle. Notwithstanding that Holland was consuming approximately twice her prescribed dose of OxyContin, Whitten not only continued her prescription, but increased her dose of OxyContin and, in addition, continued to prescribe a multitude of other medications. (Whitten Dep. 29:14 – 31:16).

In *Hospodar,* the physician knew of the patient's seizure disorder and its detrimental effect on his ability to drive, yet the Court refused to impose liability on the doctor noting that the patient-driver was also aware of his condition. In our present case, Holland was not necessarily aware that her medical condition might impair her ability to safely operate a vehicle. Holland testified that she inquired of her medical care providers, including Dr. Whitten, as to whether she should operate a car and their response was that if she felt okay to drive, it was okay. (Holland Dep. 54:8-15). Defendant Whitten assumed that Holland did not drive. He never inquired whether Holland was driving, nor did he advise her not to do so. (Whitten Dep. 117:5-118:3). Whitten admits that the regimen of medications he was prescribing, particularly in the presence of illicit substance abuse, could certainly affect her ability to safely operate a motor vehicle. (Whitten Dep. 113:20-114:21). The failure to tell Holland that she should not drive, coupled with the escalating doses of medications prescribed, raises a question as to whether Defendant Whitten aggravated Holland's condition.

In *Crosby,* the operator of the vehicle did not suffer from periodic losses of consciousness. His diabetes was under control. The court did not extend liability to the treating physician based upon the lack of an immediate health threat to the public. The court in *Crosby* found it significant that the doctor did not know or have reason to know of the patient's propensity for falling ill while driving. Conversely, here Defendant Whitten had actual knowledge of an imminent health threat and threat to the public if Holland were to operate a vehicle based upon Holland's lethargic condition displayed in his office the morning of the accident. This threat came to fruition when t h e accident occurred within minutes of Holland departing Whitten's office.

In *Heil,* a patient went to the hospital for treatment, but his treating physician was unable to see him. He was told to return during regular business hours to see a psychiatrist. The next day, the patient experienced a psychotic episode and drove his car into a police van. Based upon a lack of foreseeability, the court held that the mental health professionals owed no duty to protect third parties. In contrast, in the present case Defendant Whitten consulted with Holland within minutes of the collision. Holland was asleep or unconscious when Whitten entered the examination room. Whitten never inquired whether Holland was driving and did not admonish her not to do so. He admitted in his deposition that the regimen of medications he was prescribing, particularly in the presence of illicit substance abuse, could certainly affect her ability to safely operate a motor vehicle. Furthermore, Whitten had knowledge that Holland had been involved in at least two prior automobile accidents. (Whit-

ten Dep. 25:3-5; 50:16-52:2). Consequently, the threat of harm was neither remote nor speculative; it was foreseeable and instant.

The imposition of a duty is predicated on the relationship that exists between the parties at the relevant time. Generally, the law does not impose affirmative duties absent the existence of some special relationship, be it contractual or otherwise. However, where the parties are strangers to each other, such a relationship may be inferred from the general duty imposed on all persons not to place others at risk of harm through their actions. *Matharu v. Muir,* 29 A.3d 375, 385 (Pa. Super. 2011). The scope of this duty is limited, however, to those risks which are reasonably foreseeable by the actor in the circumstances of the case. Only when the question of foreseeability is undeniably clear may a court rule as a matter of law that a particular defendant did not have a duty to a particular plaintiff *Alumni Association v. Sullivan,* 535 A.2d 1095, 1098 (1987).

Pennsylvania Rule of Civil Procedure 1035.2 governs the standard of review in determining a motion for summary judgment. The rule states that after the relevant pleadings are closed, within such time as not to unreasonably delay trial, a party may move for summary judgment in whole or in part as a matter of law when there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. In resolving a motion for summary judgment, the court must examine the record in the light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Jones v. SEPTA,* 565 Pa. 211, 772 A.2d 435, 438 (2001). Summary judgment will be granted only in those cases that are free and clear from doubt. *Marks v. Tasman,* 527 Pa.132, 589 A.2d 205, 206 (1991). If there are any material facts in dispute, or if the facts can support conflicting inferences, the case is not free from doubt, and therefore, summary judgment would be inappropriate. *Weaver v. Lancaster Newspapers, Inc.,* 592 Pa. 458, 926 A.2d 899, 902 (2008).

In the present case, Plaintiffs have submitted sufficient evidence of foreseeability and causation to survive summary judgment. Pennsylvania courts in regards to causation have adopted the substantial factor test found in the Restatement (Second) of Torts § 431 (a). *Trude v. Martin,* 660 A.2d 626, 632 (1995). Under this approach, a legal cause of a plaintiff's injury need not be the sole cause or most direct cause of the injury; so long as the defendant's negligence was a substantial factor in contributing to the plaintiff's harm, the defendant may be liable to the plaintiff. Whether a defendant's conduct was a substantial factor in causing plaintiff's injury is ordinarily a question of fact for the jury. The matter may be removed from the jury's consideration only when it is clear that reasonable minds cannot differ on the issue. *Rabutino v. Freedom State Realty Co.,* 809 A.2d 933, 941 (2002).

Here, Ms. Holland's irresponsible and uncontrolled drug use led to the injuries sustained by Plaintiff Kobayashi. However, there exists a question of fact as to whether Dr. Whitten's treatment also was a substantial factor in contributing to Plaintiff's harm. Considering the knowledge Defendant Whitten had of Holland's condition, there appears to be a question of fact concerning whether Defendant Whitten caused or aggravated Holland's condition as a result of his negligence in prescribing a regimen of medication in escalating doses. Accordingly, the following Order of Court will be

entered denying Defendant's Motion for Summary Judgment.

ORDER OF COURT

AND NOW, this 22nd day of May, 2012, it is hereby ORDERED and DECREED that the Defendant Thomas L. Whitten, M.D.'s Motion for Summary Judgment is DENIED.

BY THE COURT:
/s/ Gary P. Caruso, President Judge

JAMIE MORABITO, Appellant
V.
CITY OF LOWER BURRELL ZONING HEARING BOARD
and DONALD W. MELLON, Appellees
and
CITY OF LOWER BURRELL, Intervenor

ZONING AND PLANNING

Special Exception and Variance; Standard of Proof Applied to Request for Variance; Unnecessary Hardship

1. Standard applied to a request for a variance requires proof of five elements: (1) whether the provision of the zoning ordinance imposes an unnecessary hardship that results from unique physical circumstances or conditions of the property; (2) whether, because of such physical circumstances or conditions, there is no possibility of developing in strict conformity to the zoning ordinance; (3) the determined hardship is not self-inflicted; (4) the variance being sought will not destroy the character of the area; and (5) the requested variance will constitute the least possible modification of the zoning ordinance.

2. Unnecessary hardship must be unique and particular to the property in question and the reason for the variance must be substantial, serious, and compelling.

3. Where, as here, a review of the record of the proceedings before the Zoning Hearing Board indicates that Appellee failed to offer proof to support its findings and determinations as no hardship was testified to or demonstrated by the photos introduced into evidence.

4. Zoning Hearing Board's conclusions of law fail to address any of the standards necessary to the grant of a variance and therefore must be overturned.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 3684 of 2010

Appearances:

Craig H. Alexander,
Pittsburgh, for the Appellant
Leslie J. Mlakar,
Greensburg, for the Appellee Donald W. Mellon
Stephen Yakopec, Jr.,
Arnold, for the Intervenor

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION AND ORDER OF COURT

The matter is before the Court on a land use appeal from the decision of the Zoning Hearing Board (ZHB) of the City of Lower Burrell granting a use variance on property at 3162 Leechburg Road, Lower Burrell, on the request of Donald W. Mellon for a special exception/variance to Article 1335.06(b) of the zoning ordinance of the city.

The property in question is located in an area zoned C-2. The use to which Mellon sought to put the premises, a tire and alignment shop, is not a permitted use in a C-2

district, Article 1335.03(b), and is not permitted as a special exception, Article 1335.04(a). Nevertheless, the ZHB voted unanimously to grant the request for a special exception/variance, and issued findings of fact and conclusions of law in support of that decision on May 11, 2010.

The scope of this Court's review is to decide if the ZHB has abused its discretion or committed an error of law in its action. *Hogan, Lepore & Hogan v. Pequea Township Zoning Board,* 638 A.2d 464 (1994). The standard applied to a request for a variance requires proof of five elements: (1) whether the provision of the zoning ordinance imposes an unnecessary hardship that results from unique physical circumstances or conditions of the property; (2) whether, because of such physical circumstances or conditions, there is no possibility of developing in strict conformity to the zoning ordinance; (3) the determined hardship is not self-inflicted; (4) the variance being sought will not destroy the character of the area; and (5) the requested variance will constitute the least possible modification of the zoning ordinance. 53 P.S. §10910.2, The Municipalities Planning Code, *Evans v. ZHB of Borough of Spring City,* 732 A.2d 686 (Pa.Cmwlth. 1999).

Unnecessary hardship must be unique and particular to the property in question. *Magrann v. Zoning Board of Adjustment,* 170 A.2d 553 (1961); and the reason for the variance must be substantial, serious and compelling.

A review of the record of the proceedings before the ZHB conducted on April 19, 2010, indicates that Mellon failed to offer proof to support the findings and determinations of the ZHB. No hardship whatsoever was testified to, or demonstrated by the photos introduced into evidence. As no hardship has been shown, the other factors to be considered in relation to a finding of hardship need not be analyzed. Suffice it to say, however, that many other possible uses in conformity with the zoning ordinance can be envisioned, and the proposed variance would constitute the least possible modification of the zoning ordinance.

The conclusions of law of the ZHB failed to address any of the standards necessary to the grant of a variance under these circumstances. The reasons for the ruling state therein are not relevant to the determination required to be made, and do not constitute an adequate basis for the ZHB's grant of special exception/variance.

ORDER OF COURT

AND NOW, to wit, this 8th day of June, 2012, based upon the foregoing Opinion, it is hereby **ORDERED, ADJUDGED** and **DECREED** that the land use appeal of Jamie Morabito is **GRANTED**.

FURTHER, in accord with Pa.R.C.P. No. 236(a)(2)(b), the Prothonotary is **DIRECTED** to note in the docket that the individual(s) listed below have been given notice of this Order.

BY THE COURT:
/s/ Richard E. McCormick, Jr., Judge

COMMONWEALTH OF PENNSYLVANIA
V.
CHARLES ROBERT KIRKPATRICK, Defendant

CRIMINAL LAW; FIREARMS

Omnibus Pretrial Motion; Firearms; Assault Rifle; Reckless Endangerment; Simple Assault; Disorderly Conduct; Municipal Police Jurisdiction Act

1. Where Defendant was arrested while walking along a public street with a loaded assault rifle, and where Defendant did not point the weapon at any person and obeyed the commands of the police, the Commonwealth failed to establish a prima facie case of the crimes of reckless endangerment, simple assault, or disorderly conduct.

2. No law prohibited Defendant from carrying his rifle in public.

3. Where a Delmont police officer responded to 911 dispatch in his jurisdiction, but arrested the defendant in Salem Township, a municipality serviced by the Pennsylvania State Police, the facts did not establish a violation of the Municipal Police Jurisdiction Act.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 4757 C 2011

Appearances:
Rebecca Calisti, Assistant District Attorney,
Westmoreland County, for the Commonwealth
Charles Robert Kirkpatrick,
Pro Se

BY: JOHN E. BLAHOVEC, JUDGE

OPINION AND ORDER OF COURT

The above captioned case is before the Court for disposition of the Defendant's omnibus pretrial motion. The Defendant is charged with one count of recklessly endangering another person in violation of 18 Pa.C.S.A. §2705, one count of simple assault in violation of 18 Pa.C.S.A. §2701(a)(3), and one count of disorderly conduct in violation of 18 Pa.C.S.A. §5503(a)(4). The charges stem from an incident that occurred on October 30, 2011 in Delmont, Westmoreland County.

The Defendant in his omnibus pretrial motion seeks numerous requests for relief. A hearing on the Defendant's motion was held by this Court on April 3, 2012. At the hearing the Defendant argued specific grounds for dismissal of the charges and this Opinion addresses those arguments. Also at the hearing the preliminary hearing transcript was submitted and the arresting officer provided additional testimony.

The Defendant first argues that the charges should be dismissed because the criminal complaint was not filed within the time constraints of Rule 519 of the Pennsylvania Rules of Criminal Procedure. Rule 519 requires that a criminal complaint be filed within 5 days of the defendant's release when he has been arrested without a warrant and promptly released from custody. Pa.R.Crim.P., Rule 519(B),

42 Pa.C.S.A. However, dismissal of a complaint for violation of Rule 519 is inappropriate unless the defendant is prejudiced by the delay. *Commonwealth v. Wolgemuth,* 737 A.2d 757, 760 (Pa. Super. 1999). The record indicates that the defendant was arrested without a warrant on October 30, 2011 and that the criminal complaint was filed on November 9, 2011. The Defendant has not alleged any prejudice. Thus the Defendant's motion to dismiss for violating Rule 519 is denied.

Next the Defendant seeks dismissal of the charges alleging a violation of the Municipal Police Jurisdiction Act. (42 Pa.C.S.A. §8951 et seq.). This Court has found no legal authority indicating that dismissal of the charges is an appropriate remedy for a violation of the Act. Suppression of evidence for a violation of the Act may or may not be the appropriate remedy. *Chernosky,* 874 A.2d 123, 130 (Pa. Super. 2005). A case-by-case approach is to be used to decide whether or not evidence should be suppressed due to violation of the Act. *Id*.

Though the Defendant is not arguing suppression, he does argue that the Act has been violated; thus, this Court will address briefly address the issue of jurisdiction. Officer James Henderson of the Delmont Police Department testified before this Court that on October 30, 2011 he responded to a 911 call of a man with an assault rifle walking on Church Street. Church Street is 1/2 in Delmont Borough and 1/2 in Salem Township. The 911 call originated from the residence of 412 Church Street which is in Delmont. Officer Henderson testified that he did not encounter the individual with the assault rifle until 482 Church Street which is in Salem Township.

At the preliminary hearing, Officer Henderson testified that Salem Township is the jurisdiction of the Pennsylvania State Police. He testified that to his knowledge there was no agreement with the Pennsylvania State Police granting the Delmont Police Department permission to operate in Salem Township on a regular basis. However, Officer Henderson testified that there was an agreement between the Delmont Police Department and the Pennsylvania State Police that the two agencies would back each other up when needed. (Preliminary Hearing Transcript, p. 27).

On October 30, 2011 a female Pennsylvania State Trooper was at the scene. Officer Henderson testified that the female trooper indicated that she was there to back him up. He also testified that the female trooper indicated that the charges were to be filed by the Delmont Police Department. (Preliminary Hearing Transcript, p. 28).

The Pennsylvania Supreme Court has indicated that the Municipal Police Jurisdiction Act is to "be liberally construed to achieve its purposes, one of which is to provide police with the authority to act as police officers outside their jurisdiction in limited circumstances." *Commonwealth v. Lehman,* 870 A.2d 818, 820 (Pa. 2005). The Pennsylvania Supreme Court has further noted that the Act "is not intended to erect 'impenetrable jurisdictional walls benefit[ing] only criminals hidden in their shadows.'" *Lehman,* 870 A.2d at 820 quoting *Commonwealth v. Merchant,* 595 A.2d 1135, 1139 (Pa. 1991). In this case the officer responding to a 911 call in his jurisdiction traveled into the jurisdiction of the Pennsylvania State Police. A trooper of the Pennsylvania State Police responded as back up at the scene. The trooper advised that the Delmont Police were to file the charges. Based on the facts before this Court, this Court finds no violation of the Act. Thus the Defendant's motion is denied.

Next the Defendant argues that the charges should be dismissed because the Commonwealth did not establish that he committed a crime. A prima facie case consists of evidence produced by the Commonwealth which sufficiently establishes that a crime has been committed and that the accused is probably the perpetrator of that crime. *Commonwealth v. McBride,* 595 A.2d 589, 591 (Pa. 1991). Every element of the crime charged must be supported by the evidence; however the Commonwealth need not establish guilt beyond a reasonable doubt. *Commonwealth v. Lopez,* 654 A.2d 1150, 1153 (Pa.Super. 1995). The Commonwealth establishes a prima facie case as long as the evidence presented establishes sufficient probable cause to warrant the belief that the accused committed the offense. *Id*.

The Commonwealth presented the following evidence: James and Marlene Cavicchio live at 412 Church Street in Delmont. On October 30, 2011 they were both at home and they both saw a man walk past their home carrying what appeared to be an assault rifle. They described the man as wearing jeans, a gray hoodie with the hood up, and carrying a backpack. They did not see his face. The man did not turn towards their residence, did not come on their property, and did not stop at their residence. They had no contact with the man. They did not feel threatened but were startled by the site of the weapon and phoned 911 out of caution. (Preliminary Hearing Transcript, pp. 8-14).

