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CONTAINING

Decisions of the Courts of Westmoreland County, Pennsylvania

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2013

TABLE OF CASES REPORTED

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ROCCI ROSS, a minor by and through his
Natural Guardian, SUSAN ROSS, Plaintiff
V.
HEMPFIELD AREA SCHOOL DISTRICT, Defendant

CIVIL RIGHTS

Rights Protected and Discrimination Prohibited In General; Handicap, Disability or Illness; Who Is Disabled; What Is Disability; Impairments In General; Major Life Activities

1. Under the Americans With Disabilities Act (ADA), a disability is defined as (1) a physical or mental impairment that substantially limits one or more major life activities of an individual; (2) a record of such impairment; or (3) being regarded as having such an impairment.

2. Non-contagious temporary cold sore did not fall under ADA's definition of disability when it was not a physical impairment that substantially limited one or more of Plaintiff's major life activities.

3. Defendant school district did not regard Plaintiff as having a physical impairment that substantially limited one or more of Plaintiff's major life activities when school district merely regarded Plaintiff as having a cold sore that may have been contagious for a period of time, causing school district to take safety precautions and shut down wrestling program for 14-day time period.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 11002 of 2009

Appearances:
Samuel J. Cordes,
Pittsburgh, for the Plaintiff
Michael L. Fitzpatrick,
Carnegie, for the Defendant

BY: GARY P. CARUSO, PRESIDENT JUDGE

DECISION AND ORDER

This matter is currently before me as the result of a Motion for Summary Judgment filed on behalf of the defendant. This matter arises as the result of a civil action wherein the plaintiff claims that Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §12132, has been violated by the defendant. The plaintiff contends that the violation resulted from Rocci Ross being excluded from participation in, and being denied the benefits of, services, programs and activities provided by the School District because of a disability, all of which subjected him to harassment. Rocci claims that he has suffered damages in the nature of the loss of educational opportunities and emotional distress, anxiety, humiliation and inconvenience. He also requests, based upon the alleged violations of the ADA, that the defendant be ordered to compensate the plaintiff for any out of pocket expenses related to this parents being required to make alternative schooling arrangements for him; and that he be awarded compensatory damages; and that the School District be enjoined from discriminating or retaliating again the plaintiff as prohibited by the ADA; and that the plaintiff be awarded costs

and expenses of the litigation including attorneys fees; and any other relief that the Court deems appropriate.

Rocci Ross was a junior high wrestler. He developed a cold sore on his lip. Rocci's mom was concerned because there had been an outbreak of Herpes Gladitorium among wrestlers in western Pennsylvania so she took Rocci to the doctor. Rocci's doctor determined that he did not have Herpes Gladitorium. The day after his doctor's appointment Rocci went to see the school nurse to obtain Neosporin to put on his cold sore. Later, another school nurse notified the athletic department that Rocci had Herpes Gladitorium. Rocci did not attend wrestling practice that night. An athletic trainer at the school contacted the Department of Health for information and then gathered the wrestlers together to conduct a skin check of the wrestlers with whom Rocci had contact. This gathering was also attended by Greg Meisner, the Athletic Director and Jack Bachman, the junior high wrestling coach. There was one other wrestler that had a cold sore that "was on the healing side". It was decided that the wrestling program would be shut down for 10 to 14 days. Meisner explained to Mr. Bachman that he was taking this action for the safety of the kids because he did not want the Herpes to spread to others. At this point there had been no communication with Rocci. There had been no request that Rocci provide a writing from his doctor stating whether he was contagious. The action that was taken by Mr. Meisner was taken without his observation of Rocci. Further, he had not seen a doctor's note nor did he talk to the parents of Rocci before making the decision to shut down the program.

Rocci began to receive text message at his home wherein he was blamed for the wrestling program's shut down. That same evening Rocci's mom spoke to Mr. Bachman and explained that Rocci's doctor said Rocci was not contagious. Mr. Bachman suggested that Mrs. Ross get a note from the doctor. On the next day the note was obtained and faxed to the fax number provided by Mr. Bachman the previous day. Nevertheless the program remained closed. Rocci was being teased by his classmates for causing the closing of the wrestling program. Rocci then left the School District for a period of time and attended a charter school.

The first thing that must be determined is whether the plaintiff was suffering from a "disability" which would qualify him for protection under the ADA. Under the ADA a disability is defined as (1) a physical or mental impairment that substantially limits one or more major life activities of an individual; (2) a record of such impairment; or (3) being regarded as having such an impairment. 42 U.S.C. §12102. I find that a herpes cold sore does not fall under the Americans with Disabilities Act's definition of a "disability". This temporary cold sore did not substantially limit one or more of the major life activities of the plaintiff. I find, based upon the evidence, that no two reasonable people could differ in the conclusion that a non contagious, temporary cold sore is not a physical impairment that substantially limits one or more major life activities of an individual. For the plaintiff's counsel to argue otherwise serves only to denigrate those with actual impairments that substantially limit their life's activities. Here this temporary cold sore merely prevented the plaintiff from participating in a wrestling program for, at most, a period of 14 days. Also, the plaintiff herein was not

subject to any individualized disparate treatment, as the whole wrestling program was shut down for the 14 day period. The School District also had information that another wrestler on the team also had an outbreak of a cold sore on his face. The School District also knew that neighboring School Districts were having herpes skin related issues with their wrestling programs. Here the School District did not regard the plaintiff as having a disability. They did not regard him as having a physical impairment that substantially limited one or more of his major life activities. They merely regarded him as having a cold sore that may have been contagious for a period of time. Thus, the School District took safety precautions by shutting down the wrestling program for all wrestlers involved in the program. Even if the School District, through its employees, did not act in all manners that the plaintiff believed were appropriate under the circumstances presented to them, the condition of the student did not invoke the protection of the ADA.

Therefore, I will enter the following Order.

ORDER

And now this 26th day of December, 2012, in accordance with the foregoing Decision, it is hereby Ordered and Decreed that the Motion for Summary Judgment filed by the Hempfield Area School District is granted and the Complaint against it is dismissed.

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

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COMMONWEALTH OF PENNSYLVANIA
V.
MELISSA L. McMULLEN, Defendant

CRIMINAL LAW

Sentencing; Petition Requesting Early Termination of Probation; Adam Walsh Act; Plea Agreements

1. Plea Agreements are strictly enforced; if either party to a negotiated plea agreement believed the other side could approach the judge and have the sentence unilaterally altered, neither the Commonwealth nor any defendant would be willing to enter into such an agreement.

2. Plea Agreements cannot be made voluntarily and knowingly with a full understanding of the consequences if the plea agreement may be altered by imposition of conditions that did not even exist at the time of the entry of the plea.

3. Defendant's request to alter her plea agreement, by which she avoided trial on charges that would have required registration under Megan's Law had she been found guilty, may not be altered simply because she is doing well on probation.

4. Defendant's guilty plea to charges, as part of a plea agreement, do not require her to register under the Adam Walsh Act, a law that did not exist when she entered her plea, even though such guilty plea would require such registration under ordinary circumstances.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
No. 3316 C 2008
No. 3317 C 2008

Appearances:
Jennifer Dupilka, Assistant District Attorney,
Westmoreland County, for the Commonwealth
Caroline Roberta,
Pittsburgh, for the Defendant

BY: JOHN E. BLAHOVEC, JUDGE

OPINION AND ORDER OF COURT

The Defendant, Melissa L. McMullen, was charged with: three counts of Indecent Assault, 18 Pa. C.S.A. 3126 (a) (8) M-2; one count of Interference with Custody of Children, 18 Pa. C.S.A. 2904 (a) F-3; three counts of Unlawful Contact or Communication with Minor, 18 Pa. C. S. A. 6318 (a) (1) F-3; Criminal Use of a Communication Facility, 18 Pa. C.S.A. 7512 (a) F-3; two counts of Selling or Furnishing Liquor or Malt or Brewed Beverages to Minors, 18 Pa. C. S. A. 6310. 1 (a) M-3; and two counts of Corruption of Minors, 18 Pa. C.S.A. 6301 (a) (1) M-l at Case Numbers 3317 C 2008. The offense dates were between February 23, 2008 and March 3, 2008. The victim was E.D.

At Case Number 3316 C 2008, Defendant was charged with; Interference with Custody of Children, 18 Pa. C.S.A. 2904 F-3; three counts of Corruption of Minors, 18 Pa. C.S.A. 6301 (a) (1) M-l, and three counts of Selling or Furnishing Liquor or Malt or Brewed Beverages to Minors, 18 Pa. C.S.A. 6301.1(a) M-3. The victims in

3316 C 2008 were E.D., A.D. and D.S. The offense date was February 15, 2008. The Defendant had been E.D.'s basketball coach.

On June 24, 2009 at 3316 C 2008, the Defendant entered a plea of guilty to Count One, Interference with Custody of Children, 18 Pa. C.S.A. 2904 (a) F-3 and Count Two, Corruption of Minors, 18 Pa. C.S.A. 6301 (a) (1) M-1. All other charges were dismissed upon motion of the Commonwealth. Defendant was sentenced by the Court, pursuant to a negotiated plea agreement to two years intensive probation at Count One consecutive to the sentence imposed at 3317 C 2008 and one year intensive probation at Count Two concurrent to Count One.

On the same day, Defendant entered a plea of guilty at 3317 C 2008 to Count One, Indecent Assault, 18 Pa. C.S.A. 3126 (a)(8) M-2; Count Two, Indecent Assault, 18 Pa. C.S.a. 3126 (a) (8), M-2, Count Three, Indecent Assault, 18 Pa. C.S.A. 3126 (a) (8), M-2; Count Four, Interference with Custody of Children, 18 Pa. C.S.A. 2904 (a) F-3; Count Nine, Selling or Furnishing Liquor or Malt or Brewed Beverages to Minors, 18 Pa. C.S.A. 6310. 1 (a) M-3; Count Ten, Corruption of Minors, 18 Pa. C.S.A. 6301 (a) (1) M-1; Count Twelve, Corruption of Minors, 18 Pa. C.S.A. 6301 (a) (1) M-1. Counts 5,6,7,8, and 11 were dismissed upon motion of the Commonwealth.

The Defendant was sentenced according to a negotiated plea agreement as follows:

Count One:	One Year intensive probation;
Count Two:	One Year intensive probation consecutive to Count One;
Count Three:	One Year intensive probation consecutive to Count Two;
Count Four:	Two Years intensive probation consecutive to Count Three;
Count Nine:	One Year intensive probation consecutive to Count Four plus a $1000.00 Fine;
Count Ten:	One Year intensive probation consecutive to Count Nine;
Count Twelve:	One Year intensive probation consecutive to Count Ten.

The Sentencing Order further provides that after five years, Defendant may present a Petition to the Court seeking to reduce intensive supervision to regular probation. Defendant was ordered to pay costs and supervision fees; obtain sexual offenders evaluation by Dr. Carol Hughes (a recognized authority in the field and member of the Megan's Law Assessment Board) and follow treatment recommendations. Defendant was also ordered not to have contact with the victim or her family, no unsupervised contact with minors, and was prohibited from coaching sports teams.

The plea agreement was accepted by the Court. Defendant was represented by competent counsel. The government was represented by an Assistant District Attorney who had special expertise as a prosecutor of sex offenses. In the experience of this

Court, members of the District Attorney's "sex unit", in addition to knowledge of the law have an especially acute sensitivity to the wishes and needs of the victims of sex crimes. Defendant pled guilty to no offenses requiring registration under Megan's Law and that factor was a part of the negotiated plea agreement. This Court accepted the plea as knowingly, intentionally and voluntarily entered by the Defendant. This Court accepted the plea agreement as entered between the government and the Defendant, with both represented by competent counsel with the victim and her family in agreement. The sentence imposed was also within the standard range of the Sentencing Guidelines as Defendant had no prior criminal record.

This matter comes before the Court for determination of a Petition Requesting Early Termination of Probation filed on behalf of the Defendant. On or about November 19, 2012, Defendant was notified by her Probation Officer that pursuant to the law commonly known as the Adam Walsh Act (AWA), effective December 20, 2012, the Defendant would be required to register as a sex offender with the Pennsylvania State Police. The federal AWA compels states to conform to its standards or lose 10% of certain criminal justice funds. Pennsylvania became AWA compliant by enacting legislation effective on December 20, 2012. See PA. C.S.A. 9799 et seq.

Under the new law, charges that Defendant pled guilty to on June 24, 2009 now require registration. Defendant would be required to register as a sex offender for the rest of her life. Defendant argues that this change in the law could not have been contemplated by the parties three years earlier when the negotiated plea agreement was accepted by the Court. Parenthetically, this Court makes no claim to an ability to foretell the future incidental to donning a judicial robe. Defendant seeks either an early termination to her probation prior to December 20, 2012 or "permission to renegotiate a new basis for the guilty pleas nunc pro tunc before December 20, 2012."

It should be noted that Defendant has been in compliance with her intensive probation. She has paid costs and supervision fees of $4,002.85. She has been evaluated by Psychologist Carol Hughes. The evaluator determined to a reasonable degree of professional certainty within the field of psychology that Defendant "presents with a low risk for re-offense and does not present with significant risk to community safety." These factors do not lead this Court to conclude that early termination of probation is appropriate. Rather, these factors show that the Commonwealth's plea offer was sensible and warranted (given the victim's agreement). They make this Court feel that an appropriate sentence was imposed given the clarity of 20-20 hindsight.

The Commonwealth has noted in its response to the Petition that our Supreme Court has held that things like registration and license suspensions are not punishment but only collateral consequences of a plea. In *Commonwealth vs. Leidig,* 598 Pa. 211, 956 A.2d 399 (2008), Defendant had entered a plea of nolo contendre to an offense that required Megan's Law registration. He was advised that his plea subjected him to ten year registration requirements under Megan's Law I. Subsequently, upon learning he would instead be subject to the lifetime registration requirements of Megan's Law II, defendant moved to withdraw his plea and modify sentence. The trial judge denied

both motions and the Pennsylvania Supreme Court ultimately granted allowance of appeal. In affirming the Superior Court's affirmance of the trial court's decision, Mr. Justice McCaffery noted the distinction between a direct and collateral consequence of a guilty plea has been defined by the Supreme Court as the distinction between a criminal penalty and a civil requirement over which a sentencing judge has no control.

This distinction makes perfect sense in the real world. The easiest example is the license suspension that follows conviction of certain drug offenses. In *Leidig,* Defendant was advised he had to register as a sex offender for ten years under Megan's Law I. He had pleaded to an offense that require registration. The only error was in the duration of the registration period. The collateral consequence of registration existed at the time of the plea. In the present case, Defendant pleaded guilty to offenses that did not require sex offender registration. To subject her to such registration three years after her plea is not imposing a collateral consequence because that consequence did not even exist at the time of the plea.

Plea agreements or plea bargains, as they are often referred to, are sometimes looked on with disfavor by the public. In Westmoreland County, the Criminal Court disposes of around 5000 new cases per year with only 30 to 40 of those cases being disposed of by jury trials. Every other county may have similar statistics. Plea bargains do not represent situations wherein the Commonwealth "gives away the store". Rather, plea bargains are based upon evaluation of the evidence, determination of any evidentiary issues, consideration of the wishes of the victim, protection of society, amenability to rehabilitation, likelihood of restitution, the Sentencing Guidelines, and many other factors. Both sides benefit from plea bargains. The District Attorney not only represents the interest of the victims, but also the people of Pennsylvania. Plea agreements are not made in the recesses of dark alleys but in the bright light of Courtrooms on the public record. The system would collapse without them.

Our appellate courts have long recognized the nature, viability and necessity of plea agreements. In *Santobello vs. New York,* 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), the United States Supreme Court held that where a plea agreement has been entered of record and accepted by the trial court, the state is required to abide by the terms of the plea agreement.

In *Commonwealth vs. Ortiz,* 854 A.2d 1280, 2004 Pa. Super. (2004) the Superior Court held that when a plea is entered following negotiations, it is even more important that the terms of the agreement be followed. In *Commonwealth vs. Coles,* 365 Pa. Super. 562, 530 A.2d 453, 458, (1987) the Superior Court explained why it is essential that negotiated pleas be strictly enforced:

> "If either party to a negotiated plea agreement believed the other side could, at any time following entry of sentence, approach the judge and have the sentence unilaterally altered, neither the Commonwealth nor any defendant would be willing to enter into such an agreement"

The *Coles* Court refused to allow a judge to accede to a defendant's request to accede to a defendant's request to reduce his sentence <u>one week</u> after a negotiated

guilty plea, reasoning that it would "strip the Commonwealth of the 'benefit of the bargain". The Court expounded:

> ''To hold otherwise would make a sham of the negotiated plea process and would give the defendant a second bite at his sentence. Which we have frequently deplored in the context of withdrawal of a guilty plea." Id. at 456.

In *Commonwealth vs. Zuber,* 466 Pa. 453, 353 A.2d 441 (1976), Chief Justice Jones noted: While it is true that the practice of plea bargaining is looked upon with favor, the integrity of our judicial process demands that certain safeguards be stringently adhered to so that the resultant plea as entered by a defendant and accepted by a trial court will always be one made voluntarily and knowingly, with a full understanding of the consequences.

It is respectfully submitted that a plea cannot be made voluntarily and knowingly with a full understanding of the consequences (collateral or not) if the plea agreement may be altered by imposition of conditions that did not even exist at the time of the entry of the plea.

What both parties are entitled to in the present case is enforcement of the plea agreement. Defendant should not be permitted to have nearly seven years of probation removed merely because she is doing well on probation. The Commonwealth argues in its answer to the petition, granting Defendant's petition would cause substantial prejudice to the Commonwealth "as it has been several years since these crimes occurred and the victim is just starting to heal."

The Commonwealth also argues that the negotiated plea agreement was "not crafted in order to avoid Megan's Law registry." Further, the Commonwealth agrees: "the charged offenses were not Megan's Law applicable in 2004."

This Court determines that the plea agreement validly entered must be enforced. Additionally, this Court determines that modification of the agreement is not an option without consent of both sides.

What then of the Defendant? Should she now be subject to lifetime registration as a sex offender as the result of the passage of a law that did not even exist when she entered her plea? Due process, fundamental fairness, justice, and even the laws of contract say no.

Would it be legal to avoid the "fiscal cliff" for Congress to pass a law which would require every tax payer to pay an additional 10% income tax from 2000 forward? Would it be legal to pass a criminal law which required every person who pled guilty or was convicted of a crime since 1995 to pay an additional $5000.00 fee to supplement the state budget? What if, in order to reduce the strain on over taxed probation offices both state and county, the legislature passed a law providing that every person on probation at present will have their probationary term reduced by 50 per cent? Would the Commonwealth agree to such a law?

This Criminal Court Judge like many, I suspect, handles hundreds of cases every month. Most are resolved by agreements; punishments are imposed; criminals go to

jail; rehabilitation efforts are made; addicts receive treatment; victims are heard, and sometimes compensated; people who slipped once are given a second chance through ARD or PWOV, costs and terms to plea agreements, whether we call those terms "collateral consequences" or modifications of sentence is patently unfair and violative of fundamental due process. As defense counsel asked in the present case: "How are we ever to be effective advocates if we are to tell our clients that despite the agreement we have reached with the government, and which the Court has approved, you may become subject to conditions created in the future, which do not exist now, and which no one can foresee?"

If consequences can be imposed three years after entry of the plea agreement, there can be no certainty in negotiated guilty pleas. That is a world this Court simply cannot imagine.

Accordingly, the following Order is entered:

AMENDED ORDER OF COURT

AND NOW, this 18th day of December, after consideration of the Petition Requesting Early Termination of Probation, IT IS HEREBY ORDERED AND DECREED as follows:

1) The Petition is denied.
2) The request to re-negotiate the plea agreement nunc pro tunc is denied;
3) The Defendant is not required to register as a sex offender under Act 111 of 2011, 42 Pa. C. S. A. Sec. 9799 et. Seq., also known as Pennsylvania SORNA. Application of the statute to the Defendant violates due process of law, fundamental fairness, and provisions of the negotiated plea agreement entered into between the Defendant and the government. It would also destroy the process of negotiated plea agreements essential to the efficient disposition of criminal cases in Westmoreland County.

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

CAROLINE CASTELLUCCIO, Plaintiff
V.
PENN TOWNSHIP; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION; PATRICIA FASICZKA; and MARK MINNAJI, Defendants

AUTOMOBILES

Injuries from Defects or Obstructions in Highways and Other Public Places; Nature and Grounds of Liability

1. To maintain an action against a Commonwealth defendant, the Sovereign Immunity Act requires that the cause of action fall within one or more of nine enumerated exceptions in which sovereign immunity has been waived.

2. A dangerous condition of highways is one of the exceptions to sovereign immunity.

3. It is a question of fact, not law, whether a dangerous condition existed.

4. Township's Motion for Summary Judgment denied because question of fact existed as to whether condition of highway was a dangerous one even though township asserted that it had no actual or constructive notice of any alleged dangerous conditions at intersection or complaints of sight distance problems.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION – LAW
No. 5208 of 2009

Appearances:

Gerald J. Hutton,
Pittsburgh, for the Plaintiff
Brian P. Gabriel,
Pittsburgh, for the Defendant Penn Township
John R. Benty,
Pittsburgh, for the Defendant Commonwealth of Pennsylvania, Department of Transportation
Warren L. Siegfried,
Pittsburgh, for the Defendant Patricia Fasiczka
Kerri A. Shimborske-Abel,
Greensburg, for the Defendant Mark Minnaji

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, Penn Township. The instant case involves a motor vehicle and motorcycle accident which occurred on July 26, 2007, at the intersection of Pleasant Valley Road and State Route 4047 (a/k/a Snyder Road), in Penn Township, Westmoreland County, Pennsylvania. Plaintiff was a passenger on a motorcycle operated by Defendant, Mark Minnaji, which was travelling on Pleasant Valley Road, when a vehicle operated by Defendant, Patricia Fasiczka, in an attempt to make a left

hand turn onto Pleasant Valley Road, entered the intersection from Snyder Road and was struck by the motorcycle. As a result of the collision Plaintiff suffered various personal injuries.

Pennsylvania Rule of Civil Procedure 1035.2 provides that summary judgment is only appropriate when, after examining the record in favor of the non-moving party, there is no genuine issue of material fact and the movant clearly establishes entitlement as a matter of law. *Ertel v. Patriot News Company,* 674 A.2d 1038 (Pa. 1996). In passing upon a Motion for Summary Judgment, the trial 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. *Marks v. Tasman,* 527 Pa. 132, 589 A.2d 205 (1991). It is only when the facts are so clear that reasonable minds cannot differ, may a trial court properly enter summary judgment. *Basile v. H&R Block, Inc.,* 761 A.2d 1115, 1118 (Pa. 2000).

Plaintiff sued Penn Township for negligently designing, constructing, inspecting, maintaining, and repairing both Pleasant Valley Road and Snyder Road such that there was inadequate sight distance; failure to reduce the speed limit on both roads; failure to warn; failure to cut back vegetation and/ or cut back the embankment; failure to relocate the intersection; failure to redesign the intersection; and failure to post cones, barrels or other warning devices to warn of the dangerous conditions. According to the Complaint, Pleasant Valley Road was under the care, custody, control and owned by Penn Township. At Count 1 of her Complaint, Plaintiff averred that Penn Township maintained Pleasant Valley Road and in doing so owed a duty of care to insure that the conditions upon Pleasant Valley Road and the intersection of Pleasant Valley Road and Snyder Road were safe for those using the roadway.

In a report submitted by Ronald Eck, P.E., Ph.D., it was confirmed that at the time of the accident, there were neither stop signs nor traffic control devices at the intersection along either Pleasant Valley Road or Snyder Road. Defendant argues Mr. Eck's opinion is not supported by a traffic or engineering investigation. However, in Dr. Eck's report he expressly referenced a traffic volume and speed study prepared by Mr. Greg Sullenberger. In his reports Dr. Eck opines at length on the appropriateness and effect of the proposed traffic controls, noting that the placement of multiway stop signs would not impact traffic flow.

To maintain an action against a Commonwealth defendant, the Sovereign Immunity Act requires that the cause of action fall within one or more of the nine enumerated exceptions in which sovereign immunity has been waived. 42 Pa.C.S.A. sec. 8522. A dangerous condition of highways under the jurisdiction of a Commonwealth agency is one of the exceptions to sovereign immunity. 42 Pa.C.S.A. sec. 8522 (b)(4). Defendant Penn Township maintains Plaintiff's cause of action fails to fall within any of the exceptions to sovereign immunity. Penn Township argues that no defect originating from Penn Township-owned real estate caused the accident. Additionally, Penn Township argues that it had no actual or constructive notice of any alleged dangerous conditions at the intersection of Pleasant Valley Road and Snyder Road.

The Pennsylvania Supreme Court held in *Kennedy v. City of Philadelphia,* 635 A.2d 1105 (Pa. 1994) that plaintiff failed to establish an exception to governmental

immunity because she offered only proof of a dangerous condition in general, but did not prove that the defendant had actual or constructive notice under 42 Pa C.S. 8543(b)(4). In the instant case, Penn Township maintains there is no evidence of a single prior accident that was similar or alleged to have involved insufficient sight distance at this intersection. Moreover, there is no evidence of any complaints regarding sight distance of vehicles turning out of Snyder Road at the intersection.

Whether a dangerous condition existed at the intersection of Pleasant Valley and Snyder Roads is a question for a jury. In *Bendas v. Township of White Deer,* 531 Pa. 180, 611 A.2d 1184 (1992) motorists whose vehicles collided at the intersection of a Commonwealth highway and a township road brought separate suits, alleging both the township and the Department of Transportation negligently failed to erect traffic control devices at the intersection or, in the alternative, failed to correct a dangerous condition. The Pennsylvania Supreme Court held that the question of what constitutes a dangerous condition is a question of fact, not law, and is to be answered by the jury.

Further, regarding Penn Township's argument that it had no actual or constructive notice of any alleged dangerous condition at the intersection of the two roads, Penn Township's Manager testified that there is no sight distance because of the geometry of the intersection and that this defect was obvious and known by him for years. The sight distance limitation was also reported by the investigating Penn Township police officer who states that "it was long known that the sight distance is impeded at the intersection." The Pennsylvania Supreme Court held that the notice required under the real estate exception to sovereign immunity is co-extensive with that required under a common law cause of action in negligence. *Commonwealth of Pennsylvania, Department of Transportation v. Patton,* 546 Pa. 562, 686 A.2d 1302 (1997). The court stated whether a landowner had constructive notice of a dangerous condition and thus should have known of the defect, i.e., the defect was apparent upon reasonable inspection, is a question of fact. As such, it is a question for the jury, and may be decided by the court only when reasonable minds could not differ as to the conclusion.

Summary judgment should be entered only in those cases which are clear and free from doubt that the moving party is entitled to judgment as a matter of law. Here, viewing the record evidence the Court concludes that Defendant Penn Township has failed to satisfy its burden in moving for summary judgment. The question of what is or is not a dangerous condition is a question of material fact that must be answered by a jury. Similarly, whether Penn Township had actual or constructive notice of any alleged dangerous condition at the intersection of Pleasant Valley Road and Snyder Road is a question of fact. Accordingly, the following Order of Court will be entered denying Defendant Penn Township's Motion for Summary Judgment.

ORDER OF COURT

AND NOW, this 16th day of November, 2012, it is hereby ORDERED and DECREED that Penn Township's Motion for Summary Judgment is denied.

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

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ALBERT E. THOMPSON, JR. and RITA M. THOMPSON, his wife,
and JOHN A. RUNCO and JOAN C. RUNCO, his wife, Plaintiffs
V.
JASON ZIMMERMAN and CHRISTINE ZIMMERMAN, his wife, Defendants

REAL ESTATE

Restrictive Covenants; Equitable Relief; Recreational Vehicle Parking on Lot Restricted to Single Family Dwellings; Estoppel

1. In interpreting a restrictive covenant running with the land, the intention of the drafters at the time the restrictive covenant was entered into governs.

2. Restrictive covenants must be construed in the light of their language, the nature of the subject matter, the apparent object or purpose of the parties, and the circumstances or conditions surrounding their execution.

3. Where clear and unambiguous language of restrictive covenant limits use of residential lots to one detached single family dwelling and a one or two-car private garage, no recreational vehicle, trailer, or other form of mobile residence is permitted.

4. Plaintiffs were not estopped from seeking equitable relief for removal of recreational vehicle on Defendants' lot where Plaintiffs acquiesced in allowing Defendants to have a pop-up camper on their property that was smaller and was only visible periodically.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION – LAW
No. 5862 of 2011

Appearances:
R. Jerry Little,
New Kensington, for the Plaintiffs
Rachel M. Yantos,
Greensburg, for the Defendants

BY: GARY P. CARUSO, PRESIDENT JUDGE

DECISION AND ORDER

This case is before the Court as the result of a Motion for Summary Judgment filed on behalf of Defendants, Jason and Christine Zimmerman. Plaintiffs, Albert E. Thompson, Jr., and his wife, Rita M. Thompson, and John A. Runco and his wife, Joan C. Runco, are owners of Lots No. 245 and 246 of the Bergman No. 4 Plan of Lots, respectively, also known as 240 and 244 Laura Drive, New Kensington, Pennsylvania. Defendants are owners of Lot No. 233 of the Bergman No. 4 Plan of Lots and who reside at 227 Laura Drive.

On August 30, 2011, Plaintiffs brought this Complaint in Equity against Defendants surrounding the parking of the Defendant's Recreation Vehicle (RV) on their own lot since late spring or early summer of 2011. Contained within the recorded Plan for Bergman No. 4 are certain restrictive covenants designed to run with the land and inure to the benefit of all owners of lots in the plan. Plaintiffs contend that the Defendants

are in violation of certain of these restrictive covenants. Plaintiffs request the Court to enter an order declaring that the Defendants have intentionally and knowingly violated the restrictive covenants and that the continuous violation of said covenants is a nuisance. Plaintiffs request the Court to grant a permanent injunction requiring Defendants to remove their RV from their property and prohibit them from parking or placing it on their lot.

Defendants have filed the instant Motion for Summary Judgment on the following grounds. Defendants argue they are not in violation of any of the covenants. Additionally, Defendants maintain Plaintiffs are estopped from objecting to this alleged violation by asserting that the doctrine of laches prevents this lawsuit due to Plaintiffs' failure to object to a pop-up camper Defendants placed on their property prior to the Defendants' purchase of the RV. Further, Defendants argue Plaintiffs are precluded from asserting this action since they have brought this litigation with unclean hands. Defendants assert no material issues of genuine facts exist as to these issues and, thus Defendants are entitled to summary judgment as a matter of law.

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).

Paragraphs 6 and 7 of the restrictive covenants state as follows:

> 6. No trailer or other form of mobile residence shall be moved upon any lot in said plan, and no basement, tent, shack, garage, barn or other outbuilding shall at any time be used as a residence, temporarily or permanently; nor shall any residence of a temporary character be permitted nor shall any garage be erected upon any lot until a dwelling house shall be erected thereon. Every structure erected in said plan shall be completed within two years from the date when construction began.
>
> 7. No structure shall be moved onto any lot unless it shall conform to and be in harmony with existing structures in said plan.

Defendants argue the above covenants refer to trailers as mobile homes and residences and not the type of RV used by Defendants for camping purposes off the property. Defendants argue they do not reside in or camp in their RV on their property in the Plan.

In interpreting a restrictive covenant, the intention of the drafters at the time the

restrictive covenant was entered into governs. *Buck Hill Falls Co. v. Clifford Press,* 791 A.2d 392, 397 (Pa. Super. 2002). Restrictive covenants must be construed in the light of (1) their language; (2) the nature of the subject matter; (3) the apparent object or purpose of the parties; and (4) the circumstances or conditions surrounding their execution. *Snyder v. Plankenhorn,* 153 A.2d. 209 (1960).

In the case of *Hodder v. Green,* 359 Pa. Super. 409 (1986), the defendants wanted to place a trailer on a lot in a residential plan. The covenant prohibited mobile homes and trailers to be placed on the premises. The defendants argued that their trailer was not a trailer since they intended to construct a foundation and remove the wheels and the undercarriage so that it would become immovable. The Court held that it was prohibited and reasoned that "because the restrictive covenant was intended to regulate the aesthetic characteristics of the neighborhood, the Court concluded that even if placed on a foundation, it nevertheless is the type of home that was meant to be excluded by the restrictive covenant." Additionally, in the case of *Shohola Falls Trails End Property Owners Ass'n.. Inc. v. Zoning Hearing Board of Shohola Township, Pike County, PA,* 679 A.2d 1335, the Court held that even a recreational vehicle was a structure within the meaning of a zoning ordinance.

In the instant case, it is clear that the developers intended to specifically limit certain types of structures to be built or moved onto or placed on each and every lot in the recorded subdivision. This is obvious from Paragraph 1 of the restrictive covenants which states, "All lots in said Plan shall be known and designated as residential lots, and no structure shall be erected on any lot other than one detached single-family dwelling and one or two-car private garage." The language of the covenants is not ambiguous. The covenant is clear. No trailer or other form of mobile residence shall be moved upon any lot in said plan.

Defendants also argue that Plaintiffs should be barred from pursuing their cause of action for the reason that they delayed the filing of the lawsuit and as a consequence Defendants were somehow prejudiced by their delay. Defendants waited until May or June of 2011 to bring the trailer in question onto their property. After that, Plaintiffs immediately notified the Defendants of their objections and filed civil suit shortly thereafter. Therefore, any argument made by the Defendants as to Plaintiffs' delay in invoking the aid of equity until after the Defendants, with the knowledge of the Plaintiffs, had expended considerable funds is without merit. Plaintiffs acted timely by immediately notifying the Defendants and shortly thereafter filing suit.

Defendants additionally argue that estoppel applies because Plaintiffs acquiesced by allowing Defendants to have a pop-up camper on their property. The pop-up camper was either behind Defendants' house or at the bottom of the driveway and was only visible periodically. Furthermore, a pop-up camper is a tiny camper; whereas, the trailer in question is 32 feet in length, 7 feet in width and 10 feet in height and cannot be compared to a pop-up camper. Therefore, the argument made by the Defendants as to Plaintiffs' being prevented from pursuing this action based on acquiescence is without merit.

Based on the foregoing, summary judgment at this time is inappropriate. Plaintiffs

have established a prima facie case supported by facts that require the case to proceed to trial. Accordingly, the following Order of Court will be entered denying Defendant's Motion for Summary Judgment.

ORDER OF COURT

AND NOW, this 11th day of September, 2012, it is hereby ORDERED and DECREED that Defendants Jason and Christine Zimmerman's Motion for Summary Judgment is DENIED.

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

ALBERT E. THOMPSON, JR. and RITA M. THOMPSON, his wife,
and JOHN A. RUNCO and JOAN C. RUNCO, his wife, Plaintiffs
V.
JASON ZIMMERMAN and CHRISTINE ZIMMERMAN, his wife, Defendants

REAL ESTATE

Restrictive Covenants; Equitable Relief; Recreational Vehicle Parking on Lot Restricted to Single Family Dwellings; Estoppel

1. In interpreting a restrictive covenant running with the land, the intention of the drafters at the time the restrictive covenant was entered into governs.

2. Restrictive covenants must be construed in the light of their language, the nature of the subject matter, the apparent object or purpose of the parties, and the circumstances or conditions surrounding their execution.

3. Where clear and unambiguous language of restrictive covenant limits use of residential lots to one detached single family dwelling and a one or two-car private garage, no recreational vehicle, trailer, or other form of mobile residence is permitted.

4. Plaintiffs were not estopped from seeking equitable relief for removal of recreational vehicle on Defendants' lot where Plaintiffs acquiesced in allowing Defendants to have a pop-up camper on their property that was smaller and was only visible periodically.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION – LAW
No. 5862 of 2011

Appearances:
R. Jerry Little,
New Kensington, for the Plaintiffs
Leslie J. Mlakar and Rachel M. Yantos,
Greensburg, for the Defendants

BY: GARY P. CARUSO, PRESIDENT JUDGE

DECISION AND ORDER

This case is before the Court as the result of Defendants Jason and Christine Zimmerman's Motion for Reconsideration of Amended Order entered October 2, 2012, denying its Motion for Summary Judgment.

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

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Editor's note: An opinion on this docket number dated September 11, 2012, was published in 95 W.L.J. 15.

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).

Plaintiffs, Albert E. Thompson, Jr., and his wife, Rita M. Thompson, and John A. Runco and his wife, Joan C. Runco, are owners of Lots No. 245 and 246 of the Bergman No. 4 Plan of Lots, respectively, also known as 240 and 244 Laura Drive, New Kensington, Pennsylvania. Defendants, Jason and Christine Zimmerman, are owners of Lot No. 233 of the Bergman No. 4 Plan of Lots and reside at 227 Laura Drive.

On August 30, 2011, Plaintiffs brought this Complaint in Equity against Defendants involving the parking of the Defendant's Recreation Vehicle (RV) trailer on their own lot since late spring or early summer of 2011. Contained within the recorded Plan for Bergman No. 4 are certain restrictive covenants designed to run with the land and inure to the benefit of all owners of lots in the plan. Plaintiffs contended that the Defendants are in violation of certain of these restrictive covenants. Plaintiffs requested the Court to enter an order declaring that the Defendants have intentionally and knowingly violated the restrictive covenants and that the continuous violation of said covenants is a nuisance. Plaintiffs filed a Motion for Summary Judgment requesting the Court to grant a permanent injunction requiring Defendants to remove their RV trailer from their property and prohibit them from parking or placing it on their lot.

Defendants filed a Motion for Summary Judgment on the following grounds. Defendants argued they are not in violation of any of the covenants. Additionally, Defendants maintained plaintiffs are estopped from objecting to this alleged violation asserting that the doctrine of laches prevents this lawsuit due to Plaintiffs' failure to object to a pop-up camper that the Defendants placed on their property prior to the Defendants' purchase of the RV trailer, causing prejudice to the Defendants. Further, Defendants argued Plaintiffs are precluded from asserting this action since they have brought this litigation with unclean hands. Defendants asserted that no material issues of genuine facts exist as to these issues and, thus Defendants are entitled to summary judgment as a matter of law.

Paragraphs 6 and 7 of the restrictive covenants state as follows:

> 6. No trailer or other form of mobile residence shall be moved upon any lot in said plan, and no basement, tent, shack, garage, barn or other outbuilding shall at any time be used as a residence, temporarily or permanently; nor shall any residence of a temporary character be permitted nor shall any garage be erected upon any lot until a dwelling house shall be erected thereon. Every structure erected in said plan shall be completed within two years from the date when construction began.
>
> 7. No structure shall be moved onto any lot unless it shall conform to and be in harmony with existing structures in said plan.

Defendants argued the above covenants refer to trailers as mobile homes and residences and not the type of RV used by Defendants for camping purposes off the property. Defendants argued they do not reside in or camp in their RV on their property in the Plan.

In interpreting a restrictive covenant, the intention of the drafters at the time the restrictive covenant was entered into governs. *Buck Hill Falls Co. v. Clifford Press,* 791 A.2d 392, 397 (Pa. Super. 2002). Restrictive covenants must be construed in the light of (1) their language; (2) the nature of the subject matter; (3) the apparent object or purpose of the parties; and (4) the circumstances or conditions surrounding their execution. *Snyder v. Plankenhorn,* 153 A.2d. 209 (1960).

In the case of *Hodder v. Green,* 359 Pa. Super. 409 (1986), the defendants wanted to place a trailer on a lot in a residential plan. The covenant prohibited mobile homes and trailers to be placed on the premises. The defendants argued that their trailer was not a trailer since they intended to construct a foundation and remove the wheels and the undercarriage so that it would become immovable. The Court held that it was prohibited and reasoned that "because the restrictive covenant was intended to regulate the aesthetic characteristics of the neighborhood, the Court concluded that even if placed on a foundation, it nevertheless is the type of home that was meant to be excluded by the restrictive covenant."

In the instant case, it is clear that the developers intended to specifically limit certain types of structures to be built or moved onto or placed on each and every lot in the recorded subdivision. This is obvious from Paragraph 1 of the restrictive covenants which states, "All lots in said Plan shall be known and designated as residential lots, and no structure shall be erected on any lot other than one detached single-family dwelling and one or two-car private garage." Paragraph 7 of the restrictive covenants prohibits the movement of any structures onto any lot unless they shall conform to and be in harmony with existing structures in said plan. The language of the covenants are not ambiguous. The covenants are clear. No trailer or other form of mobile residence shall be moved upon any lot in said plan.

Defendants also argued that Plaintiffs should be barred from pursuing their cause of action for the reason that they delayed the filing of the lawsuit and as a consequence Defendants were somehow prejudiced by their delay. Defendants waited until May or June of 2011 to bring the RV trailer in question onto their property. After that, Plaintiffs immediately notified the Defendants of their objections and filed civil suit shortly thereafter. Therefore, any argument made by the Defendants as to Plaintiffs' delay in invoking the aid of equity until after the Defendants had expended considerable funds is without merit. Plaintiffs acted timely by immediately notifying the Defendants and shortly thereafter filing suit.

