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Decisions of the Courts of Westmoreland County, Pennsylvania

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2014

TABLE OF CASES REPORTED

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CODY DAVIS, Petitioner
V.
HIGHMARK INC., d/b/a BLUE CROSS AND BLUE SHIELD SERVICE BENEFIT PLAN, Respondent

INSURANCE

Federal Health Care Benefits; Preemption of Pennsylvania's Motor Vehicle Act Anti-Subrogation Statute

1. In general, the Federal Employees Health Benefits Act provides: "The terms of any contract ... which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any state or local law, or any regulation issued thereunder, which relates to health insurance or plans."

2. The Pennsylvania Motor Vehicle Code does not allow for subrogation or reimbursement from a claimant's tort recovery with respect to "benefits paid or payable by a program, group contract or other arrangement."

3. The Motor Vehicle Code's anti-subrogation statute relates to health insurance or plans.

4. The Federal Employees Health Benefits Act's preemption statute is subject to two plausible constructions: "Reading the reimbursement clause in the master OPM-BCBSA contract as a condition or limitation on 'benefits' received by a federal employee, the clause could be ranked among '[contract] terms ... relat[ing] to ... coverage or benefits' and 'payments with respect to benefits,' thus falling within §8902(m)(1)'s compass ... [or] ... a claim for reimbursement ordinarily arises long after 'coverage' and 'benefits' questions have been resolved, and corresponding 'payments with respect to benefits' have been made to care providers or the insured. With that consideration in view, §8902(m)(1)'s words may be read to refer to contract terms relating to the beneficiary's entitlement (or lack thereof) to Plan payment for certain health-care services he or she has received, and not to terms relating to the carrier's post payments right to reimbursement."

5. The Federal Office of Personnel Management, or OPM, is the Federal Agency charged with administering the Federal Employees Health Benefits Act.

ADMINISTRATIVE LAW AND PROCEDURE

Deference to Agency in General

1. There is a two-step process to determine how much deference to afford a Federal Agency ruling.

2. The first step is to determine whether Congress directly expressed its intent. If Congress directly expressed its intent, the matter is resolved.

3. If Congress is silent or ambiguous with respect to the specific question, the issue for the Court is whether the agency's answer is based on a permissible construction of the statute.

4. This type of deference is only given to agency rules promulgated through notice and comment rule making procedure because those rules carry the force of law as governed by the Federal Administrative Procedures Act.

5. If an agency acts pursuant to an informal means, such as a letter, the agency is afforded deference only with "respect to its persuasiveness."

6. The factors a court must consider if an informal agency ruling is persuasive include whether the agency has access to specialized experience, broad investigations, and information; the thoroughness evident in the consideration of the decision; the validity of the reasoning; its consistency with earlier and later pronouncements; and all those factors which give it power to persuade.

7. Because the OPM decided the Federal Employees Health Benefits Act preempted state law to the contrary via an informal letter and without the benefit of formal notice and comment, the Court had to determine whether the Office's informal ruling was persuasive.

8. In this matter, the OPM's informal determination that the Federal Employees Health Benefits Act preempted state law to the contrary was not persuasive because it was self serving, it did not consider any alternatives, its conclusion was not supported by the facts in the letter, it did not acknowledge another potential interpretation of the Federal Employees Health Benefits Act, and it did not provide a rationale for choosing one interpretation of the statute over the other.

9. Because the OPM's informal letter on the interpretation of the Federal Employees Health Benefits Act was not persuasive and only demonstrative of its intention without the force of law, the Court held the subrogation provisions in the Federal Employees Health Benefits Act did not sufficiently relate to the "nature, provision, or extent of coverage or benefits (including payments with respect to benefits)," and thereby do not preempt the anti-subrogation provisions of 75 Pa.C.S.A. §1720.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION–LAW
No. 7356 of 2012

Appearances:
Todd Berkey,
Pittsburgh, for the Petitioner
Kristen A. Morris,
Plymouth Meeting, for the Respondent

BY: GARY P. CARUSO, PRESIDENT JUDGE

DECISION AND ORDER

The Respondent has filed a subrogation claim against the Petitioner as a result of a health insurance contract issued by Respondent to Petitioner's father. The Petitioner, Cody Davis, was seriously injured in a motor vehicle accident on March 23, 2012.

The Petitioner obtained settlement offers from all of the automobile insurance coverage available to him including Mr. Querry's liability coverage and the household underinsured motorists' coverages in both the Petitioner's mother's and father's households. The total amount of coverage available to Petitioner is $165,000.00.

Petitioner's medical bills are in excess of $400,000.00 and his first party medical benefits of $5,000.00 obviously were quickly exhausted. Petitioner was insured under his father's health insurance policy which was issued by the respondent. The policy is a Federal Employee Plan (FEP) issued pursuant to the Federal Employees Health Benefits Act (FEHBA), 5 U.S.C. §§8901-8914. The Respondent has paid medical bills on behalf of the Petitioner as of October 23, 2012, in the amount of $97,618.91 and has asserted a lien against any recovery obtained by the Petitioner as a result of his tort claim.

Petitioner's counsel had contacted the Respondent's agent, Healthcare Recoveries, and inquired as to whether a lien would be asserted on behalf of the Respondent and, if so, on what basis the Respondent was claiming an exception to the Pennsylvania anti-subrogation statute, 75 Pa.C.S.§1720. The Respondent contends, through its agent, that the exception to the Pennsylvania anti-subrogation statute is that the FEHBA organizational status pre-empted the Pennsylvania law. Of course, the Petitioner disagrees with this position and has filed a writ of summons against the Respondent and petitioned this Court to issue a rule requiring the Respondent to show cause why it is entitled to subrogation.

FEHBA has vested the Office Personal Management ("OPM") with the sole authority to contract for the creation and promulgation of a health benefit plan for federal employees and their dependents, i.e., the FEP. The express preemption language contained in FEHBA provides:

> "The terms of any contract under this chapter which relate to the nature, provision or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans. 5 U.S.C. §8902 (m) (1)."

OPM has contracted with Blue Cross Blue Shield Associations for a service plan which is administered by local Blue Cross Blue Shield entities. The contract between OPM and Blue Cross contains a "Statement of Benefits" which includes a subrogation and right of recovery provision that basically sets forth that if an insured is injured and benefits are paid and the insured receives a recovery from another source the insured must agree to the following provisions:

> "All recoveries you or your representative obtained (whether by lawsuit, settlement, insurance or benefit program, claims or otherwise), no matter how described or designated, must be used to reimburse us in full for benefits we paid..."

As set forth above, the Petitioner has refused to honor the subrogation claim and maintains that the lien is abrogated by the Pennsylvania Statute, 75 Pa.S.C. §1720. The relevant portion of §1720 provides:

> "in actions arising out of maintenance or use of a motor vehicle, there shall be no right of subrogation or reimbursement from a claimant's tort recovery with respect to...benefits paid or payable by a program, group contract or other arrangement...".

There is no question in this case that the subject plan meets the definition of a "program, group contract or other arrangement." Therefore, the question becomes whether or not the terms of FEP (1)Relate "to the nature, provision, or extent of coverage or benefits" and (2) the state or local law must relate "to health insurance or plans."

There is no dispute that §1720 meets the second condition as a result of the United States Supreme Court's holding in *FMC vs. Holliday,* 498 U.S. 52 (1990). In *Holliday,* the Supreme Court determined that ERISA pre-empted the application of §1720 to a self-funded healthcare plan that was an employee welfare benefit plan within the meaning of ERISA under 29 U.S.C. §1002 (1). The *Holliday* court found that §1720 related to the employee benefit plan because the statute made "reference to" and had a "connection with" employee benefit plans. The Respondent therefore argues that for the same reason §1720 "relates to" employee benefit plans, it also relates to "health insurance or plans." The petitioner, while not disputing that §1720 relates to the FEHBA plan, distinguishes an ERISA from an FEHBA plan by arguing that ERISA's pre-emption provisions are broadly worded as opposed to those of the FEHBA and that is the reason that the ERISA plans are neither subject to state court jurisdiction nor state subrogation laws.