Officer James Henderson of the Delmont Police Department responded to the 911 call. He did not stop to speak to Mr. and Mrs. Cavicchio but continued past their residence. He encountered the individual, later identified as the Defendant, walking on Church Street just outside of Delmont. The Defendant was facing away from Officer Henderson holding the rifle in both hands. Officer Henderson got out of his vehicle and ordered the Defendant to stop and not move. The Defendant in response began to turn towards Officer Henderson. (Preliminary Hearing Transcript, pp. 19-20, 27). Officer Henderson testified before this Court that he could see that a magazine was loaded in the rifle. He testified that the Defendant turned approximately 15 to 20 degrees. He also testified before this Court that when he first encountered the Defendant that his lights and sirens were not on.

Upon seeing the Defendant turn, Officer Henderson drew his weapon, moved to the back of his police vehicle, and screamed at the Defendant not to move. The Defendant complied and never made a complete turn towards the officer. Officer Henderson then ordered the Defendant to place his weapon at his feet and the Defendant complied. The Defendant was then told to step backwards away from the weapon and the Defendant again complied. Once the Defendant was a safe distance from the weapon Officer Henderson ordered him to kneel on the ground and the Defendant did so. Officer Henderson then approached the Defendant and ordered him down on the ground with his arms and legs stretched straight out and the Defendant followed the order. Officer Henderson then handcuffed the Defendant, conducted a search of the Defendant, and then placed the Defendant in the police car. (Preliminary Hearing Transcript, pp. 20-21, 31).

After placing the Defendant in the police car Officer Henderson retrieved the weapon which was identified as an AR15-type rifle. The rifle was placed in the trunk

of the police vehicle. When back-up arrived Officer Henderson showed them the condition in which the rifle was being carried. Specifically a magazine was in the rifle and the selector switch was in the fire mode. The rifle was then placed in safe mode and the magazine was removed. The magazine was fully loaded. There was also a round found in the chamber. The Defendant's backpack contained a nylon ammunition carrier which contained five additional fully loaded 30 round magazines; a box of Winchester .223 55 grain cartridges totaling 200 rounds of ammunition, and a set of hearing protectors. The Defendant told Officer Henderson that he was going target shooting on property nearby and that he had not broken any laws. Officer Henderson did not check the location where the Defendant said he was going to target shoot. (Preliminary Hearing Transcript, pp. 21-23, 29, 33).

The Defendant is charged with recklessly endangering another person. An individual recklessly endangers another person "if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." 18 Pa.C.S.A. §2705. "Danger, and not merely the apprehension of danger, must be created." *In re Maloney,* 636 A.2d 671, 674 (Pa. Super. 1994). Case law indicates that a firearm must not only be loaded, but also pointed at the victim in order for the Commonwealth to establish recklessly endangering another person. (See *In re Maloney,* 636 A.2d 671,674-675 (Pa. Super. 1994); *Commonwealth v. Trowbridge,* 395 A.2d 1337, 1340-1341 (Pa. Super. 1978); and *Commonwealth v. Reynolds,* 835 A.2d 720, 727-728 (Pa. Super. 2003)). The crimes code indicates that

> "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation."

18 Pa.C.S.A. §302(b)(3).

In this case the Defendant is not charged with pointing a loaded firearm at the victim but specifically with "carrying and/or swinging a loaded AR-15 rifle in the direction of" Officer Henderson. (See the Criminal Information). The evidence established that Officer Henderson could see that the rifle was loaded due to the presence of the magazine. Officer Henderson testified that he approached the Defendant from directly behind. He did not have his lights and sirens on. He ordered the Defendant to stop and the Defendant began to turn around. The Defendant only turned 15 to 20 degrees and never made a complete turn towards the officer. The Defendant was instructed to stop, place the rifle on the ground, and step away from the rifle. The Defendant obeyed all the officer's commands.

The Defendant neither pointed the gun directly at the officer nor did he completely turn around. The Defendant did begin to turn after he first heard the officer but stopped turning when the officer instructed him to stop. The Defendant obeyed all of the

officer's commands. There is no evidence that the Defendant intended to place the officer in danger of death or serious bodily injury simply by "carrying" his rifle or by beginning to turn in response to hearing someone behind him. The only evidence of the Defendant's intent, presented by the Commonwealth, is the Defendant's own statement that he was going target shooting. The Commonwealth has failed to establish that the Defendant recklessly engaged in conduct that placed the officer in danger of death or serious bodily injury.

Next, the Defendant is charged with simple assault in violation of 18 Pa.C.S.A. §2701(a)(3). This section indicates that a person commits an assault "if he attempts by physical menace to put another in fear of imminent serious bodily injury." 18 Pa.C.S.A. §2701(a)(3). Thus, the Commonwealth must establish the following elements: (1) that the defendant attempted to put the victim in fear of imminent serious bodily injury, and took a substantial step toward that end, (2) that the defendant used physical menace to do this, and (3) that it was the defendant's conscious object or purpose to cause fear of serious bodily injury." *Commonwealth v. Little,* 614 A.2d 1146, 1151 (Pa. Super. 1992).

"A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime." 18 Pa.C.S.A. §901(a). A person "acts intentionally with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist."

18 Pa.C.S.A. §302(b)(1).

There is no evidence in this case that the Defendant attempted to put the officer in fear of imminent serious bodily injury. The evidence indicates that the Defendant was walking along the street carrying his rifle. The officer approached the Defendant from behind. There is no evidence that the Defendant knew of the officer's presence until the officer spoke to him. When the Defendant went to turn towards the officer he was ordered to stop and the Defendant complied. The rifle was not pointed at the officer at any time. The Defendant put the rifle on the ground, back away from the rifle, and laid flat on the ground when ordered to do so. There is no evidence that the Defendant intended to place the officer in fear of imminent serious bodily injury or that he attempted to do so.

Finally the Defendant is charged with disorderly conduct in violation of 18 Pa.C.S.A. §5503(a)(4). "A person is guilty of disorderly conduct, if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor." 18 Pa.C.S.A. §5503(a)(4). "The cardinal feature of the crime of disorderly conduct is public unruliness which can or does lead to tumult and

disorder." *Commonwealth v. Greene,* 189 A.2d 141, 144 (Pa. 1963). "The crime of disorderly conduct is not intended as a catchall for every act which annoys or disturbs people; it is not to be used as a dragnet for all irritations which breed in the community." *Id*. at 145. Conduct that is lawful and constitutionally protected serves a legitimate purpose. *Commonwealth v. Roth,* 531 A.2d 1133, 1137 (Pa. Super. 1987).

In this case there is no evidence that the Defendant "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor." Mr. and Mrs. Cavicchio testified that they called the police out of caution not because they felt threatened. The Defendant did not approach them or their property. In fact the evidence indicates that the Defendant did not even look at them. There is no evidence that the Defendant had contact with any member of the public.

Also, there is no law prohibiting the Defendant from carrying his rifle in public. Though this Court could see where a member of the public might be concerned about seeing the Defendant walking with his rifle, the Defendant did nothing illegal in this case. The fact that the Defendant complied with the officer's orders and caused no disturbance further supports this Court's findings.

Finally, this Court's ruling is based specifically on the facts presented in this case. This Court in no way is stating that a person carrying a rifle/firearm in public could never be charged/convicted with a crime. Different facts clearly lead to different conclusions. One legally carrying a rifle/firearm in public is required not only to abide by the firearm laws but also to abide by all the laws of this Commonwealth.

Accordingly the following Order will be entered.

ORDER OF COURT

AND NOW, to wit, this 29th day of May, 2012, for the reasons set forth in the foregoing Opinion, IT IS HEREBY ORDERED AND DECREED that the Defendant's motion to dismiss charges for failure to establish a prima case is **GRANTED**. IT IS FURTHER ORDERED that the Delmont Police Department is to return all evidence seized to the Defendant within thirty (30) days of the date of this Order.

BY THE COURT:
/s/ John E. Blahovec, Judge

THE FIRST WIMMERTON COMMUNITY ASSOCIATION, INC., Plaintiff
V.
SEAN M. LYNCH and LYNN O'HARA, Defendants
and
WIMMER CORPORATION, Intervenor

REAL PROPERTY

In-Ground Swimming Pool; Restrictive Covenant; Prohibited Structure

1. Restrictions on the use of land are not favored by the law because they are an interference with an owner's free and full enjoyment of his or her property, and nothing will be deemed a violation of a restriction that is not in plain disregard to its express words.

2. Where the restrictive covenant proscribed structures such as trailers, tents, shacks, barns, pens, and other outbuildings, the construction of an in-ground swimming pool was not prohibited by the covenant.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 2710 of 2011

Appearances:
Stacey M. Noble,
Pittsburgh, for the Plaintiff
Timothy G. Hewitt,
Latrobe, for the Defendants
Donald J. Snyder, Jr.,
Latrobe, for the Intervenor

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION AND ORDER OF COURT

This matter is before the Court on the Defendants' Motion for Summary Judgment, seeking an Order from this Court which would allow them to install an in-ground swimming pool in the backyard of their home in the community of Wimmerton in Latrobe. The procedural history and the development of the facts in this case are as follows.

The Plaintiff, The First Wimmerton Community Association, Inc., filed this action seeking to enforce Restrictive Covenants on the Defendants' property, which covenants are referenced in various instruments of record. The Intervenor, Wimmer Corporation, "has an interest in the enforcement of the Restrictive Covenants by virtue of the fact that it is the owner of the remaining tracts of land and adjacent to the Wimmerton Community and the enforcement of the Restrictive Covenants is consistent with the development of the Wimmerton Community that has taken place to date." (Wimmer Corporation's Brief in Opposition to Motion for Summary Judgment, June 12, 2012, p. 1.)

On two separate occasions, Defendants applied for and received a building permit from Unity Township that would authorize them to install an in-ground swimming pool with accompanying landscaping and fencing. On each occasion, Plaintiff Community Association opposed the construction in reliance upon certain provisions in the Declaration of Covenants, which are referenced in the Defendants' Deed as follows:

> SUBJECT to the terms, conditions and restrictions of and together with the benefits, rights and privileges of the Declaration of Covenants for Wimmerton dated January 8, 1975, and recorded in Deed Book Volume 2178, page 882, in the Office of the Recorder of Deeds of Westmoreland County, Pennsylvania, and as said Declaration of Covenants were amended and supplemented by Agreement between First Wimmerton Community Association, Inc. and Wimmer Corporation dated March 17, 1995 and recorded in Deed Book Volume 3319, page 463, and as said Declaration of Covenants, as amended, may be hereafter amended in accordance with the terms of said Declaration.

Defendants' argument in support of their Motion for Summary Judgment is two-fold: (1) because their lot is part of "Plan 7," which was never properly annexed to the Declaration of Covenants by the Declarant and the Wimmer Corporation, these covenants are not applicable to their property; and alternatively, (2) even if the Declaration of Covenants is applicable to their property, the land use restrictions contained within the Covenants do not prohibit the Defendants from installing an in-ground swimming pool.

The parties agree on many of the underlying facts of this case. The Wimmer Corporation purchased a parcel of land that includes the Defendants' property from the Benedictine Society, by Deed dated April 6, 1974, and recorded at DBV 2150, page 563. The property was divided into sections with each section developed separately. With respect to Plan 7, which contained Defendants' property, the National Development Corporation (NDC), filed a development plan in 1978 (Plan Book Vol. 83, pp. 115-16), although Wimmer remained the sole owner.

In 1975, NDC, as Declarant, executed original covenants that attached to the real property in the Wimmer development (recorded April 21, 1975 at DBV 2178, p. 882). This Declaration of Covenants stated that the restrictions applied only to the land specified in "Exhibit A," which included individual home lots from Plan 1 along with some additional ground leased by NDC from Wimmer for common areas, apartment housing and commercial space. Plan 7 was not included in "Exhibit A" and was instead treated separately as part of "Exhibit B."

The Covenants provided that "LAND SHALL BE SUBJECT TO THE DECLARATION ONLY AS INCLUDED IN EXHIBIT "A" HEREOF OR AS HEREAFTER INCLUDED BY THE FILING OF LEGALLY EFFECTIVE SUPPLEMENTAL DECLARATIONS OF ANNEXATION IN ACCORDANCE WITH ARTICLE II, Section 4 OF THIS DECLARATION." (DBV 2178, at p. 936)

Article II, Section 4, provides:

> Additional land within Wimmerton Stage I not included within the land described in Exhibit "A" (such additional Premises being described in Exhibit "B" attached hereto and made a part hereof), may from time to time be annexed by the Declarant, its successors and assigns, and made subject hereto without the consent of Members for a period of twenty (20) years from the date of this instrument.

Sometime in the mid- to late-1980's a dispute arose between NDC and Wimmer arising out of the 1974 Amended Agreement. NDC filed a lawsuit against Wimmer, and in 1989 the parties reached a settlement that was memorialized in a Final Settlement Agreement dated April 14, 1989. The settlement agreement does not contain express language stating that NDC, its successors or assigns, had annexed additional property, specifically property within Plan 7, to be subject to the Declaration of Covenants that was originally applicable only to the land described in Exhibit "A." However, on January 6, 1995, Wimmer Corporation, acting "in its own right and as successor to the rights of National Development Corporation under the Declaration of Covenants dated January 8, 1975," filed a "Supplemental Declaration of Annexation of Wimmerton Plan No. 7 as Recorded in Plan Book Volume 83, Page 115 & 116," stating that it "hereby makes this Supplemental Declaration of Annexation pursuant to the provisions of Article II, Section 4 of the Declaration of Covenants, of the plan of lots designated as the Wimmerton Plan #7 as same is recorded in the Office of the Recorder of Deeds, as aforesaid, in Plan Book Volume 83, page 115-116 *to the effect that owners of lots in said plan shall be bound by and entitled to the benefits of the Declaration of Covenants as aforesaid*." (Emphasis ours.)

All of the Deeds in the Defendants' chain of title that were executed subsequent to the filing of the January 6, 1995, Declaration of Annexation, including the Defendants' Deed, conveyed an interest in real estate which was subject to the restrictive covenants that are referenced in the "Supplemental Declaration of Annexation of Wimmerton Plan No. 7 as Recorded in Plan Book Volume 83, Page 115 & 116," and that are the subject of this litigation.

Plaintiff and Intervenor argue that if this Court determines that the Final Settlement Agreement did not provide for an express, written assignment or transfer of NDC's rights with respect to the Declaration – and we do not find that an express, written assignment was made – then, at the very least, an ambiguity exists in the terms of the Final Settlement Agreement. Consequently, they further assert, if an ambiguity exists, parol evidence should be admitted to explain, clarify or resolve the ambiguity. To this end, the parties have submitted the deposition testimony of Father Grinder, who was actively involved in the settlement negotiations, and argue that he would be able to establish that the Final Settlement Agreement was intended by the parties to assign or transfer all of NDC's development rights with respect to the Declaration.

We do not find the Final Settlement Agreement to be ambiguous. As much as the Plaintiff and Intervenor would urge us to find otherwise, it is a fully integrated document, clear in its language and addressing the issues raised in the litigation that it

resolved. Accordingly, we do not find that the terms of this Agreement resolve the issue presented by the present motion.

We do find, however, that the Supplemental Declaration of Annexation recorded on January 17, 1995, resolves the issue. Although this Supplemental Declaration did not follow the mandates delineated in the document that required additional land to be annexed by NDC (the Declarant), the clear, expressly stated intent in filing the Supplemental Declaration is found in the last three lines, which state that the purpose and effect of the recordation of this document is "that owners of lots in said plan shall be bound by and entitled to the benefits of the Declaration of Covenants as aforesaid." In other words, apart from anything else, Wimmer Corporation determined that Wimmerton Plan #7 would be subject to the specifically-referenced restrictions that were contained in the Declaration of Covenants and all Deeds in the Defendants' chain of title, which transfer property interests subsequent to the filing of the notice of that determination, plainly and directly state that the grantee is taking the property "subject to" those restrictions. To hold otherwise would lead to a grossly inequitable result.

Having determined that the Defendants' property is subject to the restrictions contained within the Declaration of Covenants, we next consider whether an in-ground swimming pool is a prohibited structure under the terms of the Declaration. In Article VIII, Section 1. Prohibited Uses and Nuisances, of the Declaration, the following is set forth: "[E]xcept with the prior written approval of the Committee: …(k) No structure of a temporary character, and no trailer, tent, shack, barn, pen, kennel, run, stable, outdoor cloths [sic] dryer, playhouse shed, or other outbuildings shall be erected, used or maintained on any Lot at any time." Plaintiff argues that it has the power under this provision to require that Defendants submit their request to install an in-ground swimming pool to the Committee for its written approval. We disagree.

It is well-settled law that restrictions on the use of land are not favored by the law because they are an interference with an owner's free and full enjoyment of his property. Nothing will be deemed a violation of a restriction that is not in plain disregard of its express words. *Jones v. Park Lane for Convalescents,* 120 A.2d 535 (Pa. 1956). Furthermore, we consider the hornbook concept of *ejusdem generis* in evaluating whether an in-ground swimming pool is the type of structure contemplated in subsection (k). *Black's Law Dictionary* describes the *ejusdem generis* rule as follows:

> ... A canon of construction that when a general word or phrase follows *a list* of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed....