Defendants additionally argued that estoppel applies because Plaintiffs acquiesced by allowing Defendants to have a pop-up camper on their property. The pop-up camper was either behind Defendants' house or at the bottom of the driveway and was only visible periodically. Furthermore, a pop-up camper is a tiny camper; whereas, the RV trailer in question is 32 feet in length, 7 feet in width and 10 feet in height and cannot

be compared to a pop-up camper. The RV trailer consumed fully 42% of Defendants' lot frontage. There was no inducement by the Plaintiffs' action which would allow a reasonable person to infer that by failing to object to a small pop-up camper, it would be okay for the Defendants to move onto their property the RV trailer of such proportions. Therefore, the argument made by the Defendants as to Plaintiffs' being prevented from pursuing this action based on acquiescence is without merit.

Based on the foregoing, there is no genuine issue of any material fact as to a necessary element of Plaintiffs' cause of action. It is clear that Defendants are in violation of the restrictive covenants discussed above. Defendants Recreational Vehicle trailer is not in conformity with and is not in harmony with the other structures in the plan. Accordingly, the following Order of Court will be entered.

ORDER OF COURT

AND NOW, this 28th day of December, 2012, it is hereby ORDERED and DECREED that Defendants', Jason and Christine Zimmerman's, Motion for Summary Judgment is DENIED. The Motion for Summary Judgment of the Plaintiffs, Albert E. and Rita M. Thompson and John A. and Joan C. Runco, is GRANTED. Defendants shall remove their Recreational Vehicle/Trailer, being 38 feet long, 7 feet wide and 10 feet in height from their property and are prohibited from parking or placing the same on their lot.

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

CLARA PETERS, an individual, and
PATRICIA RAYNOR, an individual, Plaintiffs
V.
BEVERLY HAHN, an individual, MARLENE FABYONIC, an individual,
KEVIN EAGAN, an individual, RUSSELL WALLIS, an individual,
DENNIS A. MOORE, an individual, BRIAN LENHART, an individual,
PAUL FISCHERKELLER, an individual, RICHARD BAUGH, an individual
and REBECCA BRAMMELL, an individual, And MICHAEL SALVATORE,
an individual, Defendants

LIBEL AND SLANDER

Privileged Communications; Criticism and Comment on Public Matters; Qualified Privilege; Abuse of Qualified Privilege

1. When the statement in question involves a matter of public concern, the First Amendment compels the plaintiff to prove, as an additional element of a defamation action, that the defamatory statements are in fact false.

2. Matters concerning the operation of a public charity, the YMCA, were matters of general interest to the public and, therefore, were matters of public concern.

3. Conditional privilege or qualified privilege is for the Court, not a jury to decide.

4. When statements are fair comment upon judicial proceedings, they are conditionally privileged against defamation suits.

5. Defendants were conditionally privileged to comment on the allegations set forth by Plaintiffs in an underlying lawsuit.

6. Once conditional privilege has been established, the plaintiff must establish that privilege has been abused.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 4928 of 2006

Appearances:

Anthony C. Mengine,
Pittsburgh, for the Plaintiffs

John B. Cromer,
Pittsburgh, for the Defendants Hahn, Fabyonic, Eagan, Wallis, Moore, Lenhart, Fischerkeller, Baugh, and Salvatore

Bradley Linsenmeyer,
Pittsburgh, for the Defendants Eagan, Lenhart, and Fischerkeller

David M. McQuiston,
Pittsburgh, for the Defendant Baugh

Dennis J. Roman and Charlene S. Siebert,
Pittsburgh, for the Defendant Brammell

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION and ORDER OF COURT

This matter is before the Court on Defendants' *Motions for Summary Judgment* in a defamation action filed by two former employees of the Oak Hollow YMCA in North Huntingdon (hereinafter "YMCA") against some members of the YMCA Board of Directors and its Solicitor, Attorney Rebecca Brammell. After careful consideration of the arguments of counsel, we find no genuine issue of a material fact. Therefore, the motions will be granted and the action dismissed.

The facts underlying this controversy are as follows. Plaintiff Patricia Raynor (hereinafter "Raynor") was employed by the YMCA as its Chief Executive Officer for approximately 25 years. Plaintiff Clara Peters (hereinafter "Peters") was employed by the YMCA as the Associate Director for approximately eighteen years. Peters was also the president of the YMCA's "Oak Hollow Auxiliary," whose purpose was to "solicit funds to support program operations and assist in maintaining the buildings and grounds for the benefit of all program participants of the Oak Hollow Auxiliary." Oak Hollow Auxiliary Bylaws, Article 2, ¶2. The Auxiliary acted as a funding stream to the YMCA. The Auxiliary had no independent authority to determine how its funds were spent; that authority lay with the YMCA.

In August 2005, a dispute arose and controversy ensued among the YMCA Board of Directors and the YMCA Auxiliary with respect to the management and budget of the Y and the use of the Auxiliary funds. Plaintiffs had segregated certain funds raised by the Auxiliary into a separate bank account, with another bank, and refused to grant control of those monies to the Board. When the Board asked the Plaintiffs questions about the YMCA's and Auxiliary's finances and recordkeeping, they failed to respond to the Board's satisfaction. As a consequence, and with escalating discord between Plaintiffs and the Board, Peters and Raynor were terminated from their at-will employment.

On March 13, 2006, Peters and Raynor filed an equity action against the Board. The lawsuit (filed at No. 1920 of 2006) alleges that "disputes have arisen between Plaintiffs and the Board with respect to fundraising activities of the YMCA Auxiliary and control over expenditure of those monies." (See Complaint at ¶7.) In addition, the suit references Plaintiffs' personal computers, which were used for YMCA business, and references a lease agreement between Peters and the YMCA for the rental of a three-bay garage and two rooms at the senior center owned by the Y. Among other things, the suit seeks injunctive relief to prohibit the Board and its Solicitor from interfering with Plaintiffs' use of their personal property.

The following day, on March 14, 2006, Plaintiff Peters and her husband, Joseph Peters, and three other individuals, all of whom were members of the YMCA, filed another equity action (at No. 1969 of 2006) against the Board alleging that the Board did not follow the mandatory procedures of the YMCA's Constitution and By-laws, and had abused their discretion with respect to its management and operation. The suit sought injunctive relief in the form of the removal of the Board pursuant to 15 Pa.C.S.A. § 5726(c), and asked the Court to enjoin the Board from suspending or terminating key employees Peters and Raynor, Plaintiffs herein.

On May 1, 2006, both suits were discontinued. However, the YMCA was closed and the Board resigned.

On June 12, 2006, Plaintiffs filed the within lawsuit against nine (9) of the twelve (12) Board members of the YMCA, and against its Solicitor. The Complaint alleges that Defendants made seven defamatory statements concerning the reasons behind Plaintiffs' termination from employment. Defendants filed Preliminary Objections to the Complaint, and the Honorable Daniel J. Ackerman sustained the objections in part, dismissing three (3) of the alleged defamatory statements as inactionable. Consequently, the remaining four statements are the focus of these summary judgment motions, which statements can be summarized as follows:

1) On March 16, 2006, two days after the second of the two equity actions was filed, at a meeting of the Board and certain YMCA members, the Board presented a proposed press release that Plaintiffs purport to infer that the Plaintiffs were guilty of committing serious accounting errors and that they embezzled or improperly withheld funds belonging to the YMCA.

2) The Defendants released a statement to the media about Plaintiffs' termination from employment, which was published on March 18, 2006, in the *Daily News*. This statement allegedly made inferences that were capable of a defamatory meaning.

3) A newspaper article published on March 23, 2006, in the *Pittsburgh Tribune Review,* included allegedly defamatory and untrue remarks by Defendant Brammell, and purportedly insinuated that Peters rented space from the YMCA to store illegal video poker machines, a matter that had been turned over to the authorities.

4) On March 16, 2006, at a meeting of the Y membership, Defendant Brammell, purportedly at the direction of the Board, is alleged to have accused Peters of possessing and storing "illegal" gaming and video machines on YMCA property.

Plaintiffs allege that these statements damaged their business and professional reputations. They contend that because the defamatory communications constitute defamation *per se,* they are not required to prove actual damages. Furthermore, they contend that Defendants' statements were not privileged.

The issue presented with these Motions for Summary Judgment is whether "(1) ...there is no genuine issue as to any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) [i]f, after the completion of discovery relevant to the Motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial will require the issues to be submitted to a jury." Pa.R.Civ.Pr. 1035.2. After careful review of the applicable case law, and a step-by-step analysis of the nuances of the tort of defamation, particularly with respect to matters of public concern and ongoing litigation, we find that Defendants had a conditional privilege to comment as they did in all four statements.

Under Pennsylvania law, truth is an absolute defense to defamation. 42 Pa.C.S.A. § 8343(b). Specifically, section 8343(b) provides:

> **(b) Burden of defendant.**—In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:
>
> (1) The truth of the defamatory communication.
>
> (2) The privileged character of the occasion on which it was published.
>
> (3) The character of the subject matter of defamatory comment as of public concern.

When the statement in question involves a matter of public concern, the First Amendment compels the plaintiff to prove, as an additional element, that the alleged defamatory statements are in fact false. *Lewis v. Philadelphia Newspapers, Inc.,* 833 A.2d 185, 191 (Pa.Super. 2003).

We first examine whether the statements were made on an issue of public concern. An issue is one of "public concern" where there is a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. In other words, a public controversy exists when a reasonable person would expect persons beyond the immediate participants in the dispute to feel the impact of its resolution." *Mendelson v. Morning Call,* Lehigh Co., *aff'd in* 867 A.2d 655 (Pa.Super. 2004). Here, the controversy affected more than the Plaintiffs and the YMCA Board. The YMCA is a charitable organization that serves the local community and is largely supported by donated funds from its members and the public. It provides public services in the form of a swimming program, a library, childcare, services for the elderly, and other recreational and educational activities to improve "the spiritual, mental, social and physical condition of young people." Approximately 1,000 members were directly affected by the Board's decision to close the Y after concerns were raised about its financial condition and the storage of video poker machines on Y premises. Clearly, matters concerning the operation of the YMCA were matters of general interest to the public; this was not merely a private dispute.

Because the dispute out of which this matter arose is a matter of public concern, the Plaintiffs bear the burden to prove that the allegedly defamatory statements were false. Going line by line through each of the statements, Plaintiffs cannot dispute that each of the assertions made by the Plaintiffs is true. However, Plaintiffs argue that these publications "falsely implied" certain facts, and that the words were understood by the recipient – perhaps mistakenly, but reasonably – to mean that Plaintiffs were terminated from their employment because they were engaged in misfeasance or illegal activities. Restatement, Torts, § 563. See *Baird v. Dun & Bradstreet,* 285 A.2d 166 (Pa. 1971). This false implication of facts is sometimes referred to as "defamation by innuendo."

Pennsylvania courts recognize that defamation by innuendo is actionable. A communication may be deemed capable of defamatory meaning by innuendo even though the words utilized therein are not in themselves defamatory. *See, e.g. Thomas Merton Center v. Rockwell Int'l Corp.,* 497 Pa. 460, 467, 442 A.2d 213, 217 (1981); and Livingston v. Murray, 612 A.2d 443, 449 (Pa.Super. 1992). "The legal test to be

applied is whether the challenged language could 'fairly and reasonably be construed' to imply the defamatory meaning alleged by a plaintiff." *Today's Housing v. Times Shamrock Communications,* 21 A.3d 1209, 1215 (Pa.Super. 2011). Even where a plausible innocent interpretation of the communication exists, if there is an alternative defamatory interpretation, it is for the jury to determine if the defamatory meaning was understood by the recipient. Pelagatti v. Cohen, 536 A.2d 1337, 1345 (Pa.Super. 1987).

If our analysis ended here, we would be obliged to deny Defendants' motions for summary judgment and put the ultimate outcome of this case in the hands of a jury. However, even assuming for argument's sake that these statements were capable of a defamatory meaning by innuendo, Defendants' statements are not actionable under the doctrines of "absolute privilege," "fair comment privilege," and "conditional privilege."

Preliminarily, with respect to Defendant Brammell, solicitor for the Board, the Restatement (Second) of Torts, section 586, states:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

Clearly, Defendant Brammell, who spoke in her professional capacity as the attorney for the YMCA Board, is absolutely privileged to comment upon the circumstances surrounding the lawsuits.

Regarding "conditional privilege," it is the duty of the court, not the jury, to rule on the question of conditional privilege. *Rankin v. Phillippe,* 211 A.2d 56, 58 (Pa.Super. 1965). "'An occasion is conditionally privileged when circumstances are such as to lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that facts exist which another sharing such common interest is entitled to know.'" "Thus, proper occasions giving rise to a conditional privilege exist when (1) some interest of the person who publishes defamatory matter is involved; (2) some interest of the person to whom the matter is published or some other third person is involved, or (3) a recognized interest of the public is involved. [Citations omitted.]" *Miketic v. Baron,* 675 A.2d 324, 329 (Pa.Super. 1996). When statements are fair comment upon judicial proceedings, they are conditionally privileged against defamation suits. *Doe v. Kohn Nast & Graf, P.C.,* 866 F.Supp. 190, 193 (E.D.Pa. 1994).

Here, the Plaintiffs had filed two equity actions against the Defendants, and the contents of each of the four allegedly defamatory statements simply stated the position of the Defendants in response to the allegations contained in the lawsuits. If the "fair comment" privilege did not apply to statements that a party intends to make during the course of judicial proceedings, then a plaintiff would be permitted to report his own allegations, because he has filed his pleadings, but a defendant would be subject to a defamation claim because he has not had the opportunity to file a response with the court. This would lead to an incongruous result. In circumstances such as this, a

defendant may fairly comment in advance. *See Doe v. Kohn Nast & Graf, P.C.,* 866 F.Supp. 190, 194-95 (E.D.Pa. 1994).

"Once a matter is deemed conditionally privileged, the plaintiff must establish that the conditional privilege was abused by the defendant. Miketic v. Baron, 675 A.2d 324, 329 (Pa.Super. 1996). Abuse of a conditional privilege is indicated when the publication is actuated by malice or negligence, is made for a purpose other than that for which the privilege is given, or to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege, or includes defamatory matter not reasonably believed to be necessary for the accomplishment of the purpose." *Miketic v. Baron,* 675 A.2d at 329.

In the case before us, the record is devoid of evidence of malice or negligence. To the contrary, the allegedly defamatory statements were in direct response to Plaintiffs' allegations concerning the opening of the Auxiliary bank account outside of the Board's view; the dispute with the Board over expenditures; the Board's interference with Plaintiffs' personal property; the Plaintiffs' termination from employment; and the injunctive relief that Plaintiffs sought against the Board. No malice or negligence appears in the Defendants' responses; their statements were made as a direct response to the allegations in the lawsuits, were fair comment under the law, and thus were conditionally privileged.

Accordingly, we enter the following Order.

ORDER OF COURT

AND NOW, to wit, this 22nd day of October, 2012, based upon the rationale contained in the foregoing Opinion, it is hereby **ORDERED** and **DECREED** that the *Motions for Summary Judgment* filed on behalf of the Defendants are **GRANTED**. The Complaint against all Defendants is **DISMISSED** with prejudice.

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.
GARY J. CELOVSKY, Defendant

CONTROLLED SUBSTANCES
Confidential or Unnamed Informants

Independent police work used to corroborate an otherwise unreliable informants' tip may constitute probable cause by providing the police a sufficient indicia of reliability for the information.

SEARCHES AND SEIZURES
What Constitutes Cause In General; Personal Knowledge or Observation of the Police In General; Places, Objects or Persons to be Searched

1. Probable cause exists when the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense occurred.
2. The totality of the circumstances test dictates that all relevant facts be considered.
3. Separate living units of a multiple tenant building must be treated as if they were separate dwelling houses and probable cause must be shown to each one.
4. The exceptions to this rule occur when there is cause to believe all of the units are being used for the unlawful purpose or when the premises covered by the warrant are being used as a single unit.
5. The odor of marijuana, in itself, is sufficient to establish probable cause.
6. Because the officer smelled the odor of marijuana emanating from the Defendant's home, and because the officers observed the Defendant's four-unit home being used as a single unit for the cultivation of marijuana, the search warrant obtained by the officers was supported by probable cause and was not overbroad.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 640 Crim. of 2012

Appearances:
Allen Powanda, Assistant District Attorney,
Westmoreland County, for the Commonwealth
Casey D. White,
Pittsburgh, for the Defendant

BY: DEBRA A. PEZZE, JUDGE

OPINION AND ORDER

BY THE COURT,

(Opinion by Pezze, J., issued January 3, 2013)

I. FACTS

Gary J. Celovsky, defendant, is charged with two counts of Manufacture, Delivery or Possession with Intent to Deliver and one count of Possession of Drug Paraphernalia as a result of items confiscated pursuant to a search warrant on December 22, 2011. The warrant, obtained by Rebecca R. Fabich, a Pennsylvania State Trooper, and issued by Magistrate Michael Mahady, noted that the location to be searched was a two story apartment building with number 212 to the right of the front door with an address of 212 Sewickley Avenue, Sewickley Township, Westmoreland County.

The Affidavit of Probable Cause describes the affiant's training in narcotics and the receipt of an anonymous tip on December 21, 2011 that the smell of marijuana was coming from 212 Sewickley Avenue, an unoccupied building. The informant stated that a white male would arrive in a white Ranger truck, registration number YYS-5552, remain at the residence approximately one hour, and then leave.

The warrant recited that the vehicle's registration number was checked and that the vehicle belonged to Mr. Celovsky. Further, his J-NET photograph matched the description provided by the informant. Officer Fabich noted that she conducted surveillance on the residence and smelled an odor of marijuana emanating from the building. She observed that the windows and doors were boarded up or covered in black plastic bags. Four electric meters, all registering, were affixed to the side of the building but there was no sign of visible light and the building appeared unoccupied.

The warrant recited that the following day Trooper Noel reported a white Ford Ranger was parked in the alley behind the building. Later that day Troopers Fabich, Zona and Noel returned to the residence and smelled an odor of marijuana which became stronger at the rear of the building, which contained six rear doors, one of which was open. Officer Zona knocked on the side door and Mr. Celovsky answered. After the door opened, a stronger aroma of marijuana was present. Mr. Celovsky refused a search of the residence and thus a warrant was prepared and served.

At the Preliminary Hearing, occurring on February 3, 2012, Trooper Giran testified as to the odor of raw marijuana coming from within the residence. (PH 6, 15)[1] He noted that once inside he saw more than one living space and the unit on the left had no door (PH 13)

Trooper Fabich also testified. She stated that she confirmed the informant's complaints by travelling to the residence and confirming that there was an odor of marijuana coming from 212 Sewickley Avenue. (PH 19) The following day she returned to the building and was present when Mr. Celovsky answered the door. He indicated that he owned the building. (PH 19-20, 28-29)

Trooper Fabich testified that she knew who owned the residence because she ran a background check on the owner. The information she received was Mr. Celovsky's name and the address of 212. While she knew that there were multiple apartment units, there were no lights on anywhere. (PH 26) She did not believe anyone was living there. (PH 27) She thought the building was being remodeled and was under construction. (PH 31, 33)

II. DISCUSSION

Mr. Celovsky claims that the evidence seized during the execution of the search warrant must be suppressed because 1) the warrant lacked probable cause and the officer's conduct was in bad faith, and 2) the warrant was overbroad because it was issued for the entire building instead of Mr.. Celovsky's separate living space.

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[1] PH refers to the transcript of testimony taken at the Preliminary Hearing on February 13, 2012 before Magistrate Charles Christner.

A. Probable Cause

Mr. Celovsky contends that because the anonymous informant was not shown to be reliable, nor was there any independent basis supporting his/her veracity, the search and his arrest was illegal because the warrant lacked probable cause.

Probable cause exists where the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution in the belief that an offence has been committed. The totality of the circumstances test dicates that all relevant facts be considered. *Appeal of O.A.,* 717 A.2d 490, 495-496 (Pa. 1998)

In *Appeal of O.A.,* the arresting officer did not witness the drug transaction that had been described by the informant. The officer received only a description of the location of the transaction and a description of two persons, one of whom was only generally described. No arrest or search warrant was obtained; the defendant was arrested by police only because he fit the informant's description. In this situation the court concluded that the officer needed to further investigate before arresting the defendant. The court did note, however, 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. *Appeal of O.A.* at 497

In *Commonwealth v. Clark,* 28 A.3d 1284 (Pa. 2011), the lower court, with Superior Court affirming, found the search warrant infirm because the affidavit of probable cause failed to address the veracity, reliability and basis of knowledge of the informant. The Supreme Court reversed, finding that after receiving the tip from the informant, the arresting officer had set up a controlled purchase of narcotics from the defendant. In this situation the court noted, "Thus, an informant's tip may constitute probable cause where police independently corroborate the tip. The corroboration of significant details disclosed by the informant in the affidavit of probable cause meets the *Illinois v. Gates* threshold." *Clark* at 1288.

It should be noted that the odor of marijuana, in itself, is sufficient to establish probable cause. See *Commonwealth v. Brook,* 471 A.2d 1223, 1225 (Pa. Super. 1984); *Commonwealth v. Copeland,* 955 A.2d 396, 401 (Pa. Super. 2008)

In the instant case, every detail of the informant's information was corroborated by police. Officers travelling to 212 Sewickley Avenue immediately detected the smell of marijuana as reported by the informant. This smell was identified as coming from inside the building, became stronger at the rear of the building, and stronger still when Mr. Celovsky opened the door. This was not a generalized odor, but came from inside the building, the same location as that identified by the informant. In addition, police corroborated the presence of a white Ranger truck whose owner, police confirmed, was listed as Mr. Celovsky. Police also confirmed the informant's observation that no one appeared to live at the address since the windows were either boarded up or covered, no lights were on, and the building seemed to be undergoing a renovation.

Since probable cause for arrest exists when a police officer smells the odor of marijuana, even if no informant existed, a search warrant could nevertheless have been issued by a detached and neutral magistrate. Thus, Mr. Celovsky's argument that no probable cause existed for the search of 212 Sewickley Avenue must fail.

Further, this Court concludes that Trooper Fabich did not act in bad faith. Despite the discrepancy between the vehicle registration number provided in the Affidavit of Probable Cause and the registration number provided by counsel, there is no dispute that Mr. Celovsky's photo ID and vehicle description, obtained by the officer, matched the vehicle at the scene and the informant's description of the man who entered the building. Similarly, the officer's observation that the building looked like one unit was not deceptive given that the building was described in the warrant as a two story apartment building. At the Preliminary Hearing Trooper Fabich stated, "I knew there were multiple units, but everything looked adjoined." (PH 26) Thus, although sinister motives are attributed to her, the record does not support bad faith conduct.

B. Search Warrant Overbreadth

In *Commonwealth v. Johnson,* 323 A.2d 26 (Pa. Super. 1974), a search warrant was found to be constitutionally defective because it was issued for an entire building that contained separate living units. The court held that separate living units of a multiple tenant building must be treated as if they were separate dwelling houses and probable cause must be shown to search each one. Since the premises contained three living levels and the locus of criminal activity was confined to one specific portion of the premises, a warrant issued for the entire premises was found to be defective.

In *Commonwealth v. Chamberlain,* 419 A.2d 1261 (Pa. Super. 1980), however, a claim that a search warrant for an entire building was defective because of the existence of separate living units was rejected. According to trial evidence, the second floor of the dwelling contained ten hotel-type rooms which were rented seasonally. The court acknowledged that the United States and Pennsylvania constitutions prohibit the issuance of a search warrant for an entire building containing separate living units. It found, however, that if there is cause to believe the premises are being used as a single unit, a warrant directing the search of more than one unit is valid. As Chamberlain was in control of the building and was in residence there, there was no reason to believe the structure contained more than one living unit. The court concluded that the search warrant was not defective.

In *Commonwealth v. Simpkins,* 36 A.3d 623 (Pa. Super. 2012), the court reversed the suppression of evidence of a search of a single family home that had two bedrooms rented on the second floor. The court found that the home was not divided into separate apartments and police were not aware that the bedrooms were rented until after the search. The court, quoting *Maryland v. Garrison,* 480 U.S. 79 (1987), noted "... the discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant. The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing authority." *Simpkins* at 627.

In *Commonwealth v. Copertino,* 224 A.2d 228 (Pa. Super. 1966), the court noted that in the usual case, separate living units of a multiple tenant building must be treated as if they were separate dwelling houses, and probable cause must be shown to search each one. There are, however, two exceptions to this rule. The first is when a warrant

directing the search of more than one unit is issued because there is cause to believe all units are being used for the unlawful purpose. The second exception occurs when there is cause to believe that the premises covered by the warrant are being used as a single unit. *Copertino* at 230. The court referred to *United States v. Poppitt,* 227 F.Supp. 73 (Delaware Dist. Ct. 1964) in which it was held that a search warrant could direct the search of an entire building if probable cause is shown for searching each separate apartment, or if the entire building is actually being used as a single unit. *Poppitt* at 76.

In this case there was evidence that the building at 212 Sewickley Avenue was an apartment building. It was two stories with several electric meters, several unmarked mailboxes and had several doors at the rear of the building. Although photographs of the building were taken by Trooper Fabich, these photos never reached the magistrate and will not be considered by this Court.

Despite this evidence, however, there was also testimony and evidence that the building was unoccupied. No lights were ever seen, the windows were either boarded up or covered in plastic garbage bags, and the site appeared to be undergoing renovation. Officer Fabich had confirmed the address, both by noting it posted in front of the building and by running a background check on the owner of the residence which indicated the address of the property was 212 Sewickley Avenue. No one appeared to be living in the building and Mr. Celovsky confirmed that he owned it.

Given these circumstances, this Court concludes that it was reasonable to assume the address of the property was 212 Sewickley Avenue and that the premises were being used as one unit by the owner. It appears that the inside units were being renovated and used to grow marijuana. Thus, they were used for one criminal purpose-the cultivation of marijuana.

Trooper Giran described the inside of the building as open with no door closing the apartment or shutting if off. Trooper Gabich explained that the entryway was framed out, not too much drywall, like an opening. There was no evidence that any of the units were being used by anyone, and Mr. Celovsky appeared to be the only occupant.

Given this situation, the Court concludes that the building was in sole control of Mr. Celovsky and was being used for one purpose and as a single unit. For this reason, the Court concludes that the search warrant was not overbroad. The Motion to Suppress is, therefore, denied.

ORDER OF COURT

AND NOW, this 3rd day of January, 2013, IT IS HEREBY ORDERED that the Motion to Suppress is DENIED

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

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KRISTIE QUIGLEY and GLENN QUIGLEY, Plaintiffs
V.
JET ONE, LLC, Defendant

JUSTICES OF THE PEACE

Review of Proceedings; Appeal and Error; Dismissal, Withdrawal or Abandonment; Reinstatement

The court denied Motion to Reinstate Appeal From Magisterial Judge Judgment when counsel for defendant/appellant failed to serve a copy of the Notice of Appeal From Magisterial Judge Judgment that was filed with the prothonotary, failed to serve a Rule to File a Complaint issued by the prothonotary and filed an affidavit as to service that was factually inaccurate.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 6357 of 2012

Appearances:
John Linkosky,
Carnegie, for the Plaintiffs/Appellees
Bradley S. Dornish,
Pittsburgh, for Defendant/Appellant

BY: GARY P. CARUSO, PRESIDENT JUDGE

DECISION AND ORDER

This matter is presently before me as the result of a Motion to Reinstate Appeal filed on behalf of the defendant. On September 25, 2012 a hearing was held before Magisterial District Judge James Albert as the result of a complaint filed by the plaintiffs against this defendant. The complaint sought recovery of a security deposit. At the conclusion of the hearing the Magisterial District Judge found a judgment in favor of the plaintiffs and against the defendant in the amount of $1,487.50.

On October 17, 2012 the counsel for the defendant mailed to the plaintiffs by certified mail a document that purported to be a "Notice of Appeal From Magisterial Judge Judgment". However, this document was not signed by a Prothonotary or Deputy Prothonotary, did not contain a time stamp indicating that the appeal had been filed and did not contain a docket number. As a result this document did not constitute a "Notice of Appeal From Magisterial Judge Judgment" as no appeal had been filed as of that date.

It was not until October 19, 2012 that the defendant filed a "Notice of Appeal From Magisterial District Judge Judgment" at No. 6357 of 2012 in the Court of Common Pleas of Westmoreland County. On October 25, 2012 counsel for the defendant filed an "Affidavit of Service". In that affidavit said counsel deposed and stated that he had served the "Notice of Appeal From Magisterial Judge Judgment" upon the plaintiffs. This however, was not accurate as the document served was not the "Notice of Appeal

From Magisterial District Judge Judgment" that had been filed. Said counsel also deposed and said in the affidavit that he served a Rule to File a Complaint by the Prothonotary of Westmoreland County upon the Appellant by Certified Mail and U.S. First Class Mail, return receipt requested on October 23, 2012. However, the return receipt shows that the plaintiffs received a document on October 19, 2012. Receipt of the "Praecipe to Enter Rule to File a Complaint" by the plaintiffs on October 19, 2012 would have been an impossibility as the document was not filed until October 19, 2012 at 1:41 p.m. It appears from the evidence that the document that was sent on October 19, 2012 was not Rule to File a Complaint issued by the Prothonotary of Westmoreland County.

Furthermore, the affidavit states that there is attached to the affidavit a copy of the Notice of Appeal served upon the plaintiffs when in fact the copy of the Notice of Appeal attached to the affidavit is not a copy of the document mailed to the plaintiffs and the Magisterial District Judge, rather it is a copy of a Notice of Appeal filed on October 19, 2012. As previously stated, the document served upon the plaintiffs purporting to be a Notice of Appeal was not signed by the Prothonotary nor time stamped by the Prothonotary. Therefore, it was a nullity.

In addition the affidavit states that counsel for the defendant served a Rule to File a Complaint upon the Appellant when in fact his own client was the Appellant. Further, he states that the evidence of service of the Rule to File a Complaint is evidenced by a copy of a mailing receipt attached as Exhibit "B" to the affidavit. However, once again this is inaccurate. The document attached as Exhibit "B" to the affidavit is a certified mail receipt showing that someone at 617 Keystone St., Greensburg, Pa. received certified mail on October 19, 2012. Obviously, this cannot be proof of receipt of a document that counsel for the defendant claims in his affidavit was sent on October 23, 2012, some four days later. Counsel for the defendant admits that he failed to send a copy of a Rule to File a Complaint by certified mail. Counsel, at most, can say that "he believes" the Rule to File a Complaint was sent to the plaintiffs. There is no proof that has been offered that a Rule to File a Complaint issued by the Prothonotary of Westmoreland County was ever sent in any manner to the plaintiffs.

Thereafter, on November 28, 2012 the defendant filed its "Praecipe to Strike Appeal Pursuant to Magisterial District Judge Rule 1006." The Motion to Reinstate the Appeal was presented to the Court on December 21, 2012.

This case is not a situation where the appellant has merely failed to comply with the rules pertaining to the filing of an Affidavit of Service that apply to the filing of a Notice of Appeal From Magisterial Judge Judgment, but rather it is the failure to serve a copy of the actual Notice of Appeal From Magisterial Judge Judgment that was filed with the Prothonotary and the failure to serve upon the Appellees a Rule to File a Complaint issued by the Prothonotary of Westmoreland County.

This failure was then compounded by the filing of an affidavit by Counsel that was factually inaccurate. The instant case does not support a mere failure to file proofs of service in a timely manner, but reflects a complete and total disregard on the part of Defendant's counsel for the Rules of Procedure concerning the filing of, perfecting and

service of a Notice of Appeal and Rule to Show Cause. There was no good faith effort to comply with the Rules but rather misleading information was provided to the Court by way of the aforesaid Affidavit of Service and there was no substantial compliance with the Rules.

Therefore, I will enter the following Order denying the Motion to Reinstate the Appeal.

ORDER

And now this 26th day of December, in accordance with the foregoing Decision, it is hereby Ordered and Decreed that the Motion to Reinstate Appeal is denied.

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

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COMMONWEALTH OF PENNSYLVANIA
V.
CHARLES EDWARD TINSLEY, Defendant

CRIMINAL LAW

Evidence; Speed and Radar; Reliability of Particular Testing Devices

1. In order to sustain a conviction for speeding, the Commonwealth must show that 1) the accused was driving in excess of the speed limit; 2) the speed timing device was approved by the Department of Transportation; and 3) the device was calibrated and tested for accuracy within the prescribed time period by a station approved by the Department.

2. The Court may take judicial notice that a speed timing device has been approved by PennDOT provided that the approval has been published in the Pennsylvania Bulletin.

3. The Court may also take judicial notice that the facility verifying the accuracy of a police car's speedometer has been approved by PennDOT if the approval is published in the Pennsylvania Bulletin.

4. Prosecution's production of a Certificate of Speedometer Accuracy and evidence of publication of the facility which had done the testing as an approved facility in the Pennsylvania Bulletin were grounds to dismiss Defendant's challenges to the speeding charges.

AUTOMOBILES

Arrest, Stop or Inquiry; Grounds

1. Reasonable suspicion exists to warrant a traffic stop when an officer articulates specific observations which, in conjunction with reasonable inferences derived from these observations, lead him reasonably to conclude, in light of his experience, that criminal activity was afoot and the person he stopped was involved in that activity.

2. Court elected to believe officer's testimony that he observed Defendant traveling at a high rate of speed, that he followed him for five tenths of a mile, and clocked his speed using his speedometer at 80 miles an hour in a 55 mile per hour zone.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 2639 Criminal, 2011

Appearances:
Jennifer L. Dupilka, Assistant District Attorney,
Westmoreland County, for the Commonwealth
Alan John Manderino,
Monessen, for the Defendant

BY: DEBRA A. PEZZE, JUDGE

OPINION AND ORDER

BY THE COURT,
(Opinion by Pezze, J., issued January 22, 2013)

I. **FACTS**

Charles Edward Tinsley, defendant, has been charged with Driving While Intoxicated as a result of a detention by Trooper Michael Pickard, a state police officer. Trooper Pickard, employed since May, 2005, and formerly stationed at Troop

A, Greensburg, was working a 10:00 p.m. - 6:00 a.m. shift on October 15, 2009. (OPM 4)[1] He was driving a marked patrol vehicle with partner Trooper Jesse Cramer. He had previously received training in motor vehicle code violations. (OPM 4-5)

At 1:25 a.m., while he was monitoring traffic on Humphrey Road near the on-ramp to SR30 westbound, he observed a red Dodge Stratus entering the on-ramp at a high rate of speed. For this reason, he positioned his patrol unit behind the vehicle and utilized the speedometer to determine an accurate speed. (OPM 5) A Certificate of Accuracy for the speedometer was admitted as an exhibit at the Hearing which showed that the speedometer had been tested for accuracy on August 17, 2009. (OPM 6-7)

The Stratus was clocked at 80 miles per hour in a 55 mile per hour zone after the officer had followed the vehicle for five tenths of a mile. (OPM 8-9) Once this speed was determined, Officer Pickard initiated a traffic stop in the area of the Route 119 exit ramp off Route 30 West by utilizing his lights and siren. Mr. Tinsley, the driver of the Stratus, pulled into a NAPA Auto Parts dealer store and presented a Florida drivers license. Mr. Tinsley was identified at the Hearing as the driver Trooper Pickard arrested that evening. (OPM 10-11)

Mr. Tinsley also testified. He first saw the police cruiser as he was about to exit Route 30. (OPM 31) He had been travelling at 55 miles per hour or less, and noted that he was passed by a car going at a high rate of speed. (OPM 33) He recalled that the trooper told him that he was stopped because he was following a car too closely. Trooper Pickard never mentioned anything about his speed. (OPM 34).

II. **DISCUSSION**

Mr. Tinsley claims that there was insufficient probable cause to stop him because no traffic violation had occurred. In addition, he challenges the Certificate of Speedometer Accuracy and claims that because the Commonwealth did not present evidence that the station testing the accuracy of the speedometer was approved by the Department of Transportation, the speed violation must fail. Because the stop was, therefore, unwarranted, the evidence gleaned as a result of the illegal stop must be suppressed and the case dismissed.

In *Commonwealth v. Kittelberger,* 616 A.2d 1, 3 (Pa.Super. 1992), the court observed that to sustain a conviction for speeding, the Commonwealth must show 1) that the accused was driving in excess of the speed limit; 2) the speed timing device was approved by the Department of Transportation; and 3) the device was calibrated and tested for accuracy within the prescribed time period by a station which has been approved by the Department.

The court may take judicial notice of the fact that the device has been approved by PennDOT provided that the approval has been published in the Pennsylvania Bulletin. Evidence independent of the Certificate of Accuracy is necessary to prove that the testing station had been approved by PennDOT. *Commonwealth v. Kaufman,* 849 A.2d 1258, 1261 (Pa. Super. 2004)

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[1] OPM signifies testimony taken at the December 13, 2012 Omnibus Pretrial Motion hearing before this Court.

In this case the Commonwealth offered the Certificate of Speedometer Accuracy into evidence as its Exhibit 1. This Certificate, issued August 17, 2009, shows that the device was tested within 60 days of the date it was used to calibrate Mr. Tinsley's speed. Had this Certificate been the sole evidence, the prosecution's case would fail for its failure to show that approval of speedometer accuracy was made by a station approved by PennDOT. In its Brief, however, attached as Exhibit 2, is the Pennsylvania Bulletin showing that Davidheiser's Speedometer Repair Inc. is approved as a testing station for use by police. 75 Pa.C.S. Section 3368 (c)(3) Thus, claims that the case must be dismissed for failure to provide a Certificate of Speedometer Accuracy and because the testing station was not shown to be approved, must fail.

Mr. Tinsley also claims that he was not speeding and that he was stopped because he was leaving a tavern. In *Commonwealth v. Little,* 903 A.2d 1269 (Pa. Super. 2006), the defendant was stopped after the detaining officer heard a racing engine and observed the defendant travelling in excess of the speed limit. The court noted that reasonable suspicion exists when the officer articulates specific observations which, in conjunction with reasonable inferences derived from these observations, lead him reasonably to conclude, in light of his experience, that criminal activity was afoot and the person he stopped was involved with that activity. *Id* at 1272. The court found that reasonable suspicion was established due to the conditions of the roadway and the acceleration of the defendant's car.

In *Commonwealth v. McElroy,* 630 A.2d 35 (Pa. Super. 1993), the police officer observed McElroy's vehicle for approximately five seconds and opined that it was travelling at a high rate of speed. The defendant was pursued and stopped, and ultimately charged with drunk driving. The court, affirming the conviction, noted that the officer's opinion that McElroy's vehicle was travelling 80 miles per hour in a 35 mile per hour zone amounts to articulable and reasonable grounds to suspect that he was speeding.

In this case, the Court elects to believe Trooper Pickard's testimony that he observed Mr. Tinsley travelling at a high rate of speed, that he followed him for five tenths of a mile and clocked his speed at 80 miles per hour in a 55 mile per hour zone. Thus, the officer had reasonable suspicion to detain Mr. Tinsley for excessive speed. The signs of alcohol intoxication became apparent once the Dodge Stratus was pulled over. Because there was reasonable suspicion justifying the traffic stop, the Motion to Suppress is denied.

ORDER OF COURT

AND NOW, this 22nd day of January, 2013, IT IS HEREBY ORDERED that the Motion to Suppress is hereby DENIED.

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

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JIM JAY ENTERPRISES, INC. t/a THUNDER ROLLS, Appellant
V.
PENNSYLVANIA LIQUOR CONTROL BOARD, Appellee

INTOXICATING LIQUORS

Legislative Regulation; Licenses and Taxes; Renewal; Conditions Imposed on Licensees

1. With regard to regulation and control of use and sale of alcoholic beverages, police power of state is plenary.

2. Liquor Control Board has the discretion not to renew a liquor license due to the manner in which the licensed premises was operated.

3. Trial court, like Liquor Control Board, has discretion to grant a renewal of a liquor license.

4. Trial court has discretion to grant renewal of liquor license and to impose certain conditions on the renewal such as tighter security on the premises and more monitoring of patrons.

NUISANCES

Public Nuisance; Actions

A liquor licensee can be held accountable for activity occurring off-premises where there is a causal connection between the licensed premises and the conduct.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 820 MD 2012

Appearances:
Gregory T. Nichols,
Greensburg, for the Appellant
Peter Yoon,
Plymouth Meeting, Pa., for the Appellee

BY: GARY P. CARUSO, PRESIDENT JUDGE

DECISION AND ORDER

Jim Jay Enterprises is a Pennsylvania corporation (hereinafter "Appellant"), licensed by the Pennsylvania Liquor Control Board to operate a restaurant/tavern facility at 312 Clay Avenue, Jeannette, PA pursuant to authority of restaurant liquor license R-1005, LID No. 51530. This matter comes before the Court on a statutory appeal from Order of the Liquor Control Board dated September 25, 2012 denying renewal of licensee's liquor license for term expiring June 30, 2014. Appellant has been a Board approved licensee authorized to operate at 312 Clay Avenue since 2003. In its ten (10) year tenure, one (1) citation was issued against the licensee in 2010 (10-0347) and as a result thereof a fine was paid. The PLCB Bureau of Licensing objected to renewal of licensee's license for term expiring June 30, 2014 via non-renewal letter of June 15, 2012. Licensee thereafter operated by authority letter pending Board disposition.