In support of his position that the Pennsylvania statute is not pre-empted, the Petitioner cites the U.S. Supreme Court case of *Empire Healthcare Assurance, Inc. vs. McVeigh,* 547 U.S. 677 (2006) in which a health insurance company contracted by OPM pursuant to the FEHBA sued a former federal employees' estate seeking reimbursement of benefits it paid because the former employee had received damages for injuries in a state court tort action. Empire argued that there was federal jurisdiction due to the fact that state law was pre-empted by the FEHBA. The Supreme Court held that federal jurisdiction did not exist relating to the contractual subrogation claims between the FEHBA health plans and their enrollees and further held that neither federal statutory law nor federal common law govern such claims. However, the Court did not determine whether the FEHBA reimbursement provision could be interpreted as a condition or limit on "coverage" or "benefits" thereby being subject to FEHBA's pre-emption provision or whether it could be concluded that reimbursement occurred long after "coverage and benefit" issues were resolved thereby removing the reimbursement from the scope of FEHBA's pre-emption provision. The Court recognized that there were these two plausible constructions that could be given to Section 8902 (m) (1) of FEHBA when it stated that:

> "*Section 8902(m)(1)* is a puzzling measure, open to more than one construction, and no prior decision seems to us precisely on point. Reading the reimbursement clause in the master OPM-BCBSA contract as a condition or limitation on "benefits" received by a federal employee, the clause could be ranked among "[contract] terms ... relat[ing] to ... coverage or benefits" and "payments with respect to benefits," thus falling within *§ 8902(m)(1)*'s compass. See Brief for United States as Amicus Curiae 20; Reply Brief 8-9. On the other hand, a claim for reimbursement ordinarily arises long after "coverage" and "benefits" questions have been resolved, and corresponding "payments with respect to benefits" have been made to care providers or the insured. With that consideration in view, *§ 8902(m)(1)*'s words may be read to refer to contract terms relating to the beneficiary's entitlement (or lack thereof) to Plan payment for certain health-care services he or she has received, and not to terms relating to the carrier's post payments right to reimbursement. See Brief for Julia Cruz as Amicus Curiae 10, 11.
>
> *Section 8902(m)(1)*'s text does not purport to render inoperative any and all state laws that in some way bear on federal employee-benefit plans. Cf. *29 U.S.C. § 1144(a)* (portions of ERISA "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"). And, as just observed, see supra, at 2135, given that *§ 8902(m)(1)* declares no federal law preemptive, but instead, terms of an OPM-BCBSA negotiated contract, a modest reading of the provision is in order. Furthermore, a reimbursement right of the kind Empire here asserts stems from a personal-injury recovery, and the claim underlying that recovery is plainly governed

> by state law. We are not prepared to say, based on the presentations made in this case, that under *§ 8902(m)(1)*, an OPM-BCBSA contract term would displace every condition state law places on that recovery.
>
> In sum, the presentations before us fail to establish that *§ 8902(m)(1)* leaves no room for any state law potentially bearing on federal employee-benefit plans in general, or carrier-reimbursement claims in particular. Accordingly, we extract from *§ 8902(m)(1)* no prescription for federal-court jurisdiction."

Therefore, although the *McVeigh* Court offered two plausible interpretations of the FEHBA, the *McVeigh* Court did not ultimately answer the question of federal pre-emption.

The Petitioner, in support of his position, also cited the case of *Calingo vs. Meridian Resources Co. LLC,* 2011 U.S. Dist. LEXIS 83496 (S.D.N.Y. 2011). *Calingo* was a class action case in which plan members subject to subrogation claims by the defendant, FEHBA health plan. The members, who were all New York residents, argued that New York's anti-subrogation law, which precluded subrogation except where there is a statutory right of reimbursement, prevented the subrogation claims made by the defendants. The *Calingo* court initially held that "Because, following *McVeigh,* subrogation and reimbursement pursuant to a health insurance policy does not relate to the coverage and benefits under such a policy, the Court finds FEHBA does not pre-empt New York law."

However, on June 18, 2012, the OPM issued Letter No. 201218 to all carriers, such as the Respondent, that administrate FEP's. This letter is attached to the Respondent's brief as Exhibit 2 and advises that OPM finds that "The carrier's right to subrogation and/or reimbursement recovery is both condition of, and a limitation on, the payments that enrollees are eligible to receive for benefits; the carrier's contractual obligation to obtain them necessarily relates to the enrollee's coverage or benefits(including payments with respect to benefits) under the FEHB Program. These recoveries therefore fall within purview of FEHBA's pre-emption clause and supersedes state laws that relate to health insurance or plans." The Letter references the Supreme Court decision in *McVeigh* and indicated that "it is plausible to construe subrogation in reimbursement contract terms as a condition or limitation on benefits received by a federal employee, allowing these FEHB program contract requirements to pre-empt state law according to 5 U.S.C. §8902(m)(1)."

As a result of the OPM Letter, the Calingo defendants filed a motion for judgment on the pleadings. The district court granted the motion and entered judgment on behalf of the defendants. In his opinion, Judge Briccetti first determined the extent of deference that a court should grant the OPM Letter. He cited the case of *Chevron, USA, Inc. vs. Natural Resources Defense Council, Inc.,* 461 U.S. 837 (1984) in which the Supreme Court held that there is a two step test to determine how much deference to afford a formal agency ruling. The first step is to determine whether Congress has spoken to the precise question at issue. If Congress has directly expressed its intent, then the matter is resolved. However, if the statute is silent or ambiguous with respect

to the specific question, the issue for the court is whether the agency's answer is based on a permissible construction of the statute. This type of deference is only given to agency rules promulgated through notice and comment rule making procedures because those rules carry the force of law as governed by the Administrative Procedure Act. If, as in this case, the agency has only spoken through an informal medium, such as a letter, the agency is afforded only "respect according to its persuasiveness." *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944).

The issue then becomes whether or not the OPM Letter is deemed persuasive. In *United States vs. Meade, Corp.,* 533 U.S. 218 (2001) the court summarized the factors that determine whether an informal agency ruling is persuasive. These factors include whether the agency issuing the material has access to specialized experience, broad investigations, and information; the thoroughness evident in the consideration of the decision; the validity of the reasoning; its consistency with earlier and later pronouncements; and all those factors which give it power to persuade. *Id.* at 228.

I must decide whether the interpretation of the FEHBA set forth in the OPM Letter is sufficiently persuasive for me to find that the contract term in the OPM/BCBSA contract concerning reimbursement and subrogation relate to the nature, extent and provision of coverage. The OPM is the agency responsible for implementing and maintaining the FEHB programs and contracts. There is no doubt that OPM has access to specialized experience, broad investigations, and information. However, this alone is not persuasive.

The OPM reasons that because reimbursement recoveries serve to lower subscription charges for individuals enrolled in FEHB programs, subrogation sufficiently relates to the nature, provision, or extent of the coverage or benefits. The Federal Government is the primary contributor to the FEHB fund.[1] The letter fails to address alternative, possibly federally funded, ways of keeping subscription costs affordable, and whether or not any alternative is feasible. The statement that "the carrier's right to subrogation and/or reimbursement recovery is both a condition of, and a limitation on, the payments that enrollees are eligible to receive for benefits; the carrier's contractual obligation to obtain them necessarily relates to the enrollee's coverage or benefits," is a conclusion not supported by facts contained in the letter. I do not find this conclusion very persuasive as there is no factual basis for this conclusion apparent in the Letter.