Black's Law Dictionary, p. 535 (7th ed. 1999) (emphasis added). *See Steele v. Statesman Insurance Co.,* 530 Pa. 190, 191, 607 A.2d 742, 743 (1992) (quoting from *Black's Law Dictionary*). The rule can appropriately be applied, therefore, only where a general word or phrase follows a list of specific words, usually in the same sentence; *i.e.,* a summary word or phrase after a list of specific illustrations. *See also,* 5 *Corbin on Contracts* § 24.28, p. 309 (rev. ed.). "[*Ejusdem generis* comes from] the assumption

that when parties list specific items, followed by a more general or inclusive term, they intend to include under the latter only things that are like the specific ones. II *Farnsworth on Contracts* § 7.11, p. 282 (2d ed.) See also, 11 *Williston on Contracts* § 32:10, p. 451 (4th ed.) (the rule "applies where there is an *enumeration* or *listing* of specific things, followed by more general words relating to the same subject matter").

Here, the phrase "other outbuildings" follows "trailer, tent, shack, barn, pen, kennel, run, stable, outdoor cloths [sic] dryer, [and] playhouse shed," all of which, with the exception of the clothes dryer, are relatively small, above-ground structures that house either people, animals or storage items. They are also small structures – protrusions on the landscape-- which could arguably be considered to be eyesores in a manicured, residential development of well-maintained, solidly middle-class, suburban homes. A swimming pool does not even remotely fit within the definition of "outbuilding" as illustrated by these examples.

In summation, we find that the restrictive covenants referenced in Defendants' Deed are applicable to their property, but that an in-ground swimming pool is not prohibited by Article VIII, Section 1, subsection (k) of the Declaration. The parties are directed to proceed accordingly, in conformance with the preceding rationale.

ORDER OF COURT

AND NOW, to wit, this 2nd day of July, 2012, upon consideration of the Motion for Summary Judgment filed on behalf of the Defendants, it is hereby **ORDERED** and **DECREED** that Summary Judgment is **GRANTED** in favor of the Defendants in a manner that is consistent with the rationale contained in the foregoing Opinion.

FURTHER, in accord with Pa.R.C.P. No. 236(a)(2)(b), the Prothonotary is **DIRECTED** to note in the docket that the individual(s) listed below have been given notice of this Order.

BY THE COURT:
/s/ Richard E. McCormick, Jr., Judge

Blank Page

MICHAEL V. PISANO, Individually and as Administrator of the
ESTATE OF VINCENT F. PISANO, Deceased, Plaintiff
V.
EXTENDICARE HOMES, INC., operating under the fictitious name
BELAIR HEALTH AND REHABILITATION CENTER, Defendant

WRONGFUL DEATH AND SURVIVAL ACTIONS

Application of Alternative Dispute Resolution Agreement; Right to Trial By Jury; Binding Effect of Decedent's Agreement to Arbitrate Upon Children of Decedent; Contractual Rights and Constitutional Rights; Consolidation of Actions

1. Parties to a lawsuit are generally entitled to trial by jury, and Pennsylvania Rules of Civil Procedure require the trial of all wrongful death actions with all survival actions if they are not joined in the filing of the Complaint.

2. Agreement between decedent, through his Agent, and Defendant to resolve any dispute through binding arbitration was not binding upon decedent's heirs in wrongful death action against Defendant on account of decedent's death.

3. Wrongful death action is a creature of statute, and while the basis of a wrongful death action lies in the tortious act which would support a survival action, it is independent of the decedent's estate's right to an action against the tortfeasor.

4. Decedent's estate's right to a trial by jury in wrongful death claim does not depend upon decedent's right to a survival action, but depends only on the occurrence of the tortious act upon which it is based.

5. Defendant's contractual right to binding arbitration must give way to decedent's estate's constitutional right to trial by jury, particularly when a procedural rule also requires the consolidation of a wrongful death action with a survival action.

6. Decedent's children did not enter into agreement with Defendant to participate in binding arbitration, and therefore cannot be deemed to have waived their jury trial right by actions of the decedent's Agent.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 41 of 2012

Appearances:
Robert F. Daley and Max Petrunya,
Pittsburgh, for the Plaintiff
Thomas T. Frampton,
Pittsburgh, for the Defendant

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION AND ORDER OF COURT

The matter is before this Court regarding Preliminary Objections filed by the Defendant seeking to have the case dismissed for lack of subject matter jurisdiction.

Extendicare Homes, Inc. conducting business under the fictitious name Belair Health and Rehabilitation Center, operates a long-term care nursing facility where the decedent Vincent F. Pisano resided at the time of his death. At the time of his

admission to the Belair Health facility, on April 24, 2010, Janice Pisano, the decedent's daughter with a Power of Attorney, executed an Alternative Dispute Resolution Agreement provided by the Defendant, agreeing that any dispute covered by the Agreement would be resolved through binding arbitration pursuant to the terms of the Agreement. It is this Agreement that the Defendant seeks to invoke as a basis for dismissal upon a lack of jurisdiction in the trial court.

The decedent died survived by Jamie Pisano, as well as Amanda Ann Pisano, a daughter, and his sons, Michael V. Pisano and James Joseph Pisano. Jamie Pisano has executed a Disclaimer and Renunciation on October 10, 2011, regarding all proceeds in any wrongful death recovery.

The competing interests being considered herein are the right to a jury trial inherent in the Plaintiff's interest versus the right to arbitration set forth in the ADR Agreement executed by the Defendant and the decedent's representative.

Generally, the parties to a lawsuit are entitled to a trial by jury. Pa. Const., Article 1, §6. Rule 213(e) of the Pa. Rules of Civil Procedure requires the trial of all wrongful death actions with all survival actions, if they are not joined in the filing of the Complaint. The Rule does not speak to the right to a trial by jury in conjunction with the necessity of consolidation.

The particular circumstances of this case are of first impression in Pennsylvania. The Defendant claims, and cites cases to support, the proposition that because there is an ADR Agreement between decedent's representative and the Defendant regarding arbitration that the survival action and the wrongful death action must, of necessity, be resolved through the arbitration process. However, the Defendant's argument is distinguishable from the circumstances herein. Defendant's argument is premised upon the contention that a wrongful death action under the statute is derivative and dependent upon the right of action that would have existed in the decedent in life.

A wrongful death action is a creature of statute, 42 Pa.C.S. §8301 *et seq*., and while the basis of a wrongful death action lies in the tortious act which would support a survival action, it is independent of the decedent's estate's right to an action against the tortfeasor. In other words, the right to the wrongful death action, created by the statute, does not depend upon the decedent's estate's right to a survival action, but depends only upon the occurrence of the tortious act upon which it is based. *Kaczorowski v. Kalkosinski,* 184 A. 663 (Pa. 1936), cited in *Rodney v. Staman,* 89 A.2d 313 (Pa. 1952). Only in that limited way is the wrongful death action derivative.

If the right to a wrongful death action exists independently from the right to a survival action, the rights attendant to a wrongful death action exist independently, most particularly where the constitutional right of a trial by jury is concerned. Pa. Const., Article 1, §6, *Siskos v. Britz,* 790 A.2d 1000 (Pa. 2002). It is axiomatic that contractual rights must give way to constitutional rights, particularly when a procedural rule also requires the consolidation of a wrongful death action with a survival action.

The Plaintiffs, the children of the decedent, did not enter into the Voluntary

Agreement to Participate in Alternative Dispute Resolution and cannot be deemed to have waived their jury trial right by the actions of the decedent's representative. As Rule 213 generally requires the consolidation of the survival action with the wrongful death action, this Court will require the trial by jury of the survival action with that of the wrongful death action in lieu of the ADR process called for in the Voluntary Agreement.

ORDER OF COURT

AND NOW, to wit, this 9th day of July, 2012, based upon the foregoing Opinion, the Preliminary Objections are hereby **OVERRULED**. The Defendant is granted thirty (30) days from the date of this Order to file its responsive pleadings.

FURTHER, in accord with Pa.R.C.P. No. 236(a)(2)(b), the Prothonotary is **DIRECTED** to note in the docket that the individual(s) listed below have been given notice of this Order.

BY THE COURT:
/s/ Richard E. McCormick, Jr., Judge

Blank Page

LORENZO RUSSELL, Plaintiff
V.
SANDRA KOLENC, Defendant

CIVIL PROCEDURE

Compulsory Arbitration; Local Rule; Bill of Costs; Motion to Award Costs

1. Westmoreland County Local Rule W1312(d) provides that arbitrators may award costs.
2. Where the arbitration panel is silent on the matter of costs, the verdict winner is not permitted to file a bill of costs pursuant to Westmoreland County Local Rule W609.
3. A trial court cannot amend an arbitration award to include costs.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 1209 of 2012

Appearances:
Neil J. Marcus,
Monongahela, for the Plaintiff
Amy M. Kirkham,
Pittsburgh, for the Defendant

BY: GARY P. CARUSO, PRESIDENT JUDGE

DECISION AND ORDER

Pending before the Court are Plaintiff Lorenzo Russell's "Motion for Sanctions" and Defendant Sandra Kolenc's "Objections to Plaintiff's Bill of Costs and Defendant's Motion for Sanctions." The instant dispute arises from a July 16, 2012 arbitration award against Defendant. (Plaintiff's Motion at ¶ 1). The arbitration panel did not address the issue of costs in the award. (Id. at ¶ 2). Plaintiff subsequently filed a Bill of Costs under Westmoreland County Local Rule 609 in the sum of $290.00. (Id. at ¶ 4). Defendant objects to Plaintiff's filing of a Bill of Costs, claiming that local rules W609 and W1312 do not permit recovery of costs where the arbitration award does not specifically award record costs. (Defendant's Objections at ¶ 5).

Pursuant to Section § 7361 of the Judicial Code, 42 Pa.C.S. § 7361, local courts are permitted to establish compulsory arbitration procedures. *Mancini v. Southwestern Pennsylvania Transportation Authority,* 756 A.2d 108, 110 (Pa.Comwlth. 2000). The court in *Mancini* discussed the role of arbitrators in awarding costs as follows:

> Although Section 7361 does not provide for the payment or allocation of costs incurred, it does provide that the arbitrators shall have the powers prescribed in the general arbitration rules. Section 7312 of the general arbitration rules provides that "[u]nless otherwise prescribed in the agreement to arbitrate, the expense and fees of the arbitrators and other expenses (but not including attorney's fees) incurred in the conduct of the arbitration shall be paid as prescribed in the award."

> Section 7312 of the Judicial Code, 42 Pa.C.S. § 7312. In other words, the allocation of the costs of arbitration is within the discretion of the arbitrators and not with the trial court.

Mancini, 756 A.2d at 110.

While an award of costs is left to the discretion of the arbitrators and arbitration procedure is left to local courts, Westmoreland County's local procedure is not clear regarding whether a party may file a bill for costs when an arbitration panel is silent on the matter. Westmoreland County Local Rule W1312(d) provides that arbitrators *may* award costs. Clearly, arbitrators are not required to award costs. However, the local arbitration rules are silent as to how a party may proceed when an arbitration panel is silent on the matter of costs.

Although the local rules regarding arbitration provide no further guidance regarding a Bill of Costs when an arbitration panel is silent on the matter, the local rules regarding bills of costs may. Westmoreland County Local Rule W609 provides in relevant part:

> If the verdict winner desires to file a *Bill of Costs,* he shall do so by filing same with the Prothonotary with an Affidavit of Service on the opposing party or his counsel of record within ten (10) days after the entry of a verdict by a jury, or a final Order or decree by a Non Jury or Equity Trial Judge.

Westmoreland County Local Rule 609.

An arbitration award is not contemplated in rule 609. In absence of arbitration awards listed among the events after which a Bill of Costs may be filed, Plaintiff cannot file a Bill of Costs under rule 609. (See Plaintiff's Motion at ¶ 4). Furthermore, given that costs were not included in the arbitration award, it seems that Plaintiff improperly filed a Bill of Costs.

Plaintiff requests that this Court amend the arbitration award to include costs. (Plaintiff's Motion at ¶ 6). Local rule W1312 provides a note regarding the recovery of costs that refers to *Mancini* and *Sillings v. Protected Home Mutual Life Ins. Co.,* 84 W.L.J. 7 (2001). As noted above, *Mancini* emphasizes that awarding costs is discretionary for arbitrators, trial courts cannot award costs, and local courts are to set the relevant procedure. *Sillings* emphasizes the same points. (Defendant's Objections at ¶ 10). Defendant correctly relies on *Mancini* and *Sillings* in support of the position that trial courts cannot award costs when arbitrators do not. (Defendant's Objections at ¶ 10). Therefore, Plaintiff's request that this Court amend the arbitration award to include costs is improper. (Plaintiff's Motion at ¶ 6).

ORDER

And now this 7th day of August, 2012, in accordance with the foregoing Decision, it is here by Ordered and Decreed that the Plaintiff's Bill of Costs is stricken from the docket. It is further Ordered that the Motion for Sanctions is denied.

It is further Ordered that the Motion for Sanctions of the plaintiff is denied.

BY THE COURT:

COMMONWEALTH OF PENNSYLVANIA
V.
R.W.W., Defendant

INFANTS

Rights and Privileges as to Adult Prosecutions; Juvenile Transfers and Certifications; Transfer from Adult Court; Grounds, Factors and Considerations

1. The Juvenile Act is designed to effectuate the protection of the public by providing children who commit delinquent acts with supervision, rehabilitation, and care while promoting responsibility and the ability to become a productive member of the community.

2. When a case involving a juvenile goes directly to the criminal division, the juvenile defendant can request decertification if he proves by a preponderance of the evidence that the transfer to juvenile court best serves the public interest.

3. In considering whether the transfer will serve the public interest, the court must consider the impact of the offense on the victim; the impact on the community; the threat to the safety of the public or any individual posed by the child; the nature and circumstances of the offense; the degree of culpability; and the adequacy and duration of dispositional alternatives available in the juvenile and adult systems.

4. The determination of whether the child is amenable to treatment, supervision, or rehabilitation as a juvenile depends upon consideration of the child's age, mental capacity, maturity, degree of criminal sophistication, previous records, nature and extent of prior delinquent history including success or failure of previous attempts of the juvenile court to rehabilitate the child, whether the child can be rehabilitated prior to the expiration of juvenile court jurisdiction, probation, or institutional reports and any other relevant factors.

5. The ultimate decision of whether to grant decertification is within the sole discretion of the court.

6. Court granted Motion to Transfer case to juvenile court after concluding that a preponderance of the evidence established that both the public interest, as well as the interests of the juvenile, were best served if the case was transferred to the juvenile court.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 2922 C 2011
No. 2923 C 2011

Appearances:

Leo J. Ciaramitaro, Assistant District Attorney,
Westmoreland County, for the Commonwealth
Timothy C. Andrews,
Greensburg, for the Defendant

BY: DEBRA A. PEZZE, JUDGE

OPINION AND ORDER OF COURT- MOTION TO TRANSFER

I. FACTS

Defendant, R.W.W., a juvenile born April 21, 1995, has been charged in two indictments involving the setting of fires on June 8 and June 13, 2011 at 1118 Liberty Street, Scottdale, East Huntington Township, PA. At No. 2922 C 2011 he is charged with Criminal Attempt- Homicide, Arson-Danger of Death or Bodily Injury,

Arson- Reckless Endangerment of Inhabited Buildings, and two counts of Recklessly Endangering Another Person ("REAP"). At No. 2923 C 2011 he is charged with Criminal Attempt-Homicide, two counts of Arson and three counts of REAP. He was 16 years of age when these crimes were committed.

Facts reveal that on June 8, 2011 at 5:15 a.m. a fire was set in the rear corner porch of the Liberty Street residence while three persons were sleeping inside. This fire damaged the porch and was extinguished by a neighbor with a garden hose. The damage was minor in that the fire did not enter the interior of the home. (See Affidavit of Probable Cause)

Five days later, at 1:45 a.m., a second fire was set in the same location, however, on this occasion it entered the home causing interior damage and destroying the entire residence. Two occupants were present inside the home but escaped injury.

Police investigation revealed that the home was owned by Mr. Walter Weltz who related that his son, T.W., had an ongoing feud with R.W.W. Further investigation revealed that R.W.W. had admitted causing both fires, stating that he had worn dark clothes and had set fires on the rear porch where wicker couches were located. These statements were made on Microsoft X-Box 360 Live and on cell phone text messages.

A search warrant was obtained for these items, and messages on them were located. The messages stated, "I was bored and it wasn't just to kill the cat, it was because I hate the kid that lived in it." and, "I'm not worried at all. I left nothing behind...so I'll get away with two counts of attempt murder (people were inside sleeping), arson and vandalism." (See Affidavit of Probable Cause) R.W.W. was accordingly arrested and charged.

Charges were filed in the adult division of common pleas court. A subsequent Motion for Transfer to Juvenile Court was made by counsel. In response both the Commonwealth and defense counsel retained experts in order to determine whether a transfer to Juvenile Court was warranted. The Commonwealth's psychologist, Carol Hughes, is an expert examiner for the Commonwealth of Pennsylvania Sexual Offenders Assessment Board, a member of the Association for Treatment and Training in the Attachment of Children and a fellow of the Infant-Parent Mental Health Certification Program. This Court has paid close attention to her 27 page report and its consequent recommendation that R.W.W. be remanded to Juvenile Court.