At a non-renewal hearing conducted before a Hearing Examiner on Wednesday, July 18, 2012 evidence was submitted by the PLCB with regard to the above citation

as well as fourteen "police incidents" which occurred at or about the premises over a two year period to determine whether the evidence constituted egregious activity warranting non-renewal of the license. Following the hearing on July 18, 2012 and based upon his consideration of all evidence and testimony presented, the hearing examiner submitted a written report to the Board recommending renewal of the license subject to implementing security and utilizing a security wand at the licensed premises. Notwithstanding the examiners recommendation of renewal and based upon a recommendation of the PCLB Bureau of Licensing by Order dated September 25, 2012 the Board did not renew the license.

The Legislature of Pennsylvania has granted the Board broad police powers for the protection of the public welfare, health, peace, and the morals of the citizens of the Commonwealth. To achieve these purposes, the Liquor Code must be liberally construed pursuant to section 104(a) of the Code. [47 P.S. § 1-104(a)]. As stated by the Pennsylvania Supreme Court:

> There is perhaps no other area of permissible state action within which the exercise of the police powers of a state is more plenary than in the regulation and control of the use and sale of alcoholic beverages.

In re Tahiti Bar, Inc. Liquor License Case, 395 Pa. 355, 150 A.2d 112, 115 (1959).

Renewal of a liquor license is not an automatic procedure. *See U.S.A. Deli, Inc. v. Pennsylvania Liquor Control Bd.,* 909 A.2d 24 (Pa. Cmwlth. 2006). Section 470(a.1) of the Liquor Code expressly grants the Board the authority to refuse to renew a liquor license under the following circumstances.

> (1) if the licensee, its shareholders, directors, officers, association members, servants, agents, or employes have violated any of the laws of this Commonwealth or any of the regulations of the board;
>
> (2) if the licensee, its shareholders, directors, officers, association members, servants, agents or employes, have one or more adjudicated citations under this or any other license issued by the board or were involved in a license whose renewal was objected to by the Bureau of Licensing under this section;
>
> (3) if this licensed premises no longer meets the requirements of this act or the board's regulations; or
>
> (4) due to the manner in which this or another licensed premises was operated while the licensee, its shareholders, directors, officers, association members, servants, agents or employees were involved with that license. When considering the manner in which this or another licensed premises is being operated, the board can consider activity that occurred on or about the licensed premises or in areas under licensee's control if the activity occurred when the premises was open for operation and if there was a relationship between the activity outside the premises and

> the manner in which the licensed premises was operated. The board may take into consideration whether any substantial steps were taken to address the activity occurring on or about the premises.

[47 P.S. § 4-470(a.1)]. A licensee can be held accountable for activity occurring off-premises where there is a causal connection between the licensed premises and the activity. *Commonwealth v. Graver,* 461 Pa. 131, 334 A.2d 667 (1975). As stated above, there must be some relationship between the activity outside the premises and the manner in which the licensed premises is operated.

The Commonwealth Court has upheld the Board's exercise of its discretion under section 470 of the Liquor Code and has stated that even one (1) past citation or violation may be sufficient to support a decision refusing a renewal application. *Hyland Enterprises, Inc. v. Pennsylvania Liquor Control Bd.,* 158 Pa. Cmwlth. 283, 631 A.2d 789 (1983). In the present matter there has been only one (1) citation over a ten (10) year period and that citation was issued on March 5, 2010. It was issued because the Licensee had three video machines. If a patron collected ten (10) tickets from the machine they were awarded a T-shirt. The License accepted responsibility and paid a fine of $600.00.

The Board may refuse to renew a license where the licensee knew or should have known of a pattern of criminal activity at the licensed premises and failed to take substantial or affirmative steps to prevent such activity. *Id.; Philly International Bar, Inc. v. Pennsylvania Liquor Control Bd.,* 973 A.2d 1 (Pa. Cmwlth. 2008); *Rosing, Inc. v. Pennsylvania Liquor Control Bd.,* 690 A.2d 758 (Pa. Cmwlth. 1997). *See also* 47 P.S. § 4-470(a.1). When violations of the Crimes Code or other criminal laws occur on or about the licensed premises, if a licensee can show that it took substantial measures to prevent the criminal or illegal activity on or about the premises, the Board may consider those steps in rendering its decision. [47 P.S. § 4-470(a.1)(4)]; *TLK, Inc.,* 544 A.2d 931. However, remedial measures taken by a licensee must be taken at a time when the licensed establishment knows or should know that illicit activity is occurring on the premises. *I.B.P.O.E. of West Mount Vernon Lodge 151,* 969 A.2d at 649; *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Can, Inc.,* 651 A.2d 1160 (Pa. Cmwlth. 1994).

As stated previously, the licensee has been issued only one citation over a ten year period of continual operation. This Citation No. 10-0347 was issued by Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") against Licensee on March 5, 2010, and charged Licensee with violating section 471 of the Liquor Code [47 P.S. § 4-471] and section 5513 of the Crimes Code [18 Pa. C.S. § 5513], in that on February 1, 2010, Licensee, by its servants, agents or employees, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries on its licensed premises. Licensee admitted to the charge and was fined six hundred dollars ($600.00). (N.T. 5; Ex. B-3).

The remaining reasons for non-renewal involve a number of "police incidents" that occurred in or near the licensed premises. I will hereinafter review each incident relied upon by the Board in its decision to not renew the license.

On August 14, 2010 at approximately 12:02 a.m., Mr. Frank Adar, his wife, and brother were patrons at the licensed establishment and he was playing pool with Angela Smail's son. Angela Smail is the daughter of the owner of the licence. She is also an employee of the licensee. Mr. Adar indicated that Ms. Smail's son struck him over a refusal to pay a ten dollar ($10.00) pool game wager. (N.T. 77-80, 83). Mr. Adar then went after his assailant but the matter was broken up by other patrons and did not escalate. Mr. Adar indicated that Ms. Smail's husband stopped the fight. The licensee has clearly posted rules that state there shall be no betting on games of pool. The licensee has a policy that if there is a violation of the rules then the violating parties will be barred for thirty days from the premises. Mr. Adar then left the premises. (N.T. 79, 83). According to Mr. Adar, after leaving the licensed establishment, his wife flagged down a police officer because she was mad about the assault. (N.T. 80-81). However, the incident was of such a nature that Mr. Adar did not wish to press charges. Mr. Adar has returned to the establishment to play pool and has even done so with his former adversary. Mr. Adar states that he feels safe in the premises even after this incident. Mr. Adar indicated that Licensee had no security working at the time of the incident. (N.T. 84).

Later the same morning of August 14, 2010 at approximately 1:32 a.m., Sergeant Donald Joseph Johnston, Jr. was patrolling the vicinity of the licensed premises and observed a disturbance involving several people pushing and shoving each other outside the licensed establishment. (N.T. 6, 87-88; Ex. B-9). As Sergeant Johnston stopped and approached the incident, he observed that Frank Kozinko and another person entered the licensed establishment and that a third individual, later identified as Robert Myers, was walking away from the licensed establishment towards 4th Street. (N.T. 6, 88; Ex. B-9). Sergeant Johnston entered the licensed establishment and observed that a patron was sitting at the bar, who was crying and bleeding from her nose. She told the Sergeant that Mr. Myers had punched her in the face, grabbed her, and pushed her to the floor. (N.T. 6, 88; Ex. B-9). Sergeant Johnston spoke to several witnesses, which included Ms. Smail (aka Angie Graham), who told the Sergeant that the victim and Mr. Myers had been arguing, and that he had punched the victim in the face and threw the victim to the floor. (N.T. 6, 88-89; Ex. B-9). Mr. Myers was subsequently arrested and charged with simple assault (N.T. 89). Sergeant Johnston, a thirteen year veteran of the Jeannette police force, testified that this was a domestic dispute that occurred on the premises which he described as a "one punch" incident. (NT 91), Sergeant Johnston testified that the owners/operators of the premises were fully cooperative in the investigation that led to the arrest of Mr. Myers. (NT 90, 109).

On September 1, 2010 at approximately 1:45 a.m., Sergeant Johnston observed a seventeen (17)-year-old minor, Brandon Iapalucci, on the street in violation of the City's curfew. When the minor saw the police he ran into the licensed establishment. (N.T. 7, 92; Ex. B-10). Sergeant Johnston subsequently entered the licensed establishment and observed Mr. Iapalucci heading towards Licensee's bathroom in the back of the establishment. The Sergeant subsequently took him into custody in the bathroom. Mr. Iapalucci was cited for a curfew violation. (N.T. 7, 93; Ex. B-10). Sergeant Johnston related that he did not observe Licensee taking any actions to

prevent Mr. Iapalucci from entering the licensed establishment. (N.T. 93). Under the described circumstances it does not appear that there was an opportunity to take such action. This incident was a spontaneous act on the part of the juvenile who had "ducked into" the premises to hide from the officer because the juvenile knew he was in violation of the curfew of the city of Jeannette. The juvenile was apprehended within minutes of his entry into the premises. (NT 95-96).

More than four months later, on January 30, 2011 at approximately 12:15 a.m., Officer Richard Jay O'Neal, a twenty three year veteran of the Jeannette police force, was dispatched to the licensed premises for a reported fight inside the establishment. (N.T. 7, 28; Ex. B-14). Upon arrival, the fight had ended, but Officer O'Neal was advised that the one (1) of the participants in the disturbance, Tiffany Grogan, was inside a vehicle across the street from the licensed establishment and the other participant, Jay Davis, was still inside the establishment. (N.T. 7, 28; Ex. B-14). Officer O'Neal's investigation revealed Ms. Grogan had instigated the matter and attacked Mr. Davis inside the licensed establishment for no reason. (N.T. 7, 28; Ex. B-14). Licensee's bartender, Rose Klingensmith, told Officer O'Neal that she wanted Ms. Grogan to leave the licensed establishment and not frequent the establishment anymore. (N.T. 7, 28; Ex. B-14). Officer O'Neal advised Ms. Grogan of Ms. Klingensmith's request and Ms. Grogan began to threaten the person she was with, which subsequently resulted in Ms. Grogan being cited for disorderly conduct. (N.T. 7, 28-29; Ex. B-14). (N.T. 29-30). Officer O'Neal testified that this was essentially a spontaneous assault within the premises based upon some prior interaction between two patrons. It should be noted that upon his arrival the perpetrator had already been removed from the premises. He further testified that he provided premises owners and operators with his cell phone number and encouraged calls if they ever had any problems and/or needed police assistance. (NT 30) He was very clear in his testimony to state that his interaction with the owner and operators of the licensee has been a positive one and that premises owners/operators had always been cooperative with him. He was further of the opinion that the establishment was not an unusual problem bar, but rather a "typical bar". (NT 33)

On February 4, 2011 at approximately 1:21 p.m., Corporal Shannon Binda, a twenty two year veteran of the Jeannette police force, received a call to respond to the licensed premises for a report of an assault in front of the licensed establishment. (N.T. 7, 21; Ex. B-17). Upon arrival, Corporal Binda observed that the victim, Michael Taylor, was laying on the ground bleeding, and witnesses at the scene told the Corporal the assailant, later identified as Reginald Patterson, had fled the scene on foot prior to the Corporal's arrival. (N.T. 7, 21; Ex. B-17). Corporal Binda called an ambulance for Mr. Taylor and later was able to locate Mr. Patterson across the street from Licensee behind Ager's Maytag. (N.T. 7, 21-22; Ex. B-17). Corporal Binda's investigation revealed that Mr. Taylor had been inside the licensed establishment and after exiting the establishment, he was talking to a woman when Mr. Patterson, who appeared to not have been inside the establishment, hit him on the side of his face. (N.T. 7, 22-23; Ex. B-17). Mr. Patterson was subsequently arrested and charged with simple assault and aggravated assault. (N.T. 7; Ex. B-17). The incident occurred on the

sidewalk in front of the licensed establishment, approximately three (3) to four (4) feet from the establishment. (N.T. 23). It is important to note that the victim was assaulted by an individual who was never in the premises. (NT 22). There simply does not appear to be any causal connection between the assault and the manner of operation of the licensed premises. Once again the office stated that the owners/operators of the premises were in his experience helpful to law enforcement on that incident and incidents occurring at or about the premises even if the incidents were unrelated to the premises. (NT 24). The officer clearly stated that he has never had an issue with regard to the owner's cooperation with any police investigations. He further stated that the owner calls to seek assistance of the police in the event of an incident at the bar that is dangerous. (NT 24). Officer Binda noted that this particular bar does not require any more police resources than any other establishment during his working shift.

On February 6, 2011 at approximately 1:32 a.m., Sergeant Johnston was on patrol in the vicinity of the licensed premises and observed several people in front of the licensed establishment. The Sergeant could hear screaming and yelling coming from the group. (N.T. 7, 97-98; Ex. B-11). Sergeant Johnston observed that one (1) of the individuals in the group that he recognized from prior incidents, Mr. Kozinko, was screaming obscenities. (N.T. 7, 98; Ex. B-11). Sergeant Johnston stopped his vehicle and as he was approaching the group, they all reentered the licensed establishment. (N.T. 7, 98, 100; Ex. B-11). Sergeant Johnston entered the licensed establishment looking for Mr. Kozinko and discovered him inside Licensee's bathroom. (N.T. 7, 98; Ex. B-11). Sergeant Johnston told Mr. Kozinko that he must leave the licensed premises because he was causing a disturbance and proceeded to escort him from the establishment. (N.T. 7, 98; Ex. B-11). Sergeant Johnston observed that Mr. Kozinko was intoxicated and after he had exited the licensed establishment, Mr. Kozinko continued to argue with the Sergeant that he did not want to leave the premises, which subsequently resulted in him being arrested when he attempted to reenter the establishment. (N.T. 7, 98-99; Ex. B-11). During a pat down search of Mr. Kozinko, the police recovered two (2) plastic baggies containing a green vegetable matter that was later tested to be marijuana. (N.T. 7, 99-100; Ex. B-11). At the police station, the police recovered a third plastic baggie containing a white substance that was later tested to be cocaine. (N.T. 7, 99-100; Ex. B-11). Mr. Kozinko was charged with possession of marijuana and cocaine, public drunkenness, and disorderly conduct. (N.T. 7; Ex. B-11). Once again the officer testified that the owner and operators of the licensed premises were fully cooperative with the efforts of the officers with regard to this incident. (NT 101). There was no evidence that this criminal act was in any way connected with the manner in which the licensed premises was operated.

On May 3, 2011 at approximately 12:15 a.m., Officer O'Neal was dispatched to the licensed premises for a reported fight inside the establishment. (N.T. 7, 33; Ex. B-15). Upon arrival, Paul Jones Jr. was waiting outside the licensed establishment and he told Officer O'Neal that he had had an altercation inside the establishment with a patron whom he had an issue with on a prior occassion, and that the patron had left the licensed premises prior to the Officer's arrival. (N.T. 7, 33; Ex. B-15). Officer O'Neal did not observe any injuries on Mr. Jones, and the Officer believed that Mr. Jones was

intoxicated. (N.T. 7, 34-35; Ex. B-15). The Officer conducted an investigation of the incident but was not able to determine the identification of the assailant. (N.T. 7, 35-36; Ex. B-15). Paul Jones Jr. lives in Jeannette, Pennsylvania, and he testified at the administrative hearing that he frequented the licensed establishment approximately one (1) or two (2) times a week. (N.T. 42-43). According to Mr. Jones, he was a patron at the licensed establishment on May 3, 2011 where he was assaulted by another patron who he had met on a prior occasion. (N.T. 44-45). With regard to this incident, the incident had nothing to do with the bar other than the fact that Mr. Jones was in the bar and somebody came in and accosted him because of a prior incident. Mr. Jones was barred from the premises for the rest of the evening by the bartender. The officer testified that the owner and operators of the bar were fully cooperative with the officer in his investigation. (NT 34-35).

Officer James Phillips of the Jeanette Police Department was on patrol, on August 18, 2011 at approximately 12:57 a.m., in the vicinity of the licensed premises and observed two (2) individuals, William Gavidia and Jesse Loughner, arguing on the sidewalk in front of the licensed establishment. (N.T. 6, 8; Ex. B-5). Mr. Gavidia and Mr. Loughner told Officer Phillips that they had been arguing inside the licensed establishment and had exited the establishment to continue their argument. (N.T. 6, 10; B-5). Officer Phillips informed Mr. Gavidia and Mr. Loughner that they were causing a disturbance and should return to the licensed establishment, and he warned them that if they continued to cause a disturbance, they would be cited for disorderly conduct. (N.T. 6, 8, 10, 13; Ex. B-5). The officer actually directed the actors back into the licensed premises. Later that morning at approximately 2:05 a.m., Officer Phillips and another officer were again dispatched to the licensed premises for a disturbance involving Mr. Gavidia. (N.T. 6, 8-9; Ex. B-5). Officer Philips could see and hear a disturbance taking place in the vicinity of the licensed premises approximately two (2) blocks from the licensed premises. (N.T. 6, 9; Ex. B-5). Upon arrival, Officer Phillips observed Mr. Gavidia standing outside the licensed establishment and he was screaming, yelling, and throwing his arms around. (N.T. 6, 9; Ex. B-5). Mr. Gavidia was taken into custody and cited for disorderly conduct and public drunkenness. (N.T. 6, 9; Ex. B-5). Officer Phillips testified that he has never known the owner or operators of the establishment to be uncooperative with the police.

On September 1, 2011 at approximately 4:47 p.m., Sergeant Johnston responded to the licensed premises for a reported fight. (N.T. 7, 102; Ex. B-12). Upon arrival, Sergeant Johnston observed Sara Chew standing outside the licensed establishment. She told the Sergeant there had been a fight inside the establishment and she had been assaulted. (N.T. 7, 102; Ex. B-12). Sergeant Johnston entered the licensed establishment and was told that Nicole Devosky, who was a prior employee of Licensee, had been harassing Licensee's bartender, Carla Maloy. The harassment escalated to Ms. Devosky punching Ms. Maloy in the face. (N.T. 7, 102-103; Ex. B-12). Sergeant Johnston was also advised that as Ms. Devosky was attempting to leave the licensed establishment, she initiated an argument with Ms. Chew that escalated into a physical confrontation. (N.T. 7, 103; Ex. B-12). Ms. Chew told Sergeant Johnston that Ms. Devosky struck her several times before Licensee's patrons

were able to stop the fight. (N.T. 7, 103; Ex. B-12). Sergeant Johnston was unable to locate Ms. Devosky at the scene of the incident, but was able to locate her later; however, Ms. Chew and Ms. Maloy did not want to proceed with criminal charges against Ms. Devosky. (N.T. 7, 103; Ex. B-12). Sergeant Johnston indicated that Ms. Chew is employed by Licensee as a bartender, but he did not know if she was working at the time of the incident. (N.T. 104). This incident arose as the result of a domestic situation between Carla Maloy and Nicole Devosky. Ms. Maloy and Ms. Devosky had lived together. Ms. Chew merely tried to intervene to quell the argument. The incident was reported to the police by Ms. Chew, who was a bartender at the premises. The officer also made it very clear that whoever was in charge of the licensed premises was fully cooperative with the police.

On September 10, 2011 at approximately 1:22 a.m., Officer O'Neal was dispatched to the licensed premises for a reported fight inside the establishment between a group of females. (N.T. 7, 36-37; Ex. B-16). Upon arrival, Officer O'Neal observed a female outside the licensed establishment, later identified as Leah Mezeivtich, and the Officer observed that she was bleeding from her face. (N.T. 7, 37; Ex. B-16). Ms. Mezeivtich told Officer O'Neal that she had been struck in the face with a beer bottle by another patron, Sarah McRoberts. (N.T. 7, 37; Ex. B-16). Officer O'Neal interviewed another patron, Lisa Klingensmith, who was also involved in the altercation inside the licensed establishment, and she refused to comply with the Officer's request to stop yelling and screaming obscenities, which subsequently resulted in her being arrested. (N.T. 7, 37; Ex. B-16). Officer O'Neal also had problems with Ms. Mezeivtich not complying with his request to stop yelling obscenities, which resulted in her being arrested. (N.T. 7, 38-39; Ex. B-16). Ms. Mezeivtich and Ms. Klingensmith were both cited for public drunkenness and disorderly conduct. (N.T. 7, 39; Ex B-16). Ms. Mezeivtich received treatment from the Jeannette EMS for the injury she suffered during the fight. (N.T. 7, 39; Ex. B-16): Officer O'Neal viewed Licensee's surveillance footage for the incident inside the licensed establishment, which showed Ms. Mezeivtich entering the establishment and going to where Ms. McRoberts was and initiating a fight. (N.T. 39). The operator of the bar on that night, Ms. Angela Smail provided surveillance footage to the officers to assist them in their investigation of the incident. The evidence clearly showed that Ms. Mezeivitch entered the bar and went directly to Ms. McRoberts and instigated the fight. There was no evidence that Ms. Mezeivitch was drinking in the bar prior to her starting the fight. It also appears that Ms. Mezeivitch had previously been barred from the premises but entered in any event and before any action could be taken accosted Ms. McRoberts. Thus, although the Licensee had taken preventative measures, they were unsuccessful.

On March 7, 2012 at approximately 9:08 p.m., Officer Dennis Pape was called to the licensed premises for a fight inside the establishment. (N.T. 6, 15; Ex. B-6). Upon arrival, Officer Pape observed that the victim, Stephanie Gantt, was outside the licensed establishment. (N.T. 6, 15, 18; Ex. B-6). Ms. Gantt told the officer that another patron, Melissa Maloy, had punched her in the face while inside the establishment, and the Officer observed she had a lump around her eye. (N.T. 6, 15, 18; Ex. B-6). As Officer Pape was talking to Ms. Gantt, he observed Ms. Maloy exiting the licensed

establishment and observed that she appeared to be intoxicated, smelled of alcohol, was staggering, and he was unable to understand what she was saying. (N.T. 6, 15-16; Ex. B-6). Officer Pape subsequently arrested and charged Ms. Maloy for simple assault, criminal mischief, and public drunkenness. (N.T. 6, 16; Ex. B-6). Officer Pape also arrested and charged Ms. Maloy's boyfriend for public drunkenness because he would not comply with the Officer's request to leave the licensed premises. (N.T. 6; Ex. B-6). Officer Pape further testified that the owner and operators of this establishment are cooperative with the police and that he has never had an issue with them. Further, he stated that they systematically call the police if there is an incident that they believe requires police intervention. (NT 17).

On March 14, 2012 at approximately 1:45 a.m., Sergeant Johnston was dispatched to the licensed premises for a reported fight. (N.T. 7, 106-107; Ex. B-13). Upon arrival, Sergeant Johnston observed numerous individuals outside Licensee's entrance and as the Sergeant approached most of the people started to walk away. (N.T. 7, 107; Ex. B-13). Licensee's bartender told Sergeant Johnston that Amber Hall had punched the victim in the face and bit the victim's cheek. (N.T. 7, 107-108; Ex. B-13). The victim stated that this incident took place outside of the licensed premises when her assailant approached her and punched her and bit her cheek. (NT 107). The victim entered her vehicle and left the area. Ms. Hall was subsequently arrested for simple assault and public drunkenness. (N.T. 7, 107; Ex. B-13). Sergeant Johnston contacted the victim a short time after the incident and observed injuries to the victim's face, abrasions to the victim's neck, and a bite impression on the victim's left cheek. (N.T. 7, 107; Ex. B-13). Sergeant Johnston indicated that the police have four (4) problematic licensees where the majority of the incidents occur, and Licensee is one (1) of those establishments. (N.T. 111-112).

On April 9, 2012 at approximately 12:00 a.m., Sergeant Jose A. Gonzales and Sergeant Johnston were dispatched to the vicinity of the licensed premises for a man being shot. (N.T. 6, 54; Ex. B-7). Upon arrival at a municipal parking lot about one half block from the licensed premises, Sergeant Gonzales observed a woman yelling and screaming that someone had shot her dad. The Sergeant found approximately five (5) shell casings in the parking lot. (N.T. 6, 54-55, 63-64; Ex. B-7). Dispatch informed Sergeant Gonzales that the victim, later identified as Tom Milliron, had been transported to Westmoreland Hospital by family members with three (3) gunshot wounds. (N.T. 6, 55-56; Ex. B-7).

Sergeant Gonzales interviewed Mr. Milliron at the Westmoreland Hospital, and he told the Sergeant that he, his brother, and daughter had been at the licensed establishment prior to the shooting. (N.T. 6, 56-57; Ex. B-7). Mr. Milliron told Sergeant Gonzales that he had observed another patron, who his brother had identified as "Menice", inside the licensed establishment and his brother had advised him that Menice did not like them. (N.T. 6, 57; Ex. B-7). Mr. Milliron told Sergeant Gonzales that after being inside the licensed establishment a short period of time, his brother and daughter exited the establishment ahead of him, and he observed another patron, later identified as Antawn Williams, follow his brother and daughter out of the establishment. (N.T. 6, 57; Ex. B-7). Mr. Milliron told Sergeant Gonzales that as he exited the licensed

establishment he observed that "Menice" was standing in Licensee's doorway and that Mr. Williams was standing at the corner of the parking lot. (N.T. 6, 57; Ex. B-7). Mr. Milliron told Sergeant Gonzales that as he was walking in the parking lot he observed Mr. Williams pull a gun from his waistband and attempt to rob him, which resulted in Mr. Milliron running across the parking lot, while Mr. Williams was shooting at him. (N.T. 6, 57; Ex. B-7).

Sergeant Gonzales saw Mr. Williams enter the licensed establishment as he arrived at the scene of the incident and interviewed him inside the establishment prior to going to the hospital to see Mr. Milliron, but the Officer was not aware at that time that Mr. Williams was the shooter in the incident. (N.T. 59). After Mr. Milliron had been released from the hospital, he identified Mr. Williams as the shooter from a photo lineup, which subsequently led to the arrest of Mr. Williams and charges. (N.T. 59-60). (N.T. 61).

Sergeant Gonzales indicated that Ms. Smail (aka Angie Graham) cooperated fully with him and provided him with surveillance footage of the inside of the establishment that showed Mr. Williams was inside the establishment prior to the shooting. The surveillance footage also showed a drug deal that occurred inside the establishment. (N.T. 62). This surveillance footage also established that there had been no interaction between the persons involved in the shooting while they were in the licensed premises.

Sergeant Gonzales indicated that during his midnight shift, he responds mostly to four (4) licensed establishments and Licensee is one (1) of those establishments. (N.T. 66-67). He stated that this particular licensed establishment is not any better or worse than the other bars to which he responds to the most.

According to the shooting victim, Thomas Milliron, he was a patron at the licensed establishment on April 9, 2012 and he observed two (2) patrons "staring at [him], eying [him] up" while inside the establishment. He believes the staring started when he opened his wallet to give his daughter some money. (N.T. 68-69, 74). Mr. Milliron indicated that he did not like the two (2) patrons staring at him so he left the licensed establishment after approximately twenty-five (25) minutes and after saying goodbye to his brother, sister-in-law, and daughter; he exited the establishment and started walking toward the parking lot. (N.T. 69-70). According to Mr. Milliron, as he was walking a man approached him from the front and another man approached him from the back, and the man in the back pulled a gun out of his pants and attempted to rob him. Mr. Milliron indicated that he said "hell no" and started running in the parking lot. (N.T. 69, 74). Mr. Milliron indicated that as he was zigzagging through the parking lot the shooter shot him in his leg, back, and buttocks. (N.T. 70). According to Mr. Milliron, Licensee had approximately eight (8) patrons inside the licensed establishment, excluding the two (2) patrons staring at him and his family. (N.T. 71). Mr. Milliron indicated that he did not see any security at the licensed establishment and the only employee of Licensee that he saw was a bartender. (N.T. 71). Mr. Milliron did not make Licensee's bartender aware that he felt uncomfortable that the two (2) patrons were staring at him. (N.T. 72). The only nexus to the premises is that each party to the incident was at the premises prior to the incident but, as previously stated, there

was no interaction among them during their visit nor any sign that there was trouble brewing.

Following the incident, the premises owners/operators were cooperative with police providing video tape of the entire period that the parties were in the premises NT 62-63 for investigative purposes. All participants have been barred from the premises for life.

The Board expressed its reasons for not renewing the license in its Opinion. The Board was troubled by the Licensee's failure to implement any substantial and timely corrective measures to address the ongoing problems occurring in and nearby the licensed premises. The Board was concerned with the Licensee's inability to appropriately address its security issues at the premises.

The Board found it troubling that the Licensee did not ban the assailant in the April 9, 2012 incident from the premises. However, it appears from the evidence that he had been barred for life.

The Board also is disappointed that the Licensee did not begin to utilize a metal detection wand to check its patrons for weapons. This is something that can be remedied easily by the Licensee.

The Board was concerned that the Licensee did not provide pertinent details with regard to its policy concerning barring patrons. At the de novo hearing before me the Licensee did present evidence of its barred patrons list and its policy for barring patrons. It is true that some of the patrons involved in the police incidents do not appear on the barred list. However, the reasons for their failure to appear are not at all clear from either to Licensee's perspective or the Commonwealth's perspective.

The Board was also concerned with the fact that the Licensee did not provide security personnel for the licensed premises. This, like the metal detection wand, can be easily remedied.

The Board was also troubled by the fact that the Licensee did not provide exterior surveillance cameras and adequate lighting outside the premises. The Licensee does have interior surveillance and in fact has assisted in police investigations by providing the footage to the police. The Licensee can provide exterior surveillance in the future. I examined the evidence and find that the exterior lighting is sufficient.

The Board also had some concern that there was a drug problem in the licensed premises because it was aware of a drug transaction that took place on April 9, 2012 and because a patron in the bar on February 6, 2011 had marijuana and cocaine on his person. To say that two such incidents over a ten year period constitute a drug problem is a stretch. I do not find that there has been sufficient evidence to establish that there is a "drug problem" in the licensed premises.

The Board also was concerned that the Licensee permitted minors to frequent the premises. This was based upon the incident in September of 2010 when a 17 year old ran into the premises to hide from the police because it was after curfew. He ran into the premises and directly into the bathroom and was immediately apprehended. This is hardly a minor "frequenting" the premises.

The Board was also troubled because there was allegedly a bet on a pool game on August 14, 2010 shortly after the Licensee had received a citation for gambling taking place on the premises. However, the evidence established that the "bet" that resulted in the argument had not taken place on August 14, 2010 but at some prior time. Furthermore, the Licensee had clearly posted rules against gambling.

Another area of concern was the Licensee's manner of operations. The Board believed that the evidence showed that the Board appointed manager, Ms. Anderson, was not fulfilling her duties as a manager appointed by the Board. It is true that Ms. Anderson did feel it necessary to travel to Virginia every six weeks to two months to care for her ailing parents. When her mother was living Ms. Anderson would visit her mother approximately four times per year for one to two weeks at a time. Her mother has now passed away. During the period of time that she was not there her daughter, Ms. Smail, a/k/a Ms. Graham, was in charge of the day to day operations of the licensed establishment. Currently Ms. Anderson is present at the premises approximately 60 hours per week.

There seems to be no question that the Licensee was aware of a pattern of violent conduct in and about the licensed premises for at least a two year period. Her knowledge of such activity cannot be questioned because on many of the occasions of violent conduct she or her employees were the persons that notified the police.

The case of *U.S.A. Deli, Inc., v. Pennsylvania Liquor Control Board,* 909 A.2d 24 (Pa. Cmwlth., 2006) makes it clear that there is unfettered discretion in the Board to renew a license based upon what ever reasoning it believes should allow renewal. Thus, if the Board has such unfettered discretion so does the trial court. It is only when such discretion is abused that the decision of the court to renew may be reversed. Therefore, I find that I have the discretion to grant renewal with specific conditions placed upon such renewal to assure that the Licensee will operate the establishment in accordance with the liquor laws and to assure that there be no relationship between activity occurring outside the premises and the manner in which the premises is operated.

Although there are a number of incidents that have occurred outside and inside the premises that have required police intervention, on most occasions the intervention was sought by the Licensee. Furthermore, many of the incidents did not have a relationship to the manner in which the licensed premises is operated. Certainly the evidence shows that improvements can be made in the security and monitoring of patrons at the establishment to allow for more rapid intervention and perhaps even prevention. This is something that I will order be accomplished as a part of the conditional renewal of the license that I will Order. I believe a conditional renewal that requires tighter security and monitoring of both the inside and outside of the licensed building will serve the interests of justice and at the same time protect the public welfare and promote the peace and morals of the Citizens of the Commonwealth.

ORDER

And now this 9th day of January, 2013, in accordance with the foregoing Decision it is hereby Ordered and Decreed that The Pennsylvania Liquor Control Board

conditionally renew Restaurant Liquor License No. R-1005 for the licensing period from July 1, 2012 to July 30, 2014 under the following conditions:

1. That the Licensee employs a bouncer/security person or persons each night the bar is open from 9:00 p.m. to closing.
2. That the Licensee purchase and utilize a device to wand all patrons entering the establishment to determine whether the patron is carrying any type of weapon.
3. That the Licensee purchase security cameras for the exterior of the premises.
4. That if the Licensee intends to abdicate her duties as the Board approved manager then she must complete the requisite application with the Board to have another appointed.
5. That the Licensee prepare a more detailed list of patrons that are barred from the premises setting forth:
    a. The name of the patron that is barred.
    b. The length of time that they are barred
    c. The date of the incident that resulted in the patron being barred.
    d. The details of the incident that resulted in the patron being barred.
    e. The name of the employee of the Licensee that barred the patron.

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

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COMMONWEALTH OF PENNSYLVANIA
V.
SONYA E. BERGMAN, Defendant

ARREST

Investigatory Stops; Casual, Routine, or Random Encounters

Because a mere encounter does not require any suspicion, the question is when in time a defendant is subjected to an investigative detention and whether at that time there existed a sufficient justification for that class of detention.

SEARCHES AND SEIZURES

Custody, Restraint, or Detention Issues; Particular Cases

1. A uniformed police officer exercises some force because he is in uniform, a symbol of authority, when he approaches and questions a citizen.

2. The mere existence of a uniformed officer's presence is insufficient to support the finding of a seizure.

3. A situation can remain a mere encounter even where a patrol car's overhead lights are activated.

4. A police officer's request for identification does not turn a mere encounter into an investigatory detention.

5. Other factors a court may apply in determining whether a seizure occurred are the brandishing of weapons, applications of force, threats, blocking of exits, and the use of language or tone not commensurate with the circumstances.

6. The court applies an objective test to determine whether a seizure occurred and determines whether a reasonable person would feel free to leave absent some objective manifestation of the officer's subjective beliefs to the Defendant during the course of the encounter.

7. In the present matter, the encounter between the officer and Defendant was a mere encounter because the officer made no show of force, made no threats, did not block Defendant's truck, and did not brandish a weapon.

8. Because Defendant exhibited signs of intoxication during the encounter, and because the officer saw Defendant was in control of her vehicle, the officer's decision to administer field sobriety testing was reasonable.

CRIMINAL LAW

Investigatory Stops

Defendant's statements made during her mere encounter with the police did not require Miranda warnings because it was general investigative questioning, designed to determine whether a crime was being committed.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 975 C 2012

Appearances:
Jennifer Dupilka, Assistant District Attorney,
Westmoreland County, for the Commonwealth
Thomas Anthony Will,
Pittsburgh, for the Defendant

BY: DEBRA A. PEZZE, JUDGE

OPINION AND ORDER

BY THE COURT,

(Opinion by Pezze, J., issued February 19, 2013)

I. FACTS

Defendant, Sonya E. Bergman, has been charged with two counts of Driving Under the Influence as a result of her arrest on December 25, 2011. The arresting officer, Stephen Jay Crawford, employed by Rostraver Township, was working an 11:00 p.m. to 7:00 a.m. shift and was present in the area of the rear parking lot of Giant Eagle in the Tri-County Plaza. (OPH 4-6)[1] At approximately 12:15 a.m. he saw a green Chevrolet pickup truck drive east down Finley Road and make a right hand turn into the Gabriel Brothers Shopping Plaza. The truck drove behind the buildings, out of the officer's view. (OPH 6-7)

Because none of the stores were open, it was late and there is criminal activity in that area, the officer waited a minute or two to see if the truck would reappear. When it did not, he made a decision to investigate. (OPH 7-8) He proceeded to drive his marked car to the truck, and noted that although the headlights were out, the engine was running. (OPH 8-9) He observed that Ms. Bergman was seated in the driver's position and that the key was in the ignition. (OPH 9, 19)

Officer Crawford pulled his police vehicle behind and slightly to the side of the truck so he could approach it from the rear. It was his recollection that the truck had ample room to come out around if it chose to depart the area. (OPH 13) The parking lot was totally deserted and he had no recollection of a delivery truck in the vicinity. (OPH 13, 19) Officer Crawford activated his takedown and flasher lights but not the entire light bar. The flashers were used to pinpoint his location in the event something untoward happened. (OPH 20) He agreed that he had not witnessed any moving violations, there were no equipment violations on the truck and he would not have cited the vehicle for parking in that location. (OPH 20; PH 24)[2] He did not see the occupants of the truck engage in illicit activity such as drug use. Nevertheless, at this point he would not have allowed Ms. Bergman to leave (OPH 20) because he did not know why the vehicle was in that location. (OPH 18)

Officer Crawford approached the truck, identified himself and explained that he thought it was suspicious, the area was high crime, and he was investigating. (OPH 13) He asked Ms. Bergman for her driver's license and vehicle registration card. Ms. Bergman handed him the registration card but had to sort through a stack of documents several times to locate her driver's license. Eventually Officer Crawford identified the license for her. (OPH 10) He noted that Ms. Bergman had bloodshot, glassy eyes, slurred speech and had an odor of alcohol on her breath. She had a passenger who

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[1] OPH indicates notes of testimony taken at the Omnibus Pretrial Hearing on December 10, 2012 before this Court.

[2] PH references testimony given at the Preliminary Hearing on March 5, 2012 before Magistrate Charles Christner.

identified herself as Cherish Pastrick, Ms. Bergman's daughter. Ms. Bergman explained that they were out drinking and had stopped in order to urinate. (OPH 11-12)

Because the officer suspected that Ms. Bergman was intoxicated, he had her perform field sobriety tests which she failed. (OPH 12; PH 12-14) She was then placed under arrest, transported to the Rostraver Township police station and tested. Her blood alcohol level was .142. (PH 14, 17)

II. DISCUSSION

Ms. Bergman contends that she was stopped and interrogated without reasonable suspicion or probable cause and that her statements were involuntary because she was not given *Miranda* warnings.

Interactions between police and citizens have been classified as mere encounters, investigative detentions or custodial detentions. A mere encounter can be any formal or informal interaction, but will normally be an inquiry by the officer. Since a mere encounter requires no suspicion at all, the question is when in time the defendant is subjected to an investigative detention and whether at that time there existed sufficient justification for that class of detention. See *Commonwealth v. DeHart,* 745 A.2d 633, 636 (Pa. Super. 2000) Courts have recognized that a police officer in uniform must be considered as showing authority and exercising some force simply because he is in uniform, a symbol of authority, when he approaches and questions a citizen. The existence of this effect, however, is not in and of itself a sufficient basis to support the finding of a seizure. *Commonwealth v. Strickler,* 757 A.2d 884, 898 (Pa. 2000) Other factors to consider include brandishing of weapons, application of force, threats, blocking of exits, and use of language or tone not commensurate with the circumstances. *Strickler,* supra at 900. *Commonwealth v. Smith,* 836 A.2d 5, 12 (Pa. 2003)

In *Commonwealth v. Collins,* 950 A.2d 1041, 1048 (Pa. Super. 2008), a police officer observed a vehicle parked at an overlook and determined to investigate. He parked next to the vehicle with his headlights shining into the car but did not block it from leaving. The officer agreed that there was no outward sign of distress and that there was nothing that led him to believe that there was something illegal going on. The vehicle was not obstructing traffic or in violation of any traffic restrictions. The court noted that even where a patrol car's overhead lights are activated, the situation can remain a mere encounter. In this circumstance, in carrying out a duty to check on the safety of motorists, Trooper Walton discovered that the defendant was engaged in illegal activity. The court found that the mere encounter escalated into reasonable suspicion when, in the course of the interaction, the officer espied a bong and smelled marijuana.

In *Commonwealth v. Lyles,* 54 A.3d 76 (Pa. Super. 2012), police saw the defendant seated in front of a vacant building in an area with a large number of burglaries. The officer approached Lyles, asked for identification and questioned why he was there. The Superior Court characterized this interaction as a mere encounter. It noted that a request for identification does not transform a mere encounter into an investigative detention. There was no evidence that the officer engaged in intimidating movements

or an overwhelming show of force. Further, the officer's subjective belief that Lyles was not permitted to walk away from his questioning was determined to be immaterial. The test is whether a reasonable person would feel free to leave absent some objective manifestation or demonstration of the officer's subjective belief to the defendant during the encounter. *Lyles* at 83.

In *Commonwealth v. Au,* 42 A.3d 1002 (Pa. 2012), a police officer on patrol in the early morning hours observed a motor vehicle parked in the lot of a business premises. The officer positioned his car so as to illuminate the passenger side of the car, but without blocking the vehicle. He approached the car with a flashlight, asked what was going on, and requested identification. In this circumstance the court observed, "The owners of businesses...would not want the police to simply ignore nocturnal activity in their parking lots after hours...Requiring officers to have reasonable suspicion before requesting identification from individuals while performing these salutary duties is too onerous," *Au* at 1006. The court held that the arresting officer's request for identification did not transform this encounter into an investigatory detention.