The OPM Letter goes on to cite the decision in *Empire Healthchoice Assurance, Inc. v. McVeigh,* 547 U.S. 677 (2006), and relies on one of two plausible interpretations discussed in that case. The OPM relies on the interpretation that it is plausible to construe subrogation and reimbursement contract terms as a condition or limitation on benefits received by a Federal employee, allowing these FEHB Program contract requirements to preempt state law according to 5 U.S.C. § 8902(m)(1). The Letter

[1] See U.S. Department of Defense, *Federal Employee Health Benefits (FEHB) Program,* Department of Defense Education Activity, (June 20, 2013, 10:26 AM), http://www.dodea.edu/Offices/HR/resources/hq/eop/benefits/benefits.cfm. Seventy-five percent of the funding for the FEHB program comes from the Federal Government. Only one quarter of the funding for the FEHB program comes from enrollees' subscription charges.

states that OPM maintains this construction of the statute that allows preemption of state laws relating to subrogation and reimbursement. However, OPM provides no rationale or justification for maintaining this construction of the statute. There exists another interpretation that OPM fails to discuss. This second plausible interpretation is that a claim for reimbursement ordinarily arises long after coverage and benefits questions have been resolved, and therefore subrogation does not sufficiently relate to the nature, provision, or extent of coverage or benefits. OPM's failure to provide a rationale for choosing one interpretation over another creates a conclusion without an argument. Stating a conclusion without stating a proper rationale or addressing the counterargument is the antithesis of being persuasive. The conclusion by OPM is consistent with only one plausible interpretation and fails to acknowledge the other.

The last factor in determining whether or not an informal agency decision is persuasive is "all those factors that give it the power to persuade." The fact that OPM is making a decision on the right to subrogate that it created in its contract with BCBSA, and the power of this provision to preempt State law, creates an inherent bias. It would be illogical for OPM to do anything but adhere to the construction of the statute that is most beneficial to the financial goals of the program that it has implemented through the provision in question, and at the same time cloak the existence of another plausible interpretation. This inherent bias assists in negating OPM's power of persuasion and the Letter's credibility. Where two plausible statutory constructions exist, allowing the agency to choose the one that is most beneficial to its own agenda, without justification or without the slightest acknowledgment that another possibility exists, unveils the inherent bias in the agency's decision. The reason that bias in this case negates the power of persuasion is because the Letter has not gone through formal notice and comment rule making procedures nor has it faced formal administrative adjudication. This Letter is purely demonstrative of OPM's intention without the force of law.

Thus, the subrogation and reimbursement provisions in the contract, pursuant to the language of the FEHP, do not preempt any State or local law, which would include 75 Pa. C.S.A. §1720. Based on the lack of persuasiveness of the OPM Letter, I find that subrogation and reimbursement provisions in the FEHBA benefit plans do not sufficiently relate to the "nature, provision, or extent of coverage or benefits (including payments with respect to benefits)." The OPM Letter contains only conclusions without sufficient rationale for respect to be granted to its persuasiveness. Therefore, I will enter the following Order:

ORDER OF THE COURT

AND NOW, this 24th day of June 2013, it is hereby ORDERED and DECREED that the Petition filed by Cody Davis, Petitioner, along with the Rule to Show Cause issued by this Court, are hereby granted. I find that the Federal Employee Health Benefits Act does not preempt 75 Pa C.S.A. §1720 and therefore the Respondent is unable to assert its subrogation claim.

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CHRISTINE PARKER, Plaintiff
V.
CITY OF GREENSBURG and
THE CITY OF GREENSBURG PARKING AUTHORITY, Defendants

MUNICIPAL CORPORATIONS

Torts; Defects or Obstructions in Streets and Other Public Ways; Streets and Other Ways as to Which Municipality Is Liable; Sidewalks, Footways and Cross Streets; In General

1. A local agency may be liable for the care, custody, or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of a local agency.

2. A sidewalk is excluded from the exception to governmental immunity provided by 42 Pa.C.S.A. §8542(b)(3).

3. A sidewalk is that portion of a street between the curb lines, or the lateral lines of roadway, and the adjacent property lines, intended for the use by pedestrians.

4. The court determined that walkway located in parking garage where the plaintiff fell was not a sidewalk when the walkway was not located adjacent to a street or a right-of-way of any street owned by the City of Greensburg.

5. Walkway was adjacent to "driveway" used by vehicles and pedestrians who utilized the Bell parking garage, and was not a public right-of-way.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION–LAW
No. 1091 of 2011

Appearances:
Richard M. Rosenthal,
Pittsburgh, for the Plaintiff
Paul N. Lalley,
Pittsburgh, for the Defendant City of Greensburg

BY: GARY P. CARUSO, PRESIDENT JUDGE

DECISION AND ORDER

The threshold issue in this Motion for Summary Judgment is whether the plaintiff's claim falls within the "Real property" exception of 42 Pa.C.S. §8542 (b)(3). It must be determined whether the area where the plaintiff fell is a "sidewalk", which is specifically excluded from the exception to governmental immunity that is provided by 42 Pa.C.S. §8542 (b) (3).[1] The defendants also raise the issue as to whether they are

[1] If the area is a sidewalk, the next issue to be determined is whether or not the sidewalk is within the rights-of-way of streets owned by the City of Greensburg; whether the City had actual notice or could be reasonably charged with notice under the circumstances in sufficient time prior to the accident to have taken measures to protect against the dangerous condition that caused the accident; and whether or not there is a genuine issue of material fact as to whether the dangerous condition of the sidewalk existed which caused the fall. Since I have determined that the area where Ms. Parker fell is not a "sidewalk", it will not be necessary for me to determine the issues referred to herein.

entitled to summary judgment based upon their claim that the plaintiff's parking lease agreement contained an enforceable exculpatory clause.[2]

The plaintiff, Christine Parker, was injured when she fell on November 4, 2010, on a walkway located within the Robert A. Bell parking garage owned by the City of Greensburg. The walkway is located within the garage in an area near the office of the parking garage and also near restroom facilities as depicted on the photographs that are attached as exhibits to the record in this case. The walkway is also located along what I would consider to be a "driveway" that is used by vehicles exiting the Bell garage on that floor of the garage and is also used for pedestrian traffic.

Section 8542 (b) (3) of the Political Subdivision Tort Claims Act (PSTCA) provides one of the 8 exceptions to a local agency's immunity under the PSTCA. This exception, the "Real property" exception, provides that a local agency may be liable for "the care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of a local agency." This exception, however, specifically excludes certain items from the definition of "Real Property" including "sidewalks"; therefore, a claim based upon negligence of a local agency with respect to a sidewalk cannot be brought under the PSTCA's general real property exception. I have determined that this walkway located in the parking garage where the plaintiff fell is not a "sidewalk" as per the Commonwealth Court in *Snyder v. North Allegheny School District,* 722 A.2d 239 Pa. Comm. Ct. (1998). In *Snyder,* the Commonwealth Court referred to the definition of a sidewalk as utilized in the Pennsylvania Motor Vehicle Code:

> A sidewalk is "that portion of a street between the curb lines, or the lateral lines of roadway, and the adjacent property lines, intended for the use by pedestrians." 75 Pa.C.S. §102.

The Court also referenced §8542 (b) (7) of the PSTCA which provides another exception to the sovereign immunity for "sidewalks" and sets forth that: "A dangerous condition of sidewalks within rights-of-way of streets owned by local agency ...".

Clearly, as in the *Snyder* case, the walkway in this case is not located adjacent to a street or a right-of-way of any street owned by the City of Greensburg. It is adjacent to what I refer to above as a "driveway" used by vehicles and pedestrians who utilize the Bell parking garage and is certainly not a public right-of-way.

The City attempts to rely upon the Supreme Court case of *Reid v. City of Philadelphia,* 598 Pa. 389, 957 A.2d 232 (2008) for what it claims is its holding that §8542 (b) (3) of the PSTCA does not apply to claims with respect to a sidewalk located adjacent to municipal-owned property. If that would be the case, then clearly this walkway would be a sidewalk since it is located adjacent to city-owned property, i.e., the Bell garage. I agree with the plaintiff in this case that in the *Reid* case the parties agreed that the area in question was in fact a sidewalk abutting a Philadelphia police

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[2] The parties have agreed that I should dismiss the defendant, the city of Greensburg Parking Authority, from this action without prejudice.

station. Apparently, there was no issue raised as to whether or not the sidewalk in *Reid* abutted a public right-of-way or street. In fact, the issue in *Reid* as cited by the Supreme Court was whether §8542 (b) (3) applies to sidewalks abutting local agency property and not whether the area in question was, in fact, a "sidewalk".