Ms. Hughes interviewed both R.W.W. and his mother, R.K. At the time of the interview, R.K. was separated from her husband, R.W.W.'s stepfather. R.K. noted that her son was the second of two children to Mr. R.W., and that she was 19 and R.W.W. was 6-8 weeks old when they separated. R.W.W.'s sister, R., has no involvement with the courts, plans to attend college and is currently employed. R.K. is employed delivering newspapers for the Tribune Review.

R.K. married L.K. in 1997 when R.W.W. was two years old. R.W.W. has a half sister, age 15, who is in ninth grade and has no involvement with the juvenile court system. R.K. noted that domestic violence occurs in her current marital relationship and that verbal arguments are loud. When these arguments occur, R.W.W. will emerge from his room to ensure that she is ok. She has witnessed one episode in which her

husband was physically violent to R.W.W. R.W.W. has no history of out of home placement and no involvement with child protective services. He does not have significant behavioral difficulties at home.

R.W.W. has no history of grade retention nor is he a special needs student. He had been suspended from school in April 2011 because he brought and used Hydrocodone at school and gave a portion to a classmate. Because he was expelled for a year, he has been attending Adelphoi Village, an alternative educational program. His grade point average is 3.0 and he has had only 10 absences from school, all excused. He has no interpersonal difficulties with parents, teachers or school officials. In his former school he had five unexcused absences and seven disciplinary referrals, most being for inappropriate cell phone use, and the last for possession of Hydrocodone tablets.

R.W.W. has no history of formal employment but does work for his girlfriend's grandfather. He is on electronic monitoring, and his probation officer noted that supervision of R.W.W. has been incident free.

The Hughes' report also notes and incorporates findings by Tara Travia, Ph.D., a licensed psychologist who had been retained by defense counsel. Ms. Travia noted that R.W.W. has no history of psychiatric admissions and is in the average range of intelligence. He is affected by the distress in his home and feels there is no one to talk to, but he does have a girlfriend highly important to him. His choice of drugs suggests that he is self-medicating for pain. He denies committing the instant crimes, possibly because it is not in his best interest legally to admit them, requiring that this investigator consider other factors in determining amenability to treatment.

R.K. reported that R.W.W. had no history of playing/experimenting with fire. There was no history of finding melted or scorched items in the home. R.W.W. did not play with lighters and was not curious about fire. To her knowledge R.W.W. has not accessed materials on the internet with respect to reading/learning about fire.

R.W.W. stated that his mother and stepfather fight all the time and that he has witnessed incidents of violence. He stated that his communications with his peers about the fires were responses to comments that they made. He referred to his comments as jokes and explained that he had dark humor, and began to joke once the fires had occurred.

The Commonwealth's psychologist, Ms. Hughes, opined that R.W.W.'s denial of the crimes should not be interpreted as his not being amenable to treatment. She noted that he could be supervised by the juvenile court for close to four years. She cited studies which suggest that a transfer to adult court has numerous negative effects on youth, including the juvenile's safety, and create the likelihood of future offending. Convictions in adult court affect future employment and do not have the intended deterrent affect. Further, youth in adult facilities are 500 times more likely to be sexually assaulted and 200 times more likely to be physically assaulted by faculty staff than youth in juvenile facilities. Suicide rates are 165 times the national adolescent average and youth in adult facilities are 8 times more likely to commit suicide than their counterparts in juvenile facilities.

Ms. Hughes concludes that R.W.W. can benefit from therapy. She does not believe that there was any sophistication in the commission of the arson and notes the lack of prior juvenile court history. Because R.W.W. is compliant with the conditions of supervision of his probation, he would be able to adhere to conditions placed on him by the court. He does not have a history of verbal aggression or threatening behavior, and no history of significant disordered behavior in the community. For all of these reasons she concludes, "...that rehabilitation for [R.W.W.] within the juvenile court would best serve him at this time."

Dr. Travia, expert for the defense, repeats the same findings and conclusions. In her opinion, "...[R.W.W.] would be best served by rehabilitation within the context of juvenile court and he is amenable to treatment."

II. ANALYSIS

The Juvenile Act, 42 Pa.C.S.A. Section 6301 et seq, is designed to effectuate the protection of the public by providing children who commit delinquent acts with supervision, rehabilitation and care while promoting responsibility and the ability to become a productive member of the community. 42 Pa.C.S.A. Section 6301 (b)(2) When a case involving a juvenile goes directly to the criminal division, the juvenile defendant can request decertification if he proves by a preponderance of the evidence that the transfer to juvenile court best serves the public interest. 42 Pa.C.S.A. Section 6322(a); *Commonwealth v. Brown,* 26 A.3d 485, 392 (Pa.Super. 2011)

A court must consider the factors enumerated in 42 Pa.C.S.A. Section 6355 (a)(4)(iii) in determining whether the transfer will serve the public interest. These factors include: A.) the impact of the offense on the victim, B.) the impact on the community, C.) the threat to the safety of the public or any individual posed by the child, D.) the nature and circumstances of the offense, E.) the degree of culpability, and F.) the adequacy and duration of dispositional alternatives available in the juvenile and adult systems. The determination of whether the child is amenable to treatment, supervision or rehabilitation as a juvenile depends upon consideration of the child's age, mental capacity, maturity, degree of criminal sophistication, previous records, nature and extent of prior delinquent history including success or failure of previous attempts of the juvenile court to rehabilitate the child, whether the child can be rehabilitated prior to the expiration of juvenile court jurisdiction, probation or institutional reports, and any other relevant factors. 42 Pa.C.S.A. Section 6355 (a)(iii)(G)(I-IX). The ultimate decision of whether to grant decertification is within the sole discretion of the court. *Brown,* supra, at 493.

R.W.W. had a previous school suspension for possessing, using and distributing Hydrocodone. This offense marks his only criminal involvement up to the time of the arsons. He has no criminal or juvenile record, and was found to be amenable to treatment in the juvenile court system.

The arsons on the Liberty Street home are a serious matter and endangered several people's lives. R.W.W.'s remarks after those arsons were callous, cruel and incriminating. Nevertheless, the commission of these crimes lacked sophistication.

Since the first fire was small and was extinguished by a garden hose, and the second fire was ignited in the same location, the intention of the arsonist is somewhat ambiguous. These facts, however, weigh strongly for the matter to remain in the adult criminal system.

There are, however, additional considerations pointed out by the Commonwealth's expert. R.W.W.'s performance in school has been consistent with good attendance, and he receives above average grades. He has posed no problems with school authorities, his teachers or his peers. While his home life has been scarred by his parents' violence, he has not been a disciplinary problem and has forged a close relationship with his mother. Further, he has been compliant with his probation, has attended school faithfully and has not repeated any grades.

Further evidence shows that R.W.W. has no history of playing with fire, nor does he show any fascination with fire setting. Other than the instant charges, he is not violent. The animosity between R.W.W. and T.W., shown by blocking one another out of computer games, depicts a social immaturity certainly reflective of his youth. While he denies any involvement in the arsons, both psychologists conclude that this denial may be self protective at this stage of the prosecution and cannot be considered as a negative factor.

The Commonwealth's expert has opined that sending R.W.W. to prison may increase his involvement in criminal activities. Further, the threat of both physical violence by inmates and assault by facility staff is decreased by placement in a juvenile facility. In addition, housing him in an adult facility will lead to an increased risk of suicide. Both psychologists believe that R.W.W. could engage in and benefit from therapy offered in the juvenile system.

After consideration of all these factors, it is this Court's conclusion that a preponderance of the evidence establishes that both the public interest, as well as the interests of this juvenile, are best served if this case is transferred to the juvenile court system.

The Court recognizes that there are several outstanding legal issues which can best be addressed and resolved by the juvenile court judge hearing this matter.

Thus, for all of the aforementioned reasons, the Motion to Transfer the case to juvenile court is hereby granted.

ORDER OF COURT

AND NOW, this 1st day of August, 2012, IT IS HEREBY ORDERED that the Motion to Remand Case to Juvenile Court is hereby GRANTED.

BY THE COURT:
/s/ Debra A. Pezze, Judge

Blank Page

COMMONWEALTH OF PENNSYLVANIA
V.
BROOKE C. WEATHERS, Defendant

CRIMINAL LAW

Custodial Interrogations In General; Warnings; Particular Cases

1. Law enforcement must administer *Miranda* warnings prior to a custodial interrogation.

2. A person is in custody for *Miranda* purposes only when he is physically denied his freedom of action in any significant way or is placed in a situation where he reasonably believes that his freedom of action or movement is restricted by the interrogation.

3. Police detentions become custodial when, under the totality of the circumstances, the conditions and/or duration of the detention become so coercive as to constitute the functional equivalent of an arrest.

4. The factors a court employs to determine whether a detention has become coercive so as to constitute an arrest include the basis for the detention, its length, its location, whether the suspect was transported against his will, whether restraints were used, whether law enforcement showed, threatened, or used force, and investigative methods used to confirm or dispel suspicions.

5. The court did not suppress the statements Defendant made to the police during an investigatory search of his home because he was not in custody such to warrant *Miranda* warnings.

6. Because the police informed Defendant he was not under arrest, the police informed Defendant of the need to restrain him for officer safety, the police interrogation was brief, the police did not threaten or employ force, the police informed Defendant he could stop the interview at any time and he was free to leave, and because Defendant repeatedly stated his desire and intention to cooperate, Defendant was not subjected to custodial interrogation for purposes of *Miranda*.

ARREST

What Is An Arrest; Duration of Detention and Extent or Conduct of Investigation

1. The determination whether an encounter with police is custodial is an objective one, with due consideration given to the reasonable impression conveyed to the person interrogated rather than the strictly subjective view of the trooper or the person being seized.

2. Placing a suspect in handcuffs, by itself, does not support a conclusion that an arrest occurred. The police may place a suspect in handcuffs during an investigatory detention if the police have concerns over their safety.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 1819 C 2011

Appearances:
James Hopson, Assistant District Attorney,
Westmoreland County, for the Commonwealth
Jeffrey D. Monzo,
Greensburg, for the Defendant

BY: DEBRA A. PEZZE, JUDGE

OPINION AND ORDER

I. FACTS

Defendant, Brooke C. Weathers, has been charged with Conspiracy and Receiving Stolen Property as a result of a search of his home revealing his possession of twelve

stolen firearms. Testimony elicited from Troopers Patrick Nied and James McKenzie at a hearing on a Motion to Suppress provided the factual background leading up to the search.

On January 19, 2011 a search warrant was served at 1105 Liberty Street, Mount Pleasant, PA, the home of Mr. Weathers. (SH 3)[1] The Affidavit of Probable Cause for the issuance of the warrant was based upon the statements of Kevin Green who admitted receiving stolen firearms and selling them to Mr. Weathers. Approximately seven police officers effectuated the search of Mr. Weathers' home at 9:50 p.m. Trooper Nied knocked on the door of the residence and when Mr. Weathers answered, he explained why police were there. Mr. Weathers stated his intention to fully cooperate. (SH 3, 6, 11) From his position in the doorway Trooper Nied observed a room lined with firearms. When asked, Mr. Weathers informed police that some of the firearms were loaded. He agreed to be handcuffed for officer safety even though it was explained that he was not under arrest. (SH 6-8) Sometime later, during the search, the handcuffs were removed. (SH 16) Mr. Weathers repeatedly stated that he wished to cooperate with police. (SH 6, 9, 23) Police officers told Mr. Weathers that he was not under arrest and would not be taken into custody that day. (SH 7, 9, 23, 25)

Trooper McKenzie spoke with Mr. Weathers for approximately twenty minutes. (SH 26) He was not given *Miranda* warnings because he was not under arrest and was told that he could stop the interview at anytime. (SH 25, 29) Trooper McKenzie testified that while Mr. Weathers was the focus of an investigation, he needed to do additional investigation before an arrest could be made. (SH 30-31) At some point during the evening, Mr. Weathers admitted that he knew that the twelve firearms he had purchased from Green were stolen. (SH 24, 28)

II. DISCUSSION

Mr. Weathers claims that his statements to police should be suppressed because he was in police custody when he was questioned and *Miranda* warnings were not given. He contends that because he was placed in handcuffs, he was, in effect, under arrest and warnings should have been provided.

In *Commonwealth v. Baker,* 24 A.3d 1006 (Pa. Super. 2010), the court addressed a similar situation in which during the implementation of a search warrant, the defendant made inculpatory statements to police despite the absence of *Miranda* warnings. He contended that these statements should be suppressed because he was subjected to a custodial interrogation despite the failure to provide him his rights.

The *Baker* court noted that law enforcement must administer *Miranda* warnings prior to a custodial interrogation. The determination of whether an encounter with police is custodial is an objective one, with due consideration given to the reasonable impression conveyed to the person interrogated rather than the strictly subjective view of the trooper or the person being seized, and must be determined by a totality of the circumstances. *Baker,* supra, at 1019; *Commonwealth v. Pakacki,* 901 A.2d 983, 987-988 (Pa. 2006) A person is in custody for *Miranda* purposes only when he is

[1] SH indicates the notes of testimony taken from the May 21, 2012 hearing on the Motion to Suppress held before this Court.

physically denied his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by the interrogation. *Pakacki* at 987-988 Stated differently, police detentions become custodial when, under the totality of the circumstances, the conditions and/or duration of the detention become so coercive as to constitute the functional equivalent of an arrest.

Factors utilized by courts to determine whether a detention has become coercive so as to constitute an arrest include the basis for the detention, its length, its location, whether the suspect was transported against his will, whether restraints were used, whether law enforcement showed, threatened or used force and investigative methods used to confirm or dispel suspicions. The fact that a police investigation has focused on a particular individual does not automatically trigger custody requiring *Miranda* warnings. *Baker* at 1020.

Courts have also held that placing a suspect in handcuffs, by itself, does not support a conclusion that an arrest has occurred. Such conduct may occur during an investigative detention if police have concern over their safety. *Commonwealth v. Rosas,* 875 A.2d 341, 348 (Pa. Super. 2005) In *Baker,* the defendant was told he was not under arrest and was not going to be arrested on the occasion in question, and that he was free to leave. In addition, he was not handcuffed or transported and his interrogation was not prolonged.

In the instant case, it would have been the better police practice and obviated the need for this issue to be resolved had police simply provided Mr. Weathers with *Miranda* warnings. Nevertheless, an analysis of the factors articulated by the Supreme Court leads this Court to conclude that although the better procedure would have been to provide these warnings, the failure to do so in this situation will not preclude admission of Mr. Weathers' statements.

Mr. Weathers was repeatedly informed that he was not under arrest. Police had explained that because some of the firearms were loaded, Mr. Weathers would be handcuffed. Mr. Weathers had no objection to this and, in fact, the handcuffs were ultimately removed. The interrogation lasted only 20-30 minutes and occurred in Mr. Weathers' home. No force was ever threatened or used. (SH 26) Mr. Weathers was told that he could stop the interview at any time and that he was free to leave. (SH 17, 25) Most importantly, throughout the search of his home, Mr. Weathers repeatedly stated his desire and intention to cooperate. The fact that he was the target of the investigation does not, in itself, connote that he was under arrest. Thus, and for these reasons, the Motion to Suppress is denied.

ORDER OF COURT

AND NOW, this 11th day of September, 2012, IT IS HEREBY ORDERED that the Motion to Suppress is hereby DENIED.

BY THE COURT:
/s/ Debra A. Pezze, Judge

Blank Page

COMMONWEALTH OF PENNSYLVANIA
DEPT. OF TRANSPORTATION
V.
SCOTT ALAN FANNIN, Appellant

AUTOMOBILES

License and Regulation of Chauffeurs or Operators; Suspension or Revocation of License; In General; Grounds; Intoxication; Implied Consent; Refusal to Take Test

1. Court found that officer, who arrested Defendant for driving under the influence, had reasonable grounds to conclude that Defendant had operated his vehicle while under the influence of alcohol and to request criminal testing when officer was notified of the accident and that the driver left the scene; Defendant admitted to owning and driving the wrecked car and to drinking before the accident; and at the time of his interview, Defendant showed visible signs of intoxication and elected not to participate in a field sobriety test.

2. Defendant's refusal to submit to chemical testing of his breath, after receiving and acknowledging the required warnings, justified one-year license suspension imposed.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW
No. 540 of 2012

Appearances:
Ryan J. Kammerer, Assistant Counsel, Office of Chief Counsel,
Pittsburgh, for the Department of Transportation
Joseph A. Nese,
Pittsburgh, for the Appellant

BY: DANIEL J. ACKERMAN, SENIOR JUDGE

DECISION AND ORDER

In this matter the court is asked to decide whether the one-year suspension of Scott Alan Fannin's operating privileges should be set aside by applying the reasoning set forth in *Stahr v.Commonwealth of Pennsylvania, Dep't. of Transp., Bureau of Driver Licensing,* 969 A.2d 37 (Pa Comwlth. 2009). While the factual background in the present appeal has many similarities with the facts reiterated in *Stahr,* there is one significant discrepancy which compels a finding that the officer who arrested Mr. Fannin for driving under the influence had reasonable grounds to conclude that Mr. Fannin had operated his vehicle while under the influence of alcohol, as is required by the standard set forth in *Banner v. Dep't. of Transp., Bureau of Driver Licensing,* 737 A.2d 1203 (Pa Comwlth. 1999).