In the instant case, Officer Crawford noticed a vehicle with its headlights turned off drive into the parking area of a shopping plaza late at night and when all the businesses were closed. His decision to investigate these circumstances led him to approach and question Ms. Bergman. He exhibited no show of force, made no threats, did not block her truck and did not brandish a weapon. This is precisely the type of interaction that our courts characterize as a mere encounter. During this encounter Ms. Bergman exhibited signs of intoxication which escalated the interaction into one in which the officer formed a reasonable suspicion that she might be too intoxicated to drive. Since the officer had seen that she was in control of the truck, and that the ignition was running, his decision to administer sobriety testing was reasonable. Reasonable suspicion morphed into probable cause to arrest after Ms. Bergman failed the sobriety testing. Any statements made during this encounter, and before the officer determined to administer sobriety tests, did not require *Miranda* warnings since it was general investigatory questioning, designed to determine whether a crime was being committed. See *Commonwealth v. Kloch,* 327 A.2d 375, 380 (Pa. Super. 1975); *Commonwealth v. Gonzalez,* 546 A.2d 26, 29 (Pa. 1981).

For these reasons this Court concludes that the contact between Officer Crawford and Ms. Bergman was a mere encounter that escalated into a reasonable suspicion of intoxication after the officer observed her demeanor and smelled the odor of alcohol. Thus, the request to suppress the evidence arising from the encounter and eventual arrest is denied.

ORDER OF COURT

AND NOW, this 19th day of February, 2013, IT IS HEREBY ORDERED that the Motion to Suppress evidence obtained on December 25, 2011, is hereby DENIED.

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

MAINES PAPER & FOOD SERVICE, INC., Plaintiff
V.
HOFFMAN RESTAURANT GROUP, INC., RICHARD J. HOFFMAN and LISA M. HOFFMAN, his wife, Defendants

FRAUD

Fraudulent Conveyances or Transfers; Badges of Fraud; Preferences to Officers, Shareholders, and Directors; Use of Money or Property Obtained

1. The directors of a corporation have a fiduciary duty to protect the interests of all creditors.

2. The transfer of the corporate assets to corporate directors in order to satisfy corporate debts held by the directors before satisfying debts held by other creditors gives rise to a presumption the directors took advantage of their special position in order to save themselves from being prejudiced.

3. It is improper to place the assets of a financially ailing corporation where insiders can reach them, but creditors cannot.

4. The conduct in failing to maintain actual capital within a corporation and removing all, or substantially all, of the corporation's funds to an insider or corporate director are "badges of fraud" and constitute fraudulent transfers.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 6829 of 2003

Appearances:
Jeffrey P. Brahan,
Pittsburgh, for the Plaintiff
J. Michael Baggett,
Pittsburgh, for the Defendants

BY: GARY P. CARUSO, PRESIDENT JUDGE

DECISION AND ORDER

This matter is before me as the result of a non jury trial. The matter for me to decide is whether certain actions of the defendants, Richard and Lisa Hoffman violated Pennsylvania's Fraudulent Transfer Act, 12 Pa. C.S.A. §§5101 et seq. ("FTA"). The actions complained of were allegedly taken with respect to the finances of Hoffman Restaurant Group ("HRG").

The defendant HRG was incorporated in December of 1995. Richard Hoffman (hereinafter "Richard") is the 100% shareholder. He is also its only officer. Richard married the defendant Lisa Hoffman on New Years Eve in 1997. HRG was engaged in the business of operating Burger King Restaurants. HRG maintained a single account in the Irwin Bank. This account was closed in April of 2003. The evidence has established that Richard alone controlled and was in control of the finances of HRG during the pertinent time period. HRG began suffering financial problems with regard to the operations of the Burger King Restaurants in late 2000 or early 2001. At this time a sizable debt was being created by HRG.

It appears from the evidence presented that in October of 2001 Richard and Lisa Hoffman (hereinafter "Lisa") ceased making payments on many debts upon which Lisa was not obligated but continued to pay many of the debts upon which she was not obligated. During this same time period Richard began placing Lisa's name on real estate that he had previously owned in his name alone. Lisa contended that this was done because she was caused to be a guarantor on certain obligations. However, the credibility of this contention is seriously questioned. This is because the guarantee that she was speaking of was signed nearly one year before the transfers were made. Therefore, any nexus between the two events is quite tenuous. Although the unpaid indebtedness to Maines did not arise until the end of 2002 and early 2003, the action by the Hoffmans in October and November of 2001 tends to show the beginning of a scheme that was being devised to avoid personal responsibility for the debts being incurred by HRG.

The Plaintiff, Maines Paper & Food Service, Inc., ("Maines") sold supplies to HRG. This relationship began in 1996 and continued until March of 2003. In March of 2003 Maines sent letters to HRG demanding payment of its significant indebtedness. The indebtedness at this time was in the neighborhood of $726,016.52. Maines eventually obtained a judgment against HRG in September of 2003 in the state of New York. The amount of the judgment was $794,267.64. On September 10, 2003 this judgment was transferred to Westmoreland County Court of Common Pleas. The judgment was filed at No. 5755 of 2003. This judgment was revived in 2008. Maines has recovered $55,916.02 to date on the judgment.

The evidence establishes that beginning in August of 2002 the Hoffmans improperly were transferring assets of HRG from the corporation to themselves to protect the assets from the corporate debts that were continuously being created. During the period from August of 2003 to January 2005 the significant sums were transferred from HRG to the Hoffmans as will later be set forth in detail.

The matter for me now to determine is whether transfers of property into the names of Lisa and Richard and other actions taken by them during this period of August 2003 to January 2005 were violations of the FTA. In addition, Richard was receiving from HRG $5,000.00 per month on an alleged equipment lease during 2001 up to and including March of 2003. However, this equipment lease did not exist.

The Hoffmans contend that the payment of the sums of money to them referred to above was actually the repayment of shareholder loans to HRG. However, there was no credible written evidence introduced to support this contention. There was only one alleged Note in the amount of $2,186,000.00 to support any contention of shareholder loans. The original of this Note has not been entered into evidence. There is merely a copy of this alleged Note to review. It is interesting that this Note states that the principal balance of that alleged loan is an alleged aggregate or a consolidation of an alleged series of judgment Notes owed by HRG to Richard. However, none of these referred to "series of judgment Notes" were ever introduced into evidence. In the first paragraph of the alleged Note it sets forth a date of August 31, 2000. The Note states that it was executed under and pursuant to the Resolution of the Board of Directors of

Hoffman Restaurant Group, Inc. at a meeting of the Corporation on August 31, 2000. However, this Resolution was not entered into evidence. Other than this alleged Note there is no other promissory Note from HRG to the Hoffmans evidencing any other such loans. The fact that there is very little documentation of loans from the shareholders to HRG is an important consideration in determining whether the loan is legitimate. All of this calls into question the validity of the alleged Note for $2,186,000.00.

Furthermore, the purported loans from shareholders were not tracked in the accounting system of HRG. With the exception of a single handwritten summary prepared by Richard there are no documents within the accounting records of HRG that track this alleged indebtedness of the corporation to Richard or Lisa. The referred to handwritten note was prepared well after the fact of any alleged loans. It is very difficult for me to believe that loans in the amount of several million dollars were not formally accounted for in the corporate accounting system. It does not appear that any such documentation exists because when asked to produce such documentation HRG said they would if the documentation existed; but HRG has not produced the documentation. Therefore, I conclude that such documentation does not exist. There is no other written evidence that the sums allegedly advanced by Richard and Lisa were loans and not infusions of capital. The only other "evidence" submitted were accounting notes contained within the financial statements for 1999 and 2000. However, these accounting notes are contradictory and therefore unreliable. There had been no evidence presented at trial that explained why these sums from said alleged loans were deposited into the accounts of HRG nor the business purpose for the deposit. Based upon the evidence there is no basis upon which I can even determine that these amounts deposited were used for business purposes.

Defendants also contend that the corporate tax returns and financial statements prove that there were loans from shareholders to HRG that were to be paid back. However, the inherent inconsistency in that documentation makes them questionable indeed. In addition the only promissory note introduced at trial does not appear in the financial statements. Even the defendants' accountant could not remember seeing this alleged promissory note. The defendants claim, in support of the validity of their alleged loans, that these loans were the subject of IRS audits. However, they produced no evidence of the same.

The defendants have failed to produce credible evidence that they had made loans to HRG, when they were provided or how the funds were used in the business of HRG. The alleged shareholder loans claimed by the Hoffmans were neither well documented or "arms length" transactions. They were in the nature of "secret" debts kept unknown to other creditors to be used at the whim of the Hoffmans to defeat the claims of creditors. There is a lack of formal documentation of the loans, there is no evidence of the terms of the alleged loans and no proof of any payment of any interest on these alleged loans. The lack of such evidence severely militates against any finding that this infusion of money was a loan.

Therefore, I find that the purported loans advanced by the defendant were not legitimate shareholder loans but merely infusions of capital. Thus, the payments made

to the Hoffmans allegedly in payment of the purported loans are not insulated from liability under the Uniform Fraudulent Transfers Act. I further find that even if it is assumed that the funds deposited in the HRG accounts came from accounts owned by the Hoffmans by the entireties once it was deposited into the HRG accounts these amounts ceased being entireties property.

Richard was the sole and exclusive shareholder of HRG. I do find that Richard's financial scheme was one contrived to hinder, defraud or delay his creditors. To believe that the alleged loans could be repaid at Richard's whim would result in HRG being judgment proof throughout its existence. Pennsylvania law does not condone the notion that all capital in a corporation can at any time be withdrawn or otherwise transferred to the shareholders, particularly to the detriment of the corporate creditors. It is clear that when loans are indeed a substitute for capital that is needed to operate a business they are to be treated as capital and resultantly subordinate to the claims of creditors. As a result of HRG being undercapitalized and judgment proof throughout its existence the shareholder, Richard Hoffman, placed no assets at risk that were related to the corporations business or liabilities. Richard conducted himself in such a way as to attempt to remove any and all assets that could be attached by creditors, to the extent that he was able to do so. Richard re-configured the assets during and around November of 2002. These efforts culminated when these occurred on a nearly daily basis in April of 2003 when Trigild was granted receivership over the restaurants operated by HRG. Richard's scheme was to pay off many debts for which he and his wife were liable and causing those that did not place the marital assets at risk to go wanting. This is inappropriate as pointedly found by the Superior Court in the case of *Robar Development Com.v. Minutello,* 408 A.2d 851 (Pa. Super. 1979). In that case the Superior Court stated that where officers of insolvent corporations satisfied the corporate debts held by themselves prior to other creditors, equity has erected a presumption that such officers have taken unfair advantage of their special position and knowledge to save themselves from being prejudiced. It went on to recognize that no matter how legitimate the debt, its payment was in effect a preferential payment to themselves and was in contravention of their fiduciary duty to protect the interests of other creditors. See also, *Tri State Paving, Inc. v. Joan,* 32 B.R. 2 (Bankr. W.D.Pa. 1982). This conduct of failing to maintain any actual capital within HRG and removing all, or substantially all, of the funds of HRG starting in 2002 constitutes fraudulent transfers under 12 Pa. C.S.A.§5104(a)(1).

I further find that at the time the transfers were made HRG knew that it had incurred debts beyond its ability to pay and that HRG was thus insolvent as the result of the transfers. Based upon the evidence presented at trial the total liability of HRG was in the neighborhood of $9,889,484 and possibly much higher. Here HRG was not paying its debts when they became due and thus are presumed to be insolvent and the burden shifted to the defendants to prove the nonexistence of insolvency. This the defendants failed to do. The defendants did present evidence of two purported offers to purchase to attempt to prove that HRG was not insolvent. However, even if true, the purchase prices were insufficient to exceed the indebtedness of HRG.

In addition, on this matter of insolvency, HRG claimed that there was an impending bankruptcy or dissolution of HRG in a motion it filed with the United States District Court in December of 2002. This admission on the part of the defendant further supports the finding that the defendant was insolvent at the time of the transfers or that the transfers made it so.

It is also interesting to note that the nature of the financial statements for HRG changed when the financial condition of HRG began to change in 2000 or 2001. The accountant for HRG changed his financial analysis of the corporation from "reviewed" financial statements to only "compilation" financial statements in 2001. By using the "compilation" statement it relieved the accountant from making a representation concerning whether HRG was a viable concern.

The transactions at issue are also fraudulent pursuant to the FTA when I examine the "badges of fraud" under §5104 (b). Numerous courts have held that transfers which leave an entity without sufficient funds to pay creditors are fraudulent on their face or violate statutes that police fraudulent transfers. If I would accept the argument of the Hoffmans that money could be withdrawn from HRG by the Hoffmans at anytime because they claim to have made shareholder loans, then all of the funds of HRG would be subject to removal and nothing would be available for the payment of creditors. The law just does not countenance such a result. The effect of doing this would give an unfair advantage and preference to the sole shareholder and officer and cause the corporation to be unable to pay its other creditors given its precarious financial condition at the time. It is improper to place assets of a financially ailing corporation where insiders can reach them but creditors cannot. *Vaniman International, Inc*., 22 B.R. 166 (Bankr. E.D.N.Y. 1982).

In the present case the "badges of fraud" have been clearly established. First of all the obligations alleged were to an insider. Further Richard Hoffman, the sole shareholder and officer, retained control over the property transferred from the corporation. These alleged obligations of the corporation to the Hoffmans were undisclosed. The evidence of these obligations, if it existed at all, was not available to creditors. The transfers were made at a time when the debtor was aware of its precarious financial condition and the existence of lawsuits to collect debt and the likelihood of suits to collect its rapidly increasing debt. The only bank account of HRG was cleaned out and closed effective April 30, 2003. A portion of the assets obtained by the Hoffmans from HRG were placed in account at Merrill Lynch in the names of Richard and Lisa Hoffman. This would tend to conceal the assets from corporate creditors. As previously set forth the proof of actual shareholder loans is meager indeed and wholly insufficient to prove the same. The insolvency of HRG either actually existed or was imminent at the time the transfers were made. The end of HRG was clearly on the horizon in March of 2003 and the majority of the funds were usurped in the first days of April 2003.

With regard to the "unclean hands" defense raised by the defendants, I do not find the defense applicable. The defense was not raised by the New Matter filed by the defendants. Furthermore, assuming it had been raised, I find that the defense would not apply to the actions of the plaintiff herein, where the plaintiff is using the Uniform

Fraudulent Transfers Act in an effort to collect upon a valid judgment transferred from the State of New York to the Commonwealth of Pennsylvania.

Based upon my review of the evidence I have determined that transfers in the amount of $826,177.95 were made to the defendants Richard J. Hoffman and Lisa M. Hoffman during the relevant time period of August 15, 2002 until January 25, 2005 in violation of the FTA.[1] Therefore, I will Order that assets of Richard J. Hoffman and Lisa M. Hoffman having a value of $826,177.95 are subject to a lien of the judgment of the plaintiff Maines Paper & Food Service, Inc., as an unpaid creditor and may be executed upon to satisfy the judgment of record having a principal amount of $738,352.62 and in addition any post-judgment interest at the rate of 6% per annum, or $127.37 per day, for the period from September 11, 2003 until paid. It shall be further Ordered that the court shall retain jurisdiction until such time that the judgment amount plus interest has been paid.

SCHEDULE A

Date:	Amount:	Source of Funds:	Record Cite(s):
August 15, 2002	$76,306.79	Coca-Cola Fountain North America	Exhibit 33; TT, at 43-5
December 30, 2002	$2,179.12	Payment by HRG upon Loan 9005	Exhibit 38; TT, at 166-71
January 8, 2003	$2,179.12	Payment by HRG upon Loan 9005	Exhibit 38; TT, at 166-67
January 23, 2003	$2,179.12	Payment by HRG upon Loan 9005	Exhibit 39; TT, at 171
February 25, 2003	$2,179.12	Payment by HRG upon Loan 9005	Exhibit 40; TT, at 172
March 18, 2003	$13,726.00	HRG Payoff of Loan 9005	Exhibit 43; TT, at 182
April 1, 2003	$10,240.00	RSI Check to HRG	Exhibit 44; TT, at 184-5
April 7, 2003	$308,000.00	Transfer from HRG Account to Richard Hoffman Account 147918	Exhibits 46 & 47; TT, at 186-7
April 8, 2003	$122,000.00	Transfer from HRG Account to Richard Hoffman Account 147918	Exhibits 46 & 48; TT, at 186-8
April 15, 2003	$250.00	Burger King Corporation Check to HRG	Exhibits 45-6; TT, at 185-6

[1] See the attached Schedule A.

Date:	Amount:	Source of Funds:	Record Cite(s):
April 15, 2003	$3,786.62	Cashier's Check to HRG	Exhibits 45-6; TT, at 185-6
April 15, 2003	$1,723.96	Cashier's Check to HRG	Exhibits 45-6; TT, at 185-6
April 15, 2003	$4,569.33	1st Summit Bank Check to HRG	Exhibits 45-6; TT, at 185-6
October 30, 2003	$30.09	Wilkinsburg-Penn Joint Water Authority Check to HRG	Exhibit 50; TT, at 192
November 18, 2003	$20,000.00 (AMOUNT RETAINED BY HOFFMAN)	Wire Transfer from Trigild to HRG	Exhibit 51; TT, at 192-6
January 5, 2004	$2,900.00	Travelers Property Casualty Check to HRG	Exhibit 55; TT, at 408-9
January 28, 2004	$19,000.00	Coca-Cola North America Check to HRG	Exhibits 56 & 7; TT, at 409-10
April 3, 2004	$19,830.00	New Hampshire Insurance Company Check to HRG	Exhibits 58 & 59; TT, at 410-11
November 16, 2004	$68,557.43	Rodgers Insurance Group Check to HRG	Exhibits 60 & 1; TT, at 411-2
January 25, 2005	$11,541.25	Rodgers Insurance Group Check to HRG	Exhibits 62 & 3; TT, at 412-3

TOTAL: $691,177.95

RENTAL PAYMENTS TO RICHARD J. HOFFMAN ON LEASE THAT WAS NOT PROVEN TO EXIST: 27 MONTHS AT $5,000.00 PER MONTH OR $135,000.00

GRAND TOTAL: $826,177.95

ORDER

And now this 8th day of March, 2013, in accordance with the foregoing it is hereby Ordered and Decreed that the assets of Richard J. Hoffman and Lisa M. Hoffman having a value of $826,177.95 are subject to a lien of the judgment of the plaintiff Maines Paper & Food Service, Inc., as an unpaid creditor and assets valued at that amount may be executed upon to satisfy the judgment of record having a principal

amount of $738,352.62 plus any post-judgment interest at the rate of 6% per annum, or $127.37 per day, for the period from September 11, 2003 until paid. It is further Ordered that the court shall retain jurisdiction until such time that the judgment amount plus interest has been paid.

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

COMMONWEALTH OF PENNSYLVANIA
V.
ZACHARY A. LAWSON, Defendant

CRIMINAL LAW

Vehicle Stop; Reasonable Suspicion; Probable Cause; Illegal Search

1. The citizens of the Commonwealth have a constitutional right to be free from intrusions upon their personal liberty absent probable cause.

2. To justify an investigatory detention, the police must have reasonable suspicion that the person seized is engaged in unlawful activity.

3. A suspect's mere presence in an area known for high crime or drug activity is not sufficient to create a reasonable suspicion to justify a warrantless investigatory vehicle stop.

4. The police did not have probable cause or reasonable suspicion to stop Defendant's vehicle, based on the passenger's exit from the vehicle and entry into a house.

5. Even if a house is considered by the police to be a drug house, the police cannot arrest its occupants for merely entering and exiting its doors.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 2207 C 2012

Appearances:
Jacquelyn Knupp, Assistant District Attorney,
Westmoreland County, for the Commonwealth
Dennis Paluso,
Charleroi, for the Defendant

BY: DEBRA A. PEZZE, JUDGE

OPINION AND ORDER

BY THE COURT,
(Opinion by Pezze, J., issued February 19, 2013)

I. FACTS

Officer Christopher Gray, a Monessen police officer of 3 1/2 years, performed a traffic stop on March 23, 2012 that ultimately resulted in Defendant, Zachary A. Lawson's, arrest on various drug charges.(PH 26)[1] Facts elicited at the preliminary hearing establish that at 4:38 p.m. on that date Officer Gray observed a white car, driven by a white male, pull up in front of 1017 Knox Avenue. (PH 6, 27) A black male, later identified as Mr. Lawson, exited the car, remained in the residence a short period of time, and returned to the vehicle. (PH 27, 29) Although originally police saw only two individuals in the car (PH 27), when the vehicle was pulled over a small child, identified as Mr. Lawson's daughter, was present. (PH 29, 36)

[1] PH indicates notes of testimony taken at Mr. Lawson's preliminary hearing which occurred on June 8, 2012 before District Justice Bruce King.

Officer Gray testified that when he initially drove past the white car, the driver would not make eye contact with him. (PH 27) This conduct, he qualified, was not suspicious and the driver did not appear to be doing anything criminal. (PH 37) Both Officer Gray and Officer Brian Vitale, arresting officers, knew that Mr. Lawson and/or his girlfriend resided at 1017 Knox Avenue. (PH 25, 39) The officers found the situation suspicious because the area was known for drug activity and drug arrests had been made of individuals who were apprehended immediately after being inside the house. (PH 27) In addition, the officers justified the traffic stop because Mr. Lawson had remained inside the residence for only a brief period before he reemerged. (PH 28)

Once Officer Gray passed the white car in his marked patrol car, he circled by Highland Manor and observed the car travelling down Knox Avenue. He instituted a traffic stop at Sixth Street and Knox Avenue at Nuzzaci's Pizza. (PH 27) The stop was purportedly made for "suspicious activity". (PH 28) There had not been any motor vehicle violations, and the "suspicious activity" was characterized by the officers as the vehicle's brief stop at Mr. Lawson's home, a known drug house, and a location where several drug arrests had been made. (PH 41)

Mr. Lawson contends that the stop of the vehicle and his eventual arrest were without reasonable suspicion or probable cause. He claims that the brief stop of the vehicle in which he was a passenger was necessitated so that he could pick up his daughter. (See Motion to Suppress and For Habeas Corpus relief, verified by Mr. Lawson.)

II. DISCUSSION

Our Supreme Court, when addressing the right to privacy guaranteed by Article I, Section 8 of the Pennsylvania Constitution, has admonished that:

> The seriousness of criminal activity under investigation, whether it is the sale of drugs or the commission of a violent crime, can never be used as justification for ignoring or abandoning the constitutional right of every individual in this Commonwealth to be free from intrusions upon his or her personal liberty absent probable cause. *Commonwealth v. Palo,* 759 A.2d 372, 376 (Pa. 2000); *Commonwealth v. Maxon,* 798 A.2d 761, 764 (Pa. Super. 2002)

Law enforcement officers, prior to subjecting a citizen to an investigatory detention, must harbor at least a reasonable suspicion that the person seized is then engaged in unlawful activity. The question of whether reasonable suspicion existed at the time of an investigatory detention must be answered by examining the totality of the circumstances to determine whether there was a particularized and objective basis for suspecting the individual stopped of criminal activity. The test is objective and will not be satisfied by an officer's hunch or unparticularized suspicion. See *Maxon*, supra, at 768.

For example, in *Commonwealth v. Tither,* 671 A.2d 1156 (Pa. Super. 1996), a veteran police officer was patrolling an area known for frequent drug transactions and in which he had made previous drug arrests. He observed a car stopped in the middle of the street, and a male standing in the street reaching into the car. When these men became aware of the officer's presence, the car quickly pulled away and the pedestrian

retreated into a building. The court reversed the driver's conviction and noted, "The fact that [defendant] was observed in a high crime area known for drug related activity is not sufficient to justify an investigatory *Terry* stop." *Id*. at 1158. It concluded that the fact that there was a man reaching into the defendant's car window, without any further observations, is not indicative of criminal activity. See also *Commonwealth v. Walton,* 2013 Pa. Super. 3 (2013) in which the court reversed defendant's conviction finding lack of reasonable suspicion for an investigatory stop based on observations of the defendant who had driven up to a couple in a parking lot who appeared to be nervously pacing, using their cell phones and waiting for the defendant's arrival.

In *Commonwealth v. Wilson,* 655 A.2d 557 (Pa. Super. 1995), the defendant, a passenger in a car, exited the car for a short period and then returned and reentered the vehicle. This conduct occurred in three different locations, and after the third episode the car was stopped and its occupants arrested for drug possession. The court reversed the conviction noting that a suspect's mere presence in an area known for high drug related activity is not sufficient to create a reasonable suspicion in the minds of police in order to justify a warrantless investigative stop under *Terry*. The court noted, "We are hard pressed to accept any suggestion that the act of getting out of a car and back into it, without more, is irregular, suspicious or unusual behavior under *Terry*." *Wilson* at 561.

The Commonwealth, having had an opportunity to rebut these claims, has elected not to file a brief and argue its position. It seems clear to this Court, and perhaps to the prosecution, that there was neither reasonable suspicion nor probable cause to justify the stop of the car in which Mr. Lawson was a passenger. Police knew that Mr. Lawson resided at 1017 Knox Avenue with his girlfriend. Mr. Lawson's brief entry into his home did not justify the officer's hunch that narcotics were involved. In fact, it is more likely that Mr. Lawson's entry into his home was for the purpose of picking up his daughter. Even if the residence was considered to be a "drug house", police cannot arrest its occupants for merely entering and exiting its doors. The fact that Mr. Lawson remained inside only briefly, without more, is insufficient evidence of a crime and cannot justify the stop of the vehicle. Given these circumstances, it is clear that police expressed no particularized or objective basis to justify the stop, search, and seizure of Mr. Lawson.

For the reasons of fact and law enumerated above, the Court finds that the stop of the vehicle in which Mr. Lawson was a passenger was not supported by reasonable suspicion or probable cause. This illegal stop and seizure requires that its fruits be suppressed, including any narcotics discovered as a result of the illegal search.

ORDER OF COURT

AND NOW, this 19th day of February, 2013, IT IS HEREBY ORDERED that the Omnibus Pretrial Motion is GRANTED and suppression is GRANTED as to all items seized or stemming from the illegal stop of March 23, 2012.

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

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BRANDI L. SHOWERS, a minor, by and through her
parent and natural guardian, AMY SHOWERS, Plaintiffs
V.
LLOYD HALTERMAN; CAROLE KUNKLE and SCOTT KUNKLE, Defendants

DOG LAW; LANDLORD-TENANT

Dangerous Dog; Dog Bite; Residential Lease; Landlord; Knowledge of Vicious Propensities

1. To establish common law liability for a dog bite, Plaintiff must show (a) the dog had vicious propensities; (b) the owners of the dog knew it had vicious propensities; and (c) the owner failed to take proper or reasonable steps to prevent the dog from harming a human being.

2. Pennsylvania law permits a finding of liability for a dog bite based upon the singular vicious propensity exhibited during the dog bite incident in question.

3. The vicious propensity standard in Pennsylvania applies to dog owners, and not to landlords.

4. There was no showing in this case that the landlord had knowledge of the attacking dog's vicious propensities.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 8187 of 2011[1]

Appearances:
Mark S. Mislanovich,
Pittsburgh, for the Plaintiffs
Thomas W. Smith,
Greensburg, for the Defendants

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION
AND
ORDER OF COURT

By Richard E. McCormick. Jr., Judge:

The matter is before this Court regarding a Motion for Partial Summary Judgment filed on behalf of all Defendants, seeking the entry of summary judgment regarding allegations of negligence based upon common law liability, a violation of the Pennsylvania Dog law, and landlord liability regarding a dog bite injury suffered by the Plaintiff.

In their Answer and New Matter, Defendants Lloyd Halterman and Carol Kunkle admit to owning the premises at 218 West Vine Street, Mt. Pleasant, the premises in question, and Defendant Scott Kunkle admits to leasing and residing at those same premises during the period of time relevant to this case. Halterman and Carol Kunkle

[1] Editor's note: The Opinion and Orders of Court dated March 4, 2013, were erroneously filed at No. 8178 of 2011. An amended Order of Court was filed March 6, 2013, to reflect the correct case number which is No. 8187 of 2011.

deny ownership of the dog in question, Moonshine, while Scott Kunkle admits to owning the dog. However, Carol Kunkle admits to ownership of Moonshine in her deposition testimony, Plaintiffs' Exhibit 4, page 11, lines 2 through 4.

Plaintiff alleges that on September 10, 2010, Scott Kunkle invited the Plaintiff and her boyfriend to 218 West Vine Street, where she was attacked and severely bitten on the mouth and left leg by the dog, suffering various injuries. She alleges that the dog was roaming free on the premises outside of the dwelling.

The Defendants contend that the Plaintiff has not produced any evidence necessary to support the essential elements of her cause of action that (1) the dog in question wasn't properly confined within the premises; (2) prior to the incident the owner or owners of the dog knew that it had vicious propensities; and (3) prior to the incident Scott Kunkle's landlords had actual knowledge of any vicious propensities of the dog.

Plaintiff argues that those material factual issues continue to be in dispute, and therefore summary judgment should be denied.

"Pursuant to Pa. R.C.P. 1035.2(2), a trial court shall enter judgment if, after the completion of discovery, an adverse party who will bear the burden of proof at trial fails to produce 'evidence of facts essential to the cause of action or defense which in a jury trial would require the issue to be submitted to a jury.' *Rapagnani v. Judas Co.,* 736 A.2d 666 (Pa.Super. 1999). A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. In considering the merits of a motion for summary judgment, a Court views the record in the light most favorable to the non-moving party, and all doubt as to the existence of a genuine issue of material fact must be resolved against the moving party." *Phillips v. Selig,* 959 A.2d 420 (Pa.Super. 2008).

Only when the established facts of a case are so clear as to be indisputable, that reasonable minds cannot differ, may there be a basis for a grant of summary judgment. *Basile v. H & R Block, Inc.,* 761 A.2d 1115 (Pa. 2000).

The first issue of fact raised by Defendants regards whether the dog was confined within the premises in question. Defendants contend that the Plaintiff was within the fenced in area of the premises, while Plaintiff counters that evidence shows that the Plaintiff was attacked at the open gate to the fenced in area, prior to her entering the confining area beyond the gate. Obviously there is a genuine issue of material fact regarding this determination.

Next, Defendants seek summary judgment on the basis that Plaintiff has failed to adduce facts to show that Defendant owners knew or had reason to know of the dog's violent propensities. Plaintiff disputes the standard which Defendants urge upon this Court and maintain that under the standard that they propose that there is sufficient evidence to raise a genuine issue of material fact on this point.

Defendants suggest that there is a three-pronged test required to establish common law liability for a dog bite.

The Plaintiff must show that (1) the dog had vicious propensities; (2) the owners of the dog must have knowledge of the vicious propensities; and (3) the owner has failed

to take proper or reasonable steps to prevent that viciousness from exhibiting itself to the harm of a human being.

Plaintiff does not dispute Defendants' iteration of the common law standard. Rather, she premises her proof of the dog's vicious propensities upon the holding of *Underwood ex rel. Underwood v. Wind,* 954 A.2d 1199 (Pa.Super. 2008), which established that the actions of a dog constituting vicious propensities during the incident in question could be considered in determining the issues surrounding the vicious propensities element of common law dog bite negligence. See also *Commonwealth v. Hake,* 738 A.2d 46 (Pa.Cmwlth. 1999).

It appears that the *Underwood* Court has established the proper standard for the determination of vicious propensities in dog bite cases, both for common law claims as well as for negligence *per se* on dog law violation claims. *Underwood* approved of a jury instruction on dog owner liability which clearly permits a jury determination of liability based upon the singular vicious propensity exhibited during the dog bite incident in question. Based upon an application of the *Underwood* principal, there are genuine issues of material fact regarding the vicious propensities issue, as it relates to the dog's owners.

Finally, Defendants raise the issue of a showing of actual knowledge of the dog's vicious propensities by the landlords. Once again, *Underwood ex rel. Underwood v. Wind* is instructive.

While *Underwood* stands for the proposition that a dog owner may be liable for a dog bite based upon a showing of vicious propensities derived from evidence of the dog bite incident in question, it goes on to vacate judgment against the landlord defendant in the same case because the vicious propensity standard in the statute and as adopted in *Underwood* is not applicable to a landlord, only to an owner of the dog. Therefore, under the rationale of *Underwood* there has been no showing of knowledge of the vicious propensities of the dog on the part of the landlords, and as such there remain no genuine issues of material fact regarding the liability of the landlords.

ORDER OF COURT

AND NOW, to wit, this 4th day of March, 2013, based upon the foregoing Opinion, the Motions for Summary Judgment as to Carol Kunkle, as owner of the dog, and Scott Kunkle, as owner of the dog, are hereby **DENIED**. The Motions for Summary Judgment as to Lloyd Halterman, as landlord, and Carol Kunkle, as landlord, are **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 THIS COURT:
/s/ Richard E. McCormick, Jr., Judge

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NATRONA HEIGHTS SUPERMARKET, INC. and
FL&C DEVELOPMENT CORPORATION, Plaintiffs
V.
FIREMEN'S INSURANCE COMPANY OF WASHINGTON, D.C., Defendant

INSURANCE

Policy Terms Covering Employee Theft; Burden of Proof of Employee Theft

1. Where Plaintiff was covered by a policy of insurance which included coverage of losses for employee theft, coverage by insurer may not be denied where there is evidence of employee theft independent of profit and loss or inventory computations; however, computations of profit and loss or inventory computations are admissible to substantiate the amount of the claim.

2. Insured asserting an employee theft loss must prove that a loss occurred by a preponderance of the evidence, and further prove that "employee theft" is more likely than not the cause of that loss.

3. Evaluation by accounting expert which was based upon an analysis in which the physical count of the inventory and an "inventory roll forward" was employed to calculate loss meets the requirements for proof of loss under Plaintiffs' insurance policy, where evaluation is corroborated by credible testimony of multiple witnesses and loss was calculated by reference to a reduction in inventory.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 7565 of 2010

Appearances:
S. Michael Streib,
Pittsburgh, for the Plaintiffs
Paul S. Mazeski,
Pittsburgh, for the Defendant

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION

By Judge Richard E. McCormick, Jr.:

After a non-jury trial, this Court must now determine whether the Plaintiffs are entitled to be compensated for losses sustained as a result of employee thefts under the terms of an insurance policy issued by the Defendant.

The facts underlying the Plaintiffs' claims are as follows. Plaintiffs are two Pennsylvania companies that own and operate two Save-A-Lot grocery stores. One store is located in Natrona Heights (hereinafter referred to as "Natrona") and the other is located in Lower Burrell (hereinafter referred to as "FL&C"). Beginning in the spring of 2007, Natrona's anticipated gross profits noticeably began to decline, such that the Director of Operations began to inquire as to whether there was any explanation for the discrepancy. Likewise, the numbers at FL&C began to decline in 2007, and continued into 2008. Initially, no explanation for the deviations in gross profit was apparent.

In January 2009, Natrona learned that a man, Troy Lauer, was taking shopping carts full of meat out of the store on a regular basis with the assistance of employees who would let him pass through the checkout line without paying. (NT 43-45). The police apprehended Lauer, and Josh Baker, an employee who participated in the theft, was taken into custody as well. Baker cooperated with law enforcement authorities and gave a statement implicating other co-workers, including a store manager, Karen Coffman, in thefts committed at both stores. Ultimately, numerous employees were implicated, either in stealing goods for themselves or in enabling customers and co-workers to steal from the stores. As one employee put it, there was "a culture of theft" that pervaded in these grocery stores for years.

Upon receiving this information, Plaintiffs notified their insurance carrier, the Defendant, and hired Case Sabatini & Co., a certified public accounting firm, to analyze their records and compute the amount of losses sustained from these employee thefts. Case Sabatini concluded that Natrona suffered a loss of product, at cost, of $396,578 during 2006, 2007, and 2008; and that FL&C suffered a loss of product, at cost, of $79,873 during 2007 and 2008. (Stip. 12, Ex. 4, 6 & 7) Defendant hired Matson Driscoll & Damico ("MD&D"), Certified Public Accountants, to analyze the records as well. (Stip. 11) While MD&D found that $425,000 in inventory was missing at Natrona (they did not analyze FL&C's records), Defendant denied the claim, stating "there has been no confirmed unlawful taking of your property … and you have failed to identify the products that were stolen and/or the cost of the allegedly stolen product." (Ex. 5) In addition, the Defendant asserts that the claim is barred both by an exclusion in the policy and the fact that the losses could be attributable to other factors other than employee theft, such as customer theft, price reduction sales, and casualty losses.

Although each agreed with the other's methodology, the difference between the Defendant's figure of $425,000 and the Plaintiffs' figure of $396,000 is attributable to the fact that Defendant's expert did not account for "shrink," and Plaintiffs' expert subtracted the normal historical shrink (a number derived after factoring in damaged goods, spoilage and shoplifting) from their figures before concluding that there was a net employee theft loss. NT 122.

The relevant insurance policy provisions are as follows:

> A. Insuring Agreements
>
> Coverage is provided under the following insuring Agreements for which a Limit of Insurance is shown in the Declarations.
>
> 1. Employee Theft
>
> We will pay for loss of or damage to "money," "securities" and "other property" resulting directly from "theft" committed by an "employee," whether identified or not, acting alone or in collusion with other persons.

* * * * *

D. Exclusions

2. Insuring Agreement A.1. does not apply to:

b. Inventory Shortages

Loss, or that part of any loss, the proof of which as to its existence or amount is dependent upon:

(1) An inventory computation; or

(2) A profit and loss computation.

However, where you establish wholly apart from such computations that you have sustained a loss, then you may offer your inventory records and actual physical count of inventory in support of the amount claimed.

(Stip. 2)

In addition, in deciding to deny coverage, Defendant relies upon Section E.1.p. of the policy, which states that Plaintiffs are required to "keep records of all property covered under this insurance so we [the insurer] can verify the amount of any loss."

Defendant first contends that not only did Plaintiffs fail to keep records to verify the amount of the covered loss, but even after discovering the 2006 gross profit deviation in April 2007, and after experiencing continued gross profit deviations during 2007 and 2008, the Plaintiffs still failed to maintain any records that would assist the insurer in placing a value on the claimed loss. Secondly, Defendant argues that the Plaintiffs have failed to demonstrate that the loss of inventory resulted directly from theft committed by employees.

Plaintiffs counter this argument with reference to the case holding of *Movie Distributors Liquidating Trust v. Reliance Insurance Company,* 595 A.2d 1302, 1306-08 (Pa.Super. 1991). In *Movie Distributors,* the court evaluated a similar clause in an insurance contract and held that if there is evidence of employee theft independent of profit and loss or inventory computations, those computations are admissible to substantiate the employee theft and to establish the amount of the insured's claim. However, Defendant counters in its closing argument that *Movie Distributors* is distinguishable from this case because the underlying insurance policy language differs. Here, the policy contains the proviso that "inventory records and actual physical count of inventory" may be introduced "in support of the amount of loss claimed" when the insured can "establish wholly apart from such computations that the insured has sustained a loss." (Section D.2.b.(2) of the policy.) Consequently, Defendant argues, because Plaintiffs have that avenue by which to seek damages, the holding in *Movie Distributors* is distinguishable and the policy provision which precludes the use of a profit and loss computation as a method of establishing loss is enforceable.

The insured who is asserting an employee theft loss must prove that a loss occurred by a preponderance of the evidence, and further prove that "employee theft" is more likely than not the cause of that loss. Because we find that the cumulative witness testimony overwhelmingly establishes that Plaintiffs suffered losses as a result of

pervasive employee theft from 2006 thru 2008, we must consider whether Plaintiffs have presented sufficient evidence to establish the dollar amount of the loss suffered that was attributable to this employee theft.

We will first consider whether Plaintiffs established their loss through inventory records and a physical count of the inventory, as the policy requires, and whether those records support a specific dollar amount of loss attributable to employee theft. In support of Plaintiffs' position, Plaintiffs offered the following evidence. Joseph Ferraccio, a principal in the Plaintiff companies, testified that grocery store inventory is taken two to four times a year by an outside accounting firm called Retail Grocery Inventory Services or "RGIS." It is the standard in the grocery industry to use this outside accounting firm to count grocery store inventory and, in fact, RGIS kept track of the Plaintiffs' inventory.

At the end of 2006, Ferraccio noticed for the first time that the inventory was "off a bit." (NT 36) Over the next couple of years, the inventory results continued to be "off," causing him to become concerned. (NT 37) In response, Plaintiffs hired the accounting firm of Case Sabatini to analyze their financial situation in an effort to determine the extent of the loss. At trial, Robert Miller, CPA, testified on behalf of the Plaintiffs and explained the methodology employed by Plaintiffs, which calculated the loss based upon a profit and loss calculation. He then explained the methodology employed by Defendant's forensic accounting firm, MD&D:

> Q. Now, what does it mean, Mr. Miller, when Matson Driscoll says book inventory was overstated?
>
> A. Well, the way I understand the work that Matson Driscoll performed was it's a different approach than what was taken in the books of Natrona Heights. If by taking the beginning inventory and costs, subtracting sales that were then reduced to costs – so, in other words, if sales in retail were $100 and cost was $80, then they would have reduced inventory by $80 for that particular example – and they came up with what the total inventory should have been at the end of the claim period. And the difference between what the total inventory should have been at the end of the claim period and what the RGIS account was was approximately 425,000. That's my interpretation of the work that they did there.
>
> Q. Would that indicate to you a loss of 425,000 in inventory?
>
> A. It does, yes.
>
> NT 119-120.