Regarding the issue raised by the City as to the exculpatory language contained in Ms. Parker's lease agreement, I find that issue has been waived by the City for failing to raise it in its pleadings and, even if it was so raised, I find that the language of the rental agreement claimed as exculpatory by the City is inapplicable to this case. The language in question is as follows: "Use of the parking space is at the risk of the Lessee. The City of Greensburg will not be responsible for any vandalism, theft or injury to Lessees parked property or person." It is clear that the exculpatory language applies only to the use of the parking space and not to the area in which Ms. Parker fell. Accordingly, I will enter the following Order:

ORDER OF COURT

AND NOW, this 22nd day of August 2013, it is hereby ORDERED and DECREED that the Motion for Summary Judgment filed by the City of Greensburg Parking Authority is hereby granted and the said Authority is dismissed from this action without prejudice. The Motion for Summary Judgment filed by the defendant, The City of Greensburg, is hereby denied.

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

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LA VITALE ENTERPRISES, INC., t/a STEEL CITY GRILLE, Petitioner
V.
PENNSYLVANIA LIQUOR CONTROL BOARD, Respondent
and
JOAN P. BATEMAN, Intervenor

INTOXICATING LIQUORS

Licenses and Taxes; In General; Renewal

1. In hearings regarding appeals from the issuance, renewal, or transfer of liquor licenses, a trial court hears the matter *de novo* on questions of fact, administrative discretion and other matters as are involved based upon the established record and additional relevant evidence received by the trial court.

2. Sufficient causal connection existed between illegal or harmful incidents outside bar and bar's operations to hold bar responsible.

3. Even if licensee had several adjudicated violations, in exercising its discretion, trial court was permitted to consider licensee's subsequent steps to make sure that it would operate the establishment in accordance with the liquor laws, but court determined that subsequent steps were not sufficient to permit renewal in light of rash of incidents.

Licenses and Taxes; Revocation or Forfeiture of Rights; In General; Violations of the Law

The trial court may uphold a refusal to renew a liquor license for one or more Liquor Control Board violations, as well as any non-liquor code violations demonstrating a pattern of illegal activity.

EVIDENCE

Documentary Evidence; Production, Authentication and Effect; Public Documents, Records, Exemplifications, or Official Copies; Proof of Genuineness

Proper authentication and certification of police reports is required by an officer having legal custody of the documents before police reports containing hearsay may be admitted into evidence and such authentication and certification was not present in case at bar.

Documentary Evidence; Business Records

Police reports may be admitted under business records exception to hearsay rule but only if authenticating witness provides sufficient information relating to preparation and maintenance of records, and testifying officer had not.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW
No. 974 MD 2012

Appearances:

Charles L. Caputo,
Pittsburgh, for the Petitioner
Michael J. Plank,
Harrisburg, for the Respondent
Mark S. Galper,
Monessen, for the Intervenor

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION AND ORDER OF COURT

By Richard E. McCormick, Jr., Judge:

The matter is before this Court regarding the Petition for Appeal from Decision of Pennsylvania Liquor Control Board (PaLCB) refusing the renewal of the restaurant liquor license of the Petitioner, La Vitale Enterprises, Inc. (La Vitale), operating the Steel City Grille in Monessen, Pennsylvania.

The licensee, La Vitale, first acquired a restaurant liquor license, No. R-12323, to operate a licensed establishment at 275 Schoonmaker Avenue, Suite A, Monessen, Pennsylvania, on August 2, 2006. The most recent application for renewal, due on or before May 31, 2012, was received by the Liquor Control Board on June 18, 2012.

The licensee was notified of objections to the renewal of the license by letter from PaLCB on June 20, 2012, listing five citations for liquor code violations, approximately eight incidents of disturbances at or immediately adjacent to the licensed establishment during the time period of July, 2010 to the present, a failure to submit the application addendum in proper order, and a failure to file the required tax clearance from the Department of Revenue, as the bases for its objections.

A hearing on the objections noted by the PaLCB was scheduled and conducted on August 22, 2012, before John Mulroy, Hearing Examiner. A transcript of that proceeding as well as record exhibits were made a part of the record herein.

The PaLCB issued an Order dated November 14, 2012, refusing the renewal application for restaurant Liquor License No. R-12323 for the licensing term effective July 1, 2012. The Petition for Appeal was filed November 16, 2012, and an Opinion was issued by the PaLCB on February 8, 2013. A hearing on the Petition for Appeal, and the PaLCB's Petition to Vacate Automatic Supersedeas was scheduled and conducted on February 26, 2013, before this Court. On February 27, 2013, this Court issued an Order granting the Petition to Vacate the Supersedeas.

La Vitale raises several bases for its appeal. The licensee complains that the PaLCB based its decision on two incidents reported to the Monessen Police Department, which referenced matters that were not included in a notice objection letter dated June 20, 2012, and a notice of hearing letter dated July 16, 2012. Each of those notices referenced "Approximately eight (8) incidents of disturbances at or immediately adjacent to your licensed establishment during the time period July, 2010 to present reported to the Monessen Police Department."

In its Opinion, the PaLCB outlines ten incidents that it considered in reaching its decision. The ninth and tenth incidents referenced in the Opinion occurred on July 22, 2012, and July 31, 2012, after the dates of the objection notice letter and the hearing notice letter.

The statute governing the renewal of liquor licenses, 47 P.S. §4-470 requires that the Board give a renewal applicant at least ten (10) days' notice of the basis for its objections to renewal, 47 P.S. §4-470(a.2). As the incidents in question did not occur until after the dates of the letters of notice of objections and a hearing, no notice was given to the renewal applicant of those incidents designated as the ninth and tenth

incidents in the PaLCB Opinion, and they should not be considered by this Court. That is not the end of the inquiry however.

While the Board's Opinion enumerates these incidents among those that were relied upon, the conclusion made is a general one, "The record is replete with illegal activities that have either occurred at or immediately adjacent to the licensed premises. There is obviously a serious problem with licensee's operations, and the Board is very troubled by licensee's failure to implement any timely corrective measures to address its ongoing problems occurring at or immediately adjacent to the licensed premises." Board Opinion, pg. 41.

The matter presently on appeal before this Court is subject to the provisions of the Pennsylvania Liquor Code governing the procedure for hearings and appeals regarding the issuance, renewal, or transfer of liquor licenses, 47 P.S. §4-464, which, in pertinent part, requires this Court to hear the matter "*de novo* on questions of fact, administrative discretion and other matters as are involved," based upon the established record as well as additional relevant evidence received by this Court, and to make its own independent findings and conclusions. *Two Sophia's, Inc. v. Pennsylvania Liquor Control Board,* 799 A.2d 917 (Pa.Cmwlth. 2002) citing *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Cantina Gloria's Lounge, Inc.,* 639 A.2d 14 (Pa. 1994). Therefore, this Court will limit its *de novo* determination and disregard the evidence of the ninth and tenth incidents listed in the Board's Opinion.

Next, La Vitale complains that the PaLCB committed error by considering incidents that it contends bore no causal relationship to the operation of its licensed business. One of those incidents, Incident #10 listed in the Board's Opinion, has been eliminated from this Court's consideration for reasons previously stated.