The facts in *Stahr* and the present appeal both involve unwitnessed single vehicle nocturnal accidents in rural areas where the drivers left their vehicles and, by one means or another, went home where the police found them. Both showed visible signs of intoxication when interviewed by the police, and both were arrested for driving under the influence of alcohol, and refused to submit to chemical testing. The

Commonwealth Court of Pennsylvania in *Stahr* found there was no objective evidence that he had driven the car while intoxicated, and noted that there was no "timeframe" between the accident and the observed intoxication. This was based on the fact that Mr. Stahr denied any consumption of alcohol prior to the accident and asserted that he began the drinking which led to his observed state of intoxication after the accident and before the police arrived. The case against him therefore lacked any evidence that he consumed alcohol *before the accident* which could have impaired his ability to drive.

The "timeframe" in the Commonwealth Court's opinion isn't defined by the passage of any particular amount of time which a court should consider; so we are left to look for a sequence of events which would lead an officer to have reasonable suspicion that a motorist was driving under the influence. The sequence of events in Mr. Fannin's case was as follows: the state trooper was notified of the accident and that the driver had left the scene; the trooper located Mr. Fannin at his home; Mr. Fannin admitted owning and driving the wrecked car and to drinking before the accident (a couple of beers at a party), but denied drinking anything after the accident (a sequence which was reversed in Mr. Stahr's case, and which is a crucial distinction); and finally, Mr. Fannin, at the time of his interview, showed visible signs of intoxication and elected not to participate in a field sobriety test. This sequence provided the trooper with reasonable cause to believe that Mr. Fannin had been driving under the influence; to make an arrest for that offense; and to request chemical testing. Mr. Fannin's refusal to submit to chemical testing of his breath, after receiving and acknowledging the required warnings, therefore justified the one-year suspension imposed.

ORDER

And now, this 22nd day of June, 2012, the appeal of Scott Alan Fannin from the one-year suspension of his operator's license by the Department of Transportation is dismissed.

BY THE COURT:
/s/ Daniel J. Ackerman, Sr. Judge

COMMONWEALTH OF PENNSYLVANIA
V.
STANLEY SIECZKOWSKI, JR., Defendant

ASSAULT AND BATTERY

Aggravated Assault; Serious Bodily Injury

1. Prima facie case of aggravated assault under 18 Pa. C.S.A. § 2702(a)(1) requires an attempt to cause serious bodily injury or actual causing of serious bodily injury.

2. Serious bodily injury includes protected loss or impairment of the function of any bodily member or organ.

3. State trooper who was dragged by Defendant/driver's car for 30 to 40 feet and who suffered a knee injury such that surgery was required to remove bone from his knee and then to replace his knee had established a prima facie case of aggravated assault and necessary element of serious bodily injury.

Aggravated Assault on a Police Officer

1. Prima facie case of aggravated assault under 18 Pa. C.S.A. § 2702(a)(2) and (a)(3) includes an assault on a police officer.

2. State trooper who was not in uniform, and not officially on duty, still was a police officer within meaning of aggravated assault statute, and state trooper was in performance of his duties because state trooper who stopped Defendant's car believed that Defendant was a danger to himself and others because of his erratic driving.

Aggravated Assault; Automobile as Deadly Weapon

1. Prima facie case of aggravated assault under 18 Pa. C.S.A. § 2702(a)(4) requires the use of a deadly weapon.

2. Defendant's use of his vehicle to drag the state trooper after a traffic stop amounts to the use of a deadly weapon within the meaning of the aggravated assault statute.

AUTOMOBILES

Driving While Intoxicated; Aggravated Assault While Driving Under the Influence

1. Evidence established that Defendant's operation of his vehicle while under the influence caused serious bodily injury to state trooper since Defendant dragged state trooper 30 to 40 feet when Defendant pulled away during traffic stop amounting to aggravated assault by vehicle pursuant to 75 Pa. C.S.A. § 3732.1(a).

2. Prosecution sufficiently established prima facie case of driving under the influence pursuant to 75 Pa. C.S.A. § 3802(a)(1).

3. Defendant was unable to maintain his lane of travel and nearly had five to six head-on collisions on major highway, dragged state trooper for 30 to 40 feet, struck a telephone pole, and ran over a road sign and mailbox.

4. Defendant also had slurred speech, acted nervously, just stared at officer when initially questioned, and had a strong odor of alcohol.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 1510 C 2012

Appearances:

Rebecca L. Calisti, Assistant District Attorney,
Westmoreland County, for the Commonwealth

T. Brent McCune,
Pittsburgh, for the Defendant

BY: JOHN E. BLAHOVEC, JUDGE

OPINION AND ORDER OF COURT

The above captioned case is before the Court for disposition of the Defendant's Petition for Writ of Habeas Corpus. The Defendant is charged with one count of aggravated assault in violation of 18 Pa.C.S.A. §2702(a)(1), one count of aggravated assault in violation of 18 Pa.C.S.A. §2702(a)(2), one count of aggravated assault in violation of 18 Pa.C.S.A. §2702(a)(3), one count of aggravated assault in violation of 18 Pa.C.S.A. §2702(a)(4), one count of simple assault in violation of 18 Pa.C.S.A. §2701(a)(1), one count of recklessly endangering another person in violation of 18 Pa.C.S.A. §2705, one count of aggravated assault by vehicle in violation of 75 Pa.C.S.A. §3732.1(a), one count of driving under the influence in violation of 75 Pa.C.S.A. §3802(a)(1), one count of driving on the right side of roadway in violation of 75 Pa.C.S.A. §3301(a), one count of driving on roadway laned for traffic in violation of 75 Pa.C.S.A. §3309(1), one count of careless driving in violation of 75 Pa.C.S.A. §3714(a), one count of reckless driving in violation of 75 Pa.C.S.A. §3736, one count of accidents involving damage to vehicle or property in violation of 75 Pa.C.S.A. §3745(a), and one count of operation of vehicle without official certificate of inspection in violation of 75 Pa.C.S.A. §4703(a). The charges stem from an incident that occurred on January 27, 2012 at Hills Church Road and Kemerer Hollow Road in Murrysville, Westmoreland County.

The Defendant in his Petition for Writ of Habeas Corpus argues that the Commonwealth cannot establish a prima facie case of aggravated assault (all four counts), aggravated assault by vehicle, and driving under the influence. A hearing on the Defendant's Petition was held by this Court on August 21, 2012. At the hearing the Parties submitted the Petition for Writ of Habeas Corpus on the preliminary hearing transcript.

The facts of this case are as follows: On January 27, 2012 Trooper Dale Gabriel of the Pennsylvania State Police was traveling on State Route 22 near the Cozy Inn cut-off. He was off duty, not in uniform, and was traveling with his family in the family vehicle. When Trooper Gabriel reached the Cozy Inn a blue Subaru nearly struck his vehicle. Trooper Gabriel testified that the Subaru cut him off and that he had to slam on the brakes in order to avoid the collision. He followed behind the Subaru after the near collision because they were both heading in the same direction. (Preliminary Hearing Transcript, pp. 5-6, 11).

Trooper Gabriel testified that he witnessed the Subaru driving extremely erratic. The Subaru would very slowly cross the center line and then travel completely across the other lane of travel and then move back into his lane and off the berm. The Subaru continued to go back and forth. Trooper Gabriel testified that the Subaru nearly struck other vehicles head-on. He testified that he witnessed five or six near head-on collisions. Other vehicles were seen pulling off the road as far as they could to avoid the Subaru. The Subaru also nearly hit the guard rail on both berms. (Preliminary Hearing Transcript, pp. 6-8).

Trooper Gabriel testified that when he first saw the Subaru they were in Murrysville jurisdiction but he contacted his own barracks to see if any patrol vehicles were in the area. He had the barracks run the registration of the Subaru and notify the patrol vehicles. The Subaru stopped at the intersection of Old Route 22 and Hills Church Road and made a left turn onto Hills Church Road. When the Subaru made the turn it immediately came within inches of hitting another vehicle head-on. Trooper Gabriel radioed dispatch that if no patrol vehicles were nearby that he was going to have to do something. (Preliminary Hearing Transcript, pp. 6-8).

The Subaru stopped at the intersection of Hills Church Road and Kemerer Hollow Road approximately 100 feet from Pennsylvania State Police jurisdiction. At this point, Trooper Gabriel pulled his vehicle to the left and slightly in front of the Subaru. Trooper Gabriel testified that he did not block the Subaru. He immediately exited his vehicle, ran to the Subaru, opened the door and shut the key off. He was unable to pull the key out of the ignition because the Subaru was still in gear. Trooper Gabriel testified that he immediately told the driver that he was ''Trooper Gabriel of the State Police, Kiski Valley." He identified the Defendant as the driver of the Subaru. (Preliminary Hearing Transcript, pp. 8-10).

Trooper Gabriel testified that initially the Defendant did not react in any way. The Defendant appeared to be really out of it and just stared at him. Trooper Gabriel testified that he thought the Defendant might have a medical problem and he asked the Defendant if he was alright. The Defendant responded that he was okay. Trooper Gabriel testified that he immediately noticed an overwhelming odor of an alcoholic beverage and that the Defendant appeared nervous and had slurred speech. He asked the Defendant if he needed an ambulance and the Defendant responded "No, I'm okay." Trooper Gabriel then told the Defendant "Your driving is horrible. You're going to kill somebody. You nearly hit cars. You're going to kill somebody. Are you sure you're okay?" The Defendant responded the he was "okay." Trooper Gabriel told the Defendant that the police were coming and that they were going to check him out. (Preliminary Hearing Transcript, p. 8, 14).

Trooper Gabriel then reached into the Subaru to put the vehicle in park and the Defendant responded by starting the vehicle and driving off. Trooper Gabriel got trapped between the door and the door jam and was dragged 30 to 40 feet. He testified that he yelled for the Defendant to stop indicating that he was being dragged but the Defendant did not stop. He testified that he remembers grabbing the steering wheel and jerking it and then being released from the vehicle. The Defendant kept going striking a telephone pole, taking out a road sign, and taking out a mailbox. Trooper Gabriel testified that he got back into his vehicle and tried to catch up to the Subaru but was unable to do so. (Preliminary Hearing Transcript, pp. 9, 17).

Trooper Gabriel testified that he was treated at the Westmoreland Hospital Emergency Room for his injuries. He suffered swelling, abrasions, and contusions. He had several vials of fluid drained from his knees. His right knee was still swollen when he testified at the preliminary hearing. He testified that he was going to have to have surgery to remove part of the bone in his right knee and that he was going to need a knee replacement. (Preliminary Hearing Transcript, pp. 10, 18-19).

First the Defendant alleges that the Commonwealth failed to establish a prima facie case to all four counts of aggravated assault. A person is guilty of aggravated assault if he:

> (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;
>
> (2) attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c) or to an employee or an agency, company or other entity engaged in public transportation, while in the performance of duty;
>
> (3) attempts to cause or intentionally or knowingly causes bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c), in the performance of duty;
>
> (4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon;

18 Pa.C.S.A. §2702(a)(1)-(a)(4). Police officers are specifically enumerated in subsection (c). 18 Pa.C.S.A. §2702(c)(1). Bodily injury is defined as "[i]mpairment of physical condition or substantial pain." 18 Pa.C.S.A. §2301. Serious bodily injury is "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Id*.

The criminal information charges that the Defendant violated 18 Pa.C.S.A. §2702(a)(1) by causing or attempting "to cause serious bodily injury to Pennsylvania State Trooper Dale Gabriel, that is to say, the Actor dragged the victim with his motor vehicle causing serious injury to his knees." The Commonwealth's evidence at the preliminary hearing indicates that the Defendant drove off with Trooper Gabriel partially within the vehicle. The evidence indicates that Trooper Gabriel was dragged 30 to 40 feet during which time he was yelling at the Defendant to stop because he was being dragged. The Defendant did not stop, not even after Trooper Gabriel fell loose from the vehicle. Trooper Gabriel testified that bone was going to be removed from his knee and that he was going to need a knee replacement. Clearly this is a "protracted loss or impairment" of the function of his knee. The evidence established a prima facie case of aggravated assault in violation of 18 Pa.C.S.A. §2702(a)(1).

Next the criminal information charges that the Defendant caused or attempted to cause serious bodily injury and that the Defendant caused or attempted to cause bodily injury to "Trooper Dale Gabriel, a police officer in the performance of duty." 18 Pa.C.S.A. §2702(a)(2) and (a)(3). The evidence established that the officer identified himself as a police officer to the Defendant and advised the Defendant that the police were on their way to check on him. Also, as stated above, the evidence establishes that the Defendant drove from the scene dragging the officer 30 to 40 feet making no effort to stop the vehicle. The evidence established that the officer suffered swelling, abrasions, and contusions. The officer had to have fluid drained from his

knees, had to have bone removed, and was going to need a knee replacement. The officer suffered not only bodily injury but serious bodily injury.

Case law further indicates that a police officer may act in the performance of his duties even if he is not in uniform and is not officially on duty at the time. *Commonwealth v. Schwenk,* 777 A.2d 1149, 1153 (Pa. Super. 2001). Police officers have a duty to render aid and assistance to those they believe are in need of help. *Commonwealth v. Kendall,* 976 A.2d 503, 505 (Pa. Super. 2009). In this case the officer testified that he initially believed that the Defendant might have a medical problem. Also, it was clear that the Defendant was a danger to other drivers on the roadway. The officer observed 5 or 6 near head-on collisions. The officer observed other vehicles pulling off the road as far as they could in order to avoid the Defendant. The Defendant was literally all over the roadway. The Defendant was a danger to himself and others.

Upon observing the Defendant, the officer had a duty to ensure not only the Defendant's safety but also the safety of the other drivers on the roadway. The officer waited for the Defendant to come to a stop, approached the Defendant, identified himself, inquired if the Defendant needed assistance, and advised the Defendant that officers were on their way to check on him. Clearly the officer was in the performance of his duty. The Commonwealth's evidence established a prima facie case of aggravated assault in violation of 18 Pa.C.S.A. §2702(a)(2) and (a)(3).

Next the Defendant argues that the evidence does not establish a prima facie case of aggravated assault in violation of 18 Pa.C.S.A. §2702(a)(4). A deadly weapon is

> "Any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or serious bodily injury, or any other device or instrumentality which, in the manner in which it is used or intended to be used, is calculated or likely to produce death or serious bodily injury."

18 Pa.C.S.A. §2301. "Motor vehicles still outdistance firearms as the most dangerous instrumentality in the hands of irresponsible persons in our society today." *Commonwealth v. Thomas,* 656 A.2d 514, 519 (Pa.Super. 1995)(quoting *Commonwealth v. Scales,* 648 A.2d 1205, 1209 (Pa. Super. 1994)). The facts as stated previously indicate that the Defendant dragged the officer, whose upper body was trapped in the vehicle, for a distance of 30 to 40 feet. The officer suffered swelling, abrasions, and contusions. The officer had fluid drained from his knees, had a bone removed, and was going to need a knee replacement. The evidence established a prima facie case of aggravated assault in violation of 18 Pa.C.S.A. §2702(a)(4).

Next the Defendant argues that the evidence does not establish a prima facie case of aggravated assault by vehicle in violation of 75 Pa.C.S.A. §3732.1(a).

> Any person who recklessly or with gross negligence causes serious bodily injury to another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic, except section 3802 (relating to driving under the influence of alcohol or

> controlled substance), is guilty of aggravated assault by vehicle, a felony of the third degree when the violation is the cause of the injury.

75 Pa.C.S.A. §3732.1(a). The evidence established that the Defendant was a danger to himself and others on the roadway. The Defendant was unable to maintain his lane of travel and crossed entirely into the oncoming lane of travel on numerous occasions nearly avoiding 5 to 6 head-on collisions. The Defendant's driving was careless and reckless and in violation of the Motor Vehicle Code. The Defendant's carelessness and recklessness is further supported by the fact that the Defendant dragged the officer 30 to 40 feet, struck a telephone pole, took out a road sign, and took out a mailbox. Also, as stated above, the evidence indicates that the Defendant's actions caused serious bodily injury to the officer. The Commonwealth's evidence established a prima facie case of aggravated assault by vehicle.

Finally the Defendant argues that the Commonwealth's evidence did not establish a prima facie case of driving under the influence in violation of 75 Pa.C.S.A. §3802(a)(1).

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

75 Pa.C.S.A. §3802(a)(1). The evidence presented established that the Defendant was unable to maintain his lane of travel, nearly avoided 5 to 6 head-on collisions, dragged an officer 30 to 40 feet, struck a telephone pole, took out a road sign, and took out a mailbox. The officer testified that the Defendant had an overwhelming odor of an alcoholic beverage; that the Defendant was nervous; that the Defendant had slurred speech; and that the Defendant initially just stared at the officer. The evidence established a prima facie case for driving under the influence.