On the other side of the equation was the testimony of Defendant's expert, Marguerite Hart, CPA, from MD&D. The following is her testimony with respect to the instructions given her by the insurance carrier:

> A. Our instructions from the carrier were that because the method used [by Case Sabatini], the method of discovery of the claim

> had been a gross profit computation, we were instructed that we needed to be able to determine that there was a theft and to value that theft based on some other method. We, in our report, showed essentially to our client that we tried to – using the financial information provided, we tried to do a roll forward to see if we could isolate and identify where there might have been a loss in inventory, but, as we expected, because the inventory roll forward, part of it, is directly associated with the profit and loss statement, it gives us the same result as the gross profit deviation.

NT 381.

At the conclusion of her analysis, Hart determined that the "difference of 425,000 … was a difference in inventory." NT 383. Although Hart agreed that some portion of the loss could have been theft-related, she refused to guess what that amount may have been.

In other words, both experts explained the results of the evaluation conducted by MD&D as having been based upon an analysis in which the physical count of the inventory by RGIS and a process referred to as "an inventory roll forward," were employed to calculate loss. NT 385.

The policy clearly states that coverage does not apply to inventory shortages in which the loss's existence or amount is *solely* dependent upon an inventory computation or a profit and loss computation. However, this limitation is modified by the proviso that "where you establish wholly apart from such computations that you have sustained a loss," in other words, by independent evidence of employee theft, "then you may offer your inventory records and actual physical count of inventory in support of the amount claimed." Here, we find that the evaluation conducted by MD&D -- which was based upon an analysis in which the physical count of the inventory by RGIS and a process referred to as "an inventory roll forward," was employed to calculate loss -- in conjunction with the analysis conducted by Case Sabatini, meets the requirements for proof of loss under the policy. Employee theft was proven by the credible testimony of multiple witnesses and loss was calculated by reference to a reduction in inventory.

In the alternative, if we did not accept the analysis and supporting documentation of the experts as a method of calculating the loss that falls within the parameters of the insurance policy, then we would find ourselves in the same circumstances as in *Movie Distributors* -- that is, with a clause in the policy which renders the insurance protection purchased valueless.

Accordingly, we find that Plaintiffs have met their burden and proven by a preponderance of the evidence that they suffered a total employee theft loss of $476,452. Natrona should be awarded $394,290 (the $396,598 loss set forth on Exhibit 4, less $2,308, which is the portion of the 2007 loss that is above the $250,000 policy limit for that year), and FL&C should be awarded $79,873. Furthermore, Plaintiffs are entitled to pre-judgment interest at the rate of 6% from February 26, 2010 (the date of the Defendant's denial letter) to the present. See *Movie Distributors, supra* at 1308.

ORDER OF COURT

AND NOW, to wit, this 11th day of March, 2013, it is hereby **ORDERED** and **DECREED** that this Court finds in favor of the Plaintiff Natrona in the amount of $394,290 and in favor of the Plaintiff FL&C in the amount of $79,873. Furthermore, Plaintiffs are entitled to pre-judgment interest at the rate of 6% from February 26, 2010, to the present.

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

IN THE MATTER OF CONDEMNATION BY THE
CITY OF JEANNETTE OF PROPERTY AT 519-521 CLAY AVENUE,
JEANNETTE, WESTMORELAND COUNTY, PENNSYLVANIA
BEARING WESTMORELAND COUNTY TAX MAP NO. 14-01-16-0-090

FRANK M. TRIGONA, Plaintiff/Condemnee
V.
CITY OF JEANNETTE, Defendant/Condemnor

AND

IN THE MATTER OF CONDEMNATION BY THE
CITY OF JEANNETTE OF PROPERTY AT 229 FOURTH STREET,
JEANNETTE, WESTMORELAND COUNTY, PENNSYLVANIA
BEARING WESTMORELAND COUNTY TAX MAP NO. 14-01-16-2-077

FRANK M. TRIGONA, Plaintiff/Condemnee
V.
CITY OF JEANNETTE, Defendant/Condemnor

EMINENT DOMAIN

Nature, Extent, and Delegation of Power; What Constitutes a Taking; Police and Other Powers Distinguished; In General

1. A fee simple estate cannot be rendered valueless by a temporary prohibition on economic use because the property will recover value as soon as the prohibition is lifted.

2. Where a regulation places limitations on land that fall short of eliminating all economic beneficial use, a taking nonetheless may have occurred, depending upon a complex of factors including the regulation's economic effect on the landowner, the extent of which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.

3. Court accepted testimony from condemnor's expert that condemnee sustained loss of $52,400.00 from the temporary regulatory taking of 519-521 Clay Avenue and $24,500.00 from the temporary regulatory taking of 227 South Fourth Street when expert's opinion properly considered the actual economic effect that the regulation had upon the reasonable investment-backed expectations of the land owner.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 11425 of 2007
No. 11426 of 2007

Appearances:

Robert P. Lightcap and Amber R. Leechalk,
Latrobe, for the Plaintiff/Condemnee
Gary A. Falatovich,
Greensburg, for the Defendant/Condemnor
Scott E. Avolio,
Greensburg, for the Defendant/Condemnor

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION AND ORDER OF COURT

By Richard E. McCormick, Jr., Judge:

The matter is before the Court for decision following a non-jury trial regarding damages resulting from a regulatory taking of property at 519-521 Clay Avenue (11425 of 2007) and 227 South Fourth Street (11426 of 2007), in the City of Jeannette, Westmoreland County, Pennsylvania. The property was owned by Frank M. Trigona at the time of the taking.

The genesis of these condemnation actions preceded these actions and derived from another matter, *Frank M Trigona, an individual, and Trigona Corporation, a Pennsylvania Corporation vs. George Lender, an individual, and City of Jeannette, a Pennsylvania Municipal Corporation,* 2006 WL 6392834 (Pa.Com.Pl. Sept. 20, 2006)(No. 2317 of 2005), *affirmed by* 926 A.2d 1226 (Pa.Cmwlth. 2007), *appeal denied by* 944 A.2d 760 (Pa. 2008). In *Trigona vs. Lender and City of Jeannette,* the Honorable William J. Ober of this Court determined on cross motions for summary judgment, that an ordinance passed by the City of Jeannette, City Ordinance No. 05-01, that prohibited the issuance of licenses and permits to property owners who owed real estate taxes and municipal service fees to the city, was an unauthorized exercise of the taxing authority of the city. The Commonwealth Court of Pennsylvania affirmed the decision of the trial court at 926 A.2d 1226 (Pa.Cmwlth. 2007), and the Pennsylvania Supreme Court denied an appeal from the Commonwealth Court at 944 A.2d 760 (Pa. 2008).

Following the decision in *Trigona v. Lender and the City of Jeannette,* petitions for the appointment of a board of viewers were filed at each of these numbers, alleging a taking, and seeking damages from the city, as a result of its denials of permits and licenses to the property owner. Preliminary objections pursuant to the Eminent Domain Code, under 26 Pa. C.S.A. §504(d), were filed by Condemnor.

The preliminary objections raised various arguments to the general effect that the petitions did not properly set forth a claim for *de facto* regulatory takings. The Honorable Daniel J. Ackerman of this Court held an evidentiary hearing on the preliminary objections and overruled the objections by his Opinion and Order of November 3, 2009. Essentially, Judge Ackerman determined that the actions of the city in denying licenses and permits to the property owner constituted regulatory takings requiring the appointment of a board of viewers to determine damages and fees. Thereafter, the board conducted views and hearings regarding the properties and issued their reports on October 26, 2010.

Timely appeals from the viewers' reports were taken by both the Condemnor and the Condemnee, requiring a trial on the appeals. The parties waived their rights to a jury trial, whereupon the appeals were tried before this Court, requiring this Court to determine the amount of damages sustained by the Condemnee as a result of the regulatory taking by the city from May 16, 2006, the date the Condemnee received notice of the denial of permit applications by the Condemnor, to March 6, 2008, the date of the denial of the Condemnor's petition for allowance of appeal by the Pennsylvania Supreme Court. (See Ackerman Opinion, page 5.) Clearly, this Court is bound by the determinations of the previous judge presiding in this matter.

At the outset the parties fundamentally disagree as to the proper measure of damages in this matter. Condemnor even argues that the Condemnee's damage evidence is not competent, because it is contrary to a proper measure of damages, and therefore Condemnee is not entitled to just compensation. This Court refuses to impose such an absolute bar for the recovery of damages, and the Court will determine just compensation from the evidence presented.

What is the proper measure of damages in a regulatory taking such as this?

Condemnee contends that the standard to be followed is that set forth in the Eminent Domain Code, pursuant to 26 Pa.C.S.A. §101 *et seq.,* and §§701, 702, and 703, and that the Code necessarily limits the measurement of damages to the traditional formula "of the difference between the fair market value of the Condemnee's entire property interest immediately before the condemnation and as unaffected by the condemnation and the fair market value of the property interest remaining immediately after the condemnation and as affected by the condemnation." 26 Pa.C.S.A. §702(a).

Condemnor urges the Court to apply a determination of damages outside of the formula set forth in the Code, arguing that an application of the Code formula would result in the determination of no damages, as there would be essentially no change in the fair market value from before to after the period of taking.

Condemnor is correct. A *de facto* taking by regulation is generally not a complete and permanent taking of property or the value of that property, and such a complete and permanent taking did not occur in the matter before me. Rather, the restriction or prohibition on use that occurred was temporary in nature, and not amenable to an analysis under the Eminent Domain Code.

As was stated in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 152 L.Ed. 2d 517 (U.S. 2002), "[l]ogically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." Condemnee's argument that the property has suffered a permanent diminution in fair market value is not sustainable.

While it was set forth in a determination of whether a regulatory taking had occurred, rather than in formulating a calculation of just compensation, certain language quoted in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 57 L.Ed. 2d 631 (U.S. 1978), should also inform a determination of damages for a temporary regulatory taking:

> "Where, however, a regulation places limitations on land that fall short of eliminating all economic beneficial use, a taking nonetheless may have occurred, depending upon a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." (Noted with approval in *Machipongo Land and Coal Co., Inc. v. Commonwealth of Pennsylvania,* 799 A.2d 751 (Pa. 2002).)

In other words, this Court must consider the regulation's economic effect on the land owner, including the extent to which it interfered with the landowner's economic expectations. The statutory formula set forth in the Eminent Domain Code does not allow for such a calculation, as it fails to take into consideration all relevant economic effects bearing on a landowner impacted by a temporary regulatory taking.

This Court admitted the testimony in evidence of three expert witnesses: John Lizza, a certified real estate appraiser, stipulated to be a qualified valuation expert under the Code, on behalf of the Condemnee; Gary Hayden, a certified real estate appraiser, stipulated to be a qualified valuation expert under the Code, on behalf of the Condemnor; and Jeffrey Anzovino, CPA, a certified public accountant, on behalf of the Condemnor.

John Lizza, Condemnee's expert, testified to the measure of damages set forth in the Code to determine just compensation for both properties - that is, the difference between the market value immediately before and immediately after the taking, as affected by the taking, as of May 16, 2006 (the beginning date of the regulatory taking as established by Judge Ackerman) without reference to any value on March 6, 2008 (the end date of condemnation established by Judge Ackerman). Using a comparable sales approach, he posited a "before taking" fair market value of $500,000.00, and an "after taking" fair market value of $150,000.00 regarding the 519-521 Clay Avenue property, and claimed that just compensation should be awarded in the amount of $350,000.00 for that property.

Using both an income analysis for a "before taking" fair market value of $275,000.00, and a comparable sales approach, and an "after taking" value of $65,000.00, he claimed that just compensation should be awarded in the amount of $210,000.00 for the 227 South Fourth Street property.

Gary Hayden, the Condemnor's expert, testified that he applied a sales comparison approach to place a value on both properties in order to establish a fair market value as of May 16, 2006, the beginning date of the regulatory taking established by Judge Ackerman. He employed five comparable properties within the City of Jeannette, applying numerous recognized considerations to his comparable analyses to arrive at a May 16, 2006, fair market value for the property at 519-521 Clay Avenue of $170,000.00. He used five comparable properties within the City of Jeannette, applying numerous recognized considerations to his comparable analyses to arrive at a May 16, 2006, fair market value for the property at 227 South Fourth Street of $70,000.00.

He then applied the calculation set forth in the Code, under 26 Pa.C.S.A. §702(a), to the "before taking" value on May 6, 2006, and the "after taking" value on March 6, 2008, to each property. Under those calculations under the Code he posited that there had been no change in the fair market values of both properties.

Hayden then made an additional analysis and calculation based upon a consideration of quantifiable factors of ownership and investment expectations related to the use that each property was being put prior to the regulatory taking.

In the instance of the premises at 519-521 Clay Avenue, he took into consideration the fact that the property was being utilized as a bar, restaurant and banquet facility. He applied numerous factors involving the costs of ownership, from his own research as well as from other sources. He also calculated expected rates of investment return for restaurant properties and businesses from data available to him. His analysis was set forth in specific and comprehensive detail in Defendant's Exhibit J, from page 34 through page 40. After applying his considerations and calculations to the fair market value as of May 16, 2006, which was $170,000.00, he concluded that Condemnee had suffered damages of $52,400.00 from the temporary regulatory taking, leaving the fair market value as of March 6, 2008, at $117,600.00.

In the instance of the premises of 227 South Fourth Street he took into consideration that the property was being utilized as a rental property to Seton Hill Child Services, Inc. as a day care center. He applied numerous factors involving the costs of ownership, from his own research as well as from other sources. He also calculated expected rates of investment return for office type rental properties from data available to him. His analysis was set forth in specific and comprehensive detail at defense Exhibit I, from page 34 through page 41. After applying his considerations and calculations to the fair market value as of March 16, 2006, which was $70,000.00, he concluded that Condemnee had suffered damages of $24,500.00 from the temporary regulatory taking, leaving the fair market value as of March 6, 2008, at $45,500.00.

This Court also heard testimony and received evidence from Jeffrey Anzovino, CPA, on behalf of the Condemnor, but has not considered that testimony in its decision.

The Court will accept and base its decision upon the evidence presented through the testimony of Gary Hayden, the qualified valuation expert presented by the Condemnor. His opinion and conclusions were derived from a sound economic basis and properly considered the actual economic effect that the regulation had upon the reasonable investment-backed expectations of the land owner. The facts and the analysis of the facts that he relied upon reflect sound reasoning directed at fairly compensating the Condemnee for his economic losses through the period of the temporary regulatory takings as established by Judge Ackerman.

The Condemnor objects to the counsel fees, costs and expenses sought by the Condemnee regarding these proceedings. It challenges the reasonableness of the fees, arguing that a comparison of the fees calculated and submitted for the Condemnee are appreciably greater than fees paid or billed to the Condemnor.

While Condemnor offered evidence showing that some of the fees that it paid or had been billed for were lower than the bills and calculations of fees, costs and expenses of the Condemnee, that argument offers an incomplete and non-comparable situation. While Condemnee's claim for fees is complete, the Condemnor's evidence does not represent all of the fees for which they have been or will be charged, nor is it fair to compare fees available to attorneys representing a municipal client with those of a private client.

The matter before the Court is one with a long, complicated and convoluted history, involving issues of first impression in this Commonwealth. The Court has examined the hours and explanations for legal and expert services, as well as costs expended, and finds that they were necessary and reasonable for the representation of the client.

ORDER OF COURT

AND NOW, to wit, this 25th day of January, 2013, based upon the foregoing Opinion, the Court hereby determines that the Condemnee, Frank M. Trigona, is entitled to damages as just compensation as follows:

At No. 11425 of 2007, for the property at 519-521 Clay Avenue, Jeannette, Westmoreland County, Pennsylvania, $52,400.00;

At No. 11426 of 2007, for the property at 229 South Fourth Street, Jeannette, Westmoreland County, Pennsylvania, $24,500.00; and

Attorney's fees, expert's fees and costs are awarded to the Condemnee, to be paid to McDonald, Snyder and Lightcap, P.C., in the total amount of $158,427.86.

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

ROBERT CAMILLI, individually, Plaintiff
V.
PRIVATE INDUSTRY COUNCIL OF WESTMORELAND/FAYETTE, INC., a corporation or other similar business entity, t/d/b/a HEAD START OF FAYETTE COUNTY; ESTATE OF DOM MONGELL a/k/a DOMINIC MONGELL; and the ESTATE OF SUSAN MONGELL, Defendants

NEGLIGENCE

Premises Liability; Breach of Duty; Snow and Ice

1. In a claim for damages regarding a slip and fall with snowy and/or icy conditions, it must be shown that the property owner (1) allowed snow and/or ice to have accumulated on the parking lot in ridges or elevations of such size and character as to unreasonably obstruct travel and constitute a danger to pedestrians traveling thereon; (2) that the property owner had notice, either actual or constructive, of the existence of the condition; (3) that it was the dangerous accumulation of snow and ice which caused Plaintiff to fall.

2. If the evidence is that general slippery conditions existed, and there were no hills, ridges, or other elevations allowed to accumulate by the property owner, no breach of duty will be found.

3. The court concluded that it properly granted motions for compulsory non-suit, when Plaintiff failed to meet his burden necessary to allow the matter to proceed to a jury determination when the clear evidence, as presented by Plaintiff, required a finding that there were general slippery conditions throughout the area in which Plaintiff found himself, including at his home, on his way to work, at his place of employment, and at the place where he was making a delivery.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 8998 of 2007

Appearances:

Joyce Novotny-Prettiman,
Greensburg, for the Plaintiff
George N. Stewart,
Greensburg, for the Defendant Private Industry Council of Westmoreland/Fayette, Inc.
Dennis J. Slyman,
Greensburg, for the Defendants Mongell

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION AND ORDER OF COURT

By Richard E. McCormick, Jr., Judge:

The matter is before the Court on Post-Trial Motions filed on behalf of the Plaintiff following the grant of a compulsory non-suit to the Defendants in a jury trial. Subsequent to the non-suit being granted, the Plaintiff and the Mongell Defendants stipulated to the dismissal of Private Industry Council of Westmoreland/Fayette, Inc. t/d/b/a Head Start of Fayette County as a Defendant, as well as the cross-claims asserted by PIC.

Plaintiff's negligence action was brought as a result of an allegation by Robert Camilli that he slipped and fell on snow and ice in the parking lot of the premises of the remaining Defendants (Mongells) while making a delivery to a Head Start facility located on the premises, on December 16, 2005.

The evidence presented by the Plaintiff, primarily through the testimony of Mr. Camilli, was that prior to setting off for work on the morning of his fall Camilli observed that because of weather conditions that morning he noticed slushy, icy conditions on his sidewalk (Trial Transcript page 71, line 13-20, hereinafter referred to as "TT ___, ln. ___"); that, as he drove to work, the car in front of him was "sliding a little bit," and his car "was sliding just a tad" (TT 73, ln. 2-7); that when he got to work the parking lot of his employer was icy (TT 73, ln. 8-11); that when he was readying his delivery truck to go on his route he observed that the loading "dock was really icy" (TT 73, ln. 23-25; TT 74, ln. 1-2); that he salted the loading dock (TT 74, ln. 3-5); that the parking lot area of his employer was icy when he pulled out to make his deliveries (TT 75, ln. 25; TT 76, ln. 1-6); that the roadway between his employer and the Head Start facility where he was to make his delivery "was just wet" (TT 76, ln. 7-9); that the drive between his employer and Head Start took about 5 minutes (TT 76, ln. 10-12); then he arrived at Head Start between 7:30 a.m. and 7:45 a.m. (TT 76, ln. 13-17); that when he pulled in to the parking lot at the Head Start facility the parking lot had "a light snow cover" (TT 79, ln. 21-25; TT 80, ln. 1); that he experienced no slipping or sliding while driving in the Head Start parking lot (TT 80, ln. 2-6); that when he got out of his truck he stepped on to the ground which was icy "and his feet came out from under him and he fell to the ground" (TT 80, ln. 19-25; TT 81, ln. 1-3); that he observed that the parking lot surface was smooth (TT 81, ln. 7-14); that his feet kept sliding out from underneath him and "the ice was, like, patchy." (TT 81, ln. 17-20); that the ice was "spotty icy" and once the powdery snow would blow over he could see the ice (TT 82, ln. 11-17); and on cross-examination, that on the drive to work he had reason to conclude there might be some slippery conditions present (TT 90, ln. 16-25); that upon pulling into his employer's parking lot there was a dusting of snow with ice under it like what was later encountered at the Head Start facility (TT 91, ln. 1-15); that he knew that what he'd seen in his employer's parking lot might be the same condition at the Head Start facility (TT 91, ln. 16-20); that from his parking place for his car at his employer's parking lot to his place of work was 50-60 feet and it was slippery along that 50-60 feet (TT 91, ln. 23-25; TT 92, ln. 1-7); that when he was stepping down from his truck to the parking lot surface at the Head Start facility he was thinking there might be ice on the surface of the parking lot (TT 93, ln. 21-25; TT 94, ln. 1-18); that there was a smooth, flat, thin layer of ice underneath a dusting of snow in the parking lot (TT 100, ln. 19-25; TT 101, ln. 1-8).

Throughout his testimony Mr.Camilli did not describe any conditions in the Head Start parking lot that would constitute hills, ridges or elevations being present on the surface of that parking lot.

In order to prove negligence in a matter such as was before the Court at trial the Plaintiff is required to make out four elements:

1) A duty or obligation;
2) A breach of that duty or obligation;

3) A causal connection between the breach of duty or obligation and any resultant injury; and

4) An actual loss or damage being suffered.

In a claim for damages regarding a slip and fall upon a parking lot with snowy and/or icy conditions the particular circumstances of the conditions will determine the duty owed.

It must be shown that the property owner (1) allowed snow and/or ice to have accumulated on the parking lot in "ridges or elevations of such size and character as to unreasonably obstruct travel and constitute a danger to pedestrians travelling thereon; (2) that the property owner had notice either actual or constructive, of the existence of the condition; (3) that it was the dangerous accumulation of snow and ice which caused the Plaintiff to fall." *Rinaldi v. Levine,* 176 A.2d 623 (Pa. 1962), *Heasley v. Carter Lumber,* 843 A.2d 1274 (Pa.Super. 2004). If the evidence is that general slippery conditions existed, and there were no hills, ridges or other elevations allowed to accumulate by the property owner, no breach of duty will be found. *Harmotta v. Bender,* 601 A.2d 837 (Pa.Super. 1992), *Morin v. Traveler's Rest Motel, Inc.,* 704 A.2d 1085 (Pa.Super. 1997).

Giving the non-moving party, the Plaintiff, the benefit of all favorable evidence, as well as all reasonable factual inferences that result from the evidence, *Daddona v. Thind,* 891 A.2d 786 (Pa.Cmwlth. 2006), this Court has concluded that the clear evidence, as presented by the Plaintiff through his own testimony, requires a finding that there were general slippery conditions throughout the area in which the Plaintiff found himself that morning, most particularly in the parking lot at the Head Start facility where he slipped and fell. He observed snow and ice at his home, on his way to work, at his place of employment, and at the place where he was making a delivery. Each of those instances appear to have been of a similar nature, a light cover or dusting of snow over a layer of ice. He commented that at the parking lot adjacent to the Head Start facility there was a dusting of snow over smooth ice, without any accumulation of hills, elevations or ridges so as to give difficulty to his passage or notice to the property owner.

Based upon all of the testimony, this Court properly granted the motions for a compulsory non-suit, because the Plaintiff failed to meet his burden necessary to allow the matter to proceed to ajury determination.

ORDER OF COURT

AND NOW, to wit, this 8th day of March, 2013, based upon the foregoing Opinion, the Plaintiff's Post-Trial Motion requiring removal of the compulsory non-suit and a new trial is hereby **DENIED**.

FURTHER, in accord with Pa.R.C.P. No. 236(a)(2)(b), 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

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IN RE: ESTATE OF CHRISTINE M. CASTAGNERO, deceased, Petitioner
V.
BNY MELLON NATIONAL ASSOCIATION, Trustee, Respondent

TRUSTS

Termination; Construction and Operation

1. Section of Uniform Trust Act concerning termination of non-charitable irrevocable trust did not apply to termination of particular irrevocable trust because several charitable organizations were among the beneficiaries of the trust in addition to settlor's family members.

2. A spendthrift provision of a trust is presumed to be a material purpose of a trust.

3. The termination of an irrevocable trust with a spendthrift provision where all beneficiaries and remaindermen consent to the termination, would be improper because termination would frustrate the settlor's clear intent and a material purpose of the trust.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION
No. 65-10-1604

Appearances:

John M. O'Connell, Jr.,
Greensburg, for the Petitioner
Kelly K. Iverson,
Pittsburgh, for the Respondent
William Pietragallo, II,
Pittsburgh, for Helana C. Pietragallo, a Named Beneficiary

BY: ANTHONY G. MARSILI, JUDGE

OPINION

BY THE COURT:

Oral argument was conducted before the undersigned on February 7, 2013, as a result of a *Motion to Terminate Trust* filed by counsel for Petitioners, Leslie Harvath and Louis Castagnero, Jr., in the above-captioned matter. Upon presentation of Petitioners' *Motion to Terminate Trust,* this Court issued a *Rule to Show Cause Why the Petition Should Not Be Granted*, by Order of Court dated March 23, 2012, and directed the Rule to be returnable within forty-five (45) days after service upon the Trustee, BNY Mellon, and the six named beneficiaries.

Upon receipt of various responses to said Rule, counsel for Petitioners presented a Motion to obtain a hearing date. By Order of Court dated November 16, 2012, the above matter was scheduled for said hearing date, and the Court further directed any Respondents who wished to file a Reply Brief to do so on or before January 31, 2013. The Court received and reviewed the *Answer and New Matter to Petition for Rule to Show Cause, styled as Motion to Terminate Trust;* and the *Brief of Trustee in Opposition to Motion to Terminate Trust,* as filed by the Trustee/Respondent, BNY Mellon National Association, in this matter; as well as an *Answer to Motion*, as filed

by counsel for Helana C. Pietragallo, a named beneficiary of the above-captioned Estate; and an *Answer to Motion to Terminate Trust*, as filed by the Commonwealth of Pennsylvania. Counsel for the Petitioners thereafter filed a *Reply to New Matter*, in reference to the Answer and New Matter of Trustee/Respondent, BNY Mellon; as well as a *Brief* on behalf of Leslie Harvath and Louis Castagnero, Jr. The Court has reviewed said pleadings, and issues the within decision.

By way of background in this case, on December 1, 2006, Christine M. Castagnaro executed her Last Will and Testament, which provided certain assets be distributed outright to named individuals and certain assets be distributed to Mrs. Castagnero's Trust Agreement, dated December 31, 2001 (the "Trust Agreement"). It is noted that the Trust Instrument had been amended and/or restated multiple times, with the final Amended and Restated Trust Agreement being dated December 1, 2006. (See: Exhibit A – Trust Agreement, attached to *Brief of Trustee in Opposition to Motion to Terminate Trusts*). Christine M. Castagnero died on March 27, 2008.

The Amended and Restated Trust Agreement of Christine M. Castagnero, dated December 1, 2006, named Mellon Bank, N.A., as the Trustee; and provides detailed information as to the distribution of the trust estate. The Trust Agreement provided for five individuals and three charities. The first named individual, Michael Cicci, received 20% of the estate outright. Another individual, Carla Castagnero, received 17.5% of the estate outright. Other individuals were to receive certain percentages of the estate to be held in trust for them. These individuals were: Louis Castagnero, Jr., who received 20% of the estate to be held in trust for him; Leslie Harvath, who received 20% of the estate to be held in trust for him; Helana Pietragallo, who received 15% of the estate to be held in trust for her; and, 7.5% of the estate was distributed equally to three charities, with those three charities also serving as the remaindermen of the Trusts created for Louis Castagnero, Jr., Leslie Harvath, and Helana Pietragallo. (See: Trust Agreement, Article Three).

Article Four of the Trust Agreement addresses the trusts for the three beneficiaries, Louis Castagnero, Jr., Leslie Harvath, and Helana Pietragallo; and contains several sections that are relevant to the issues before this Court. First, Section 4.1 sets forth that all property set aside in Article Three for Louis Castagnero, Jr., Leslie Harvath, and Helana Pietragallo (each of whom is referred to as a "beneficiary") shall be held by the trustee in a separate trust for the benefit of such beneficiary, in trust for the following purposes (described in subsequent sections). Section 4.2 of the Trust directs the trustee to manage, and invest the trust property for the three beneficiaries, Louis Castagnero, Jr., Leslie Harvath, and Helana Pietragallo; and, further, to distribute the net income in quarter-annual installments, or more frequently, if the trustee deems it advisable, to or for the benefit of such beneficiary. Section 4.3 of the Trust states that the trustee shall distribute to or for the beneficiary such amounts of principal as the trustee shall from time to time deem necessary or proper for the health, maintenance and support of the beneficiary, taking into account other available funds known to the trustee, including such beneficiary's assets. According to Section 4.4 of the Trust, upon the death of the beneficiary, any remaining property then held in trust for such beneficiary shall be distributed in equal shares to the three named charities.

In their Motion to Terminate Trust, Petitioners, Louis Castagnero, Jr. and Leslie Harvath, argue that the trust in this case can be terminated by the consent of the beneficiaries, as well as the consent of the three named charities – Joslin Diabetes Center, American Heart Association and the Penn Township Ambulance Association Rescue 6. The stated reasons for terminating the trust, include the fact that the corpus of the trust has greatly diminished, and the son of Leslie Harvath is about to enter college and funds can be used to pay for the college education of the only child of Leslie Harvath. In support of said *Motion to Terminate Trust*, Petitioners retained the services of a mathematics professor, Joshua C. Sasmor, from Seton Hill University in Greensburg, who issued a written report as to calculations that he made regarding the present value of the trust funds for the petitioners, as well as an estimated figure as to the present value of said trust funds for the three named charities[1]. (See: Exhibit A to Motion to Terminate Trust). It is noted that Petitioner, Louis Castagnero, Jr., filed a Motion to Terminate Trust on or about August 14, 2012, alleging that he would invest any funds distributed to him, and noting that he would provide an actuarial report from Mr. Sasmor at a later date. The Motions to Terminate were consolidated by this Court. On or about December 28, 2012, Petitioner Helana Pietragallo filed her Answer to Motion to Terminate Trust joining in the consolidated Motions of Mr. Castagnero and Mr. Harvath, and requesting that her trust be terminated as well.

The Petitioners argue that the termination of a trust is governed by statute, specifically, 20 Pa. C.S. §7740.1, of the Uniform Trust Act (UTA). They further argue that subparagraph (b) and (b.1) address the provision as to allowing termination with consent by beneficiaries with Court approval. Petitioners assert that all three charities consented to the termination of the trust and that the benefit to each of the three charities is that they would receive their money now rather than waiting until the death of Leslie Harvath. At the same time, the Petitioners acknowledge that the Trust Instrument contains a spendthrift provision, which they concede is a material purpose of a trust. However, they argue that, Petitioners are willing to forego a portion of the trust fund income in order to receive the funds now. Further, it is argued that the Court can conclude that the continuance of the trust is not necessary to achieve any material purpose of the trust, since the basic purpose of the trust is to provide a financial benefit to the lifetime beneficiaries and to provide a financial benefit to the residuary beneficiaries, and therefore, the basic purpose of the trust will not be violated since all beneficiaries consented. Another point made by Petitioners in their Brief is that, if the trusts continue, upon the deaths of the lifetime beneficiaries, their heirs will get nothing. However, if the trusts are terminated, and the lifetime beneficiaries receive their money now, upon their deaths, the families of the lifetime beneficiaries will get the remaining funds of about one-third (1/3) of their trust principal. Finally, Petitioners argue that, the fact that a spendthrift provision is presumed to constitute a

[1] Paragraph four (4) of said Motion to Terminate Trust sets forth that the total assets currently in the portion of the Trust attributable to Leslie Harvath amount to $1,474,758.29; multiplying that sum by the 33.75% calculated by Professor Sasmor would mean that if the trust is terminated, Mr. Harvath's share would be $497,730.92. Therefore, the amount which would be payable to the three (3) charities would be $977,027.37; each of the three (3) charities would then receive $325,675.79.

material purpose of the trust does not prevent the Court from authorizing the termination of the trust. Per Petitioners, the statute does not say that it is conclusively presumed. Thus, per Petitioners, if the Court concludes that it is in the best interest of all of the beneficiaries, lifetime and remainder, it can overcome the presumption and authorize the termination of the trust.

Respondent, BNY Mellon, as Trustee, makes multiple arguments against the termination of the Trust Agreement. First, Respondent argues that Section 7740.1 of the Uniform Trust Act does not apply to the within case, because the Castagnero trust is, in part, a charitable trust and Section 7740.1 expressly applies to the modification or termination of a *noncharitable* irrevocable trust by consent. Another argument made by Respondent is that the trusts cannot be terminated because a life estate to an income beneficiary and charitable remainderman cannot be distributed based upon the actuarial life of the income beneficiary; rather, it is measured by the natural life of the beneficiary. A third argument made by Respondents is that a termination of the trust would frustrate Mrs. Castagnero's clear intent because, according to the express terms of the Trust Agreement, she intended to provide certain funds outright to individuals; and to provide other funds to individuals via income through the establishment of a trust. Finally, Respondent argues that, even if Section 7740.1 applies, the Trusts cannot be terminated because their continuance is necessary to carry out a material purpose of the Trusts. Respondents indicate that, per the statute itself, a spendthrift provision is presumed to constitute a material purpose of the trust, and accordingly, since the Castagnero trust contains a spendthrift provision in Article 9, specifically at §9.2[2], it is argued that the trust cannot be terminated.

Respondents note that a long line of cases in Pennsylvania are "adamant in holding that where the life interest is limited by a spendthrift provision, the trust cannot be terminated by the court." *Bosler's Estate,* 107 A.2d 443, 445 (Pa. 1954), citing *Dodson v. Ball,* 60 Pa. 492 (Pa. 1869); *Shower's Estate,* 60 A. 789 (Pa. 1905); *Moser's Estate,* 113 A. 199 (Pa. 1921); *Baughman's Estate,* 126 A. 58; *Rehr v. Fidelity-Philadelphia Trust Co.,* 165 A. 380, 381; *Harrison's Estate,* 185 A. 766; *Bowers' Trust Estate,* 29 A.2d 519; *Heyl Estate,* 43 A.2d 130; Restatement, Trusts, §337, comment 1. As argued by Respondents, the principle behind these holdings is the protection of the intent of the settlor, irrespective of the welfare or interests of the beneficiary.

The Court has reviewed the matter, and the supporting Briefs, and has considered the caselaw and the Oral Argument held on the record in this matter. The issue in this case involves the termination of a trust. In Pennsylvania, these matters are governed by statute, specifically, the Uniform Trust Act (hereinafter, "UTA"), as set forth in 20 Pa. C.S.A. §7701, et seq. Pennsylvania enacted the Uniform Trust Act in 2006, setting forth the laws pertaining to trusts, including, but not limited to the creation, validity,

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[2] Article 9 of the Trust Agreement, Section 9.2 states: Except for the right to disclaim, no interest of any beneficiary hereunder, except for the grantor, and neither the principal nor the income of the trust property shall be subject to alienation, pledge, assignment or other anticipation by the beneficiary for whom the same is intended as hereinabove provided, or to attachment, execution, garnishment, sequestration or other seizure under any legal, equitable or other process, including bankruptcy proceedings, in satisfaction of any debt or liability of a beneficiary prior to receipt by said beneficiary.

modification and termination of trusts, and the duties and powers of trustees, and issues pertaining to creditor's claims and spendthrift provisions, among other provisions. As noted by counsel in this matter, the following provision is relevant to the within case:

> **§7740.1. Modification or termination of noncharitable irrevocable trust by consent – UTC 411.**
>
> (a) **Consent by settlor and beneficiaries.**–A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or termination may be exercised by a guardian, an agent under the settlor's general power of attorney or an agent under the settlor's limited power of attorney that specifically authorizes that action. Notwithstanding Subchapter C (relating to representation), the settlor may not represent a beneficiary in the modification or termination of a trust under this subsection.
>
> (b) **Consent by beneficiaries with court approval.**—A noncharitable irrevocable trust may be modified upon the consent of all the beneficiaries only if the court concludes that the modification is not inconsistent with a material purpose of the trust. A noncharitable irrevocable trust may be terminated upon consent of all the beneficiaries only if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.
>
> (b.1) **Spendthrift provision.**—A spendthrift provision in a trust instrument is presumed to constitute a material purpose of the trust.
>
> (c) **Distribution upon termination.**—Upon termination of a trust under subsection (a) or (b), the trustee shall distribute the trust property as agreed by the beneficiaries.
>
> (d) **Consent by some beneficiaries with court approval.**—If not all the beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b), the modification or termination may be approved by the court only if the court is satisfied that:
>
> 1) if all the beneficiaries had consented, the trust could have been modified or terminated under this section; and
>
> 2) the interests of a beneficiary who does not consent will be adequately protected.

The Court has reviewed the matter and finds that the within trust cannot be terminated by consent of all the beneficiaries, per the terms of the Trust Agreement,

nor could it be terminated by the above statute provision, if applied. The Court is persuaded by the arguments made by the Respondent, both in their brief and at Oral Argument.

Initially, the Court notes that the terms of the trust instrument are clear and unequivocal, including specifically a spendthrift clause found in Section 9.2 of the Trust Agreement. In the Trust Agreement, the settlor of the trust, Mrs. Castagnero, made express outright provisions of funds available to two named individuals; and opted to place all remaining funds in separate trust accounts for the benefit of the remaining beneficiaries. As noted by Respondents, this matter involves three named beneficiaries that are charities. There can be no dispute that Joslin Diabetes Center, American Heart Association and the Penn Township Ambulance Association Rescue 6, are organizations that fall under the definition of charitable purposes, pursuant to 20 Pa. C.S.A. §7735[3] of the UTA. As such, the Court concludes that 20 Pa. C.S. §7740.1, of the Uniform Trust Act (UTA) is not applicable to these circumstances. As a result, based upon said conclusion, this Court could end its analysis here.

However, in the interests of thoroughness and diligence, and in an effort to more fully address all the issues raised by counsel, the Court did review said statute and found some guidance in subsection (b.1) as related to spendthrift provisions. First, this Court agrees that a termination of the trust would frustrate Mrs. Castagnero's clear intent because, according to the express terms of the Trust Agreement, she intended to provide certain funds outright to individuals; and, in contrast, she intended to provide other funds to individuals via income through the establishment of a trust. Equally important, is the fact that Mrs. Castagnero's intent, as set forth in Section 4.4 of the Trust Agreement, was to name the three charities as the remaindermen to the trusts created for the three beneficiaries, namely Louis Castagnero, Jr., Leslie Harvath, and Helana Pietragallo. Accordingly, Mrs. Castagnero, it would appear, was not intending to benefit the heirs of the three Petitioners; rather, only the three beneficiaries for their respective lifetimes. Again, Section 4.4 of the Trust Agreement states: Upon the death of the beneficiary, any remaining property then held in trust for such beneficiary shall be distributed in equal shares to the three named charities. Therefore, one of the stated purposes underlying the within Motion to Terminate Trust by Petitioners, is contrary to the plain terms of the Trust Agreement.

The second reason for the Court's ruling in this matter is closely associated with the first reason. The Trusts herein cannot be terminated because their continuance is necessary to carry out a material purpose of the Trusts. As noted above, per the statute itself, a spendthrift provision is presumed to constitute a material purpose of the trust. Accordingly, since the Castagnero trust contains a spendthrift provision in Article 9, specifically at §9.2, it is argued that the trust cannot be terminated.

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[3] See: 20 Pa. C.S.A. §7735. **Charitable purposes; enforcement – UTC 405.**

(a) **Purposes.**—A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes or other purposes the achievement of which is beneficial to the community.

The statute also provides a definition for "spendthrift". (See: 20 Pa. C.S.A §7703). A "spendthrift provision" is defined as a provision in a trust instrument that restrains both voluntary and involuntary transfer of a beneficiary's interest. Here, the three named individual beneficiaries desire to terminate the Trust Agreement, obtain their respective trust funds, while providing a speculative amount of funds for the three named charities, essentially arguing that "it's better to receive the money now", albeit in a lower amount, in order to pay for the college expenses for the child of one lifetime beneficiary, and to enable each lifetime beneficiary to, upon their deaths, leave money for their own heirs. This was not the intent of the settlor.

This Court has reviewed the *Bosler Estate* case. 107 A.2d 443, 445 (Pa. 1954). In *Bosler Estate*, the Pennsylvania Supreme Court held that:

> It is always to be remembered that consideration for the beneficiary does not even in the remotest way enter into the policy of the law; it has regard solely to the rights of the donor. Spendthrift trusts can have no other justification than is to be found in considerations affecting the donor alone. They allow the donor to so control his bounty, through the creation of the trust, that it may be exempt from liability for the donee's debts, not because the law is concerned to keep the donee from wasting it, but because the law is concerned to protect the donor's right of property…We repeat, spendthrift trusts are allowed not because the law concerns itself for the donee; he may conserve or dissipate as he pleases; the law's only concern is to give effect to the will of the donor as he has expressed it." Id.
>
> …
>
> Where settlor of spendthrift trust was deceased and therefore incapable of consenting to termination, trust could not be terminated even though beneficiary held both life interest and a general power of appointment. Id.