Incident #1 in the Board's Opinion was testified to in the license renewal hearing by Michelle Turner. Board Hearing Transcript, pp. 7-13. Ms. Turner related that she was present in the Steel City Grille on June 19, 2011, at approximately 1:30 a.m. with a friend, and she and the friend were engaged in a confrontation with Eric Brooks, a bouncer in the establishment. A short time after the confrontation she exited the bar and while she was crossing the street in front of the bar, Mr. Brooks drove his vehicle rapidly toward her and ran over the back of her foot and left the scene. Ms. Turner went to a nearby hospital where she had x-rays. She reported the incident to the Monessen Police Department.

Clearly, there is a sufficient causal relationship between the incident and the licensed premises for there to be a basis for the incident to be considered in the Board's and this Court's decisions. Ms. Turner was present in the bar when she engaged in a confrontation with Mr. Brooks, a bouncer employed in the bar. She estimated that only 10 or 15 minutes elapsed between the confrontation and Brooks running over her foot directly outside of the bar.

Incident #4 in the Board's Opinion was testified to by Tanya Lynn Tarpley and Officer Christopher Gray of the Monessen Police Department in the same hearing.

Ms. Tarpley testified that on December 26, 2011, she was present in the Steel City Grille at approximately midnight when an altercation took place between she and

James Carter, her mother's brother-in-law. Persons named Danny and Julius, who were apparently employed in the bar, made everyone who was in the bar leave and go outside and then the door was locked behind them. Ms. Tarpley was struck in the face by James Carter and another bar patron, and was treated for injuries at an emergency room.

Officer Gray testified that at 1:14 a.m. he and Officer Kelemen, both of the Monessen Police Department, were directed to the bar by a fireman near the bar and approached the bar, encountering a large number of persons right outside the door to the bar, and that Ms. Tarpley reported being injured in an altercation that had taken place at that location. Gray and Officer Kelemen knocked on the door to the bar numerous times, and finally the door was opened to them by a Mr. Carpenter.

While the striking of Ms. Tarpley occurred outside of the licensee's bar, the incident originated inside the establishment. That is enough for it to be considered by the Board in its decision, particularly in the way in which it supported the general conclusions of the Board. There was a sufficient causal connection with the licensed establishment to support those conclusions. *St. Nicholas Greek Catholic Russian Aid Society v. Pennsylvania Liquor Control Board,* 41 A.3d 953 (Pa.Cmwlth. 2012).

La Vitale also claims error by the PaLCB in admitting evidence constituting inadmissible hearsay regarding Incident #3 which occurred on December 10, 2011. Specifically, licensee objected to the admission of statements made by the alleged victim of a gunshot wound to the investigating officer, Officer Gray, at Mon Valley Hospital on the date of the incident.

Counsel for the licensee made hearsay objections at various points in Officer Gray's testimony. At page 54, line 22 of the hearing transcript, the officer began to indicate what he was told by the man with the gunshot wound. An objection was made and the hearing examiner overruled that objection, allowing the officer to relate that the gunshot victim told him he was shot by an unknown person at the Steel City Grille. At page 68, line 16 of the transcript, the officer is asked "Did he indicate to you how he received those injuries?" An objection was made by licensee's counsel and the objection to hearsay was sustained. The hearing examiner inconsistently overruled and sustained hearsay objections to what Officer Gray had been told by the purported victim of a gunshot wound at Mon Valley Hospital. The admission and consideration of the statements of the purported victim were improper, as the statements were clearly hearsay and not admissible under any exception to the hearsay rule.

La Vitale also objected to the admission of PaLCB Exhibit B-7, a police incident report dated June 27, 2012, with reference to what is designated as Incident #8 in the Opinion.

Exhibit B-7 is a five page incident report authored by Officer David Yuhasz concerning an incident that occurred on June 27, 2012, regarding a phone call which indicated the presence of an individual with a gun inside the Steel City Grille. Various information is entered on the first four pages of the report, and page five of the report consists of a main narrative of events by Officer Yuhasz, which included various hearsay statements by witnesses.

At the Board hearing, PaLCB offered the testimony of Detective Lieutenant Mandarino of the Monessen Police Department, who testified that he was the second in charge after the chief of police, of the Department. He provided the size of the police department and the availability of officers, the size of the City of Monessen, its geographic location relative to the surrounding communities, the location of the licensee's bar and his responsibilities as a detective lieutenant. Specifically, he indicated that among his responsibilities was to review incident reports authored by patrol officers and approve those for which he was responsible. He described that records of the incident reports are maintained through an alert system, which he did not explain, other than to say that it is all computerized, and cannot be changed once it is entered, except by the chief, the secretary and himself. Upon the offer of Exhibit B-7, and over the objection of licensee's counsel, the hearing examiner admitted the exhibit. That admission of evidence was in error. The report, particularly the main narrative, is a hearsay document, and in a number of instances it contains hearsay statements attributable to numerous witnesses. Essentially, the facts alleged in the main narrative were obtained through hearsay statements.

First Ward Republican Club of Philadelphia v. Pennsylvania Liquor Control Board, 11 A.3d 38 (Pa.Cmwlth. 2010) sets forth the criteria for the establishment of exceptions to the hearsay rule regarding police incident reports of this nature. The PaLCB argues that the Judicial Code, 42 Pa.C.S. §§6103 and 6104 provides an exception that permits admission of hearsay police reports in those instances involving official records kept by an agency of the Commonwealth which are attested to and certified by an officer having legal custody of the documents. Section 6103 of the Code applies to official records that have a proper attestation and certification of the document. *Thorne v. Commonwealth Department of Transportation,* 727 A.2d 1205 (Pa.Cmwlth. 1999). The PaLCB has failed to show the proper attestation and certification of the document in question. Additionally, under Section 6104 there is a lack of trustworthiness to the hearsay upon hearsay statements of witnesses contained in the report. Some of the witnesses who are quoted in the report are not identified, one of the witnesses quoted admits to a prejudice regarding the licensee bar, and two witnesses contradict each other in their statements. Finally, this Court questions whether an incident report prepared and filed under the circumstances herein constitutes an official record under the statute.

The PaLCB also contends that the police report is admissible under the business records exception to the hearsay rule. An authenticating witness must provide sufficient information relating to the preparation and maintenance of the records to justify a presumption of trustworthiness of the record. *First Republican Club,* 11 A.3d 46, citing *Estate of Indyk,* 413 A.2d 371 (Pa. 1979). Lieutenant Mandarino did not provide such information regarding the preparation of the records, and therefore those records are not entitled to a presumption of trustworthiness. Therefore, without any applicable exceptions to hearsay, the admission of the police report was error, and without the contents of the report there is no basis upon which Incident #8 can be considered.

That leaves the following incidents for consideration by this Court in its *de novo* review of the record:

Incident # 1 occurred on June 19, 2011. Michelle Turner was present in the Steel City Grille when she and a friend became engaged in a confrontation with Eric Brooks, a bouncer employed by the licensee. After she left the bar she was struck by a vehicle being driven by Brooks in the street in front of the bar and had to be examined for an injury at a local hospital.

Incident #2 occurred on August 3, 2011. Officer Michael Kelemen, a Monessen police officer, went to the vicinity of the Steel City Grille, where he observed "60, 70 people in the street, in the parking lot, coming from the bar. You can hear a lot of people arguing and yelling." Board Hearing Transcript pg. 115, ln. 2-4. He and another officer dispersed the crowd, along with someone who he identified as a bouncer from the bar.

Incident #3 has been eliminated from this Court's consideration.

Incident #4 occurred on December 26, 2011. Officer Kelemen was out in the middle of the street in front of bar, trying to disperse people who were standing in the street and coming from inside the Steel City Grille.

Incident #5 occurred on March 25, 2012. Officer Aaron Thompson of the Monessen Police Department was parked in a police vehicle along with Officer Yuhasz, in the parking lot for the Salvation Army, watching the area in the immediate vicinity of Steel City Grille. He observed two men come out of the licensed establishment, argue, and that one man struck the other man in the face, knocking him down to the sidewalk in front of the bar. He also observed various others who were leaving the bar arguing and bickering, back and forth among themselves. Charles Bassett, who struck James Edwards, was taken into custody. James Edwards appeared highly intoxicated, with a strong odor of alcohol on his breath, and was belligerent towards Officer Yuhasz, striking Yuhasz in the chest, and refusing to comply with being taken in to custody. A large number of persons who had come from the bar were highly agitated by the arrests of Bassett and Edwards, and it took the officers 15 minutes to disperse the crowd.