Accordingly the following Order is entered.

ORDER OF COURT

AND NOW, to wit, this 12th day of September, 2012, for the reasons set forth in the foregoing Opinion, IT IS HEREBY ORDERED AND DECREED that the Defendant's Petition for Writ of Habeas Corpus is DENIED.

BY THE COURT:
/s/ John E. Blahovec, Judge

COMMONWEALTH OF PENNSYLVANIA
V.
QUINTON MARTIN, Defendant

INDICTMENT AND INFORMATION

Successive Indictments for Same Offense

Written approval to reinstate charges previously dismissed is only necessary under Pa.R.Crim.P. 544 when the attorney for the Commonwealth is not present at a second or subsequent preliminary hearing.

SEARCH AND SEIZURE

Search Warrants; Reliability or Credibility of Informant

1. A police officer's assertion on an application for a search warrant that an informant is reliable is insufficient to support a finding of probable cause.

2. An application for a search warrant must provide objective facts that that enable the Court to conclude the informant is reliable.

3. Corroboration of an informant's tip with independent police work can provide sufficient reliability to an otherwise unreliable tip.

4. The Court could not consider the information provided by the confidential informant relative to the July 9, 2010, search warrant because there were no objective facts to corroborate the officer's assertions of the informant's credibility.

5. Once the Commonwealth linked Defendant to the crime through a buccal swab, the Court considered the confidential informant's statements because the police established an independent basis for his reliability.

Competency of Information; Probable or Reasonable Cause

1. A conclusion of probable cause is based upon a finding of probability, not a prima facie showing of criminal activity, and deference must be provided to a magistrate's finding.

2. The standard for the issuance of a warrant is whether given all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability evidence of a crime may be found in a particular place.

3. Although the Court did not consider the allegations of the confidential informant in the July 9, 2010, warrant to obtain a buccal swab from Defendant, this warrant was supported by sufficient probable cause.

4. The warrant alleged a crime occurred near Defendant's home, blood at the scene of the crime indicated someone was injured, the officer observed an injury to Defendant's arm, and Defendant attempted to conceal his arm and to back away from the officer when he attempted to speak with him.

5. The July 7, 2011, warrant requesting Defendant's medical records was also supported by sufficient probable cause.

6. The application for the search warrant described the crime scene, the officer alleged Defendant's blood was found at the crime scene, and the allegations of the confidential informant were corroborated by independent police work, as the injuries described by the confidential informant were consistent with the officer's observations.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 4676 C 2011

Appearances:

James Hopson, Assistant District Attorney,
Westmoreland County, for the Commonwealth

Emily Smarto,
Greensburg, for the Defendant

BY: DEBRA A. PEZZE, JUDGE

OPINION AND ORDER

BY THE COURT,

(Opinion by Pezze, J., issued September 26, 2012)

I. FACTS

Defendant, Quinton Martin, has been charged with Burglary, Criminal Trespass, Theft, Receiving Stolen Property and Criminal Mischief as a result of a break-in at 302 Highland Manor in Monessen PA on June 30, 2010. At a Preliminary Hearing conducted on June 24, 2011, Shelley Ramsey, property manager, testified that on June 30, 2010 a tenant in the building contacted her because the front plate glass window of a first floor apartment had been shattered. (PH I 5)[1] Ms. Ramsey observed shards of glass and a shovel lying in the nearby grass and contacted police. (PH I 6) Officer Christian Gray, a patrolman with the Monessen Police Department, testified that the pieces of glass and the shovel were submitted for DNA analysis because they appeared to have blood on them.(PH I 11)

On July 8, 2010 Officer Gray encountered Mr. Martin who, he testified, had lacerations on his left arm. He applied for a search warrant for Mr. Martin's saliva, which along with the blood on the items found at the scene, was analyzed and found to be a match.(PH I 12-13)

Charges were dismissed because Officer Gray was unable to testify as to what was taken from the crime scene or the location of the broken glass since he had never been to the burglarized apartment and no other witnesses had been produced.(PH I 17)

Charges were reinstituted and a second Preliminary Hearing occurred on December 9, 2011 before Magistrate Dalfonso. At this hearing the renter of the burglarized apartment, Tamika Grayson, testified that Mr. Martin was never given permission to enter her apartment, and that the break-in, during which her TV was taken, occurred on June 30, 2010. (PH II 5, 10)[2] This date was confirmed by Ms. Ramsey (PH II 12) and by Officer James Franks of the Monessen police. (PH II 15) Officer Franks testified that he collected glass from the broken window along with a snow shovel, both of which appeared to have blood on their surfaces. (PH II 16)

Officer Gray testified that on July 8, 2010 he encountered Mr. Martin and observed injuries to his arm despite Mr. Martin's attempts to hide his wounds. (PH II 18) Officer Gray obtained a search warrant for buccal swabs in order to compare Mr. Martin's saliva with the blood taken from the pieces of glass and the shovel. Mr. Martin's DNA was determined to be a match. (PH II 19-20) Thereafter a second search warrant was issued for Mr. Martin's medical records because a confidential informant ("CI") told the officer that Mr. Martin was involved in the burglary and had been ~~treated that~~ same day at Mon Valley Hospital for arm lacerations. (PH II 22)

[1] PH I references the transcript of the Preliminary Hearing occurring June 24, 2011 before Magistrate Joseph Dalfonso.

[2] PH II references testimony taken from the second Preliminary Hearing occurring on December 9, 2011 before Magistrate Dalfonso.

II. DISCUSSION

Mr. Martin contends that the charges should be dismissed because the second Preliminary Hearing was improperly instituted, and because the search warrants were both infirm.

A. Dismissal for Improper Filing

Mr. Martin contends that after the charges against him were dismissed, the case was not refiled in accordance with the dictates of Pa.R.C.P. 544. This Rule requires that when charges are dismissed, the Commonwealth may reinstitute the charges by approving in writing the refiling of the complaint. He contends that there was no written approval and this failure requires dismissal.

In *Commonwealth v. Bowman,* 840 A.2d 311 (Pa.Super. 2003), however, the court held that approval by the Commonwealth to reinstate charges was implicit because of the Assistant District Attorney's presence at the hearing. Written approval to reinstitute charges is only required when no attorney from the Commonwealth is present at the preliminary hearing. *Bowman* at 317. Thus, because an assistant district attorney was present at the second Preliminary Hearing, this allegation is entirely without merit.

B. Validity of the July 9, 2010 and July 7, 2011 Search Warrants

In *Appeal of O.A.*, 717 A.2d 490, 494 (Pa. 1998), the court noted that where the officer's actions resulted from information gleaned from an informant, in determining whether there was probable cause the informant's veracity, reliability and basis of knowledge must be assessed. In *Appeal of O.A.*, the warrant averred that the informant "provided reliable information in the past" as support for a finding of reliability. The court concluded that an assertion by a police officer as to an informant's reliability with no objective facts to substantiate his assertion is insufficient to support a finding of probable cause. The court observed that merely stating than an informant is reliable is insufficient: reliability should be established by objective facts that enable a court to conclude that the informant was reliable. The court qualified its holding by noting that corroboration of the details of an informant's tip with independent police work can provide sufficient indicia of reliability to an otherwise unreliable tip. *In Re O.A.* at 497 The court refused to condone arrests based solely upon a bald assertion that an informant has proved reliable in the past, without any consideration of whether there was a fair probability that the person arrested actually committed the crime. *In Re O.A.* at 499. See also *Commonwealth v. Hall,* 302 A.2d 342, 345 (Pa. 1973).

It is important to note, however, that a conclusion that probable cause exists is based on a finding of probability, not a prima facie showing of criminal activity, and deference is to be accorded a magistrate's finding of probable cause. *Commonwealth v. Woosnam,* 819 A2d 1198, 1208 (Pa. Super. 2003) The standard for evaluating whether probable cause exists for the issuance of a search warrant is the totality of the circumstances test as set forth in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). A magistrate is to make a practical common sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that evidence of a crime will be found in a particular place. *Commonwealth v. Hawkins,* 45 A.3d 1123, 1127 (Pa. Super. 2012)

1. July 9, 2010 Warrant

This warrant requested a buccal swab from Mr. Martin in order to perform a DNA analysis. Facts supporting probable cause include the date, time and location of the burglary and the finding of pieces of glass and a shovel containing blood stains. The warrant recites that eight days after the burglary, the officer saw Mr. Martin who had "fresh scars" on his arm, appeared as if he was going to run and who tried to hide his injured arm from the officer. It was averred that Mr. Martin was treated at Mon Valley Hospital for an unknown injury on the same date as the burglary.

A CI, described as reliable because he had given the officer credible and reliable information in the past, informed the officer that Mr. Martin was in the area prior to the burglary. The warrant noted that Mr. Martin lived two doors down from the burglarized home and that he refused to voluntarily provide a buccal swab.

This Court finds that the information provided by the CI cannot be considered because the warrant contained no objective facts to substantiate the assertions of his reliability. Merely asserting that an informant is reliable will not suffice; thus, the averment that Mr. Martin was in the area where the burglary was committed will not be considered in determining whether probable cause to grant the warrant exists.

Despite this limitation, the warrant contains sufficient probable cause since it describes probable criminal activity. It stated that the burglary occurred in an area close to Mr. Martin's home. Blood on glass shards and a shovel close to the broken window of the burglarized residence indicated that someone had been injured. Officer Gray observed an injury to Mr. Martin's arm and Mr. Martin attempted to conceal his arm and to back away from the officer when he attempted to speak with him. The same day that the burglary occurred, Mr. Martin was treated at Mon Valley Hospital. Thus, there was sufficient probable cause to justify the issuance of a warrant for a buccal swab. See also *Commonwealth v. Woosnam,* supra, in which a warrant was deemed sufficiently supported by facts that recited that the day after the pedestrian was struck by a vehicle, the defendant, who lived two miles from the scene, had damage to her vehicle consistent with a hit and run, including blood stains and a broken windshield. In this situation the search warrant was found to contain sufficient probable cause to support its issuance. Similarly, in this case there was sufficient factual evidence to establish probable cause for the issuance of the warrant.

2. July 7, 2011 Warrant

Similar to the July 9, 2010 warrant, the warrant for the Mon Valley Hospital medical records does not provide any facts supporting the assertion that the CI was reliable. Nevertheless, there is significant corroboration of the information that the CI provided because of independent police work. In addition to the description of the crime scene and the evidence seized, a buccal swab identified the blood on the fragments of glass and the shovel as a positive match to Mr. Martin. This fact substantiated the CI's information that Mr. Martin burglarized the victim's apartment. Further, the injuries to Mr. Martin's arm described by the CI matched Officer Gray's observations. Where, as here, Mr. Martin's blood was found at the crime scene, there was sufficient probable cause to obtain his hospital records for that date even though the warrant was issued approximately one year later.

Thus, and for these reasons, the claim that the search warrants lacked probable cause cannot be sustained. Both search warrants contained sufficient probable cause to permit collection of Mr. Martin's saliva and his hospital records.

ORDER OF COURT

AND NOW, this 26th day of September, 2012, IT IS HEREBY ORDERED that the Omnibus Pretrial Motion including the Motion to Suppress and the Motion for Habeas Corpus Relief is hereby DENIED.

BY THE COURT:
/s/ Debra A. Pezze, Judge

Blank Page

LU ANN ARTMAN, Administratrix of THE ESTATE OF
WILLIAM M. ARTMAN, JR., and JACOB ARTMAN, Plaintiffs
V.
PAUL KOCHKA, individually and t/d/b/a KOCHKA, INC., KOCHKA TOWING &
CAR CARE CENTER, KOCHKA TOWING SERVICE, KOCHKA SERVICE,
KOCHKA TOWING RECOVERY SERVICE and KOCHKA, et al.,
and
DAVID REDMOND, an adult individual, Defendants

PUNITIVE DAMAGES

Demurrer; Pleading of Facts Necessary to Demonstrate Knowing, Willful, Wanton, and Reckless Conduct; Sufficiency of General Averments of Wanton or Reckless Conduct

1. Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint; all material facts presented in the challenged pleadings are admitted as true as well as all inferences reasonably deducible therefrom.

2. Punitive damages are generally available to punish an individual for outrageous conduct, defined as an act done with bad motive or with a reckless indifference to the interest of others.

3. Wanton, willful, or reckless indifference to the rights of others is conduct that has been deemed outrageous and may be appropriate for awarding punitive damages.

4. Wanton conduct requires a certain state of mind, and generally means a person acts with a conscious disregard of a known danger which has a high probability of resulting in harm to another.

5. Recklessness requires a state of mind in which the actor realizes or should realize that the consequences of his actions will likely generate harm, even though he hopes or believes that his conduct will prove harmless.

6. Wanton or reckless conduct may be averred generally in a complaint and still support a claim for punitive damages.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 968 of 2012

Appearances:

Michael H. Rosenzweig and Christopher T. Hildebrandt,
Pittsburgh, for the Plaintiffs
Thomas P. Birris,
Pittsburgh, for the Defendants Paul Kochka, et al.
Scott O. Mears,
Greensburg, for the Defendant David Redmond

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION and ORDER OF COURT

By Richard E. McCormick, Jr., Judge:

This matter is before the Court on Defendant's Preliminary Objections in the nature of demurrer to Plaintiff's request for punitive damages for failure to plead facts demonstrating that Defendants were knowingly, willfully, wantonly, and recklessly

negligent in their actions. After a careful review of the arguments presented before the Court, we conclude that the Defendant's objections should be overruled at this time.

FACTUAL BACKGROUND

This action arises out of events that occurred on September 25, 2011. On that day, Co-Defendant David Redmond's vehicle broke down on La Belle Vue Road, in Westmoreland County. Defendant Kochka, a tow-truck driver, was dispatched to the scene to tow the Redmond vehicle from the roadway. While in the process of towing the Redmond vehicle, Kochka's tow-truck suffered a hydraulic failure, which resulted in fluids leaking onto the roadway. After removing the Redmond truck from the scene, Kochka applied a fluid or oil absorbent material to the surface of the roadway in an attempt to dry the spilled fluid. Sometime after the Defendant's truck experienced a fluid leak, decedent, William M. Artman, Jr., was operating a motorcycle in the eastbound land of La Belle Vue Road when he encountered the oil absorbent material on the road causing him to lose control of his motorcycle and resulting in his death.

On February 15, 2012, Plaintiffs filed a complaint in civil action against Defendants alleging that the Defendant acted in a wanton, willful, and reckless manner by knowingly operating a defective tow-truck, spilling hydraulic fluid on a public roadway, applying fluid absorbent material on the fluid, and failing to remove the fluid-absorbing material from the roadway. Plaintiffs complaint makes a claim for punitive damages as a result of this conduct.

On March 13, 2012, Defendant Kochka filed preliminary objections asserting that plaintiff's complaint had failed to plead adequately facts necessary to support a claim for punitive damages. Defendant contends that Plaintiff only alleged facts to support a claim of ordinary negligence, and that Plaintiff claimed in a conclusive fashion that Kochka's conduct was willful, careless, wanton, and reckless.

DISCUSSION

Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. *Haun v. Community Health Sys. Inc.,* 14 A.3d 120, 123 (Pa. Super. 2011). When considering preliminary objections, all material facts presented in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. *Hykes v. Hughes,* 835 A.2d 382, 383 (Pa. Super. 2003). Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. *Id.* If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections. *Id.*

Punitive damages are generally available to punish an individual for outrageous conduct. *Chambers v. Montgomery,* 192 A.2d 355, 358 (Pa. 1963); *Quoting* Restatement of Torts Sec. 908 (1). Outrageous conduct has been defined by the Pennsylvania courts as an act done with bad motive or with a reckless indifference to the interest of others. *McClellan v. Health Maint. Of Pa.,* 604 A.2d 1053, 1061 (Pa. Super. 1992); *Focht v.*

Rabada, 268 A.2d 157, 159 (Pa. Super. 1970), *citing* Restatement (Second) of Torts § 908 (b). Wanton, willful, or reckless indifference to the rights of others is conduct that has been deemed outrageous and may be appropriate for awarding punitive damages. *Hutchinson v. Luddy,* 870 A. 2d 766, 770 (Pa. 2005); *Daniel v. Wyeth Pharmaceuticals Inc.,* 15 A. 2d 909, 929 (Pa. Super. 2011). Wanton conduct requires a certain state of mind, and generally means a person acts with a conscious disregard of a known danger which has a high probability of resulting in harm to another. *Evans v. Philidelphia Transp. Co.,* 212 A.2d 440, 443 (Pa. 1965); Prosser, Torts § 33 at 151 (2d ed. 1955). Recklessness also has a state of mind requirement in which that actor realizes or should realize that the consequences of his actions will likely generate harm, even though he hopes or believes that his conduct will prove harmless. *Archibald v. Kemble,* 971 A.2d 513, 517 (Pa. Super. 2009); *Quoting* Restatement (Second) of Torts § 500 cmt. f.