Based upon the foregoing analysis, this Court has determined that the Trust Agreement cannot be terminated, despite the consent of all beneficiaries and remaindermen. As noted in *Bosler Estate,* the application of the law must concern itself only with the settlor's intent, in contrast to the will of the beneficiaries. This Court cannot interpret the language of the Supreme Court of Pennsylvania in a manner other than the plain meaning of the words used by the Supreme Court.

Finally, in conclusion, it is important to note that the Petitioners, in particular Leslie Harvath, is not left without a potential remedy in the matter, as created by the Settlor, with regard to one of his stated reasons for terminating the Trust Agreement in this matter – to pay for his son's college education. According to Section 4.3 of the Trust, the trustee shall distribute to or for the beneficiary such amounts of principal as the trustee shall from time to time deem necessary or proper for the health, maintenance and support of the beneficiary, taking into account other available funds known to the trustee, including such beneficiary's assets. It seems that this provision may possibly provide an avenue for Petitioner Harvath to obtain any additional funds needed at this

time, to possibly assist in making proper financial arrangements for his son's college education. This was one of the stated reasons for terminating the Trust Agreement in this matter.

Accordingly, the Court hereby DENIES the relief sought by Petitioners, and enters the following Order of Court:

ORDER OF COURT

AND NOW, this 14th day of March, 2013, upon careful consideration of the Motion to Terminate Trust filed by Petitioners in this matter; and, upon consideration of the Briefs filed in this matter and Oral Argument held before this Court; and, based upon the analysis contained in the foregoing Opinion, it is hereby ORDERED, ADJUDGED, and DECREED, that Petitioner's Motion to Terminate the Trust Agreement is hereby DENIED.

BY THE COURT:
/s/ Anthony G. Marsili, Judge

JASON MONTGOMERY and COURTNEY MONTGOMERY,
his wife, Plaintiffs
V.
MICHAEL GEMBAROSKY and GERRA GEMBAROSKY,
his wife, Defendants

FRAUD

Actions; Pleading

1. When there is a fiduciary relationship between parties, even an innocent misrepresentation may amount to constructive or legal fraud.

2. Seller being aware of problem with house's walls and seller having attempted to repair the problem, but seller not disclosing these facts amounted to at least fraud by negligent misrepresentation.

ANTITRUST AND TRADE REGULATION

Statutory Unfair Trade Practices and Consumer Protection; Housing Sales

1. Under Pennsylvania's Real Estate Seller Disclosure Law, a seller is not obligated to make any specific inquiry or investigation in an effort to complete a seller disclosure statement.

2. Under Pennsylvania's Real Estate Seller Disclosure Law, a seller is not held to a strict liability standard for innocent misrepresentations made in seller disclosure statement.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 07CI05719

Appearances:
Walter J. Nalducci, III,
Pittsburgh, for the Plaintiffs
John E. Becker,
Pittsburgh, for the Defendants

BY: GARY P. CARUSO, PRESIDENT JUDGE

DECISION AND ORDER

This matter is before me for disposition after a non-jury trial. Having heard such oral testimony as the parties chose to introduce and reviewed the pertinent exhibits and 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 matter begins with the completion of a Sellers Disclosure Statement on November 14, 3004. This Statement was signed by both Michael and Gerra Gembarosky. In this Statement it states that they are not aware of any past or present problems with the walls, foundation or other structural components and that there had been no repairs or other attempts to remedy or control any problems with the walls, foundation or other structural components. The plaintiff purchasers clearly testified that they relied upon these statements in making their decision to purchase the house in 2005. At the time that the plaintiffs first visited and looked at the house they noticed

small cracks in localized areas of the home. Nevertheless, they entered into an Agreement of Sale dated February 6, 2005. In that Agreement they elected to hire a home inspector to conduct an inspection of the house. The home inspector they hired classified the cracks that he observed as "normal settlement cracks". With regard to the foundation the home inspector reported that there were no visible abnormal movement or cracking but added that the inspection was limited due to the fact that 70% of the basement could not be examined because it was covered. Therefore, the Seller Disclosure Statement becomes vitally important. Based upon this report and the Seller Disclosure Statement the plaintiffs were satisfied with the condition of the house and did proceed to closing.

Within 5 months the plaintiffs began to discover additional cracking. When Mr. Montgomery examined the basement wall behind a work bench that had been covered with peg board and insulation he discovered a long crack in the wall where there had been an attempt to repair the mortar. Based upon the testimony and the evidence presented, I find that the defendant, Mr. Gembarosky, was the person that attempted to repair the crack and then placed the peg board and insulation in that area that covered the crack.

Once the plaintiffs saw the aforementioned crack they contacted AquaGuard to make an assessment concerning the extent of any problem. The owner of AquaGuard, Mr. Gallagher, testified that he viewed the crack that had previously been hidden and confirmed that there had been an attempt to repair the crack. After viewing this crack, and when viewed in conjunction with other cracks in the premises, Mr. Gallagher determined that the house had a cracked footer. Importantly he testified that this hidden crack was the piece of the puzzle that was needed to make the determination that the footer was cracked. The importance of this piece of the puzzle was corroborated by Jim Esperth who had initially performed the home inspection for the plaintiffs. According to Mr. Esperth if he had seen the crack behind the work bench it would have given him concern and he would have done a further evaluation as to the cause of the crack. However, like the plaintiffs, Mr. Esperth relied upon the statements contained in the Seller Disclosure Statement when he did his inspection and initial assessment.

AquaGuard repaired the crake footer at the cost of $12,775.00 and the same has been paid in full by the plaintiffs.

The first matter for me to determine is whether the plaintiffs have proven fraud on the part of the both Michael and Gerra Gembarosky. As stated previously they both signed the Seller Disclosure Statement. The Statement provides that those that sign it represent that the information set forth in the Disclosure Statement is accurate and complete to the best of the Seller's knowledge.

Fraud is proven when it is shown that the false representation was made knowingly, or in conscious ignorance of the truth, or recklessly without caring whether it was true or false. If a person asserts a fact as true, but he or she really does not know if it is true, he or she has the same responsibility as if the statement was made with knowledge that it was actually false. *Highmont Music Corp. v. J.M. Hoffman Co.* 155 A.2d 363 (Pa.

1959). A misrepresentation does not have to be a positive assertion but also may consist of any artifice by which a person dealing with another is deceived by that other to their disadvantage. Fraud may also consist of the intentional concealment of a true fact which is calculated to deceive another. It is well known that the failure to reveal a material fact may constitute fraud. Obviously, facts that would lead to the discovery of a cracked footer are material facts.

Recovery is also permitted in situations where there is an innocent misrepresentation. When there is a fiduciary relationship between parties even an innocent misrepresentation may amount to constructive or legal fraud. *Denny v. Cavaleri,* 443 A.2d 333 (Pa. 1982). This constitutes a breach of duty by the person or persons making the misrepresentation even though there is no vicious intent. *Charleroi Lumber Co. v. Bentleyville Borough School District,* 6 A.2d 88 (Pa. 1939).

Based upon the evidence presented I find that Mr. Gembarosky knew that the crack in the basement wall existed behind the work bench, peg board and insulation that he had placed there. I also find that he knew this at the time he completed the Seller Disclosure Statement. I also find that it was Mr. Gembarosky who attempted to repair the subject crack. I find that he knew he had attempted to repair this crack at the time he completed the Seller Disclosure Statement. Thus, it is clear that he was aware of the crack and that he had repaired it at the time he completed the Seller Disclosure Statement but failed to disclose this as required by the Seller Disclosure Statement at paragraph No. 6 of the Seller Disclosure Statement. The law requires that the seller disclose facts and/or conclusions that are known to him. By not doing so Mr. Gembarosky breached his duty to the plaintiffs.

The release provisions of the Agreement of Sale found in paragraphs 8 and 25 of do not apply to the current factual situation. The release provision of the Agreement of Sale is interesting in that it seems to only apply to a situation where the buyer is not satisfied with the condition of the property that is stated in the report of the home inspector. In the current situation the buyer was in fact satisfied with the condition of the property as reported by the home inspector. Unfortunately, as a result of the concealment by Mr. Gembarosky of the subject crack and attempted repair, the home inspector's report was not a complete and accurate assessment of the condition of the property. Therefore, the acceptance of the property in its then current condition did not trigger the terms of the release.

I therefore find that Michael Gembarosky was aware of a problem with the walls of the house and that there had been, at least, an attempt at repairing the same. I also find that this is contrary to the representation he made in the Seller Disclosure Statement. This meets the definition under the law of at least fraud by negligent misrepresentation and is deceptive conduct which creates likelihood of confusion or of misunderstanding. Furthermore, I find that by his conduct, Michael Gembarosky breached the implied covenant of good faith and fair dealing impliedly contained in the Agreement of Sale. Thus, he was in default under the Agreement. Therefore, pursuant to the terms contained in paragraph 25 of the Agreement of Sale the release did not deprive the plaintiffs of any right to pursue any remedies that may be available under law or equity. It is expressly stated in paragraph 25 that the terms of this release survived the settlement.

There remains the issue of whether the defendant Gerra Gembarosky is liable. Obviously the plaintiffs must prove their claim against her as well. The plaintiffs have not presented any evidence that Mrs. Gembarosky was aware of the subject crack and its attempted repair. She did fill out the Seller Disclosure Statement to the best of her knowledge. There was no evidence present that she +did any maintenance on the residence nor that she was aware of any structural issues with the property. In support of the position of Mrs. Gembarosky that she is not individually liable for any form of fraud she cited the case of *Growall v. Maietta,* 931 A.2d 667 (Pa. Super. 2007). In the *Growall* case both Pat and Kathy Maietta agreed to sell their house to the Growalls. The Growalls discovered a water leakage problem after taking possession that was not disclosed before closing. Growall sued both Pat and Kathy Maietta. A jury trial was held and the jury returned a verdict against Pat Maietta only. They did not find against Kathy Maietta. The case was appealed to the Superior Court and the court found that because the evidence clearly established that Kathy Maietta was not aware of any water leak in the basement until after closing her failure to disclose the water leak was not a violation of the Real Estate Seller Disclosure Law (hereinafter "RESDL").

The Superior Court in Growall stated that the RESDL 68 Pa.C.S.A. § 7301 *et seq*. provides that "Any seller who intends to transfer any interest in real property shall disclose to the buyer any material defects with the property known to the seller by completing all applicable items in a property disclosure statement which satisfies the requirements of section 7304 (relating to disclosure form)." 68 Pa.C.S.A. § 7303. The RESDL further provides, in pertinent part, "If information disclosed in accordance with this chapter is subsequently rendered inaccurate prior to final settlement as a result of any act, occurrence or agreement subsequent to the delivery of the required disclosures, the seller shall notify the buyer of the inaccuracy." 68 Pa.C.S.A. § 7307. The seller is not obligated by this chapter to make any specific investigation or inquiry in an effort to complete the property disclosure statement. In completing the property disclosure statement, the seller shall not make any representations that the seller or the agent for the seller knows or has reason to know are false, deceptive or misleading and shall not fail to disclose a known material defect. 68 Pa.C.S.A. § 7308. "A seller shall not be liable for any error, inaccuracy or omission of any information delivered pursuant to this chapter if: (1) the seller had no knowledge of the error, inaccuracy or omission...." 68 Pa.C.S.A. § 7309(a)(1).

In *Growall* the plaintiffs next argued that Kathy Maietta had an absolute duty to know the condition of her property, and violated that duty by failing to investigate or, in the alternative, failing to disclose her lack of knowledge. However, the Superior Court rejected this argument because the RESDL does not obligate a seller to make any specific investigation or inquiry when they complete the disclosure form. Furthermore, the RESDL states that the seller is not liable for any error, inaccuracy or omission of which he or she had no knowledge.

It is true that the case of *LaCourse v. Kiesel,* 77 A.2d 877 (Pa. 1951), cited in the *Growall* opinion, recognized a strong public policy against allowing a person who has ready access to information about real estate to make a statement about it and then claim that she did not know what she says she knew. However, the Superior Court in

Growall held that it cannot hold a seller to a strict liability standard concerning an innocent misrepresentation where the RESDL does not impose such an absolute duty. Furthermore, the cases cited in *Growall*, i.e. the *Miller* case and the *LaCourse* case involved "basic facts" about the property readily ascertainable by the seller making the disclosure. The Court said it could not find that Kathy Maietta's ignorance of an isolated incident of water damage/flooding in the basement constitutes such a basic fact to trigger absolute liability.

Finally, the court found no agency theory of recovery against Kathy Maietta because there was no proof of scienter on the part of the wife at the time of the husband's misrepresentation. The wife must also be proven to be aware of the problem and present at the time her husband makes the representation and nevertheless remained silent to be held under this theory.

Based upon the rationale of the *Growall* case and given that there is no evidence that Mrs. Gembarosky had any knowledge of the subject crack, attempted repair and concealment, I do not find that Gerra Gembarosky is individually liable on the theories of fraud or strict liability.

ORDER

And now this 14th day of March, 2013, in accordance with the foregoing Decision, it is hereby the Verdict of this Court that I find in favor of the plaintiffs, Jason Montgomery and Courtney Montgomery, his wife and against the defendant, Michael Gembarosky only on Counts I,II and III of the Complaint. I award the plaintiffs the sum of $12,775.00. I do not, in my discretion, award treble damages, attorney's fees or costs.

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

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IN RE: ESTATE OF VERA J. VANCE, DECEASED

FIXTURES

Nature and Conversion Into Realty In General

Because a grandfather clock was not necessary to the essential use of the decedent's home, it was personalty and it was not a fixture, although the clock was attached to the wall by the use of two bolts.

EXECUTORS AND ADMINISTRATORS

Evidence of Ownership

1. It is the burden of the objectors to show that certain property was possessed by the decedent at the time of her death in order for such personalty to be included in an inventory of property for distribution.

2. The objectors did not satisfy their burden of proof that a coin collection, a toy collection, and certain toy tractors and steam engines, were in the possession of the decedent at the time of her death because no one observed these items in the decedent's possession or home immediately after her death.

Grounds and Proceedings for Removal or Surcharge of an Executor

1. The selection of a personal representative by a testatrix is an expressed indication of choice by the testatrix, and the removal or surcharge of that representative is an extreme remedy, requiring clear and convincing evidence of a substantial nature for replacement or surcharge.

2. Because the testatrix's wishes were clear, the Court would not overturn them and it denied the petitioner's request to remove the executor.

3. However, the Court surcharged the executor for the fees and costs related to filing and litigating the amended inventory.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION
No. 65-11-0109

Appearances:

Richard W. Schimizzi,
Greensburg, for the Objectors
James S. Lederach,
Scottdale, for the Executor

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION AND ORDER OF COURT

By Richard E. McCormick, Jr., Judge:

At the conclusion of previous proceedings in this matter the Court directed the Executor of this Estate to file an Amended Inventory setting forth items of personal property that were present at 2238 State Route 981, Mt. Pleasant and owned by Vera J. Vance on the date of her death. As a result, the Executor filed an Amended Inventory that included a Schedule of Household Furnishings and Personal Effects and a line item valuation of $3,000.00 for furnishings and effects.

Thereafter, Objections to Amended Inventory were filed, as well as a Petition for the Removal of the Executor and to surcharge the Executor.

A hearing on this matter was held, and testimony was taken from the Executor and his wife, as well as from Wilma Buttermore, one of the objecting heirs. The testimony of the Executor more specifically established the status of numerous items of personalty sought to be inventoried by the Objectors.

Specifically, the attorney for the Objectors questioned the Executor about a room by room list of personal property purported to be present in the decedent's home, which had been conveyed to Alvin Vance, Jr., the Executor, some time prior to the death of the decedent and her husband, as set forth at paragraph 14 of the Objections to Amended Inventory. Of items listed in the Objections, with reference to the living room, a grandfather's clock was not inventoried, but the Executor admitted that the clock was still present, but claimed that it was a fixture and thus attached permanently as part of the real property.

The Court rejects the contention that the grandfather's clock should be treated as a fixture. While it was attached to the wall with the use of two bolts, that attachment does not make it a fixture. There is no showing that the attachment was necessary to the essential use of the real property, *Noll by Noll v. Harrisburg Area YMCA,* 643 A.2d 81 (Pa. 1994) and therefore, the grandfather's clock is to be treated as personal property to be distributed to the residuary legatees.

Regarding numerous other items of personalty that the Objectors claim, the Executor testified that they had been discarded or destroyed because they were useless or damaged during the decedent's lifetime and were disposed of prior to her death. The testimony regarding those various items and their dispositions has not been contradicted by other evidence, and therefore the Court must accept the Executor's explanations. It should be noted that the Court's original Opinion herein had invited explanations by the Executor in the Amended Inventory ordered by the Court.

Another category of items sought by the Objectors is a collection of toy or model tractors and steam engines collected by the Objectors' and Executor's parents and memorialized in a ledger introduced in the original hearing (Exhibit 7, original hearing).

It is the burden of the Objectors to show that certain property was possessed by the decedent at the time of her death in order that that personalty be included in an inventory of property for distribution. *Whitenight v. Whitenight,* 278 A.2d 912 (Pa. 1971). While the Objectors have provided a ledger purporting to list the items of personalty that they claim to be a part of the decedent's Estate, they have failed to meet their burden that the items listed in the ledger were in the possession of Vera J. Vance at the time of her death. Wilma Buttermore testified that when she was in the family home for approximately 15 minutes soon after her mother's death and prior to her funeral that she observed "boxes that the toys were actually in, they were stacked clear to the ceiling." (April 1, 2013, hearing transcript, page 56, line 4-5). She did not enter the room that the boxes were in and did not have an opportunity to look inside the boxes that she saw, nor was she able to make a list or inventory of any of the purported toy collection. She admitted that she had assisted her mother at times in noting the gift of some of the toys to relatives.

The evidence presented by the Objectors regarding the toy tractors and steam engines is not sufficient to allow this Court to determine the existence and possession of specific personalty in the decedent at the time of her death. While the Objectors would urge that circumstantial evidence is sufficient in this regard, the Court is unable to agree.

Another category of personalty alleged to be possessed by the decedent at the time of her death is a coin collection, to which the same analysis must apply. Again, the evidence offered by the Objectors is insufficient to allow a conclusion that the coin collection was possessed by the decedent at her death. It is the uncontraverted testimony of the Executor that all that he found regarding a coin collection were the empty books and empty tubes which were once utilized by his parents, his father in particular, to keep the coins. Without more, this Court cannot attribute possession of any coins to the Estate.

Ultimately, this Court can conclude, based upon the testimony, that there is sufficient evidence to support an additional Amended Inventory of the following items of personal property to be included in the Estate of Vera J. Vance:

1) Antique grandfather clock;
2) Antique book desk with book collection;
3) Color television;
4) Kitchen table;
5) Wooden barrel from first floor back bedroom;
6) Wooden dresser (5-7 drawers);
7) White dresser;
8) Glass dome gold clock;
9) Long dresser (matches bed);
10) Antique glass dome curio;
11) Full size bed (from parents' bedroom);
12) Two (2) antique wooden dressers (from parents' bedroom);
13) Clothes rack;
14) Two (2) dressers (from girls' bedroom);
15) Full size bed (from girls' bedroom);
16) Wooden wardrobe;
17) Wooden chest with fliptop lid;
18) Various Christmas decorations;
19) Antique glass dome curio;
20) Antique corner wooden China cabinet;
21) Antique five drawer dresser;
22) Small desk;
23) Two (2) antique cane rocking chairs.

A Second Amended Inventory reflecting these items of personal property is to be filed by the Executor, on the basis that the Executor has been unable to support his claim that these items of personal property belonging to his parents were specifically to be included in the sale of the real property to him.

The Objectors have also filed a petition seeking the removal of the Executor, and surcharging him for legal fees, costs and commissions, pursuant to 20 Pa.C.S. §3182 and §3183 of the Probate, States and Fiduciary Code.

As counsel for the Objectors has acknowledged, the selection of a personal representative by a testatrix is an expressed indication of choice in the testatrix, and the removal of that representative is an extreme remedy, requiring clear and convincing evidence of a substantial nature for replacement. *In re: White,* 484 A.2d 763 (Pa. 1984). The Court should give every consideration to the wishes of a testatrix in this regard. In this instance, Vera Vance's wishes have been made clear, and this Court will not overturn them.

While the entire amount sought to be surcharged will not be granted, this Court will assess a surcharge for those fees and costs incurred for the filing and litigating of Objections to the Amended Inventory. Those are reflected in the Statement for Services Rendered dated April 1, 2013, part of petitioner's Exhibit 2 to the hearing on the Objections to the Amended Inventory. Additionally, the Court will add five (5) hours to that statement, representing an estimate of the time necessary to prepare the brief submitted on behalf of the Objectors, which estimate is based upon services rendered for research and drafting for the memorandum of law submitted to the Court after the first hearing in this matter.

ORDER OF COURT

AND NOW, to wit, this 3rd day of June, 2013, based upon the foregoing, this Court **ORDERS** and **DIRECTS** the filing of a Second Amended Inventory herein, specifically setting forth the twenty-three (23) items of personal property which have been previously listed in the Opinion above.

Further, the Executor is **DIRECTED** to distribute those items of personal property to Wilma Buttermore, who the Objectors had designated as their chosen replacement should this Court have granted removal of the Executor, for distribution or disposition as decided by the residuary legatees.

The petition to remove the Executor is **DENIED**.

The petition to surcharge the Executor is **GRANTED** in part. The fee of the Executor is to be reduced by Two Thousand One Hundred and Eighty-Five Dollars ($2,185.00) accordingly.

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

E.D.P., Plaintiff
V.
W.J.K., Defendant

DOMESTIC RELATIONS

Request for Paternity Testing; Presumption of Paternity and Paternity by Estoppel; Misrepresentation to Induce Acknowledgement of Paternity; Consideration of Nature of Father-Child Relationship in Determining Best Interests of Child

1. Presumption of paternity applies to child born out of wedlock where parents of child have married each other, where putative father openly holds out the child to be his and either receives the child into his home or provides support for the child, or if there is clear and convincing evidence that the man was the father of the child.

2. In cases where the presumption of paternity has not been rebutted or does not apply, the court must consider evidence of the doctrine of paternity by estoppel; a legal determination that because of a person's conduct, that person, regardless of his true biological status, will not be permitted to deny parentage.

3. Paternity by estoppel will only apply where it can be shown, on a developed record, that it is in the best interests of the involved child, and will not be applied where fraud has been established.

4. Plaintiff signed an Acknowledgement of Paternity and held out the child as his own, after receiving the results of an over-the-counter paternity test; nevertheless, Plaintiff's request for genetic testing and an evidentiary hearing regarding paternity of the minor child will be granted due to the fact that the father-child relationship is minimal at best.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
SUPPORT
No. 61 of 2013-D

Appearances:
Andrew Skala,
Greensburg, for the Plaintiff
Blane A. Black,
Monongahela, for the Defendant

BY: MICHELE G. BONONI, JUDGE

OPINION and ORDER OF COURT

BONONI, J. May 28, 2013

This case is before the Court upon Defendant's request for an evidentiary hearing on the issue of paternity. For the reasons stated herein, the Defendant's request for paternity testing is GRANTED.

FACTS

The parties met in high school but did not start to date until July/August of 2010. (N.T. April 16, 2013, pg. 6 lines 17-19). The parties ended their dating relationship at the beginning of 2011 but continued to have a sexual relationship. (N.T. April 16, 2013, pg. 7 lines 8-13, 19-21, pg. 59 lines 11-17). The parties were sexually active in both

March and April of 2011. (N.T. April 16, 2013, pg. 33 lines 18-23, pg. 59 lines 15-20). E.D.P. stated that she was sexually intimate with one (1) other person and that she was last intimate with him in the first week of March of 2011. (N.T. April 16, 2013, pg. 59 lines 23-25, pg. 60 lines 15-21). Despite the termination of their dating relationship, the parties never stopped their sexual relationship. (N.T. April 16, 2013, pg. 61 lines 3-5).

In April of 2011, E.D.P. was sexually assaulted while a student at California University of Pennsylvania. (N.T. April 16, 2013, pg. 35 lines 25, pg. 36 lines 1-2, pg. 61 lines 7-11). E.D.P. was attacked by a stranger. (N.T. April 16, 2013, pg. 62 lines 2-3). She contacted W.J.K. and told him about the sexual assault the next day. (N.T. April 16, 2013, pg. 64 lines 18-20, 24-25, pg. 65 line 1). At the time of the sexual assault, the parties were still maintaining a regular sexual relationship but had not officially resumed their dating relationship. (N.T. April 16, 2013, pg. 65 lines 2-8). The parties did not officially resume their dating relationship until E.D.P. discovered she was pregnant. (N.T. April 16, 2013, pg. 7 lines 8-13, pg. 65 lines 9-12).

E.D.P. discovered she was pregnant when she was ten (10) weeks into her pregnancy. (N.T. April 16, 2013, pg. 65 lines 12-13). Both she and W.J.K. believe that it was summer when she discovered she was pregnant. (N.T. April 16, 2013, pg. 65 lines 12-13, pg. 7 lines 14-18). After discovering E.D.P. was pregnant, she and W.J.K. moved in together in Wyano, Pennsylvania. (N.T. April 16, 2013, pg. 8 lines 3-6). W.J.K. was hired by Siemen's Energy in August of 2011 and began traveling for work. (N.T. April 16, 2013, pg. 8 lines 12-17). W.J.K. began working in Florida in November of 2011 and E.D.P. would come and visit. (N.T. April 16, 2013, pg. 9 lines 2-3, 14-16). L.A.K. was born in Florida on January 7, 2012. (N.T. April 16, 2013, pg. 9 lines 17-18, pg. 67 lines 6-8).

At the time of the child's birth, W.J.K. believed the child was his and he signed the birth certificate and Acknowledgment of Paternity. (N.T. April 16, 2013, pg. 13 lines 14-22). After the child's birth, W.J.K.'s mother (paternal grandmother) purchased an over-the counter paternity test from the drug store and administered it to W.J.K. and the child. (N.T. April 16, 2013, pg. 14 lines 6-13). The results of the test were received in January of 2012 and indicated that W.J.K. had a zero percent (0%) chance of being L.A.K.'s biological father. (N.T. April 16, 2013, pg. 14 lines 14-20, pg. 25 lines 5-8). W.J.K. confronted E.D.P. with the results of the over-the-counter paternity test and she told him that she had slept with one other individual but that it was outside the timeframe for conception. (N.T. April 16, 2013, pg. 15 lines 1-3, 15-16). At that point, W.J.K. and E.D.P. again discussed the sexual assault. (N.T. April 16, 2013, pg. 15 lines 19-22). It did not occur to E.D.P. or W.J.K. that L.A.K. could be the result of the sexual assault until after they received the results of the over-the-counter paternity test. (N.T. April 16, 2013, pg. 37 lines 20-25, pg. 38 lines 1-4). W.J.K. never had any suspicions that L.A.K. was not his child until the results of the over-the-counter paternity test came back. (N.T. April 16, 2013, pg. 46 lines 20-23).

W.J.K. never rescinded his Acknowledgment of Paternity and never notified the Department of Vital Statistics about the possibility that he was not L.A.K.'s biological

father. (N.T. April 16, 2013, pg. lines 15-20).

After the baby was born, W.J.K. continued to work in Florida until January 26, 2012 when he, E.D.P. and the child returned to Pennsylvania and lived together until February 27, 2012 when he returned to Florida for work. (N.T. April 16, 2013, pg. 16 lines 16-21, pg. 26 lines 23-25). Once W.J.K. returned to Florida for work, E.D.P. and the child would come visit him in Florida. (N.T. April 16, 2013, pg. 16 lines 22-24). While W.J.K. was working in Florida, E.D.P. maintained a residence in Wyano, Pennsylvania. (N.T. April 16, 2013, pg. 17 lines 2-3).

W.J.K. worked in Homestead[1] for approximately three (3) to four and half (4 ½) months and then returned to Pennsylvania for about two (2) weeks. (N.T. April 16, 2013, pg. 17 lines 10-12). He then worked a short job in West Palm Beach and then continued to work there for another two and half (2 ½) months. (N.T. April 16, 2013, pg. 17 lines 12-16). W.J.K. then returned to Homestead right around Thanksgiving of 2012. (N.T. April 16, 2013, pg. 17 lines 16-17). E.D.P. and the child went with W.J.K. on the small job in West Palm Beach but towards the latter half of 2012, E.D.P. and the child remained in Pennsylvania. (N.T. April 16, 2013, pg. 17 lines 20-22). The parties ended their relationship completely on December 24, 2012. (N.T. April 16, 2013, pg. 18 lines 7-15, pg. 39 lines 20-23). W.J.K. last saw L.A.K. over Christmas of 2012. (N.T. April 16, 2013, pg. 18 lines 22-24, pg. 41 lines 2-5).

W.J.K. continued to financially support E.D.P. and the child until February or March of 2013. (N.T. April 16, 2013, pg. 20 lines 18-22). W.J.K. stated that he supported E.D.P. and the child without a court order because he felt bad and he wanted to do the right thing. (N.T. April 16, 2013, pg. 21 lines 6-10). On October 5, 2012, W.J.K. also signed a letter of support stating that L.A.K. was his son. (N.T. April 16, 2013, pg. 24 lines 20-23). W.J.K. also provides L.A.K.'s medical insurance through his employer. (N.T. April 16, 2013, pg. 27 lines 13-21).

E.D.P. and W.J.K. were still in a relationship during 2012 and W.J.K. paid for child care expenses and household expenses for the residence in Wyano. (N.T. April 16, 2013, pg. 28 lines 14-18). E.D.P. sought child support on January 8, 2013. W.J.K.'s earnings were wage attached and the money is currently being held in escrow pending the outcome of this proceeding.

STIPULATIONS

The parties stipulated to the following stipulations at the April 16, 2013 hearing:

1. E.D.P. stipulated that an over-the-counter paternity test was administered to L.A.K. and W.J.K. (N.T. April 16, 2013, pg. 12 lines 23-25).
2. W.J.K. stipulated that he held the child out as his own in 2012. (N.T. April 16, 2013, pg. 103 lines 15-21).
3. W.J.K. stipulated that he signed the Acknowledgment of Paternity when L.A.K. was born. (N.T. April 16, 2013,

[1] W.J.K. never testified where Homestead was located but the Court understands that it is located out-of-state.

pg. 69 lines 4-7).

DISCUSSION

Title 23 section 5102 states in relevant part:

> **(b) Determination of paternity.**—For purposes of prescribing benefits to children born out of wedlock by, from and through the father, paternity shall be determined by any one of the following ways:
>
> (1) If the parents of child born out of wedlock have married each other.
>
> (2) If, during the lifetime of the child, it is determined by clear and convincing evidence that the father openly holds out the child to be his and either receives the child into his home or provides support for the child.
>
> (3) If there is clear and convincing evidence that the man was the father of the child, which may include a prior court determination of paternity.

23 Pa. C.S.A. §5102(b). When issues of paternity are brought before the courts of the Commonwealth, the courts determine paternity based on two legal doctrines: the presumption of paternity and the doctrine of paternity by estoppel. The Supreme Court of Pennsylvania has stated:

> The presumption of paternity and the doctrine of estoppel, therefore, embody the two great fictions of the law of paternity: the presumption of paternity embodies the fiction that regardless of biology, the married people to whom the child was born are the parents; and the doctrine of estoppel embodies the fiction that, regardless of biology, in the absence of a marriage, the person who has cared for the child is the parent.

Brinkley v. King, 701 A.2d 176, 180 (Pa. 1997).

In cases where the presumption of paternity has not been rebutted or does not apply, the court must consider evidence of the doctrine of paternity by estoppel. *Freedman v. McCandless,* 654 A.2d 529 (Pa. 1995); 23 Pa. C.S.A. §5102(b)(2). Paternity by estoppel is merely a legal determination that because of a person's conduct (i.e. holding the child out as his own, or supporting the child) that person, regardless of his true biological status, will not be permitted to deny parentage. *Id*. at 532-33. The theory of paternity by estoppel also precludes the child's mother, who has participated in this conduct, from suing a third party for support, claiming that the third party is the true father. *Id*. Estoppel in paternity actions is based on the public policy that children should be secure in knowing who their parents are; if a person has acted as the parent and bonded with the child, the child should not be required to suffer the potentially damaging trauma that may come from being told that the father he has known all his life is not in fact his father. *T.L.F. v. D.W.T.,* 796 A.2d 358 (Pa. Super. 2002); citing *Fish v. Behers,* 741 A.2d 721, 724 (Pa. 1999).

The Supreme Court of Pennsylvania held that paternity by estoppel continues to

pertain in Pennsylvania, but it will apply only where it can be shown, on a developed record, that it is in the best interests of the involved child. *K.E.M v. P.C.S.,* 38 A.3d 798, 810 (Pa. 2012). Since the decision in *K.E.M.,* the Superior Court of Pennsylvania issued a further decision. The Superior Court interpreted *K.E.M.* as follows:

> …K.E.M. stands first for the proposition that paternity by estoppel is applicable only where it is in the best interests of the child. Additionally, K.E.M. supports increased flexibility with respect to application of paternity by estoppel. Rather than rote application, the courts must look to the facts of each specific case and the relationship that is to be protected. Where there is no relationship, application of the doctrine is irrelevant to the child's best interests. Absent a relationship, what becomes relevant is who will be financially responsible for the child.

V.E. v. W.M., 54 A.3d 368, 371 (Pa. Super. 2012). The Superior Court reasoned:

> The focus of the doctrine of paternity by estoppel is the father-child relationship and whether that relationship has been reinforced through either the mother or the 'father.' The doctrine is a legal fiction and it exists for the benefit of the child; like here, application of the doctrine would serve no purpose.

Id.

However, the doctrine of paternity by estoppel will not be applied where fraud has been established. *Ellison v. Lopez,* 959 A.2d 395, 398 (Pa. Super. 2008); *see Gebler v. Gatti,* 895 A.2d 1, 4 (Pa. Super. 2006). "When an allegation of fraud is injected in a case, the whole tone and tenor of the matter changes. It opens the door to overturning settled issues and policies of the law." *B.O. v. C.O.,* 590 A.2d 313, 315 (Pa. Super. 1991). The test for fraud is: (1) a misrepresentation; (2) a fraudulent utterance; (3) an intention by the maker that the recipient will thereby be induced to act; (4) justifiable reliance by the recipient upon the misrepresentation; and (5) damage to the recipient as a proximate result. *Id.* Fraud must be averred with particularity and must be proven by clear and convincing evidence. Pa. R. C. P. 1019(b), *B.O. supra.*

In addition to proving fraud, however, the party alleging fraud must provide evidence supporting a conclusion that Mother's actions fraudulently caused him to acknowledge paternity. *Hamilton v. Hamilton,* 795 A.2d 403, 407 (Pa. Super. 2002). *See Warfield v. Warfield,* 815 A.2d 1073, 1077 (Pa. Super. 2003) ("The fraud exception set out in the statute, I believe, addresses those instances in which a man acknowledges paternity because he believes he is the child's father and his belief is based on fraudulent misrepresentations upon which he reasonably relied.") If fraud cannot be established or the party alleging fraud cannot establish that the fraud caused him to acknowledge paternity, the doctrine of paternity by estoppel can be employed.

If the trier of fact determines that one or both of the parties are estopped, no blood tests will be ordered. *Ellison,* at 398; *see Freedman,* 654 A.2d 529 (where estoppel is applied, blood test may be irrelevant because the law will not permit a person in an estoppel situation to challenge the status previously accepted; only when estoppel is

inapplicable will blood tests be ordered).

In the instant case, the parties were never married to each other or anyone else. Therefore, the presumption of paternity is not at issue in this case and as such will not be addressed.

In determining whether W.J.K. is either estopped from denying parentage of L.A.K. or whether genetic testing is appropriate, the Court must focus on his conduct and role in L.A.K.'s life First, W.J.K. stipulated that he signed the Acknowledgement of Paternity and held L.A.K. out as his own during 2012, after receiving the results of the over-the-counter paternity test. Additionally, the Court notes that W.J.K. also consented to being listed as the child's father on the birth certificate and provided the child his last name.

At the time of L.A.K.'s conception, both E.D.P. and W.J.K. believed that W.J.K. was the father. Both E.D.P. and W.J.K. operated under that assumption until after L.A.K. was born and the over-the-counter paternity test was performed. E.D.P. said that after W.J.K. confronted her with the results of the over-the-counter paternity test, W.J.K. was distant with her and the baby. However, after a little time passed, W.J.K. came around and continued to be involved in the baby's life.

Despite the results of the over-the-counter paternity test, W.J.K. continued to financially support both E.D.P. and L.A.K, he held L.A.K. out as his own and acted as any father would.

Both E.D.P. and W.J.K. testified that W.J.K. started working for Siemen's Energy in August of 2011 and began traveling extensively for work. W.J.K. stated that Siemen's Energy would pay for E.D.P. to visit him. E.D.P. even gave birth to L.A.K. while visiting W.J.K. in Florida.

E.D.P. testified that during the first half of 2012, she and L.A.K. visited with W.J.K. frequently while he was out of town for work. However, during the latter half of 2012, they did not visit him as much. E.D.P. stated that when she and L.A.K. were separated from W.J.K. they would talk daily and Skype so that W.J.K. and L.A.K. could see each other.

W.J.K. stated that he was in Pennsylvania and living with E.D.P. and L.A.K. for approximately two and half (2 ½) months in 2012. E.D.P. disputes this amount but never specifies the amount of time she believes W.J.K. lived with her and L.A.K. W.J.K. and E.D.P. agree that W.J.K. has not seen L.A.K. since December of 2012 and he was not present for L.A.K.'s first birthday.[2]

Prior to the recent decisions of the Pennsylvania Supreme Court and the Pennsylvania Superior Court, the above facts would have been sufficient for this Court to find that W.J.K. was estopped from denying parentage of L.A.K. However, in light of those recent decisions, the Court must focus on the father-child relationship and whether a bond has formed between W.J.K. and L.A.K. Additionally, the Court must determine if genetic testing would potentially traumatize L.A.K. in that it may be

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[2] The Court notes that the decision not to see L.A.K. was W.J.K.'s. E.D.P. tetified that she has not kept W.J.K. away from L.A.K.. W.J.K.'s mother still continues to see L.A.K.

determined that the father he has known his life is in fact not his father.

The Court is tremendously bothered by this case. Regardless of the Court's decision, L.A.K. stands to suffer. If the Court orders genetic testing and the results are consistent with the over-the-counter paternity test, the Court essentially leaves this child fatherless and brands him the product of a sexual assault. On the other hand, if the Court denies the request for paternity testing, it creates a legal fiction which potentially perpetuates a falsehood regarding the true parentage of the child and saddles W.J.K. with task of financially supporting this child until the age of 18. The Supreme Court of Pennsylvania has determined that the Court should only apply the doctrine of paternity by estoppel when it is in the best interest of the child. In the instant case, the Court finds it nearly impossible to enter a ruling that is in the child's best interest.

Further, the Court is troubled by the fact that the parties knew of the potential paternity issue in the child's first month of life and waited an entire year before attempting to rectify the situation. Had the parties addressed this situation when it came to light in January of 2012, it could have minimized the potential effects on L.A.K.

The instant case is factually distinguishable from both *K.E.M.* and *V.E.* In *K.E.M.,* the child at issue was four (4) years old and involved a mother who was married at the time of the child's conception and birth but whose husband was not biologically linked to the child. In *V.E.,* the child was nine (9) days old when mother filed for support and was four (4) months old when the trial court ruled that genetic testing was appropriate because the child was of such a tender age that it could not have forged a strong bond with the putative father.

In the case at bar, the child is approximately one and half (1 ½) years old. Based on the testimony, W.J.K. has spent little time with L.A.K. due to traveling for work. As previously stated, W.J.K. resided with E.D.P. and L.A.K. for approximately two and half (2 ½) months during 2012. The Court acknowledges that E.D.P. and L.A.K. visited W.J.K. during the first half of 2012. However, the Court is also aware that E.D.P. and L.A.K. did not visit W.J.K. much after the middle of 2012 and that W.J.K. has not had any contact with L.A.K. since Christmas of 2012.

Based on the above, the Court reluctantly finds that due to L.A.K.'s age and the amount of contact W.J.K. and L.A.K. have had since L.A.K.'s birth, that the father-child relationship is minimal at best and that L.A.K. has not forged a strong bond with W.J.K. to the point that a determination that W.J.K. is not his biological father would traumatize him.

In his Motion, W.J.K. makes references to the fact that E.D.P. made misrepresentations to him which induced him into believing that he was L.A.K.'s father. The Court received no testimony that indicated that E.D.P. made misrepresentations with the intent to defraud W.J.K. To the contrary, the Court finds that E.D.P. honestly discussed her sexual assault with W.J.K. W.J.K. testified that both he and E.D.P. believed that he was the father and that it never occurred to either of them that he was not the father until they received the results of the over-the-counter paternity test. The Court finds

that there is no clear and convincing evidence of fraud in this case.