Incident #6 has been eliminated from the Court's consideration.

Incident #7 occurred on May 26, 2012. Officer Christopher Gray went to the Steel City Grille at 1:39 a.m. on that date and encountered a large group of people who had come from the bar and were in the street and disrupting traffic. He returned at 2:10 a.m. with other officers and observed Steafany McCanch, who had been in the bar, and who appeared to be staggering, slurring her words, had bloodshot eyes and had the odor of an intoxicating beverage coming from her breath. He also noticed that she was bleeding from her nose and face and had bumps and bruises about her arms, head and face.

The PaLCB also listed five citations regarding the licensee in its Opinion.

On June 15, 2008, two underage patrons were served alcohol in the licensed establishment, resulting in a $1,400.00 fine, and a compliance order to the RAMP program. After its liquor license expired on June 30, 2010, the licensee admitted to selling alcoholic beverages without renewing its license, resulting in fines totaling $3,250.00.

In September, 2011 and February, 2012 the licensee received citations for failing to post suspension notices in a conspicuous place on the outside of the licensed premises, resulting in fines totaling $550.00, and a one day suspension of its license.

La Vitale raises the defense of substantial steps to address or prevent additional activity occurring on or adjacent to the premises. *U.S.A. Deli, Inc. v. Pa. Liquor Control Board,* 909 A.2d 24 (Pa.Cmwlth. 2006). It claims that it voluntarily closed the licensed premises for two weeks following Incident #3, which occurred on December 10, 2011. It also claims that it has barred persons from the premises and has maintained a list of persons who are barred, that it maintains a panic button connected to the police station that employees are instructed to use in the event of trouble in the bar, that it moved last call to 1:30 a.m. from 2:00 a.m., that it will not allow persons back in to the bar once they have left, that it maintains two security personnel in the bar, that its employees have gone through the RAMP training program.

As has been stated, the scope of review for this Court on the matter before me is a *de novo* consideration of the record of proceedings before the hearing examiner and the Board, as well as all competent evidence presented to this Court. *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Kelly's Bar, Inc.,* 639 A.2d 440 (Pa. 1994), *Two Sophia's Inc. v. Pa. Liquor Control Board,* 799 A.2d 917 (Pa.Cmwlth. 2002). "*De novo* review contemplates an independent evaluation of the evidence, which has already been presented. In essence, '*de novo* review' means that the reviewing Court will reappraise the evidence in the record and has the authority, in the exercise of its statutory discretion, to make independent findings of fact and conclusions of law. Most important, the reviewing Court has the authority to sustain, alter, change, modify or amend a decision of the Board, even if that Court does not make findings of fact that are materially different from those found by the Board." *Two Sophia's,* footnote 5. "The trial Court is not restricted to reviewing the established record, but may hear new evidence. See *Craft American Legion,* 718 A.2d at 277, etc." *Two Sophia's,* footnote 6.

While this Court did allow testimony from six witnesses at the proceeding on February 26, 2013, the primary purpose of that testimony was with regard to the supersedeas petition. In several instances reference was made to matters from the Board hearing before the hearing examiner, but this Court has excluded those matters from its consideration.

The Pennsylvania Liquor Control Board may refuse the renewal of a liquor license for one or more Board citations, as well as any non-liquor code violations demonstrating a pattern of illegal activity on or adjacent to the licensed premises that the licensee knew or should have known of and failed to prevent. *Philly International Bar, Inc. v. Pa. Liquor Control Board,* 973 A.2d 1 (Pa.Cmwlth. 2008). A pattern of activity may be considered in determining whether renewal of a license is warranted. *I.B.P.O.E. of West Mount Vernon Lodge 151 v. Pa. Liquor Control Board,* 969 A.2d 642 (Pa.Cmwlth. 2009).

Based upon all competent and admissible evidence before it, this Court determines that the PaLCB has met its burden regarding the non-renewal of this restaurant liquor license.

La Vitale has been the subject of various citations regarding the operation of the licensed premises. While the incidents giving rise to each citation are not of a particularly serious nature, they point to a pattern of disregard by the licensee for the requirements for operation of a licensed facility. At Citations No. 10-2011 and 10-2592 the licensee allowed its license to expire, yet continued to operate without having renewed. The expiration occurred on June 30, 2010, and patrons were served on August 21, 2010, and October 13, 2010. After the fines were imposed the licensee failed to pay them in a timely manner and was additionally suspended. The fines in question were not paid until September 14, 2011, nearly three months after they were due. Additionally, the licensee failed to timely file its renewal application for the present licensing period.

Of those incidents of disturbances that this Court has considered, other patterns emerge. Incident #1 involved a bouncer employed by the licensee engaging in assaultive behavior towards a patron who he had had a verbal confrontation with inside the bar only minutes before. Incident #2 involved a disturbance created in the immediate vicinity of the bar by 60 or 70 of the bar's patrons who had just come from inside the bar. Incident #4 involved another disturbance in the immediate vicinity of the bar involving patrons who had just left the bar. Incident #5 involved two patrons who were arguing as they left the bar, one of whom punched the other. Each of them were highly intoxicated and the victim of the punching himself struck a police officer and struggled being taken into custody. Incident #7 involved two matters. A large group of patrons from the bar obstructing traffic and creating a disturbance in the immediate vicinity of the bar, and the subsequent assault of an intoxicated patron either in the bar or in the immediate vicinity of the bar. Only during Incident #2 was there any action taken by the licensee's employees to control its patrons.

While the licensee contends that it has taken substantial steps to cure the problems that cause many police calls to be made to the licensed premises, the record does not support those contentions. This Court has ruled that it will not consider hearsay evidence regarding several incidents, but in a purported shooting incident, Incident #3, there were observations made by the police officers present that cause this Court to conclude that employees of the bar impeded the entry of the police, refused to cooperate in the police investigation, and made efforts to clean up the establishment in order to prevent a full investigation to be made. The testimony of Julius Dawkins, a bouncer employed by the bar, at a hearing before this Court, was palpably not credible, and yet, at the time of his testimony he indicated that he had been promoted to manager of the bar.

On the subject of management, this Court concludes that Larry A. Vitale, the president, treasurer, director and shareholder of La Vitale and Frank Vitale, the LCB approved manager, were, in fact, not managing the bar. At the time of the matters complained of herein, Daniel Carpenter was running the day to day operations of the licensed establishment, apparently without LCB approval, and without RAMP training. It also appears that Julius Dawkins, the successor to Mr. Carpenter, is also not an approved manager by the LCB. Although the license is a restaurant-liquor license,

at the Board hearing Larry Vitale admitted that they had not been serving food for one and one-half years prior to the hearing.

Cumulatively, this is a licensed establishment that was operating in non-compliance with the requirements of its license, without supervision and management of the establishment by properly designated employees, and a history of patron behavior, both within and immediately adjacent to the licensed premises which was highly detrimental to the peace and security of the citizens of Monessen, and a great drain upon the resources of the Monessen Police Department.

ORDER OF COURT

AND NOW, to wit, this 30th day of September, 2013, based upon the foregoing, the appeal of the licensee, La Vitale Enterprises, Inc. t/a Steel City Grille is hereby **DENIED**, and the non-renewal of the restaurant-liquor license is **UPHELD**.

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

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INDIANA FIRST BANK, f/ INDIANA FIRST SAVINGS BANK, Plaintiff
V.
THOMAS E. REIBER and KAYE K. REIBER, Defendants

JUDGMENT

On Motion or Summary Proceeding; Grounds for Summary Judgment; Particular Cases; Mortgages or Secured Transactions, Cases Involving

1. In mortgage foreclosure action, lender plaintiff moving for summary judgment has burden of proof to establish that non-moving party has failed to allege any facts that would establish a defense to foreclosure action.