The pleading standard required to aver wanton or reckless conduct, and in turn have a claim for punitive damages, has been addressed in *Archibald* where the court indicated that wanton or reckless conduct may be averred generally in accordance with Pa. R.C. P. 1019. *Archibald*, 971 A.2d at 517. *Archibald* held:

> Pennsylvania Rule of Civil Procedure 1019(b) provides: "Malice, intent, knowledge and other conditions of the mind may be averred generally." An example of a condition of the mind that may be averred generally is wanton conduct. (citations omitted). Because recklessness is also known as "wanton and willful misconduct," "recklessness" is a condition of the mind that may be averred generally.

Id. at 519.

Throughout the Plaintiff's briefs, as well as his oral arguments, Plaintiff contends that his complaint meets the general averment standard set by *Archibald*. Plaintiff asserts that the complaint contains allegations sufficient to satisfy the minimum pleading requirements, and Plaintiff further contends that paragraph 27 of his complaint alone satisfies the pleading requirement, as it argues that defendant Kochka:

> [A]cted in a willful, wanton, reckless, negligent, and grossly negligent manner... by knowingly operating a defective tow-truck on a public roadway, spilling hydraulic fluid on a public roadway, placing oil-absorbent material and/or foreign debris on a public roadway and leaving and failing to remove said hydraulic fluid, oil absorbent material and/or foreign debris from a public roadway.

In contrast, Defendant Kochka argues that Plaintiff's complaint is insufficient to support a claim for punitive damages as it fails to provide facts that support the allegation of wanton or reckless conduct. Defendant reasons that there is nothing in Plaintiff's complaint that rises to the level of wanton or reckless conduct and that the claims for punitive damages should be stricken from the record since Plaintiff's complaint lacks these elements.

We conclude that striking the claim for punitive damages at this time would be inappropriate and untimely. If we accept everything in the Plaintiff's complaint as true,

and make all reasonable inferences from the averments of said complaint, we are unable to hold as a matter of law that Defendant Kochka did not act in a wanton, reckless, or grossly negligent way. Plaintiff's ability to support its allegations with adequate facts will be determined through the discovery process. When discovery is complete Defendants will again have the opportunity to ask for a dismissal of the punitive damages claim in a motion for summary judgment. However, until that time this Court finds that it would be premature to strike allegations of willful, wanton, reckless, and grossly negligent conduct and the claim for punitive damages.

ORDER OF COURT

AND NOW, to wit, this 20th day of June, 2012, it is hereby **ORDERED** and **DECREED** that the Preliminary Objections of Defendants to the Complaint are **OVERRULED** without prejudice to the right of the Defendants to raise the issue in a motion for summary judgment. Discovery concerning the wealth of a defendant in the claim for punitive damages is governed by Pa RC.P. No. 4003.1.

FURTHER, in accord with Pa.RC.P. No. 236(a)(2)(b), the Prothonotary is **DIRECTED** to note in the docket that the individual(s) listed below have been given notice of this order.

BY THE COURT:
/s/ Richard E. McCormick, Jr., Judge

HABITAT FOR HUMANITY OF CAMBRIA COUNTY, INC., Plaintiff
V.
DANIEL L. McADAMS and DANA MARIE McADAMS,
husband and wife, Defendants

MORTGAGE FORECLOSURE

Limitation of Counterclaims in Mortgage Foreclosure Action; Effect of Assignment of Mortgage on Counterclaims Relating to Construction of House; Defense to Mortgage Foreclosure Action Based on Fraud

1. Counterclaims of Defendants in mortgage foreclosure action are limited to claims which arise from same transaction or occurrence or series of transactions or occurrences from which the cause of action arose.

2. Defendants' claim that mortgage was procured by fraud because they were induced to sign mortgage documents in exchange for mortgagee's promise to complete construction of their home is not supported, where, as here, Defendants remained silent for nine years, and accepted the home in the condition that it was given to them.

3. Plaintiff, to whom original mortgage was transferred, is not liable to Defendants for the actions of its predecessor, where transfer agreement limited Plaintiff's potential liability to those arising after the acquisition of the mortgage.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 8526 of 2010
No. 4109 of 2012

Appearances:
Donald J. Snyder, Jr.,
Latrobe, for the Plaintiff
Dwayne E. Ross,
Latrobe, for the Defendants

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION and ORDER OF COURT

By Judge Richard E. McCormick, Jr.:

This matter was before the Court for a non-jury trial and is now ready for final disposition. Habitat for Humanity of Cambria County (Plaintiff) filed an action (No. 8526 of 2010) in mortgage foreclosure against Mr. and Mrs. McAdams after they defaulted on their mortgage note obligation. In response, the McAdamses countered that Plaintiff owed them for the cost of defects in the construction of the home. Because Pa. R.C.P. No. 1148 limits counterclaims in mortgage foreclosure actions to claims "which arise from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose," the McAdamses' claim was assigned a separate docket number (No. 4109 of 2012) and they pursued their claims in this separate action. In the interest of judicial economy, both cases were consolidated for purposes of trial.

The facts underlying this matter are as follows. In 1999, the Defendants entered into an agreement with Eastern Westmoreland Habitat for Humanity ("Eastern Westmoreland") for the construction of a home. Volunteers provided construction services and materials were obtained, and the Defendants themselves participated in the building of their home with their contribution of "sweat equity" and office-related tasks. Construction on the home began in 2000 and on May 8, 2001, the real estate closing, which included the transfer of ownership and the signing of a mortgage in the amount of $42,000, took place. At the time of closing, the parties agreed that a few items still needed to be completed on the construction of the home — specifically, the telephone needed to be connected, the downspouts on the porch had to be attached, and the front railing needed to be completed — but the closing occurred nonetheless.

Approximately four months after the closing, the Defendants sent a letter to Eastern Westmoreland inquiring about the repair and completion of several items in the house. Although Eastern Westmoreland responded with an offer to inspect the home and address the McAdamses' concerns, the McAdamses never followed through on that offer nor did Eastern Westmoreland make any of the requested repairs. The McAdamses concede that the statute of limitations has expired on their ability to seek to be compensated for any damages related to events that occurred in this time period.

Under a Bill of Sale dated November 30, 2009, and effective December 31, 2009, Eastern Westmoreland assigned its assets to Habitat for Humanity of Cambria County ("Cambria"). Eastern Westmoreland dissolved as a corporate entity. The Defendants' mortgage was assigned from Eastern Westmoreland to Cambria on December 2, 2009, and as of January 1, 2010, the McAdams mortgage was being serviced by Cambria.

By letter dated August 6, 2010, Cambria advised the McAdamses that they were in serious default of their mortgage obligation because they failed to make monthly payments in the amount of $290.00 per month for the months of May through August, 2010. When they failed to cure this default, the Plaintiff filed the within action in mortgage foreclosure on November 24, 2010. As of February 29, 2012, the Defendants were indebted to the Plaintiff in the amount of $26,032.97.

In May 2010, a representative from the Weatherization Program of Westmoreland County inspected the McAdamses' home to see whether their program could be of service to them. Upon inspection, the McAdamses discovered that their home had mold infestation that spread through the attic, the upstairs bedroom and bathroom, and along the walls and ceiling. Subsequent inspections performed in December 2011 revealed numerous cracks in the basement floor; water infiltration into the basement; improper grading; condensation in the windows; and inadequate ventilation that has contributed to the presence of mold.

In the mortgage foreclosure action, the Defendants argue that the mortgage was procured by fraud because they were induced to sign the mortgage documents in exchange for Eastern Westmoreland's promise that it would complete construction on the home. As such, they argue that the mortgage is voidable and that they may rescind the agreement in its entirety. This Court finds this argument to be disingenuous, at best. The mortgage note and related documents were signed by the McAdamses in May of

2001. They remained silent for almost 9 years, substantially meeting their obligation to make payments under the mortgage loan and accepting the home in the condition that it was charitably given to them. Never once in that 9 year span did they challenge the validity or enforceability of the mortgage, note or the associated documents on their home.

In addition, this Court previously ruled against the Defendants on their argument that federal statutes and regulations required Eastern Westmoreland to comply with specific notice requirements when it assigned the mortgage loan to Cambria. *See* 12 U.S.C. § 26005(c)(1)-(2)(A). (Transcript, pp. 180-84) Even if Defendants were able to assert a defense under this statute that was pertinent to the mortgage foreclosure action, they have failed to prove that they suffered any damages as borrowers as a result of the failure of Eastern Westmoreland to follow the letter of the law. Accordingly, we find that the Defendants have not established any defense to the claim against them in mortgage foreclosure.

With respect to the McAdamses' claim against Cambria, we find that Cambria is not liable to the McAdamses for the actions of Eastern Westmoreland. The pertinent provisions of the Bill of Sale and Agreement between Eastern Westmoreland ("Transferor") and Cambria ("Transferee"), two separate entities, provide in Paragraph 2(a):

> General. Notwithstanding anything to the contrary contained herein, none of the Liabilities of Transferor shall be Transferred to, or assumed by, Transferee; provided, however, that Liabilities ... arising after the Effective Time under Contracts... that are part of the Acquired Assets shall be and hereby are assumed by Transferee at the Effective Time.

Here, one of the assets that Cambria acquired when it entered into the Bill of Sale with Eastern Westmoreland was the Defendants' mortgage. The only liabilities for which Cambria may have been responsible would have been "Liabilities... arising **after** the Effective Time under Contracts... that are part of the Acquired Assets...". In other words, Cambria's potential liability to the McAdamses is limited to liabilities that are related to the transferred asset, that is, liabilities arising out of the mortgage and the mortgage note. Its liability is limited to the "paper" it acquired; Cambria did not assume responsibility for the construction activities of its predecessor, the assignor, Eastern Westmoreland. If Eastern Westmoreland was negligent in its construction of the McAdamses' home, and could have been liable for defects and damages as a result, this liability was not assumed by, transferred to or assigned to Cambria. No such assignment of obligation exists.

Based upon the foregoing, we enter the following Order.

ORDER OF COURT

AND NOW, to wit, this 29th day of August, 2012, based upon the rationale contained in the foregoing Opinion, it is hereby **ORDERED** and **DECREED** that a

verdict is entered in favor of the Plaintiff Habitat for Humanity of Cambria County, Inc., and against the Defendants in the mortgage foreclosure action at No. 8526 of 2010 in the amount of $28,975.66 together with interest from September 10, 2010 through the date of entry of judgment and costs;

AND FURTHER, a verdict is entered in favor of the Defendant Habitat for Humanity of Cambria County, Inc., and against the Plaintiffs McAdamses in the action filed at No. 4109 of 2012.

FURTHER, in accord with Pa.R.C.P. No. 236(a)(2)(b), the Prothonotary is **DIRECTED** to note in the docket that the individual(s) listed below have been given notice of this Order.

BY THE COURT:
/s/ Richard E. McCormick, Jr., Judge

COMMONWEALTH OF PENNSYLVANIA
V.
BETH A. THOMAS, Defendant

SENTENCING AND PUNISHMENT

Punishment; In General

1. A person who is convicted of violating section 13(a), (14), (30) or (37) of The Controlled Substance, Drug, Device and Cosmetic Act where the controlled substance or a mixture containing it is classified in Schedule I or Schedule II under section 4 of that act and is a narcotic drug shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in 18 Pa.C.S. § 7508.

2. When the aggregate weight of the compound or mixture containing the substance involved is at least 2.0 grams and less than ten grams, the mandatory minimums are two years in prison and a fine of $5,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity; however, if at the time of sentencing the defendant has been convicted of another drug trafficking offense, the mandatory minimums are three years in prison and $10,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity.

3. When the aggregate weight of the compound or mixture containing the substance involved is at least ten grams and less than 100 grams, the mandatory minimums are three years in prison and a fine of $15,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity; however, if at the time of sentencing the defendant has been convicted of another drug trafficking offense, the mandatory minimums are five years in prison and $30,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity.

CONSTITUTIONAL LAW

Enforcement of Constitutional Provisions; Determination of Constitutional Questions; Presumptions and Construction as to Constitutionality; Plainly Unconstitutional; Doubt; In General

1. When presented with a challenge to the constitutionality of a statute, there is a strong presumption that legislative enactments are constitutional.

2. For an act to be declared unconstitutional, the challenger must prove that the act clearly, palpably, and plainly violates the constitution.

3. All doubts are to be resolved in favor of sustaining a statute.

Equal Protection; In General; Relationship to Similar Provisions; Federal/State Cognates

1. When considering a challenge based upon equal protection rights, the analysis is the same under both state and federal constitutions.

2. Equal protection analysis recognizes three types of governmental classification, each of which calls for a different standard of scrutiny.

3. The appropriate standard of review is determined by examining the nature of the classification and the rights thereby affected.

Equal Protection; In General; Levels of Scrutiny; Particular Classes; Race, National Origin, or Ethnicity

1. Where the classification relates to who may exercise a fundamental right or is based on a suspect trait such as race or national origin, strict scrutiny is required.

2. When strict scrutiny is employed, a classification will be invalid unless it is found to be necessary to the achievement of a compelling state interest.

Equal Protection; In General; Levels of Scrutiny; Rational Basis Standard; Reasonableness

1. The second type of classification which, although not suspect is either sensitive or important but not fundamental.

2. Such a classification must serve an important governmental interest and be substantially related to the achievement of that objective.

3. The third type of situation involves classifications which are neither suspect nor sensitive or rights which are neither fundamental nor important.

4. Such classifications will be valid as long as they are rationally related to a legitimate governmental interest.

Equal Protection; Criminal Law; Sentencing and Punishment; Extent of Punishment

1. Defendant, who was convicted of dealing a controlled substance in an amount large enough to trigger the provisions of enhanced mandatory sentencing provisions, was found not to be a member of a "suspect class" requiring the application of strict scrutiny.

2. The classification of individuals based upon the quantity of controlled substances delivered or possessed with the intent to deliver is not sensitive or important, nor is it designed to deprive the class of any fundamental right.

3. Court found that the classification of individuals based upon the quantity of controlled substances delivered, or possessed with intent to deliver, as set forth in 18 Pa.C.S.§ 7508 was of the third type, causing the "rational relationship" test to be applied to the defendant's constitutional challenge.

4. The classification will survive equal protection scrutiny so long as it is not arbitrary and rests upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons in similar circumstances shall be treated alike.

CONTROLLED SUBSTANCES

In General; Statutes and Other Regulations; Validity

1. Court found that sentencing provisions as set forth in 18 Pa.C.S. § 7508 based upon the amount of controlled substances delivered bore a rational relationship to the objective of the statute to alleviate the ravages of drug trafficking and drug abuse in our society and to impose more severe penalties on those individuals who were found to possess and/or deliver greater quantities of drugs.

2. Statute was not applied in an arbitrary manner, as all persons, regardless of race, gender, religion, age or any other characteristic, who deliver or possess with the intent to deliver controlled substances in weights large enough to trigger the provisions of 18 Pa.C.S. § 7508 are treated equally under the statute.

3. Court found that trafficking of controlled prescription drugs represented a significant danger to the public and that classification at issue clearly related to the objectives of the statute.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 3997 C 2009

Appearances:

Christiann Flanigan, Assistant District Attorney,
Westmoreland County, for the Commonwealth
Edward J. Bilik,
Greensburg, for the Defendant

BY: RITA DONOVAN HATHAWAY, JUDGE

OPINION OF THE COURT ISSUED
PURSUANT TO PA.R.A.P. RULE 1925

The Defendant, Beth A. Thomas, was charged by criminal information filed at No. 3997 C 2009 in the Court of Common Pleas of Westmoreland County, with violations of the Controlled Substance, Drug Device and Cosmetic Act (35 P.S. §780-113(a)(30) and (16). Thomas was convicted following a non-jury trial before this court, at which time the defense and the Commonwealth agreed to the following stipulations of fact:

1. On or about June 1, 2009, in the City of Greensburg, Westmoreland County, Pennsylvania, the Defendant delivered 33 pills marked M523/10-325 to a police informant.[1]
2. The 33 pills together weigh 17.4 grams, which includes 330 mg of oxycodone, a Schedule II narcotic. The remaining weight is acetaminophen, binders and fillers.

Following multiple sentencing proceedings, Thomas was sentenced to the mandatory minimum sentence of three to six years incarceration on October 7, 2011. This timely appeal followed.

ISSUE PRESENTED ON APPEAL:

WHETHER THE TRIAL COURT COMMITTED AN ERROR OF LAW IN SENTENCING THOMAS TO A MANDATORY TERM OF INCARCERATION PURSUANT TO 18 PA.C.S. §7508(a)(2), IN THAT THE SAID STATUTE IS UNCONSTITUTIONAL IN VIOLATION OF THOMAS' RIGHT TO EQUAL PROTECTION UNDER THE LAW AND RESULTS IN AN UNDULY HARSH SENTENCE?

The sole issue on appeal challenges the legality of Thomas' sentence, alleging that that the mandatory sentence requirements set forth in 18 Pa.C.S. §7508 are unconstitutional.[2] Specifically, Thomas alleges that the imposition of the mandatory sentence in this case violates her right to equal protection under the law, and results in an unduly harsh sentence.