For the above reasons, the Court grants Father's request for genetic testing and enters the following Order…

ORDER OF COURT

AND NOW, to wit, this 28th day of May 2013, it is hereby ORDERED and DECREED:

1. Pursuant to Pa. R.C.P. §1930.6, the Defendant is granted the right to obtain genetic testing for the minor child, L.A.K. (D.O.B. January 7, 2012).
2. The Defendant is directed to pay to the Domestic Relations Office the sum of $96.00. This sum covers the cost of the genetic testing for Plaintiff, Defendant and the minor child.
3. Upon payment of said sum, the Westmoreland County Domestic Relations Office shall then set up genetic testing with E.D.P., W.J.K., and L.A.K.

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

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

HUSBAND AND WIFE

Marriage Settlements; Construction and Operation; Construction and Operation In General

1. Principles of contract law apply to prenuptial agreements in Pennsylvania.

2. Court held that provision of prenuptial agreement that provided for distribution of property "acquired by the parties and titled to them jointly, either as tenants by the entireties, joint tenants or tenants in common," did not imply an actual instrument of title.

3. Court rejected husband's position that prenuptial agreement rendered all property acquired after date of agreement to be husband's separate property since he was the main provider of income during the marriage from his separate car business.

4. Court concluded that the plain reading of the prenuptial agreement provided that the parties intended to divide what was earned during the term of their marriage, including any joint property acquired after the agreement was entered, and including any appreciation in the value of separate property of each party, but would retain what property he or she had when the prenuptial agreement was entered even in the event that such property was sold, mortgaged, transferred or leased, and even if the nature of the separate property was converted to proceeds.

Mutual Rights, Duties, and Liabilities; The Relation In General

For the purpose of determining title of household goods and furnishings between husband and wife, the property that has been acquired, will, in the absence of evidence showing otherwise, be presumed to be held jointly by the entireties.

CONTRACTS

Construction and Operation; General Rules of Construction; Intent of Parties; Construing Whole Contract Together

1. The whole prenuptial agreement shall be considered in arriving at contractual intent and a court shall not assume that language was chosen carelessly.

2. When writing is clear, its meaning must be determined by its contents alone.

3. The court should not focus on a technical, precise and narrow definition of only one clause in the contract.

Construction and Operation; General Rules of Construction; Consider as a Whole

Interpretations that render provisions of a contract meaningful are to be preferred over those that render provisions meaningless.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
FAMILY DIVISION
No. 2188 of 2011-D

Appearances:
John M. Ranker,
Greensburg, for the Plaintiff
H. Gervase Fajt, Jr.,
Greensburg, for the Defendant

BY: CHRISTOPHER A. FELICIANI, JUDGE

OPINION AND ORDER OF COURT

This case is before the Court for consideration of a Petition for Special Relief to Enforce Order of Court dated November 8, 2012, filed on behalf of the Plaintiff, D.A.M. (hereinafter "Wife") in the above matter. In her Petition, Wife asks the Court to interpret a Pre-Nuptial Agreement (hereinafter "the Agreement") entered into by the parties on October 16, 1992. Specifically, Wife asks the Court to read the Agreement to provide that all property acquired by either of the parties from and after the date of the Agreement be divided equally between the parties. Wife further asks the Court to enter an Order requiring that: (1) any and all property acquired by either of the parties from and after the date of the Pre-Nuptial Agreement, whether individually or jointly owned shall be divided equally between the parties; (2) that the appreciation in value of any property owned by either of the parties at the time of their marriage shall be divided equally between the parties, (3) that Husband shall pay for the cost of any and all appraisals of property acquired by either of the parties from and after the date of the Pre-Nuptial agreement, and (4) any other relief that the Court deems appropriate.

Both parties have submitted briefs on the issue of what is subject to distribution under the Pre-Nuptial Agreement. Neither party alleges that the Court must look beyond the Agreement to resolve any alleged ambiguity. Rather, the parties disagree as to whether property acquired by the parties after entering the Agreement on October 16, 1992 is subject to equal distribution under the Agreement. Both parties have cited to paragraph 7.C. of the Agreement, which provides:

> 7. POSSIBLE TERMINATION OF MARRIAGE: EQUITABLE DISTRIBUTION. In the event that the marriage of the parties is terminated by divorce, the parties specifically agree as follows:
>
> Any property acquired by the parties and titled to them jointly, either as tenants by the entireties, joint tenants or tenants in common, shall be divided equally between the parties.

Agreement at 7.C.

Husband argues that paragraph 7.C. refers to only property that was both acquired by the parties and which was titled to them. Husband argues that the word "titled" implies an actual instrument of title, such as a deed. *See* Deft's Brief in Opposition at p. 7.

Wife observes that paragraph 3 of the parties' Agreement, relating to after-acquired property, defines as joint property "[a]ny property acquired by either of the parties from and after the date of th[e] Agreement. . ." Wife further observes that in the Agreement, the parties have waived the right to separate property, (except for the appreciation value of such separate property which is to be divided equally between the parties), but not to joint property. *See* Plf's Brief in Support at 12. Wife reasons that if paragraph 7.C. meant only items of property which carried an instrument of title, such a reading would render paragraph 3 of the agreement meaningless. Wife argues that it wouldn't make sense to classify certain property as "joint" under the Agreement, and then fail to address its distribution. Husband, however, argues in response that because Husband was the breadwinner during the marriage, and because items of personalty "acquired during the marriage" were attributable to his efforts in obtaining

income through his car business, such property is not subject to distribution under the Agreement, and that the Agreement is consistent, because the Agreement as a whole defines "joint property" broadly in paragraph 3, and then narrows the joint property subject to distribution in paragraph 7. *See* Deft's Brief at 7-9.

The Court first notes that principles of contract law apply to prenuptial agreements in Pennsylvania. *Porreco v. Porreco,* 571 Pa. 61, 68, 811 A.2d 566, 570 (Pa. 2002). The whole Agreement shall be considered in arriving at contractual intent and a court should not assume that language was chosen carelessly. *Murphy v. Duquesne Univ. of The Holy Ghost,* 565 Pa. 571, 590-91. 777 A.2d 418, 429-30 (2001)(internal citations omitted). When writing is clear, its meaning must be determined by its contents alone. *Id*. The court should not focus on a technical, precise, and narrow definition of only one clause in the contract. *Anglo-American Ins. Co. v. Molin,* 673 A.2d 986 (Pa. Comm. Ct. 1996), order rev'd on other grounds, 547 Pa. 504, 691 A.2d 929 (1997). Interpretations that render provisions of a contract meaningful are to be preferred over those that render provisions meaningless. *Evans Products Co. v. Swanger,* 363 F. Supp. 808 (E.D. Pa. 1973); *Servomation Mathias, Inc. v. Englert,* 333 F. Supp. 9 (M.D. Pa. 1971).

The parties correctly cite to paragraph 7.C. of the Agreement to guide them in distribution of the property. The Court notes first that paragraph 7.C. provides for distribution of property "acquired by the parties and titled to them jointly, either as tenants by the entireties, joint tenants, or tenants in common." Pennsylvania case law holds that "for the purpose of determining title of household goods and furnishings between husband and wife, the property that has been acquired, will, in the absence of evidence showing otherwise, be presumed to be held jointly by the entireties." *DiFlorido v. DiFlorido,* 459 Pa. 641, 331 A.2d 174 (1975). Thus there is authority for the proposition that in Pennsylvania, personalty may be held by the entireties. *See Bramberry's Estate,* 156 Pa. 628, 629, 27 A. 405, 408 (1893); *Madden et al. v. Gosztonyi Savings & Trust Co.,* 331 Pa. 476, 484, 200 A. 624, 628 (1938). Although Husband argues that paragraph 7.C *implies* that such property must be accompanied by an *instrument* of title, the Agreement does not state that. Further, Husband argues that the forms of titled property referred to are "generally partnered with an instrument setting forth that title." *See* Deft's Brief at 7. The Court is not persuaded that the language set forth in the agreement which states, "titled to them" means "and accompanied by an instrument of title." The parties could have (and would have) made reference to an "instrument of title" had they intended to divide equally only that property which was accompanied by evidence of an instrument of title. However, they did not. Further, it is *presumed* under Pennsylvania law that goods purchased by a spouse and acquired during the marriage by both spouses are the property of both spouses as tenants by the entireties. *DiFlorido, supra*. To read the Agreement as inconsistent with the presumption of Pennsylvania law that property is held by the entireties if acquired during the marriage does not make sense, particularly in light of the fact that such a reading of the Agreement requires the Court to imply a phrase (e.g. "and accompanied by an instrument of title") which is not present in the Agreement. Further, as noted by both parties, it would be unusual and burdensome for the parties

to obtain documentary evidence of title on the many and various items of personalty that was acquired during the marriage. The Court cannot conclude that the parties intended this.

Husband further takes the position that paragraph 2.C. of the Agreement renders all property that was acquired after October 16, 1992 to be Husband's separate property under the Agreement. *See* Brief in Opposition at p. 9. Husband's reasoning is that "[s]ince Husband was the main provider of income during the marriage," and since Husband's income came from "the sale, transfer, mortgaging or use" of his separate car business, all property acquired after the Agreement is defined as Husband's "Separate Property" under paragraph 2.C. of the Agreement, and is not subject to distribution under the Agreement. Husband's argument causes him to admit additionally that paragraph 3, which makes "any and all property acquired by either of the parties from and after the date of th[e] Agreement" joint property, is really surplusage, since it defines "joint property" broadly, but then comments that the only joint property that is subject to distribution under the Agreement is that which is accompanied by documentary evidence of title under paragraph 7.C. of the Agreement. *See* Brief in Opposition at 9-10.

Husband's argument disregards the plain language of the Agreement. Paragraph 2 of the Agreement is entitled "Retention of Separate Property." Paragraph 2.C.(2) indicates that "all property acquired hereafter by either party *out of the proceeds from the sale, transfer, mortgaging or use of any such Separate Property*" is to be defined as "Separate Property" under the Agreement. Agreement at p. 5, para 2.C.(2) (emphasis added). Husband reads "sale" and "use of" to mean "stream of income generated by" separate property. The Agreement, however, does not say this. The Agreement deals only with the "sale, transfer, mortgaging or use" of the car dealership, itself an asset, and makes no reference whatsoever to any income of either party or income generated by a business venture of either party. The Court reads the Agreement to mean what it says, that is, that in the event of sale, transfer, mortgage or use of Husband's Car Dealership, Husband would be entitled to proceeds of such sale, transfer, mortgage or use. The term "use" is used as a synonym for proceeds from the lease or other use of the business asset. The phrase "proceeds from . . . the use of" the business does not mean income generated as a result of conducting a business using the marital asset. Had this been intended by the parties, they would have used the term "income," rather than the term "use of," or "sale of." Further, this portion of the Agreement is set forth under the heading "Retention of Separate Property." The heading conforms to the Court's plain language reading of the Agreement, that each party would *retain* what property he or she had when the Agreement was entered. Had the parties contemplated that future earnings were to be included under the Agreement, they would have addressed that specifically, and would likely not have used the term "retain" since such earnings would not be "retained," or preserved, but rather would be future earnings or anticipated earnings, which could not be "retained" since as of the date of the Agreement, they had yet to be earned.

Further, Husband presumes that because he was the main breadwinner during the marriage, "it stands to reason" that all property acquired during the marriage was

attributable to his efforts, and therefore the Agreement made sense at the time it was entered. The Agreement does not say this, however. Under Husband's reading of the Agreement, only that property that was "acquired . . . by either of the parties from the sale, transfer, mortgaging or use of" Husband's separate property should be retained as his. Under Husband's reading of the Agreement, the Agreement is silent as to what would happen with regard to property acquired by the parties with income earned by Wife through her part-time employment.[1] Another problem with Husband's reading of the Agreement is that it requires a tracing of property that is unreasonably burdensome and could not have been the intention of the parties, for it characterizes as "separate" only that which was acquired through the use of Husband's separate property. Thus, under Husband's reading, a painting purchased with income from the car dealership is his separate property, while one purchased by with income from Wife's part-time job is unaddressed by the Agreement. Such tracing would be not onerous, but impossible for the parties to do, and the Court finds that such tracing cannot have been what was intended under the Agreement. Alternatively, Husband argues that because Husband earned *most* money during the marriage, Husband earned *all* money during the marriage, and therefore, no matter whether an item was purchase with his funds or Wife's, that item would be his under the Agreement. This position is not supported by the language of the Agreement and is not supported by common sense: most income does not mean all income, nor does most income mean that all property was attributed to Husband's stream of income generated by the car dealership.

On the contrary, the Agreement means what it says: each party was to retain his or her separate property, even in the event such property was sold, mortgaged, transferred or leased, and even if the nature of the separate property was converted to proceeds. The earnings of either party were not addressed under the Agreement. This plain language reading of the Agreement comports with the idea that the parties intended to divide what was earned during the term of their marriage, including any joint property acquired after the Agreement was entered, and including any appreciation in the value of separate property, as set forth in paragraph 2.C (c). Simply put, the parties get to retain the assets that were theirs prior to entering the Agreement, and they would divide equally what was acquired through earnings during the term of their marriage. This is not to say that certain other separate property acquired by either party out of the proceeds from the "sale, transfer, mortgaging or use" of separate property, as stated in section 2 (c) (2) of the parties' agreement, would not remain the separate property of the party who purchased, transferred, mortgaged or used" said separate property.

In conclusion, it is clear from a reading of the Agreement that the parties put together a cohesive plan to divide and distribute equally any and all property they acquired from and after the date of the Agreement. It is undisputed by the parties that the appreciation value of each parties' separate property is to be divided on a 50/50 basis. The Court finds no bad faith on the part of Husband or his counsel for

[1] Husband's Brief makes note of the fact that "Wife was rarely employed," and that when Wife was employed she worked "only part time" and that her employment "did not last for a substantial period of time."

interpreting the Agreement as they did, and accordingly, Wife's request for counsel fees will be denied. Accordingly, the Court enters the following Order:

ORDER OF COURT

AND NOW, to wit, this 22nd day of April, 2013, it is hereby ORDERED, ADJUDGED and DECREED THAT:

1. Any and all joint property as defined hereinabove and consistent with this court's opinion, acquired by the parties after the entry of the Pre-Nuptial Agreement, shall be divided equally between the parties;
2. The appreciation in value of any separate property owned by either of the parties that accrued after the entry of the Pre-Nuptial Agreement shall be divided equally between the parties;
3. The costs of any and all necessary appraisals, including real property and personal property, shall be advanced by Husband, however, at the time of distribution, Wife shall be responsible to reimburse Husband for 50% of the cost s of each appraisal.
4. Within thirty (30) days of the date of this Order, both parties shall file amended inventories listing all joint property subject to this Order.

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

COMMONWEALTH OF PENNSYLVANIA
V.
SAMUEL ELBERT POWELL, Defendant

SENTENCING AND PUNISHMENT
Technical, Formal, or Arithmetical Error

1. The power to modify a sentence is inherent in the Court system in order to amend records, correct mistakes of Court officers or counsel's inadvertencies even after the thirty-day period for modifying sentences expired.

2. For a trial court to exercise its inherent authority and enter an order correcting a defendant's written sentence to conform with the terms of the sentencing hearing, the trial court's intention to impose a certain sentence must be obvious on the face of the sentencing transcript.

3. In the sentencing transcript, an obvious error existed on the face of the sentencing transcript because the sentencing Judge spoke clearly that he intended to impose a sentence of thirty to sixty years.

4. A scrivener's error occurred and an aggregate sentence of twenty-eight and one half years to fifty-seven years was imposed.

5. The Court exercised its inherent authority and increased the Defendant's sentence to the original thirty to sixty years as stated on the sentencing transcript.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 2580 C 1988
No. 1558 C 1989
No. 1559 C 1989

Appearances:
Barbara Jollie, Assistant District Attorney,
Westmoreland County, for the Commonwealth
Wayne P. McGrew,
Greensburg, for the Defendant

BY: JOHN E. BLAHOVEC, JUDGE

OPINION AND ORDER OF COURT

This matter comes before this Court for determination of a Motion to Correct Sentencing Order filed by the Westmoreland County District Attorney's Office. This matter was assigned to the undersigned by President Judge Gary P. Caruso since the original sentencing Judge, the learned Gilfert M. Mihalich, has been retired for a number of years.

On October 30, 1989, the Defendant entered a general plea of guilty to various sexual offenses related to the rape and sexual abuse of his young daughter. Defendant was represented by the Westmoreland County Public Defender's office, specifically Cheryl J. Peck, Esquire. A sentencing hearing was held before Judge Mihalich on January 22, 1990. As was his usual practice, Judge Mihalich imposed the sentence at each of the three cases in detail and with specificity. This can be confirmed by a

reference to the sentencing transcript. In an abundance of caution, Judge Mihalich summarized his sentence at page 53 of the sentencing transcript:

> "The Court has imposed sentences wherein the minimum sentence of all the charges and sentences totals thirty years, and the maximum sentence totals sixty years. In view of the serious nature of the defendant's acts any lesser sentence would mitigate the seriousness of the crimes and the seriousness of the defendant's acts."

It is respectfully noted that every person in the Courtroom on January 22, 1990 who could hear and comprehend knew that the aggregate sentence was not less than thirty nor more than sixty years. Certainly defense counsel knew because she filed a Petition for Modification of Sentence on or about January 24, 1990. Averment 2 of the Petition reads as follows:

> "2. Petitioner was sentenced to 30 to 60 years incarceration on all charges on January 22, 1990."

Judge Mihalich denied this Petition and the matter was appealed to the Superior Court at docket number 00441 Pittsburgh 1990 and 00442 Pittsburgh 1990. The matter was heard before President Judge Cirillo, and Judges McEwen and Montgomery. The Memorandum Opinion filed November 13, 1990 recites, inter alia,

> "On January 22, 1990, Powell was sentenced to an aggregate term of incarceration of thirty to sixty years."

The Superior Court noted in the Memorandum Opinion:

> "Powell, in his sole issue on appeal claims that his aggregate sentence of thirty to sixty years imprisonment is manifestly excessive and violative of the Pennsylvania and Federal Constitutions."

This appeal was quashed by the Superior Court because the defense failed to include a concise statement of reasons relied upon for allowance of appeal. The defense then filed an application for relief to appeal nunc pro tunc with the Superior Court which was denied without prejudice to seek relief in the trial court. The defense filed a second motion to withdraw guilty plea which the trial court denied. Judge Mihalich reinstated the defendant's right to appeal nunc pro tunc.

At Number 01448 Pittsburgh 1991 the Superior Court recognized by Memorandum dated March 18, 1992 that: "A sentence totaling thirty to sixty years imprisonment was imposed." The Superior Court affirmed the sentence and found defendant competent to enter a valid plea.

At this point in the analysis, it seems appropriate to point out that in addition to Judge Mihalich's clear indication on the record that he was sentencing Defendant to an aggregate term of thirty to sixty years, the Superior Court on two separate occasions determined that the sentence was thirty to sixty years. This matter should be res judicata. It has been conclusively determined by both the trial court and the Superior Court finally in March 18, 1992. This Court believes the matter should be ended at this point. The Defendant, the Commonwealth and the Superior Court all were satisfied that the sentence imposed by Judge Mihalich was thirty to sixty years. That is not to

say that Defendant agreed to the sentence. In fact, he challenged it on appeal. However, his appeals were unsuccessful.

It was not until some twenty years later that the Department of Corrections calculated the sentence as being different from the 30 – 60 years imposed by Judge Mihalich and scheduled Defendant for parole consideration. At the hearing before this Court on March 25, 2013, a representative of the DOC testified she calculated the sentence as twenty to forty years. Again, this Court believes that the clear intention of Judge Mihalich expressed on the sentencing record coupled with the Superior Court determinations trumps the DOC calculation. After all, sentencing is a judicial function while housing the sentenced is an executive function. The DOC should not be able to alter a sentence clear on the face of the record twenty years after it was imposed.

In the interest of completeness, however, this Court has reviewed the sentencing transcript and the Sentencing Orders signed by Judge Mihalich. This Court does find a minor conflict between the written orders and the sentence imposed by the Judge. In *Commonwealth vs. Borrin,* 12A3d 466, 473 (2011), the Superior Court held that:

> "for a trial court to exercise its inherent authority and enter an order correcting a written sentence to conform with the terms of the sentencing hearing, the trial court's intention to impose a certain sentence must be observed on the face of the sentencing transcript."

The power to modify a sentence is inherent in the Court system in order to amend records, correct mistakes of court officers or counsel's inadvertencies even after the thirty day period for modifying sentence has expired, *Commonwealth vs. Young* 695 A.2d 414 (1997).

Criminal cases before the Court of Common Pleas of Westmoreland County are conducted on the record. A court reporter records every word that is said in court so that a full record can be preserved for appellate review and any other purpose that might arise. The proof of what occurred in the courtroom is contained in the transcript which is produced from the court reporter's verbatim notes of the proceeding. Trial judges rely on the record they have made. Appellate courts from Superior and Commonwealth, to Supreme, and beyond to the federal system base their determinations on the record generated by the trial court. Expediency in criminal courts requires the use of form orders generated by a court clerk or court assistant or whatever the title may be. Boxes are checked and these hardworking people attempt to replicate on the sentencing order the exact sentence imposed by the sentencing judge. Most of the time, these orders are accurately generated, but when a question arises as to accuracy, the Court must turn to the record - the transcript of the proceeding to determine what was said and what the court intended to do. This does not require clairvoyance. It does require an ability to read the transcript. If the trial judge or sentencing judge did their job properly, the intention of the judge is readily discernible. That is true in this case.

Beginning with Case Number 2580 C 1988, this Court notes that the Sentencing Order and the transcript are in harmony. At Count One, the Defendant was sentenced to incarceration of not less than 3 years nor more than 6 years. At Counts Three and Four, Defendant was sentenced to 1 to 2 years incarceration with each sentence being

concurrent to the sentence at Count One. This sentence is confirmed by reference to the Sentencing Transcript pages 42 through 44.

At Case Number 1558 C 1989, the sentencing Order recites the sentence of incarceration imposed as follows:

> Count One: 7 to 14 years incarceration "consecutive to all sentences at 2580 C 1988";
>
> Counts Two, Three and Five: Merge with Count 1;
>
> Count Four: 1 to 2 years "concurrent with sentence at Count 1";
>
> Count Six: 1 to 2 years "concurrent with sentence at Count 1";
>
> Count Seven: 7 to 14 years "consecutive to the sentence at Count 1";
>
> Count Eight: 1 and 1/2 to 3 years "consecutive to sentence at Count 7";
>
> Count Nine: 1 and 1/2 to 3 years "consecutive to sentence at Count 8";
>
> Count Ten, Eleven and Twelve: 1 to 2 years at each "concurrent with sentence at Count 1";
>
> Count Thirteen: 3 to 6 years "consecutive to sentence at Count 8";

This Court's review of the plain language of the Sentencing Order at 1558 C 1989 establishes a sentence of 20 to 40 years consecutive to the sentence of 3 to 6 years imposed at 2580 C 1988. A review of the Sentencing Transcript, pages 44 through 50, confirms this analysis. Considering the cases at 1558 C 1989 and 2580 C 1988, the Defendant received an aggregate sentence of not less than 23 nor more than 46 years.

At case Number 1559 C 1989, a review of the Sentencing Order establishes the following sentence was imposed:

> Count One: 7 to 14 years "consecutive to incarceration at Count 1 at 1558 C 1989";
>
> Counts Two and Three: Nolle Prosse;
>
> Counts Four and Five: they merge with Count 1;
>
> Count Six: 1 to 2 years "concurrent to sentence at Count 1";
>
> Count Seven: no sentence, it merges with Count 1;
>
> Count Eight: 1 to 2 years "concurrent with sentence at Count 1".

There is a discrepancy between the Sentencing Order at Number 1559 C 1989 and the plain words of Judge Mihalich expressed in the Sentencing Transcript at pages 50 through 54. The transcript establishes that Judge Mihalich imposed a sentence at Count One as follows:

> "At Number 1559 C of 1989, count one, the charge is involuntary deviate sexual intercourse. It's the sentence of this Court that you pay the costs of prosecution, be committed to the Bureau of Corrections for confinement in an appropriate institution for a period of not less

> than fourteen years - - not less than seven years and not more than fourteen years - - that is not less than seven years and not more than fourteen years. *This sentence to run consecutive, that means to follow, the sentence imposed at 1558 of 1989*."

It should be noted that Judge Mihalich imposed the sentence at Count One of 1559 of 1989 consecutive to the sentence imposed at 1558 of 1989. There is no ambiguity in his words. However, the scrivener made a clerical error on the written Order at 1559 C 1989 by making the sentence at Count One "consecutive to incarceration at Count One at 1558 C 1989".

This is clearly the type of correction that can be made under the authority of *Commonwealth vs. Young,* supra, which permits the Court to correct the mistakes of court officers. Under *Commonwealth vs. Borrin,* supra, the trial court's intention can be clearly observed "on the face of the sentencing transcript."

At this point in our analysis, the sentence appears to be an aggregate sentence of not less than 28 and 1/2 years to not more than 57 years. That is obviously less than the sentence Judge Mihalich intended to impose. Again reference to the Sentencing Transcript has Judge Mihalich's words evidencing his clear intent at page 53:

> "The Court has imposed sentences wherein the minimum sentence of all the charges and sentence totals thirty years and the maximum sentence totals sixty years ... "

A review of the Sentencing Orders and the Sentencing Transcript reveals that Judge Mihalich made an error in the sentence he pronounced at Count Thirteen of 1558 of 1989. As evidenced by both the transcript and the order, he imposed a sentence of "not less than three years and not more than six years, and this is to run consecutive, that means to follow the sentence imposed at count *eight*" Transcript Page 49.

Clearly he intended the sentence to run consecutive to Count Nine which would be in accordance with his entire sentencing scheme and total the 30 to 60 year sentence he clearly intended to impose. This is also the sentence that the Defendant believed he had received and sought to modify; the sentence two different panels of the Superior Court acknowledged and affirmed and the sentence the Department of Corrections did not attempt to modify until some twenty years after it was imposed.

Accordingly, the following Orders are entered:

2580 C 1998

ORDER OF COURT

AND NOW, this 4th day of April 2013, after hearing and after careful consideration of the record in this matter, IT IS HEREBY ORDERED AND DECREED that the Motion to Correct Sentencing Order filed by the District Attorney of Westmoreland County at the above number is denied. There is no reason to correct the Sentencing Order at this number.

The Sentence imposed on January 22, 1990 by the Honorable Gilfert M. Mihalich of, inter alia, incarceration of the Defendant at the Bureau of Corrections is as follows.

Count One: not less than 3 nor more than 6 years;

Count Two: merges with Count 1;

Count Three: 1 to 2 years concurrent to Count 1;

Count Four: 1 to 2 years concurrent to Count 1

This is correct and corroborated by the Sentencing Transcript, pages 42 through 44.

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

1558 C 1989

ORDER OF COURT

AND NOW, this 4th day of April, 2013, after hearing and after careful consideration of the record in this matter, IT IS HEREBY ORDERED AND DECREED that the Motion to Correct Sentencing Order filed by the District Attorney of Westmoreland County is granted in the following particulars:

The sentence imposed at Count 13 is amended as follows:

Count 13: 3 to 6 years consecutive to sentence at Count ***9***

The reasons for this amendment are set forth in the Opinion of this Court and it is made to conform to the clear intention of the Sentencing Judge as evidenced in the Sentencing Transcript.

All other provisions of the Sentencing Order of January 22, 1990 not inconsistent with this Order are to remain in full force and effect.

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

1559 C 1989

ORDER OF COURT

AND NOW, this 4th day of April, 2013, after hearing and after careful consideration of the record in this matter, IT IS HEREBY ORDERED AND DECREED that the Motion to Correct Sentencing Order filed by the District Attorney of Westmoreland County is granted in the following particulars:

The Sentencing Order dated January 22, 1990 is amended as follows with regard to the sentence of incarceration imposed at Count One:

> Defendant is incarcerated at the Bureau of Corrections for a period of not less than 7 years nor more than 14 years. "This sentence is to run consecutive, that means to follow, the sentence imposed at 1558 C 1989./1 (quoting Judge Mihalich at page 51 of the transcript)

The reasons for this amendment are set forth in the Opinion of this Court and it is made to conform to the sentence actually imposed by the Sentencing Judge as shown on page 51 of the Sentencing Transcript.

All other provisions of the Sentencing Order of January 22, 1990 are to remain in full force and effect.

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

ORDER OF COURT

AND NOW, this 4th day of April 2013, after hearing and after careful consideration of the record in this matter, IT IS HEREBY ORDERED AND DECREED that the aggregate sentence imposed on the Defendant on January 22, 1990 is not less than 30 nor more than 60 years. This is in accordance with the clear intention of the Sentencing Judge Gilfert M. Mihalich expressed in the Transcript of the Sentencing Hearing. The Pennsylvania Department of Corrections is directed to amend their records accordingly.

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

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, BUREAU OF DRIVERS LICENSING, Appellee/Respondent
V.
GEORGE CHARLES HAYDEN, JR., Appellant/Petitioner

AUTOMOBILES

Suspension or Revocation of License; Procedure In or Arising Out of Criminal Prosecutions; Intoxication; Implied Consent; Refusal to Take Test

1. The statutory suspensions following a refusal to submit to a blood alcohol test or a conviction for driving under the influence are not bargaining chips to be traded in exchange for criminal convictions.

2. Alleged drunk driver's decision to refuse to take blood test was not a "knowing and voluntary" one because police officer, when providing DL-26 warning, failed to inform alleged drunk driver with a commercial driver's license that he could lose his commercial driver's license for life if he refused the blood test.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL ACTION–LAW
Nos. 2313 & 2314 of 2012

Appearances:
Ryan J. Kammerer,
Pittsburgh, for the Appellee/Respondent
Dante G. Bertani,
Greensburg, for the Appellant/Petitioner

BY: DANIEL J. ACKERMAN, SENIOR JUDGE

DECISION AND ORDER

The decision in these two license suspension appeals turns primarily upon the examination of the purpose and application of the warnings set forth in the department's form D-26, meant to be given when police seek to draw blood from a motorist to determine his blood-alcohol count. While events surrounding the warnings in this case are problematic, the evidence is adequate to support the 18-month suspension of appellant's class-C driver's license at No 2313, but not the lifetime disqualification of his commercial driver's license (CDL) at No. 2314.

In the early morning hours of November 8, 2009 the appellant was operating his personal vehicle in an easterly direction on Clay Avenue in the City of Jeannette. At the same time Officer Dennis Pape of the Jeannette Police Department was driving his patrol car in the opposite direction. As the distance between the two closed the appellant's vehicle encroached upon the opposing lane of traffic, causing the officer to swerve to avoid a collision, providing the officer with a reasonable suspicion that appellant was operating under the influence of alcohol, and justifying the immediate stop of the appellant. The officer's suspicion was bolstered by appellant's appearance and his performance on a field sobriety test, and the appellant was arrested for driving

under the influence, driving on the right side of the roadway, and a registration infraction. The appellant's contention that his stop was unwarranted lacks merit.

At the scene of his arrest appellant consented to the officer's request for a blood test and the officer drove him to the hospital. Upon arriving appellant told the officer of his need to stop at the restroom, but the officer indicated that that would have to be postponed until they had registered at the desk. Frustrated by the denial of his request appellant responded by telling the officer that he would not take the test, so the officer immediately took him from the hospital and drove him to the police station where the officer read the DL-26 warnings. In response to these warnings appellant asked for a lawyer, which the officer deemed a refusal to take the test. Appellant also refused to sign the form acknowledging that it had been read to him. While both participants acted impetuously, and the situation could have been better handled all around, in the end one has to conclude that the appellant refused to take the test after warnings were given.

The history of this particular DL-26 form after the officer signed it is troubling, for the officer held it and did not send it to the department until February 2012, two years and four months later. In the interim appellant waived a preliminary hearing, entered a guilty plea on the DUI charge, and thereafter was granted leave to withdraw the guilty plea. The form was sent to the department only after the guilty plea was withdrawn. Clearly the form was being withheld from the department as a bargaining chip relative to a plea bargain in the criminal case, a practice condemned in *Commonwealth, Dep't. of Transp., Bureau of Driver Licensing v. Lefever,* 533 A.2d 501, 110-11 (Pa. Commw. Ct. 1987). Appellant now asserts that this delay in forwarding the form constitutes cause for sustaining his appeals. He has not however proffered any credible evidence showing that he was prejudiced by the delay. The guilty plea offered in consideration for the officer's forbearance was withdrawn, and he was found not guilty at trial; and through his former counsel he was complicit in the trade-off, and hence the delay. The department cannot be faulted for failure to act upon the form, the existence of which was unknown until it arrived in 2012.

An individual is free to waive any protection he may have against government intrusion into his personal affairs, including those rights sanctified buy the Fourth Amendment. And no right is more jealously guarded than the right to be free from invasive bodily procedures (see *Missouri v. McNeely,* ___ U.S. ___, 133 S. Ct. 1552, 185 L.Ed 696 (2013). However, there is a universal principal in the law that such waivers are valid only when they are "knowingly and intelligently" made.

The DL-26 form reads:

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

penalties that would be imposed if you were convicted of driving with the highest rate of alcohol, which include a minimum of 72 consecutive hours in jail and a minimum fine of $1,000.00, up to a maximum of five years in jail and a minimum fine of $10,000.00.

While a set of Purdon's would prove helpful in obtaining a full grasp of what is at stake for the motorist to whom the DL-26 is read, it is sufficient for our purpose to say that DL-26, which was drafted to both inform and persuade, allowed appellant to perceive that his refusal would result in a maximum suspension of his driving privileges for 18 months, and, if convicted of DUI, enhanced penalties from the criminal court. Since this was made clear to him, appellant has no cause to complain about the 18-month suspension of his class C driver's license.

It is equally apparent however that DL-26 is silent on the subject of a CDL. And a lifetime disqualification from the operation of commercial vehicles is a blow to one's ability to earn a living, and is a more serious consequence than 72 hours in jail. Even Officer Pape had no idea as to what sanctions might be imposed against appellant's CDL (N.T. at 48). This omission precludes a finding that appellant was given the opportunity to make an informed and knowing decision as to the waiver of his rights beyond the scope of the warnings actually given, and therefore his refusal does not provide justification for the disqualification of his CDL. Prior cases have held that minimal warnings which don't describe sanctions, (*Weaver v. Com. Dep't of Trans., Bureau of Driver Licensing,* 873 A.2d 1, 2 (Pa. Commw. Ct. 2005)), or, those which only generally warn of suspension of operating privileges, (*Yourick v. Com. Dep't of Trans., Bureau of Driver Licensing,* 965 A.2d 341, 345 (Pa. Commw. Ct., 2009)) are sufficient. In the present case, however, where refusal sanctions appropriate for a class C licensee were presented in detail (which would be consistent with the *McNeely* Court's concern for Fourth Amendment rights *vis-'a-vis* blood tests) and the motorist is also known to have a CDL, the omission of disqualification in the warning amounts to a "bait and switch," albeit unintentional.

The law provides that an operator of a commercial vehicle is deemed to have given consent to tests needed to determine the operator's alcohol concentration. 75 Pa. C.S.A. 1613 (a). Subsection (c), which follows, provides:

"A person requested to submit to a test provided in subsection (a) shall be warned by the police officer requesting the test that refusal to submit to the test will result in the person's being disqualified from operating a commercial vehicle under subsection (e)."

The department takes the position that Officer Pape was not required to give this warning of disqualification to the appellant, a known commercial licensee, because the appellant was not operating a commercial vehicle at the time of arrest. Yet, the department seeks to have it both ways by imposing disqualification irrespective of the type of vehicle driven. Why should the type of vehicle operated at the time of arrest be a factor as to the issuance of the warning, but not as to the imposition of the sanction? In *Brigham City v. Stuart,* 547 U.S. 398, 403, 126 S. Ct. 1943 (2006) the Court noted: *"The ultimate touchstone of the Fourth Amendment is 'reasonableness'."* It follows that the reasonableness standard also applies to governmental solicitations to waive

Fourth Amendment rights. Where an arresting officer knows a motorist's CDL status as a commercial licensee, it is both reasonable and required under 75 Pa. C.S.A. 1613 (c) that a disqualification warning be given, and the failure to give it deprives the motorist of the opportunity to make a knowing and intelligent decision as to whether he should waive his rights. Disqualification should not be imposed where the motorist was not informed that it would be one of the costs of refusal.

ORDER

And now this 16th day of July 2013, the appeal of George Charles Hayden, Jr. at No. 2313 of 2012 is dismissed. His appeal at No. 2314 of 2012 is sustained and his lifetime disqualification is vacated.

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

VICTOR MILLER and DOLORES MILLER, Plaintiffs
V.
TIMOTHY BAUER and LORRIE BAUER, Defendants

REAL ESTATE

Residential Lease; Statute of Frauds; Oral Contract; Acceptance of Offer by Defendants and Formation of Rental Contract

1. Where Defendants took occupancy of residential rental property with permission of Plaintiffs, though Plaintiffs had not yet signed the written lease offered by Plaintiffs and signed by Defendants, Statute of Frauds does not apply because lease term was only two years.

2. Plaintiffs provided Defendants with a written lease which Defendants signed and delivered to Plaintiffs; once Defendants had accepted lease by signing it, the bargained-for exchange was concluded and a contract was formed.

3. Plaintiffs' attempt to revoke residential lease occurred at least six days after the Defendants had accepted the offer by hand delivering signed lease to the Plaintiffs, after which time Plaintiffs could not terminate lease contract without bringing an action to show a material breach of lease contract.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION–LAW
No. 5125 of 2012

Appearances:
William C. Stillwagon,
Greensburg, for the Plaintiffs
Susan N. Williams,
Greensburg, for the Defendants

BY: GARY P. CARUSO, PRESIDENT JUDGE

DECISION AND ORDER

Plaintiffs and Defendants submit this case upon stipulated facts for decision by a Judge without a jury.

The Plaintiffs are the owners of a Lot that is situated on Whigham Road in Greensburg, Pennsylvania on which a residential dwelling is located. The Plaintiffs advertised the property for rent. The Defendants expressed interest in renting the property and were given a rental application that was completed by the Defendants and delivered to the Plaintiffs. A written 24 month lease ("Lease") was prepared by the Plaintiffs and was hand delivered to the Defendants at the Plaintiffs' residence on May 28th, 2012. The Defendants took occupancy with the permission of the Plaintiffs on June 1, 2012 and began paying rent at the prescribed rental set forth in the Lease. Sometime between June 1, 2012 and June 15, 2012 the Defendant, Lorrie Bauer, with the authorization of her husband, signed her name and her husband's name on the Lease. The Plaintiffs, not hearing from the Defendants, went to the rental unit on June 15, 2012 and requested a return of the Lease. The Lease was returned to the Plaintiffs by the Defendants on that day. Prior to the return of the signed Lease, the Plaintiffs investigated the information supplied on the rental application. After review of their

results, the Plaintiffs decided that they did not want to rent to the Defendants. When the Lease was returned the Plaintiffs did not sign the Lease. The decision of the Plaintiffs to not sign the Lease was not communicated to the Defendants until June 21, 2012.

On June 21, 2012, the Plaintiff's hand delivered a Notice to the Defendants that notified the Defendants that they, the Plaintiffs, were not going through with the Lease and the Defendants should vacate the premises. The Defendants refused to vacate. The Plaintiffs hand delivered another Notice to vacate to the Defendants on June 28, 2012. Defendants have continued to occupy the premises and pay the required rental for eleven months since receiving the notices to terminate and vacate.

A Landlord/Tenant Complaint was filed with the District Magistrate. The Magistrate granted possession to the Plaintiffs. Defendants appealed the Decision to the Court of Common Pleas. A complaint was filed and a Counterclaim was then filed, and the matter was then submitted to Arbitration. Rental payments, as determined by the Magistrate, were in the amount of $1,000.00 per month and have been deposited in the Prothonotary's Office as part of the appeal process. The Board of Arbitration rendered a decision which only states that a Lease did exist. This decision was then appealed, and the matter is now before this Court.

Plaintiffs, as lessor, contend that since they did not sign the Lease the Statute of Frauds invalidates the agreement and, at most, the tenancy that was created was a tenancy at will. The Statute, 68 P.S. § 250.202, in pertinent part states:

> Real property, including any personal property thereon, may be leased for a term of more than three years by a landlord to a tenant or by their respective agents lawfully authorized in writing. Any such lease must be in writing and signed by the parties making or creating the same, otherwise it shall have the force and effect of a lease at will only and shall not be given any greater force or effect.

However, the term of the lease was only two years, and not more than three years, therefore the Statute of Frauds cited by the Plaintiffs is inapplicable to the present case. An offer to lease the subject premises, on the terms and conditions set forth in the writing delivered by the Plaintiffs to the Defendants was made to the Defendants on the date of delivery of the document to the Defendants on May 28, 2012. Negotiation had ended, and there were no other terms included in the offer other than what was evidenced by the writing.

As for the argument of the Plaintiffs that by application of the Statute of Frauds in question, i.e. 68 P. S. §250.202, the most that was created was a tenancy at will, I find that since the lease was for a term not more than three years, the language of the statute is not applicable and a tenancy at will was not created. Both of the cases cited by the Plaintiffs in support of their argument that a tenancy at will was created were cases where the statute in question clearly applied because the terms of the leases in question in those cases was for more than three years. See *Flomar Corporation v. Logue,* 210 A.2d 254 (Pa. 1965); and *Tuttleman v. Beetem,* 48 Pa. Super. 345 (1911). In the present case the lease term is for two years, therefore the language of the statute does not apply.