2. Non-moving party may not establish genuine issues of material fact by making general denials unsupported by any facts.

3. Defendant-homeowners' general denials in response to Plaintiff-lender's Complaint alleging amounts unpaid and due, and Defendant's general statements that amounts claimed due are inaccurate, constituted admissions of allegations of default and nonpayment.

4. Defendant-homeowners' admissions and failures to properly deny allegations of default and of amounts due and owing warranted the granting of summary judgment in Plaintiff's favor.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION – LAW
No. 696 of 2013

Appearances:
Robert F. Manzi, Jr.,
Indiana, Pa., for the Plaintiff
Aurelius P. Robleto,
Pittsburgh, for the Defendant

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 Indiana First Bank, Plaintiff. The instant matter arises from a $99,000.00 commercial loan given by Plaintiff to Specialty Seal Group on July 30, 2012. To secure repayment of that loan, Defendants gave to Plaintiff a Mortgage on certain property located in Irwin, Westmoreland County, Pennsylvania. Defendants and Specialty Seal group have defaulted on the loan in that they have not made any payments in accordance with the terms and conditions of the loan and mortgage. Accordingly, Plaintiff initiated the instant Mortgage Foreclosure action by filing a Complaint. In its Complaint Plaintiff alleges that Defendants are obligated to the underlying debt, that Defendants are in default, and that Defendants are the owners of the property subject to the mortgage securing repayment of the debt. Plaintiff alleges that the amount due and owing, including principal, interest, late charges and attorney's fees is $104,366.19.

Plaintiff maintains the only issue before the Court is whether Defendants' Answer raises any legal or factual issue which provides a basis for denying Plaintiff its request

for summary judgment. Plaintiff suggests it does not. Defendants make no specific response whatsoever regarding Defendants' failure to tender monthly payments or the amounts due and owing. Instead, Defendants make general denials under Pennsylvania Rule of Civil Procedure 1029 that the amounts claimed due and unpaid are not accurate.

Regarding Defendants' response that the claimed amounts due and owing are not accurate, Defendants cannot simply invoke Pa. R.C.P. 1029 when Defendants, as well as Plaintiff, have knowledge, or should have independent knowledge of the mortgage account. Further, as case law assumes that Defendants have knowledge of their own mortgage account, the lack of specific, detailed responses to Plaintiffs specific averments of default constitutes an admission of the default and amounts due and owing upon the mortgage. See *New York Guardian Mortgage Corporation vs. Dietzel,* 362 Pa. Super 426, 524 A.2d 951 (Pa.Super 1987). The Pennsylvania Superior Court held in that case that when a mortgagor's response offered nothing to contradict mortgagee's claim, summary judgment for the mortgagee was proper. Moreover, the burden of proof with respect to a motion for summary judgment in a mortgage foreclosure action requires the moving party to demonstrate that the non-moving party has failed to allege any facts which would establish a defense to the foreclosure action. *Washington Federal Savings and Loan Assoc. v. Stein,* 515 A.2d 980, 981 (Pa.Super. 1986). General denials are insufficient when they are unsupported by any facts. Unsupported conclusory allegations cannot create genuine issues of material fact. *Phaff v. Gerner,* 303 A.2d 826 (Pa. 1973).

Plaintiff's complaint in mortgage foreclosure reveals Plaintiff's strict compliance with the requirements of Pa.R.C.P 1147. Defendants have admitted or failed to properly deny that the mortgage is in default, that they have failed to pay interest, and that the recorded mortgage is in a specified amount. Their response should be deemed an admission of default and an admission of the amounts due and owing. Accordingly, Plaintiff's preliminary objection is sustained.

ORDER OF COURT

AND NOW, this 25th day of November, 2013, upon consideration of Plaintiff's Motion for Summary Judgment and Defendants' Response, it is ORDERED and DECREED that Plaintiff's motion is GRANTED and that Summary Judgment in mortgage foreclosure is hereby granted in favor of Plaintiff and against Defendants, with damages assessed in the amount of $104,366.19, together with interest at the rate of $15.55 per day from September 28, 2012, and for foreclosure and sale of the mortgaged premises.

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

CENTRAL WESTMORELAND CAREER AND TECHNOLOGY CENTER EDUCATION ASSOCIATION, PSEA/NEA, COLLEEN CONKO, SABINE LYNN, DANIEL LUSK, MATTHEW MORRELL and JAMES MARK SCHOMING, Plaintiffs

V.

PENN-TRAFFORD SCHOOL DISTRICT, Defendant

SCHOOL LAW

Transfer of Entities Act; Program or Course Transfers; Obligation of School District to Hire Furloughed Teachers

1. Transfer of Entities Act does not obligate school district to hire teachers furloughed from vocational-technical secondary education program where school district withdraws its students from the program and enrolls them at existing classes within the district.

2. No "transfer" occurs under Transfer of Entities Act unless program or class was dismantled at one school and then reconstituted at another.

3. Transfer of Entities Act applies only where a program or class is transferred from one school to another, teachers were suspended as a result of the transfer, services of the teachers were needed to sustain the program or class transferred, and there were no suspended professional employees of district who were certificated to fill the position in the transferred program or class.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 1120 of 2011

Appearances:

Sarah A. Wines,
Hunker, Pa., for the Plaintiffs
Michael L. Brungo and Brian P. Benestad,
Pittsburgh, for the Defendant

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION OF THE COURT

By Richard E. McCormick, Jr., Judge:

This matter is before the Court on cross-Motions for Summary Judgment filed by both the Plaintiffs and the Defendant on a Complaint that seeks declaratory judgment under the Transfer of Entities provision of the Pennsylvania School Code of 1949, 24 P.S. § 11-1113 ("Transfer of Entities Act"). The relief sought is an Order directing the School District to refrain from hiring new professional employees classified as teachers to fill any and all secondary mathematics teaching vacancies, and to employ Plaintiffs Conko, Lynn, and Lusk to fill the secondary school mathematics teaching vacancies. The Defendant School District has responded that a transfer of the mathematics program from Central Westmoreland Career and Technology Center ("CWCTC") did not occur, because the School District placed the students, who formerly received math instruction at the CWCTC, into already-existing mathematics

classes in the school district. After a careful review of the arguments of counsel and the existing case law which interprets the statute, we find that a "transfer" did not occur under the Transfer of Entities Act.

The facts out of which this action arose are as follows. Plaintiffs Conko, Lynn, and Lusk were employed as mathematics teachers by CWCTC, a vocational-technical secondary education program. Beginning with the 2010-2011 school year, eight school districts who were sending students to CWCTC, including Defendant School District, advised CWCTC that they were going to provide mathematics instruction to their CWCTC students in their home district schools rather than at CWCTC. As a consequence, the CWCTC passed a resolution adopting a curtailment or alteration of its program and furloughed the three individual Plaintiff teachers. The CWCTC Executive Director, Dr. Luanne Matta, notified the School District of the curtailment and furlough pool on August 13, 2010, stating in a letter, "... I have sent notice to the affected employees that it is the position of the CWCTC that the Transfer of Entities Act, 24 P.S. § 11-1113, does not apply to this situation as an actual transfer of courses or program has not occurred as each member school district currently offers math courses. The only obligation upon CWCTC is to create the pool." (See Exhibit E of the Complaint)

On March 16, 2010, a Penn-Trafford High School mathematics teacher, Brian O'Neil, submitted a letter of resignation, and the School Board accepted his resignation effective April 23, 2010. The School District posted a job vacancy announcement to fill O'Neil's position, and the District conducted interviews of nine candidates, among whom were Plaintiffs Lusk and Lynn. John Cortazzo, a substitute teacher, was hired to fill the vacancy, remaining in the position as a long-term substitute mathematics teacher.