The portion of the sentencing statute applied to Thomas states as follows:

> **(a) General rule.—**Notwithstanding any other provisions of this or any other act to the contrary, the following provisions shall apply:
>
> * * *
>
> (2) A person who is convicted of violating section 13(a)(14), (30) or (37) of The Controlled Substance, Drug, Device and Cosmetic Act where the controlled substance or a mixture containing it is classified in Schedule I or Schedule II under section 4 of that act and is a narcotic drug shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in this subsection:
>
> (i) when the aggregate weight of the compound or mixture containing the substance involved is at least

[1] The stipulations of fact were marked as Court Exhibit 1 at the time of the non-jury trial. Thomas was charged with selling 33 Percocet pills to a police informant.

[2] Thomas' challenge to the constitutionality of the mandatory sentencing provisions of 18 Pa.C.S. §7508 was set forth minimally in a Sentencing Memorandum presented to this court at the time of sentencing. It is noted that this court was not presented with briefs or arguments from either the Commonwealth or the defense that followed the standards set forth in ***Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991),*** regarding the presentation of constitutional questions. It is stongly suggested that the parties do so on appeal.

> 2.0 grams and less than ten grams; two years in prison and a fine of $5,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity; however, if at the time of sentencing the defendant has been convicted of another drug trafficking offense: three years in prison and $10,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity;
>
> (ii) when the aggregate weight of the compound or mixture containing the substance involved is at least ten grams and less than 100 grams; three years in prison and a fine of $15,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity; however, if at the time of sentencing the defendant has been convicted of another drug trafficking offense: five years in prison and $30,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity;

18 Pa.C.S.A. § 7508 (a)(2). Thomas suggests that, because the mandatory sentences set forth in 18 Pa.C.S. §7508 are determined by the weight of the product delivered, the application of that statute to deliveries of prescription pills containing Schedule I or II narcotic controlled substances violates equal protection principles.

The essence of Thomas' claim as articulated at the time of sentencing is that the weight of the acetaminophen, binders and fillers in the pills she sold far outweighed the amount of the controlled substance contained in those pills. The sentence, she argued, was therefore based on the large amount of non-controlled substance delivered, and not upon the amount of narcotic contained in the product.

Thomas presented the expert testimony of Peter J. Maida, a registered pharmacist, who testified that oxycodone was available commercially in several different forms. Percocet was a combination of oxycodone and acetaminophen, and came in various strengths. (ST1 13).[3] The pills delivered by Thomas were "Percocet 10/325," comprised of 10 milligrams of oxycodone and 325 milligrams of Acetaminophen (i.e., Tylenol), and certain binders and fillers. (ST1 15). Maida indicated that a 10/325 "Endo" (a generic form of Percocet") weighed a total of 450 milligrams, of which 10 milligrams was oxycodone, the Schedule II controlled substance. Conversely, an OxyContin pill, which Maida described as "Oxycodone in a time-released caplet compression form with binder and filler," containing the equivalent 10 milligrams of oxycodone would weigh a mere 140 milligrams. (ST1 13, 18) Also available commercially were 20 milligram OxyContins, 30 milligrams, 40 milligram OxyContins, 80 milligram OxyContins and even 160 milligram OxyContins. (ST1 16-17). Maida testified that

[3] Numerals in parentheses preceded by the letters "ST1" refer to specific pages of transcript of the initial sentencing hearing that occurred on July 5, 2011 before this court, and which has been made a part of the record herein.

the 33 Percocet tablets actually delivered by Thomas in this case contained a total of 330 milligrams of oxycodone, the Schedule II narcotic. One Percocet 10/325 tablet would weigh 3.2 times more than a 10 milligram OxyContin caplet, but would contain the same about of the controlled substance. Therefore, Thomas would have had to deliver 106 10 milligram OxyContin caplets to equal the weight of the 33 Percocet tablets that she sold. (ST1 19-20). Maida further described the Percocet 10/325 tablet as being much larger in size than an OxyContin caplet, and explained that as the milligram strength of an OxyContin caplet increased, so too did its size. However, Maida stated that the size of a higher strength OxyContin caplet was still not as large as the Percocet 10/325 tablet at issue in this case. (ST1 22). Maida testified that had Thomas delivered 33 10 milligram OxyContin caplets, the total weight of the product would have been approximately 4.62 grams, as compared to the total weight of the 33 10/325 Percocet tablets, which weighed 17.4 grams. (ST1 26-28). The amount of the narcotic delivered, however, would be equal. (ST1 29).

Mr. Maida's testimony made clear that the actual weight of any given pill is largely determined by the fillers and other non-controlled substances included in a tablet by the various pharmaceutical companies who manufacture the product, and bears no relationship to the actual "strength" of the pain pill or amount of narcotic contained therein. According to his testimony, then, had Thomas delivered the equally-strong, but smaller 10 milligram OxyContin tablets, she would have been subject to a two-year mandatory minimum under 18 Pa.C.S. §7508(a)(2)(i). However, because she actually delivered the much heavier, but no less potent 10/325 Percocet tablets, she was subject to a three-year mandatory minimum sentence pursuant to 18 Pa.C.S. §7508(a)(2)(ii). This happenstance, Thomas argues, violates her equal protection rights.

DISCUSSION:

When presented with a challenge to the constitutionality of a statute,

> there is a strong presumption that legislative enactments are constitutional. For an act to be declared unconstitutional, appellant must prove that the act clearly, palpably and plainly violates the constitution. All doubts are to be resolved in favor of sustaining a statute; thus an appellant has the heavy burden of persuasion when challenging the constitutionality of a statute.

Commonwealth v. Green, 849 A.2d 1247, 1250 (Pa.Super.2004). *See also,* ***Commonwealth v. Jones, 543 A.2d 548 (Pa.Super. 1988).*** Thomas has not specified in her Concise Statement whether her challenge is based upon her rights under the Pennsylvania Constitution, the United States Constitution, or both. When considering a challenge based upon equal protection rights, however, our appellate courts have held that the analysis is the same under both state and federal constitutions. ***Commonwealth v. Harley, 924 A.2d 1273 (Pa.Super. 2007).***

The constitutionality of the mandatory sentence requirements set forth in 18 Pa.C.S.

§7508 was litigated in our appellate courts as early as 1992. In ***Commonwealth v. Eicher, 605 A.2d 337 (Pa.Super. 1992), appeal denied, 533 Pa. 598, 617 A.2d 1272 (1992),*** the Superior Court held that because Eicher had not demonstrated that convicted drug dealers were a member of a suspect or sensitive class, or that such a classification involved the exercise of a fundamental or important right, a minimum level of scrutiny should apply in determining whether 18 Pa.C.S. §7508 bore a rational relationship to a legitimate legislative objective. The Superior Court reasoned:

> In enacting the mandatory sentencing provisions, the purpose of the statute was to alleviate the ravages of drug trafficking and drug abuse in our society by subjecting convicted drug dealers to greater periods of confinement. *See Commonwealth v. Biddle,* 411 Pa.Super. 210, 217n. 7, 601 A.2d 313, 317 n. 7 (1991), (opinion by Ford Elliott, J.), *citing* Senate Legislative Journal, No. 13, 172nd General Assembly, Volume I, at 1780, 1784 and 1786 (February 23, 1988). *See also* House Legislative Journal, No. 16, 172nd General Assembly, Volume I, at 357, 363, 373 and 374 (March 16, 1988) (for similar comments). Further, the legislature imposed more severe penalties on those individuals who were found to possess and/or deliver greater quantities of drugs. We agree with appellee that the legislature's scheme of imposing harsher penalties and longer periods of confinement on convicted drug dealers is rationally related to the laudable goal of attempting to put an end to the pernicious effects which drugs and the illicit drug trade have inflicted upon our society.

Commonwealth v. Eicher, 605 A.2d 337, 352 (Pa.Super.1992). Eicher had alleged that the statute violated equal protection because he had been previously convicted of a drug trafficking offense, and was classified as a recidivist offender for purposes of the statute. The Superior Court also rejected Eicher's suggestion that the statute violated equal protection because it was inconsistent with similar federal laws.[4]

Later that year, in ***Commonwealth v. Crowley, 605 A.2d 1256 (Pa.Super. 1992),*** the Superior Court held that the applicability of 18 Pa.C.S. §7508 to delivery of powdered cocaine was not fundamentally unfair and did not violate due process.[5] Crowley, although not entirely dissimilar from the case at bar, did not raise an equal protection challenge.

Most recently, in ***Commonwealth v. Harley, 924 A.2d 1273 (2007),*** the Superior

---

[4] That determination was echoed in 1994, when the Superior Court again upheld the constitutionality of 18 Pa.C.S. §7508 in ***Commonwealth v. Plass, 636 A.2d 637 (Pa.Super. 1994)(en banc).*** Citing Eicher, the Superior Court noted that: "The classification [of recidivist] will therefore survive equal protection scrutiny so long as it is not arbitrary and 'rests upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons in similar circumstances shall be treated alike.'" *Id*. at 641 (citations omitted).

[5] Crowley was found to be in possession of 37.31 grams of a powder which, when tested, proved to contain 2.61 grams of cocaine. In an argument similar to that of Thomas, Crowley argued that his sentence of 3-6 years imprisonment was fundamentally unfair since a person in possession of an "uncut" quantity of cocaine (2.61 grams) would not receive as severe a sentence.

Court held that the mandatory sentencing provisions of 18 Pa.C.S. §7508 did not violate equal protection. Again, the issue in Harley was a challenge to the recidivist classification contained in the mandatory sentence provisions of 18 Pa.C.S. §7508, rather than the weight of the controlled substance delivered or possessed with the intent to deliver. The Superior Court in ***Harley*** reiterated the premises set forth in ***Commonwealth v. Eicher, 605 A.2d 337 (Pa.Super. 1992)*** and ***Commonwealth v. Plass, 636 A.2d 637 (Pa.Super. 1994)(en banc),*** namely, that recidivist drug dealers convicted of a new drug delivery were not members of a "suspect class," nor was that classification designed to deprive that class of any fundamental right. ***Harley*** at 1281.

It does not appear that the equal protection issue presented by Thomas has yet been addressed by the Pennsylvania appellate courts. Therefore, this court must determine what level of scrutiny must be applied in considering her equal protection challenge.

> When addressing an equal protection challenge, we must initially ascertain the appropriate degree of scrutiny to which the challenged act should be subjected.
>
> Equal protection analysis recognizes three types of governmental classification, each of which calls for a different standard of scrutiny. The appropriate standard of review is determined by examining the nature of the classification and the rights thereby affected ... where the classification relates to who may exercise a fundamental right or is based on a suspect trait such as race or national origin, strict scrutiny is required. When strict scrutiny is employed, a classification will be invalid unless it is found to be necessary to the achievement of a compelling state interest.
>
> * * *
>
> The second type of case involves a classification which, although not suspect is either sensitive or important but not fundamental. Such a classification must serve an important governmental interest and be substantially related to the achievement of that objective.
>
> ***
>
> The third type of situation involves classifications which are neither suspect nor sensitive or rights which are neither fundamental nor important. Such classifications will be valid as long as they are rationally related to a legitimate governmental interest.'

Commonwealth v. Jones, 374 Pa.Super. 431, 437-438, 543 A.2d 548, 551 (Pa.Super. 1988), *citing* ***Commonwealth v. Bell, 512 Pa. 334, 344-345, 516 A.2d 1172, 1178 (1986)*** (citations omitted).

This court cannot find that Thomas is a member of either the first or the second type of classification as set forth above. Thomas, having merely been convicted of dealing a controlled substance in an amount large enough to trigger the provisions of enhanced mandatory sentencing provisions, is clearly not a member of a "suspect class" requiring the application of strict scrutiny. Individuals who sell large quantities of a controlled substance, and who are convicted of doing so, are not a class of people who

have been "traditionally oppressed or discriminated against." ***Plass*** at 641. Similarly, the classification of individuals based upon the quantity of controlled substances delivered (or possessed with the intent to deliver) is not sensitive or important, nor is it "designed to deprive the class of any fundamental right." ***Id.*** The classification at issue is neither suspect nor sensitive, nor does it implicate rights which are fundamental and/or important.

Having determined that the classification of individuals based upon the quantity of controlled substances delivered (or possessed with the intent to deliver) as set forth in 18 Pa.C.S. §7508 is of the third type, the "rational relationship" test should be applied to Thomas' constitutional challenge. "The classification will therefore survive equal protection scrutiny so long as it is not arbitrary and rests upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons in similar circumstances shall be treated alike." ***Plass*** at 641.

Applying the analysis in ***Eicher*** and ***Plass,*** this court finds that the sentencing provisions set forth in 18 Pa.C.S. §7508 based upon the amount of controlled substances delivered bear a rational relationship to the objective of that statute:

> "to alleviate the ravages of drug trafficking and drug abuse in our society by subjecting convicted drug dealers to greater periods of confinement." *Plass,* 636 A.2d at 641. **"Further, the legislature imposed more severe penalties on those individuals who were found to possess and/or deliver greater quantities of drugs."** *Eicher,* 605 A.2d at 352. "[T]he legislature's scheme of imposing harsher penalties and longer periods of confinement on convicted drug dealers is rationally related to the laudable goal of attempting to put an end to the pernicious effects which drugs and the illicit drug trade have inflicted upon our society." *Id.; see also Commonwealth v. Crowley,* 413 Pa.Super. 554, 605 A.2d 1256, 1260 (1992) (stating that "[s]ection 7508 was enacted to deal with an ever burgeoning area of criminal activity—a drug epidemic, the effect of which pervades every aspect of our daily lives.").

Commonwealth v. Harley, 924 A.2d 1273, 1282 (Pa.Super. 2007)(emphasis added). Although analyzing the statute for purposes of a due process challenge, the Superior Court in ***Commonwealth v. Crowley, 605 A.2d 1256, 1260 (Pa .Super. 1992)*** held that:

> We find that Section 7508 was enacted to deal with an ever burgeoning area of criminal activity-a drug epidemic, the effect of which pervades every aspect of our daily lives. Thus, in dealing with the drug problem, the realities of drug trafficking are not to be ignored, e.g., that cocaine is sold in a diluted form by dealers for the explicit purpose of securing more revenue for their product.
>
> Therefore, an individual in possession of a large quantity of a drug (be it with or without a diluent) exposes himself or herself to more punishment than one in possession of a small quantity, given that in the former instance the actor is more likely to be a dealer and in the

> latter case a user. *Id*. Accordingly, we will not fault the legislature for treating individuals in possession of large quantities of drugs (be they pure or diluted) more harshly than those in possession of a small quantity-e.g., less than 2.0 grams. The rationale for the escalation in penalty is proportionate to the likelihood that a large quantity of "cut" cocaine is destined to be sold and not possessed for personal use. Thus, the differentiation in treatment is constitutionally valid; to-wit:
>
> > ... even if a statute is imprecise, a person who is given fair warning that his conduct is criminal in nature has no standing to complain that other persons who engage in a different course of conduct may not constitutionally be prosecuted [to the same extent] under that statute.

Commonwealth v. Crowley, 605 A.2d 1256, 1260 (Pa .Super. 1992), *quoting* ***Commonwealth v. Potts, 314 Pa.Super. 256, 460 A.2d 1127, 1135 (1983).***

The statute is not applied in an arbitrary manner, as all persons, regardless of their race, their gender, their religion, their age, or any other characteristic, who deliver or possess with the intent to deliver controlled substances in weights large enough to trigger the provisions of 18 Pa.C.S. §7508, are treated equally under the statute. The classification at issue is clearly rationally related to the objectives of the statute. While ***Crowley*** dealt with the trafficking of cocaine, both the illegal drug trade and the trafficking of controlled prescription drugs, as in this case, represent a significant danger in our society today. Our legislature at some point may choose to reconsider the provisions of 18 Pa.C.S. §7508 as it applies to the sale and delivery of prescription products, the weight of which is determined not by the drug dealers but by the pharmaceutical companies so as to address the inequity in the statute that is perceived by Thomas. However, based upon the facts and the law before this court, this court is unable to conclude that the mandatory sentencing provisions set forth in 18 Pa.C.S. §7508 violate the tenets of equal protection under either the United States or the Pennsylvania Constitutions.

CONCLUSION:

The applicability of the mandatory sentencing provisions set forth in 18 Pa.C.S. §7508 to individuals who are convicted of delivering or possessing with the intent to deliver controlled substances in weights large enough to trigger those provisions do not violate the rights of equal protection as guaranteed by the United States and the Pennsylvania Constitutions.

BY THE COURT:
/s/ Rita Donovan Hathaway, Judge

Date: Dec. 7, 2011

Blank Page

INDEX

STATUTES

Purdon's Pennsylvania
Consolidated Statutes Annotated

Purdon's Pennsylvania Statutes

RULES

Pennsylvania Rules of Appellate Procedure

Pennsylvania Rules of Civil Procedure

Pennsylvania Rules of Civil Procedure (continued)

Pennsylvania Rules of Criminal Procedure

Pennsylvania Rules of Orphans' Court

Westmoreland County Rules of Court

United States Code

Pennsylvania Constitution

Restatement (Second) of Torts

Page

INDEX

INDEX

INDEX

Blank Page