Therefore I must decide, whether or not a Contract, in the form of a lease, existed between the two parties, based upon those terms set forth in the writing delivered to the Defendants by the Plaintiffs on May 28, 2012; and if so whether or not there was a material breach of the Contract that allowed termination of said Contract.

The first question becomes whether or not an oral contract, as evidenced by the terms of the writing existed. In the present case, Plaintiffs clearly made an offer to the Defendants to enter into a Lease (Contract) by providing Defendants with a rental application, the ability to move into the premises to be leased, and a writing containing the proposed terms. In doing so, the Plaintiffs, created the ability in the Defendants to accept that offer in a reasonable manner before any revocation of the offer by the Plaintiffs.

> An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. *Restatement (Second) of Contracts* § 24 (1981).

Once Defendants had accepted the Contract in a reasonable manner, the bargained for exchange was concluded and the Contract had been created. The Defendants in this case accepted the offer in a clearly reasonable manner. Defendants moved into the residence, paid all fees (including rent and a security deposit), and signed the Lease that the Plaintiffs provided. There is no stipulation of fact that would establish that the Plaintiffs revoked the offer in any manner **before** it was accepted. Plaintiffs revocation of the offer occurred, at the earliest, six (6) days after the Defendants had accepted the offer by hand delivering the signed proposed lease to the Plaintiffs. Therefore a Contract existed when the lease was delivered by the Defendants to the Plaintiffs and the Lease is legally sufficient.

Therefore, once the Lease came into existence, in order to terminate the Contract the Plaintiffs would have to bring an action to show that there is a material breach of said Contract. In no manner was it stipulated that the Defendants materially breached the terms of the contract. In this case, the Plaintiff only contends that the Lease was a tenancy at will under the Statute of Frauds, which it is not.

As a result this Lease will continue until May 31, 2014. The Lease does not provide a method for earlier termination by either party. As a result I shall enter a verdict in favor of the Defendants and against the Plaintiffs on the Plaintiffs Complaint and a verdict in favor of the Defendants and against the Plaintiffs on Defendants Counterclaim.

VERDICT/ORDER

And now this 20th day of August, 2013, in accordance with the foregoing Decision, it is the verdict of the Court that I find in favor of the Defendants and against the Plaintiffs on the Plaintiffs Complaint; and a verdict in favor of the Defendants and against the Plaintiffs on Defendants Counterclaim.

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

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ANTHONY MARTELLO, Plaintiff
V.
RAYMOND J. STONER, Defendant

CONTRACTS

Implied and Constructive Contracts; Unjust Enrichment; Elements; Valuation of the Benefits Conferred

1. To recover for unjust enrichment there must be both enrichment and injustice resulting if recovery for enrichment is denied.

2. The beneficiary's retention of a benefit conferred by another is not unjust if the beneficiary did not contract for the benefit or otherwise mislead the party who conferred the benefit.

3. The measure of damages for an unjust enrichment claim involving improvements to property is not the value of the work or materials purchased by the party who conferred the benefit.

4. The proper measure of damages in an unjust enrichment claim is measured by the value of the benefit received by the owner of the property where the benefit was conferred.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 1924 of 2012

Appearances:
Ronald L. Chicka,
Greensburg, for the Plaintiff
William C. Stillwagon,
Greensburg, for the Defendant

BY: GARY P. CARUSO, PRESIDENT 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 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 Complaint filed by Anthony Martello (hereinafter "Martello") seeks damages incurred as the result of an alleged breach of Lease Agreement dated March 1, 2008 (Ex #2). The defendant, Raymond J. Stoner (hereinafter "Stoner") denies there was a lease and claims he has paid $64,440.55 toward an Agreement to Sell Real Estate (Ex. #1) and that it is paid in full.

Stoner filed a Counter Claim and avers that he made repairs and remodeled the premises in reliance on the alleged Agreement to Sell Real Estate. Stoner claims that he spent $58,868.26 on materials that were used in the premises. He claims that since he allegedly complied with the Agreement to Sell Real Estate he should be entitled to require Martello to specifically perform the Agreement to Sell Real Estate. He also claims that this contract was breached by Martello and therefore he wants reimbursed

for the amounts he allegedly paid there under and for the amounts he spent on materials to repair and remodel the premises. In Count III of the Counter Claim Stoner contends that Martello has been unjustly enriched as a result of the work he has performed on the premises and as a result of the materials that were used in the performance of that work. He claims in his Complaint that the unjust enrichment totals $112,208.81 being a the total of what he allegedly paid under the Agreement to Sell Real Estate in the amount of $64,440.55 and the amount he allegedly paid for materials placed into the residence in the amount of $58,868.26.

Martello purchased a piece of property at 312 Gay St, New Alexandria, Westmoreland County on October 13, 2006. Shortly after Martello purchased the property Stoner offered to purchase the property for the sum of $60,000. Stoner prepared the "Agreement to Sell Real Estate". The Agreement provides in paragraph thirteen (13) that "time is of the essence". It has long been the law that where there is no fixed time for performance the contract must be performed within a reasonable time. In this particular case since the agreement was prepared by Stoner, this provision will be more strictly construed against Stoner. Stoner failed to close the transaction within a reasonable time. Therefore, Stoner defaulted under the terms of the agreement that he prepared.

Paragraph five (5) of the Agreement to Sell Real Estate is a liquidated damages clause. In that paragraph it provides that if the buyer fails to perform under the contract all monies paid under the contract shall be retained by the seller as the agreed liquidated damages in full settlement of any claim for damages resulting from a breach of that Agreement. The only amount paid under the Agreement to Sell Real Estate was $1,000.00. However, as a result of the novation explained below, this obligation was extinguished and the defendant should get credit for this $1000.00 paid toward any rental due under the novation in the form of the Lease Agreement entered into between the parties on March 1, 2008.

Because the defendant did not close the real estate transaction set forth in the Agreement to Sell Real Estate within a reasonable time and made no further payments on the Agreement, on March 1, 2008 Martello and Stoner entered into a "Lease Agreement" (Ex. #2). Pursuant to the terms of that Lease Agreement, Stoner was to pay to Martello the sum of $1250.00 per month. It was a month to month lease which either party could terminate on thirty (30) days notice. This lease represents a novation of the Agreement to Sell Real Estate as both parties recognized that this lease was substituted for the obligations under the original Agreement to Sell Real Estate and in essence the Agreement to Sell Real Estate was extinguished.

Stoner failed to pay the monthly rental installments when due and, as a result, he was evicted from the premises. At the time that Mr. Stoner vacated the subject premises, in July of 2012, he owed to Mr. Martello the sum of $17,510.00 in unpaid rent, and $3300 in late fees for a total of $20,810.00.[1]

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[1] It should be noted that during the term of the sales agreement stoner had paid the school and real estate taxes on the subject property. However, after the lease was executed Martello began paying the real estate taxes on the subject property. This is further evidence that Stoner was leasing the subject property from Mr. Martello at that time and not in the continuing process of purchasing the same under the Agreement to Sell Real Estate.

Therefore, pursuant to the terms of the Lease Agreement there is due to Martello the sum of $20,810.00 less a credit to Stoner in the amount of $1,000.00. Therefore I find against Raymond J. Stoner and in favor of Anthony Martello, on the Complaint of Matello for breach of the Lease Agreement, in the amount of $19,810.00.

Stoner has filed a Counter Claim. In this Counter Claim, he is claiming $122,208.81. He bases his claim on two contentions. First, he contends that he has expended money for materials, contractors, dumpsters, kitchen and bath fixtures and other payments while making improvements to the subject premises in the amount of $58,868.26. Secondly, he also claims he paid Mr. Martello $63,440.55 pursuant to the Agreement to Sell Real Estate.

As indicated above, as a result of the novation, any amounts paid by Mr. Stoner over and above the $1,000.00 hand money paid on the Agreement to Sell Real Estate was actually money paid as rental payments under the lease entered into on March 1, 2008. The amount paid under the lease was $44,840.00. There was unpaid rental as of July 10, 2012 in the amount of $17,510.00 and late fees due in the amount of $3,300.00.

There's no question that Stoner purchased a great deal of materials and performed extensive work at 312 Gay St. However, Martello has not been in enriched by all of the work performed by Mr. Stoner. In fact, based upon the inspection of Mr. Merle Musick, the Code Enforcement Officer of the municipality where the property is located and others, the condition of the property at the present time, given the nature and quality of the work of Stoner, is uninhabitable and it will require significant expenditures on the part of Martello to have the property properly inspected and placed into a condition that will enable Martello to obtain an occupancy permit.

In this case Martello did not have a contract with Stoner for the making of repairs or remodeling of the premises. Therefore, any benefit conferred as a result of the repairs and remodeling must be measured by the value of the benefit to Martello and not by the evidence of the value of the invoices submitted and amounts paid thereon by Stoner. Furthermore, the owner's retention of the benefit is not considered unjust if Martello did not contract with Stoner for the repairs or remodeling or in some way mislead Stoner. *Limbach Co. v. City of Philadelphia,* 905 A.2d 567 (Pa. Cmwlth. 2006) citing, *D.A. Hill Co. v. Clevetrust Realty Investors,* 573 A.2d 1005 (Pa. 1990).

With regard to the claim of Stoner that Martello was unjustly enriched by some alleged benefit conferred upon him, as a general matter, any benefit conferred upon the owner of the property must be based upon the value of the benefit conferred upon Martello. *Limbach,* supra., and *D.A. Hill Co.,* supra and *Meehan v. Cheltenham Tp.* 189 A.2d 593 (Pa. 1963). Unfortunately, proof of the value of the benefit conferred is not proven by the amount expended by Stoner as set forth on the invoices submitted by Stoner for the materials purchased and the work performed, but rather must be proven by establishing an increase in the value of the premises as the result of the improvements.

This is truly an unfortunate, and seemingly unfair, result given the large amount expended by Stoner for the materials that he has placed in the premises; but, the true measure of damages in a case of unjust enrichment is the **increase in value** of the

subject property as the result of the addition of the materials purchased for use in the premises and the work performed. It is not the **cost** of materials and work performed. See *Limbach, D.A. Hill* and *Meehan*, supra. The only evidence presented by Stoner that I can possibly find that increased the value of the premises is the value of the materials placed in the kitchens and the bathrooms. After examining the evidence, I find that said amount is $12,501.50. Therefore, I find that Stoner has only carried his burden of proof with regard to the claim of unjust enrichment to the extent of $12,501.50.

Furthermore, with regard to his Counter Claim, Stoner has not proven a breach of the Agreement to Sell Real Estate by Martello because there was a novation. Nor has it been established that Stoner is entitled to specific performance of the Agreement to Sell Real Estate for the same reason. As explained above, the parties entered into a novation wherein the Lease Agreement was substituted for the Agreement to Sell Real Estate. This occurred because Stoner, as the result of financial difficulties, was unable to close the real estate transaction within a reasonable amount of time.

Therefore, after considering that I have found in favor of Martello in the amount of $19,810.00 on his Complaint for breach of the Lease Agreement and that I have found in favor of Stoner on his Counter Claim for unjust enrichment in the amount of $12,501.50; I will enter a verdict in favor of Anthony Martello and against Raymond J. Stoner in the amount of $7,308.50.

VERDICT

And now this 20th day of September, 2013, in accordance with the foregoing Decision, I find in favor of Anthony Martello and against Raymond J. Stoner in the amount of $7,308.50. The Prothonotary is directed to enter judgment in favor of Anthony Martello and against Raymond J. Stoner in the amount of $7,308.50.

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

IN RE: CONDEMNATION OF THE RIGHTS OF WAY AND EASEMENTS SITUATE IN THE TOWNSHIP OF HEMPFIELD

CHARLES HORWATT and BETTY HORWATT, his wife, Plaintiffs/Condemnees
V.
THE HEMPFIELD TOWNSHIP MUNICIPAL AUTHORITY,
Defendant/Condemnor

EMINENT DOMAIN

Preliminary Objections to Petition for Appointment of Viewers Alleging De Facto Taking; Preclusion of Claim by Grant of Right of Way and Easement; Attribution of Contractor's Actions to Municipal Authority; Sufficiency of Consideration

1. A *de facto* taking occurs when an entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of his property, and a landowner alleging a *de facto* taking is under a heavy burden to establish such a taking has occurred.

2. Where plaintiffs executed a Grant of Right of Way and Easement permitting municipal authority to install public sewer facilities through their property, and the municipal authority only authorized construction activities within the bounds of the granted right-of-way, there is no basis for finding a *de facto* taking.

3. If independent contractor acted outside of the authorization given by municipal authority in constructing public sewer facilities, causing damages to landowner, such damages are not takings that are compensable by a condemning authority under the Eminent Domain Code.

4. Consideration for Grant of Right of Way and Easement is sufficient and valid where the grant is given for "benefits accruing" to landowner and the sum of one dollar ($1.00).

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 3130 of 2012

Appearances:
Gary A. Falatovich,
Greensburg, for Plaintiffs/Condemnees
Donald J. Snyder, Jr.,
Latrobe, for Defendant/Condemnor

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION and ORDER OF COURT

By Judge Richard E. McCormick, Jr.:

This matter is before the Court on the Authority's Preliminary Objections to the *Petition for Appointment of Viewers* filed by property owners Charles and Betty Horwatt. Upon consideration of the facts presented and the applicable case law, the Preliminary Objections will be sustained and the Petition dismissed.

The factual and procedural history of this case is as follows. In 2006, the Authority commenced a public sewer project in Hempfield Township. One of the properties affected by the project is owned by the Horwatts. On January 8, 2007, prior to any

construction beginning, the Horwatts signed a "Grant of Right of Way and Easement" to allow the proposed sewer line to be constructed through their property. An independent contractor, Mongiovi & Sons Enterprises, Inc., was hired by the Authority to do the construction.

Sometime after excavation and construction activities began, the Horwatts began to complain that (1) the contractor went outside of the right-of-way, removing trees and topsoil; and (2) the contractor improperly graded and back-filled their property both inside and outside of the right-of-way, causing water to pool in their front yard, blocking, damaging and destroying storm water drains, and causing water to infiltrate their basement. The Horwatts informed the Authority about the problems related to the construction, and the Authority attempted to address these issues by talking to the contractor and paying for the installation of a sump pump.

When the problems were not resolved to the Horwatts' satisfaction, they commenced these proceedings by filing a "Petition for Appointment of Viewers," asking that a Board of View be appointed to determine damages resulting from an alleged condemnation of their property that occurred as a result of the construction of the public sanitary sewers by the Authority across their property. Specifically, the Petition alleges (1) that the Authority is liable to pay damages for the acquisition of temporary and permanent easements over the property for the area used for the sewer line; (2) that the benefit assessment is inaccurate and was paid "by mistake"; and (3) that the Authority has effected a *de facto* taking by allowing its contractor to disrupt the existing storm water drainage system, thereby causing water damage to their property. The Authority responded to this Petition with these Preliminary Objections alleging that (1) the "Grant of Right of Way and Easement" precludes any claim for damages under the Eminent Domain Code, and (2) that no condemnation, either *de jure* or *de facto*, has occurred.

The Condemnor sets forth the general principles related to *de facto* takings as follows:

> A *de facto* taking occurs when an entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of his property. A landowner alleging a *de facto* taking is under a heavy burden to establish such a taking has occurred. *In re Condemnation by Municipality of Penn Hills,* 870 A.2d 400 (Pa.Cmwlth. 2005); *Shaner v. Perry Township,* 775 A.2d 887 (Pa.Cmwlth. 2001), petition for allowance of appeal denied, 790 A.2d 1021 (Pa.Super. 2001). Also, the damages sustained must be an immediate, necessary and unavoidable consequence of the exercise on the entity's eminent domain powers. *In re Borough of Blakely,* 25 A.3d 458,463-464 (Pa.Cmwlth. 2011). A *de facto* taking is not a physical seizure of property; rather, it is an interference with one of the rights of ownership that substantially deprives the owner of the beneficial use of his property. *Id*. The beneficial use of the property includes not only its present use, but all potential uses, including the

> highest and best use. *Id*. Further, there is no bright line test to determine when a government action results in a de facto taking; each case turns on its own facts. *Id*. at 465.

In this instance, the Horwatts executed a "Grant of Right of Way and Easement" for the specific purpose of permitting the Authority to install public sewer facilities through their property. The consideration for the grant was "$1.00" plus "the benefits" accruing to the Horwatts as a result of having obtained the enhanced value to their property that accrues with having public sewage services. If the Authority only authorized construction activities within the bounds of the granted right-of-way, then there is no basis for finding a *de facto* taking.

If the independent contractor acted outside of the authority given by the Authority, the contractor's actions cannot be attributed to the Authority. To seek damages for a *de facto* taking resulting from actions of an independent contractor, the landowner must prove that the taking resulted from the Authority's exercise of its power of eminent domain and not from the actions of the contractor. *Bucks County Water and Sewer Authority v. Approximately 9.180 Sq. Ft. of Land Taken as Easement,* 608 A.2d 1109, 1111 (Pa.Cmwlth. 1992). *See also Deets v. Mountaintop Area Joint Sanitary Authority,* 479 A.2d 49 (Pa.Cmwlth. 1984) and *Espy v. Butler Area Sewer Authority,* 437 A.2d 1269 (Pa.Cmwlth. 1981). In other words, when the alleged intrusions are as a result of the actions of the independent contractor, the landowner has the burden of proving that the Authority either authorized or directed the independent contractor's actions in question. The Horwatts have failed to do so in this instance.

In their petition, and in their answers to interrogatories, the Horwatts repeatedly state that the actions complained of were taken by the contractor, and that it was the contractor who went outside of the granted right-of-way. Under the case holdings in *Bucks County, Deets* and *Espy,* the "takings" that occur solely as a result of the negligent actions of a contractor are not takings that are compensable by a condemning authority under the Eminent Domain Code.

The Horwatts additionally argue that the "Grant of Right of Way and Easement" is invalid because the consideration was insufficient. The language in the Grant, combined with the applicable case law, does not support the Horwatts' position. First, the Grant states "that for and in consideration of the benefits to the parties of the first part accruing, and for the sum of One and 00/100 Dollar, receipt of which is hereby acknowledged ... ," the right-of-way and easement is transferred to the Authority. A substantial part of the consideration was the future "benefits" or value added to the property as a result of the installation of public sewage. That the benefit was such that an additional assessment was necessary to fairly compensate the Authority for the entire benefit bestowed on the property is irrelevant.

In addition, case law supports a finding that a recitation of consideration in the amount of One Dollar ($1.00) is adequate consideration to create a binding contract. *See Barnes v. McCandless Township Sanitary Authority,* 8 Pa.Cmwlth. 457, 303 A.2d 228 (1973), and *Yanssens v. The Municipal Authority of Township of Franklin, Beaver County,* 591 A.2d 335 (Pa.Cmwlth. 1991).

The bottom line is that, in this instance, the Horwatts entered into binding agreements to grant an easement and pay an additional "benefits" assessment; and the Horwatts knew what they were doing when they agreed to the same. Accordingly, we find that no *de facto* condemnation occurred on the Horwatts' property, because any alleged activity that took place outside of the Horwatts' right-of-way was taken by the independent contractor, who acted without the authority or direction of the Authority.

The Horwatts' sole remedy is to seek damages against the contractor in trespass, and not against the Authority through the Eminent Domain Code. The Preliminary Objections will be sustained and the *Petition for Appointment of Viewers* dismissed.

ORDER OF COURT

AND NOW, to wit, this 3rd day of October, 2013, it is hereby **ORDERED** and **DECREED** that the *Preliminary Objections* are **SUSTAINED** and the *Petition for Appointment of Viewers* is **DISMISSED**.

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 Opinion and Order.

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

COMMONWEALTH OF PENNSYLVANIA
V.
JUSTIN CRAIG, Defendant

SEARCHES AND SEIZURES

Expectation of Privacy

Defendant failed to establish any expectation of privacy in a package, addressed to someone else, but with Defendant's address on it, that was located in a United States Parcel distribution facility when searched.

Warrantless Searches; Use of Dogs

1. In evaluating the constitutionality of a canine sniff of a parcel, the court must apply a "reasonable grounds test," rather than the more stringent "probable cause" test that would apply if the sniff search had been conducted on a person.

2. Reasonable grounds existed for the canine sniff of the package because of the unique way that the package was taped, the use of a box within a box to conceal odors, the sending of the package from a UPS store rather than a sender's residence, and the origin of the package being Nevada, which is a common source of narcotics.

Warrants; Probable Cause

1. Probable cause existed for the issuance of a search warrant for Defendant's apartment when drug dog alerted on package that was addressed to Defendant's apartment, Officer had obtained a search warrant to open package at UPS facility, and Officer found four pounds of marijuana in the package.

2. Probable cause existed for the issuance of a search warrant for Defendant's vehicle at his residence after facts supported search of the package and the apartment when, in addition, drug dog alerted on the vehicle and troopers viewed Western Union receipts on the passenger seat.

CRIMINAL LAW

Evidence; Interrogations; Warnings

Although Defendant was detained during the search of his apartment, he was not being interrogated so his blurt-out of, "That's not my box. I don't even smoke weed," did not need to be suppressed even though no *Miranda* warnings had been given at the time the statement was made.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 816 C 2012

Appearances:

James Lazar, Assistant District Attorney,
Westmoreland County, for the Commonwealth
Duke George,
New Kensington, for the Defendant

BY: RITA DONOVAN HATHAWAY, JUDGE

OPINION AND ORDER OF COURT

This matter comes before the court on the Defendant's Omnibus Pre-trial Motions to Suppress evidence seized as a result of the execution of three search warrants at his residence and elsewhere. A hearing on these motions was held on May 24, 2013, at which time testimony was presented.

The testimony presented both at the preliminary hearing held on February 27, 2012 before Magisterial District Judge Michael Mahady and on May 24, 2013 before this court, and the information contained in the four-corners of the search warrants themselves established the following: On January 24, 2012, members of the Pennsylvania State Police were advised that a suspicious parcel was en route to the UPS location in New Stanton, Pennsylvania. This parcel, bearing tracking number 1Z2R761V1338685485, was being shipped from Henderson, Nevada via priority overnight shipping to an Abby Taylor at Apartment C-2, 1610 Briarwood Drive, Latrobe, PA. Trooper Michael Schmitt, a veteran law enforcement officer with more than thirteen years experience working for the Western Interdiction Unit of the Pennsylvania State Police, observed this parcel at the UPS facility in New Stanton on January 24, 2012. Trooper Schmitt observed that the parcel was of a shape, weight and appearance that, in his experience, was consistent with a package containing contraband narcotics. (Warrant Control Number A001-1760770, Commonwealth's Exhibit 2). Specifically, Trooper Schmitt noted in the search warrant application that

> The parcel is described as a brown cardboard box, approximately 18" x 18" x 18" and weighing approximately 24 pounds… The parcel, when picked up, felt as if there was a large "ball" shaped object in the parcel, indicative of a large bale of marijuana which this affiant has seized numerous times in the past. This parcel is indicative of parcels which contain narcotics due to the fact that narcotics shippers often times transport a box containing illegal substances within a parcel in an attempt to conceal odors from within the parcel. The parcel also has the flap heavily taped, which is normally just closed with the adhesive that is part of the package. The heavily taped flap is also indicative of narcotic shipment to keep the odor from escaping from within the package. The parcel was shipped U.P.S. Next Day Air which is also indicative of narcotic shipments based
> on the fact that the parcel has limited exposure to law enforcement because the parcel is constantly on the move in order for the delivery to be completed in a short amount of time. Usually if a parcel is shipped in the late afternoon on the West Coast of the United States, it can be delivered to the Pittsburgh area by 10:30 in the morning the next day.
>
> The parcel was also shipped from a business called "The U.P.S. Store" located in Henderson, NV. The U.P.S. Store is a common way for narcotic trafficers [sic] to send their freight because it helps conceal the identity and address of the persons sending the parcel.
>
> Through experience gained in numerous parcel drug investigations by the Pennsylvania State Police and other agencies and through information provided by individuals who have been involved in shipping drugs by U.P.S. and other shipping companies, this parcel shared the same characteristics frequently shared by packages

> containing drugs and drug proceeds mailed through these companies.
>
> The Pennsylvania State Police, Postal Inspectors, special agents of the Drug Enforcement Administration (DEA), and other intelligence sources have identified Nevada as a common origination area for controlled substances sent through the mail to Pennsylvania and other states.

(Warrant Control Number A001-1760770, Commonwealth's Exhibit 2).

Pennsylvania State Police also ascertained that there was no "Abby Taylor" listed at the address in Latrobe to where the parcel was bound, although the address was indeed a valid address. Based upon the above, the parcel was presented to drug canine "Spencer," who alerted on the package, meaning that "Spencer" had detected the odor of an illegal drug emanating from the package. Armed with all of this information, Trooper Schmitt applied for and was granted a search warrant allowing him to open the suspicious package. Inside, Trooper Schmitt found to contain approximately four (4) pounds of marijuana. (PHT 8).[1] He then applied for and was granted an anticipatory search warrant to be executed after the package had been delivered to the listed address and taken inside the residence. (SH 13; Warrant Control Number A01-1760770-A, Commonwealth's Exhibit 3).[2]

Trooper Schmitt testified that the parcel was delivered to the address at Apartment C-2, 1610 Briarwood Drive, Latrobe, Pennsylvania, by undercover law enforcement officers, who knocked at the door and, receiving no response, left the package outside the residence. A short time later, the defendant, Justin Craig ("Craig"), exited the residence, moved the box aside by some bushes, and left the area. Some three hours later, Craig returned to the residence and brought the parcel into the residence. State Police officers executed the anticipatory warrant (Commonwealth's Exhibit 3) approximately eighteen to twenty (18-20) minutes later. (PHT 20-21; SH 13-14, 24-26). In so doing, they knocked on the door to the residence and identified themselves as Pennsylvania State Police with a search warrant. Craig opened the door and police entered the residence. (SH 14). Craig was detained by law enforcement upon their entry, and made the statement, "That's not my box, I don't even smoke weed." (SH 14-15, 30, PHT 11).

In addition to the marijuana contained in the UPS package, the search of Craig's residence yielded bags and containers that smelled of raw marijuana, vacuum sealed bags with marijuana residue, and zip lock bags and other packaging material. (PHT26-27; Warrant Control Number A1-1760770 C, Commonwealth's Exhibit 1). While at Craig's residence, troopers observed Craig's vehicle, a white Chevrolet Blazer, parked in front of the apartment. A canine scan of the exterior of the vehicle indicated the presence of a controlled substance. Additionally, troopers were able to view the

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[1] Numerals in parenthesis preceded by the letters "PHT" refer to specific pages of the transcript of the testimony presented at the preliminary hearing in this matter, submitted to the court by the defendant in conjunction with his Omnibus Pretrial Motions.

[2] Numerals in parenthesis preceded by the letters "SH" refer to specific pages of the transcript of the testimony presented at the suppression hearing in this matter, held before this court on May 24, 2013.

interior of the vehicle and observed Western Union receipts on the passenger seat. Trooper Schmitt applied for and was granted a search warrant to search the interior of Craig's Chevrolet Blazer as well. (Warrant Control Number A1-1760770 C, Commonwealth's Exhibit 1).

ISSUES PRESENTED

1. Whether the warrant issued for the initial search of the UPS package at the UPS facility in New Stanton, Pennsylvania was supported by probable cause?

Craig initially challenges the constitutionality of the search of the UPS package addressed to Abby Taylor that was conducted at the UPS facility in New Stanton, Pennsylvania. Initially, this court notes that Craig has automatic standing to file such a motion because he has been charged with possessory offenses. *Commonwealth v. Bostick,* 958 A.2d 543 (Pa.Super. 2008). The effect of the concept of automatic standing "is to entitle a defendant to an adjudication of the merits of a suppression motion. In order to prevail on such a motion, however, a defendant is required to separately demonstrate a personal privacy interest in the area searched or effects seized, and that such interest was 'actual, societally sanctioned as reasonable, and justified.'" *Commonwealth v. Hawkins,* 553 Pa. 76, 718 A.2d 265 (1998)(internal citations omitted). *See also, Commonwealth v. Hunter,* 963 A.2d 545 (Pa.Super. 2008) and *Commonwealth v. Perea,* 791 A.2d 427, 429 (Pa.Super.2002), *citing Commonwealth v. Sell,* 504 Pa. 46, 470 A.2d 457 (1983). "Both Article 1, Section 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution have been interpreted as protecting zones where an individual enjoys a reasonable expectation of privacy." *Commonwealth v. Viall,* 890 A.2d 419, 422 (Pa.Super. 2005), *citing Commonwealth v. Parker,* 422 Pa.Super. 393, 619 A.2d 735, 737 (1993).

> An expectation of privacy is present when the individual, by his conduct, "exhibits an actual (subjective) expectation of privacy" and that the subjective expectation "is one that society is prepared to recognize as 'reasonable.' " *Commonwealth v. Oglialoro,* 525 Pa. 250, 256, 579 A.2d 1288, 1290-91 (1990) (*quoting Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967)). The constitutional legitimacy of an expectation of privacy is not dependent on the subjective intent of the individual asserting the right but on whether the expectation is reasonable in light of all the surrounding circumstances. *Rakas,* 439 U.S. at 151-152, 99 S.Ct. at 434-35 (Powell, J., concurring). *See Hudson v. Palmer,* 468 U.S. 517, 525-526 n. 7, 104 S.Ct. 3194, 3199 n. 7, 82 L.Ed.2d 393 (1984). Additionally, a determination of whether an expectation of privacy is legitimate or reasonable entails a balancing of interests. *Hudson,* 468 U.S. at 527, 104 S.Ct. at 3200.

Commonwealth v. Brundidge, 533 Pa. 167, 173, 620 A.2d 1115, 1118 (1993).

Craig has failed to make any showing that he had any constitutionally protected

privacy interest in the contents of the package at the time that the search was conducted at the UPS facility. The parcel did not bear his name and was addressed to another person, although it was to be delivered to his address. It is notable that he has disavowed ownership of the package entirely. Finally, the search occurred in a location (the UPS facility) in which Craig cannot claim a reasonable expectation of privacy. For these reasons, this court holds that Craig has failed to demonstrate a personal privacy interest either in the area searched or the effects seized that this court deems reasonable, and, because he has failed to demonstrate such an interest, he cannot prevail in any suppression motion related to the search of the parcel addressed to Abby Taylor that was conducted at the UPS facility in New Stanton.

Even had Craig established that he had a privacy interest in the parcel while it was located in the UPS facility, he would be unable to prevail on this issue. A review of the four corners of the affidavit in support of the search warrant provides sufficient probable cause, when read as a whole, for the issuance of a search warrant. Craig primarily challenges the constitutionality of the canine sniff of the UPS parcel at the UPS facility in New Stanton.

It is well-established that the use of drug detection dogs and other specially trained canines to sniff for the presence of controlled substances or other evidence constitutes a search under the Pennsylvania constitution. *Commonwealth v. Martin,* 534 Pa. 136, 141–142, 626 A.2d 556, 559 (1993) and *Commonwealth v. Johnston,* 515 Pa. 454, 464, 530 A.2d 74, 79 (1987).

> A warrantless canine sniff search may be deployed to test for the presence of narcotics in a place where: (1) the police are able to articulate reasonable grounds for believing that drugs may be present in the place they seek to test; and (2) the police are lawfully present in the place where the canine sniff is conducted. *Commonwealth v. Martin,* 534 Pa. at 141, 626 A.2d at 559; *Commonwealth v. Johnston,* 515 Pa. at 465–466, 530 A.2d at 79.

Commonwealth v. Diaz, 442 Pa.Super. 238, 246-247, 659 A.2d 563, 567 (1995). In evaluating the constitutionality of the canine sniff of the parcel in this case, this court must apply a reasonable grounds test, rather than the more stringent "probable cause" test that would apply if the sniff search had been conducted on a person. Certainly the facts that are set forth in the affidavit of probable cause articulate a reasonable basis for the police to believe that the parcel in question contained controlled substances sufficient to justify the canine sniff of the parcel. As there is no question that the police were lawfully in the UPS facility in New Stanton at the time that the sniff search was conducted, the canine sniff of the parcel at that location was proper.

Craig also suggests that the search warrant should not have been issued because Trooper Schmitt did not include in his affidavit of probable case any information regarding the training, reliability and certification of "Spencer," the canine. This issue was addressed by the Pennsylvania Supreme Court in *Commonwealth v. Johnston,* 515 Pa. 454, 530 A.2d 74 (1987), which held that the affidavit of probable cause need only contain "enough information to inform the magistrate that the animal used was not an

ordinary police dog who might "alert" at anything, but instead was trained to indicate the presence of narcotics." *Id*. at 471, 530 A.2d at 82, *accord, Commonwealth v. Schickler,* 451 Pa.Super. 415, 420, 679 A.2d 1291, 1293 (1996). Here, the affidavit of probable cause indicates that "Spencer" was a "State Police drug canine" which certainly informs the reader that the dog is specially trained to detect illegal drugs. As the Court in *Johnston* indicated, "to require that the affidavit indicate the school the dog attended and a breakdown of the searches in which the dog has been accurate and inaccurate would impose unreasonable burdens on the police." *Id*.[3]

In order for a search warrant to be constitutionally valid, the issuing authority must decide that probable cause exists at the time of its issuance, and make this determination on facts within the four corners of the supporting affidavit and closely related in time to the date of the warrant. A reviewing court is similarly limited, and may consider no evidence beyond that contained in the supporting affidavit. *Commonwealth v. Coleman,* 574 Pa. 261, 830 A.2d 554 (2003); *Pa.R.Crim.P. Rule 203(B) and (D)*. For the reasons set forth *supra*, after reviewing the four corners of the search warrant and evaluating the totality of the circumstances, it is clear to this court that the issuance of the search warrant authorizing the search of the parcel at the UPS facility was proper.

2. Whether the anticipatory search warrant issued for the search of the residence at Apartment C-2, 1610 Briarwood Drive, Latrobe, Pennsylvania was supported by probable cause?

Craig next suggests that the anticipatory search warrant issued for Craig's apartment was not supported by probable cause. It is again clear that Craig has standing to raise this issue, as he has been charged with a possessory offense. However, unlike the previous issue, there is no question but that Craig had a reasonable expectation of privacy in his home such as to trigger constitutional protections.

As stated above, in order for a search warrant to be constitutionally valid, the issuing authority must decide that probable cause exists at the time of its issuance, and make this determination on facts within the four corners of the supporting affidavit and closely related in time to the date of the warrant. A reviewing court is similarly limited, and may consider no evidence beyond that contained in the supporting affidavit. *Commonwealth v. Coleman,* 574 Pa. 261, 830 A.2d 554 (2003); *Pa.R.Crim.P. Rule 203(B) and (D)*. This court's review of the four corners of the affidavit of probable cause submitted in support of the anticipatory search warrant, in light of the discussion supra, establishes that the requisite probable cause is contained within that document, and that the warrant was properly issued.

Finally, in his Omnibus Pretrial Motion, Craig made an allegation that the police had violated the "knock and announce rule" at the time that the anticipatory search

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[3] The Court in *Johnston* further noted, "unless it is established, as it has not been on this record, that trained narcotics detection dogs are less than 51% accurate, there is no need for a more detailed account of a narcotics detection dog's pedigree." *Id*. No such evidence has been submitted by Craig in this case to challenge the accuracy of "Spencer" or any other drug detection dog.

warrant was executed. However, the testimony presented at the time of the hearing does not support this allegation, and, in fact, it appears to have been abandoned by Craig. (SH 14) Based upon the testimony presented, it is clear that there was no violation of the knock and announce rule such as would require suppression of evidence in this case.

3. Whether the search warrant issued for the search of the Chevrolet Blazer was supported by probable cause.

Craig next suggests that the search warrant issued for Craig's vehicle was not supported by probable cause, for the same reasons set forth in his first two issues. As in the issue addressed previously, It is clear that Craig has standing to raise this issue, as he has been charged with a possessory offense, and there is no question but that Craig had a reasonable expectation of privacy in the interior of his vehicle such as to trigger constitutional protections. However, for the same reasons as have been previously articulated, this argument is without merit. This court's review of the four corners of the affidavit of probable cause submitted in support of the anticipatory search warrant, in light of the discussion supra, establishes that the requisite probable cause is contained within that document, and that the warrant was properly issued. *Commonwealth v. Coleman,* 574 Pa. 261, 830 A.2d 554 (2003); *Pa.R.Crim.P. Rule 203(B) and (D).*

4. Whether the defendant's statements should be suppressed as having been obtained in violation of *Miranda*?

Craig next suggests that the statement made by him in the presence of the police officers at the time of the search of his residence should be suppressed because it was obtained in violation of the constitutional safeguards set forth in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In order for him to prevail on this issue, Craig must have been subjected to custodial interrogation without the benefit of *Miranda* warnings having been provided to him, and that said custodial interrogation resulted in the statements he seeks to have suppressed.

It is well-established, however, that not all statements made by suspects are subject to suppression.

> [N]ot every statement made by an individual during a police encounter constitutes an interrogation. *Commonwealth v. Williams,* 941 A.2d 14, 30 (Pa.Super.2008). *Miranda* rights are required only prior to a custodial interrogation. *Commonwealth v. Housman,* 604 Pa. 596, 986 A.2d 822, 839 (2009), *cert. denied,* —— U.S. ——, 131 S.Ct. 199, 178 L.Ed.2d 120 (2010). "Custodial interrogation is 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of [his] freedom of action in any significant way.' " *Commonwealth v. Gonzalez,* 979 A.2d 879, 887–88 (Pa.Super.2009), quoting *Miranda v. Arizona,* 384

> U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Furthermore, volunteered or spontaneous utterances by an individual are admissible without the administration of *Miranda* warnings. *Id*. *See also, Commonwealth v. Cornelius,* 856 A.2d 62, 75 (Pa.Super.2004), *appeal denied,* 586 Pa. 755, 895 A.2d 548 (2006). "When a defendant gives a statement without police interrogation, we consider the statement to be 'volunteered' and not subject to suppression.... Interrogation is police conduct 'calculated to, expected to, or likely to evoke admission.' " *Commonwealth v. Brown,* 551 Pa. 465, 711 A.2d 444, 451 (1998) (citations omitted); *Commonwealth v. Bess,* 789 A.2d 757, 762 (Pa.Super.2002).

Commonwealth v. Garvin, 50 A.3d 694, 698 (Pa.Super. 2012). In this case, Trooper Schmitt testified that Craig was in fact detained at the time of the execution of the anticipatory search warrant, and therefore he was without question "in custody" for *Miranda* purposes. (SH 14). Trooper Schmitt testified that although Craig was detained, he was not questioned by any officers before having his *Miranda* warnings read to him from a form, which was signed by Craig. Prior to that time, as the search commenced, Craig stated, "That's not my box, I don't even smoke weed." (SH 15). This statement was clearly not made in response to any questions posed by law enforcement officers, and was a prime example of a "blurt-out" or a voluntary or spontaneous statement made by Craig. Officers did read Craig the required *Miranda* warnings at some point later, which he signed, and Craig made additional statements which are not the subject of the instant Omnibus Pretrial Motion. For these reasons, the statement made by Craig, "That's not my box, I don't even smoke weed," is admissible at trial.

5. Whether the Commonwealth established a prima facie case against the defendant at the preliminary hearing sufficient to sustain his habeas corpus challenge?

"It is well-settled that the petition for writ of habeas corpus is the proper means for testing a pre-trial finding that the Commonwealth has sufficient evidence to establish a *prima facie* case." *Commonwealth v. Fountain,* 811 A.2d 24, 25 (Pa. Super. 2002).

> "A *prima facie* case consists of evidence, read in the light most favorable to the Commonwealth, that sufficiently establishes both the commission of a crime and that the accused is probably the perpetrator of that crime." *Commonwealth v. Packard,* 767 A.2d 1068, 1070 (Pa.Super. 2001)(citations omitted). The Commonwealth need not prove the defendant's guilt beyond a reasonable doubt. *Id*. "Rather, the Commonwealth must show sufficient probable cause that the defendant committed the offense, and the evidence should be such that if presented at trial, and accepted as true, the judge would be warranted in allowing the case to go to the jury." *Commonwealth v. Saunders,* 456 Pa. Super. 741, 691 A.2d 946, 948 (1997)(quotation

omitted).

Commonwealth v. Fountain, 811 A.2d 24, 25-26 (Pa. Super. 2002). Craig does not address this issue in his brief in support of Omnibus Pretrial Motions, however, he did include in his Omnibus Pretrial Motions a Petition for Habeas Corpus Relief. A review of the evidence presented at the preliminary hearing and as supplemented at the hearing held on Craig's Omnibus Pretrial Motion establishes that the Commonwealth did present a prima facie case against Craig, and that his Motion for Habeas Corpus relief is without merit.

ORDER OF COURT

AND NOW, this 9th day of September, 2013, for the reasons set forth in the foregoing Opinion, the Defendants' Omnibus Pretrial Motions to Suppress and for Writ of Habeas Corpus are hereby **DENIED**. The Court Administrator's Office shall schedule these matters for trial in the next available criminal trial term.

BY THE COURT,
/s/ Rita Donovan Hathaway, Judge

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