The mathematics vacancy for the 2010-2011 school year did not result from the School District's decision to teach mathematics to *all* of its students, but rather from the resignation of O'Neill. Furthermore, the mathematics curriculum did not change between the 2009-2010 and the 2010-2011 school years.

The Transfer of Entities Act governs the employment rights of furloughed teachers who were employed by a school entity when a program or class is transferred to another school entity:

§ 11-1113. Transferred programs and classes

> (a) When a program or class is *transferred* as a unit from one or more school entities to another school entity or entities, professional employees who were assigned to the class or program immediately prior *to the transfer* and are classified as teachers as defined in section 1141(1) and are suspended *as a result of the transfer* and who are properly certificated shall be offered employment in the program or class by the receiving entity or entities when services of a professional employee are needed to sustain the program or class transferred, as long as there is no suspended professional employee in the receiving

> entity who is properly certificated to fill the position in the transferred class or program.
>
> (b.l) Professional employees who are classified as teachers and who are not transferred with the classes to which they are assigned or who have received a formal notice of suspension shall form a pool of employees within the school entity. No new professional employee who is classified as a teacher shall be employed by a school entity assuming program responsibility for transferred students while there is:
>
> (1) a properly certificated professional employee who is classified as a teacher suspended in the receiving entity; or
>
> (2) if no person is qualified under clause (1), a properly certificated member of the school entity pool who is willing to accept employment with the school entity assuming program responsibility for transferred students.

For the following reasons, we find that in the case before us, the evidence does not establish that a "transfer" occurred, thus triggering an obligation on the part of the School District to hire one of the Plaintiffs to fill its vacancy, pursuant to the Transfer of Entities Act.

We find the case holding in *Hahn v. Marple Newtown School District,* 571 A.2d 1115 (Pa.Cmwlth. 1990), to be controlling. In *Hahn,* the Commonwealth Court held that the Transfer of Entities Act did not apply where a vocational-technical school furloughed three mathematics teachers after member school districts decided to teach mathematics to their own students. In rejecting the teachers' claims for relief, the Court set forth the legal requirements which must be met by the furloughed teachers as follows:

> In order for Appellees to establish a clear legal right, they must show that requirements of the Act were met as follows: (1) a math program or class was *transferred* from DCIU to Appellant School District; (2) Appellees were suspended as a result of the transfer; (3) services of Appellees were needed to sustain the program or class transferred; and (4) there were no suspended professional employees of Appellant's who were certificated in math to fill the position in the transferred program or class.
>
> *Hahn,* 571 A.2d at 1117.

Here, the School District withdrew its students from the math class at CWCTC and enrolled them in the existing math classes at the high school. The math class that was at CWCTC was not dismantled and then reconstituted at the High School. No additional classes or sections were added to the then-existing mathematics curriculum at the High School with this change. Accordingly, we find - as did the Commonwealth Court in *Hahn* - that because there was no program or course "transfer," there was no obligation on the part of the School District to hire one of the furloughed teachers.

Based upon the foregoing, the Defendant School District is entitled to judgment as a matter of law, and its Motion for Summary Judgment will be granted.

ORDER OF COURT

AND NOW, this 4th day of December, 2013, based upon the rationale contained in the foregoing Opinion, it is hereby **ORDERED** and **DECREED** that the *Motion for Summary Judgment* filed on behalf of the Plaintiffs is **DENIED** and the *Motion for Summary Judgment* filed on behalf of the Defendant is **GRANTED**. Judgment is entered in favor of the Defendant.

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

RONALD J. RENZONI and DARLENE M. RENZONI, husband and wife, Plaintiffs
V.
SHADY OAK ENTERPRISES, INC., t/d/b/a PREMIER FINANCE ADJUSTERS, PREMIER FINANCE ADJUSTERS INC., PREMIER MOTOR SALES, and PREMIER MOTOR SALES INC., and PHIL HOURICAN and ANDRENE T. HOURICAN, Defendants

CORPORATIONS AND BUSINESS ORGANIZATIONS
Contracts or Leases

In Pennsylvania, a contract signed by a corporate officer or agent does not have to be signed in the name of the corporation if the officer or agent had actual or apparent authority to bind the corporation and it was the intention of the parties to bind the corporation.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION – LAW
No. 153 of 2013

Appearances:
Nelson D. Berardinelli,
Greensburg, for the Plaintiffs
Peter H. Thomson,
Pittsburgh, for the Defendants

BY: GARY P. CARUSO, PRESIDENT JUDGE

DECISION AND ORDER

Before the Court are Preliminary Objections to Plaintiffs' Amended Complaint filed by Defendants, Shady Oak Enterprises, Inc., t/d/b/a Premier Finance Adjusters, Premier Finance Adjusters, Inc., Premier Motor Sales and Premier Motor Sales, Inc. (collectively referred to as "Shady Oak"), Phil Hourican and Andrene T. Hourican. Mr. Hourican is the President and a shareholder of Shady Oak, and Mrs. Hourican is a shareholder of Shady Oak.

Subsequent to Plaintiffs' Renzonis' formation of Shady Oak, the Houricans acquired from the Renzonis a one-half interest in Shady Oak, resulting in the Renzonis owning one-half of the outstanding shares and the Houricans owning one-half of the outstanding shares. On or about March 6, 2003, the Renzonis and the Houricans purchased real property located in Delmont, Pennsylvania in their individual names, with the Renzonis owning a one-half interest, and the Houricans owning a one-half interest in the real estate. The purchase of the Delmont property provided a place of business for Shady Oak.

Effective April 1, 2010, the Houricans purchased the Renzonis interest in the Shady Oak business, executing a Stock Purchase Agreement and Shady Oak, as agreed in the Stock Purchase Agreement, executed a Commercial Lease in favor of the Renzonis. The Stock Purchase Agreement provided that the Houricans intended to purchase the

Renzonis' interest in the Delmont property, as well as the Renzonis' stock in Shady Oak, constituting 50% of all outstanding shares. The Commercial Lease provided that Shady Oak is to pay the Renzonis $3,000.00 a month for continued use of the Delmont property.

The Delmont property was damaged by fire on August 20, 2011. On or about August 31, 2011, the Houricans, through Shady Oak, informed the Renzonis that Shady Oak purported to terminate the Commercial Lease pursuant to the "Damages to Premises" clause. The "Damages to Premises" clause permits either party to terminate the lease when damage renders the Delmont property "unleasable".

Plaintiffs pray for a declaratory judgment, declaring that:

- Pursuant to the Stock Purchase Agreement, Plaintiffs are entitled to receive 50% of any insurance proceeds that were or will be disbursed to Defendants as a result of damage to the Delmont property caused by the fire, less a reduction in one-half of the real estate insurance premiums and real estate taxes paid on the Delmont property by Defendants, from the effective date of the Stock Purchase Agreement up to the date of receipt of the insurance proceeds;
- Defendants were and continue to be required to designate Plaintiffs as named insureds on all insurance policies covering damage to the Delmont property;
- Pursuant to the Stock Purchase Agreement, Plaintiffs are entitled to an accounting from Defendants detailing the reduction in Plaintiffs' share of the insurance proceeds for real estate insurance premiums and real estate taxes paid on the Delmont property up to the date of receipt of any insurance proceeds as a result of the fire damage;
- Shady Oak is obligated to make lease payments in the amount of $3,000.00 per month for use of the Delmont property from August 20, 2011, to present.

Defendants argue that nothing in the Stock Purchase Agreement binds Shady Oak to do anything. It is Defendants' position that Shady Oak is not a party to the Stock Purchase Agreement because there is no reference to Shady Oak on the line below Mr. Hourican's signature. Although Shady Oak is a party to the Lease Agreement, Defendants maintain the Lease does not oblige Shady Oak to insure the property naming Renzonis as beneficiaries nor does it oblige Shady Oak to share any of the proceeds of any policy with the Renzonis. In order for it to be determined that the Stock Purchase Agreement and the Lease Agreement are, collectively, a single agreement, Defendants argue the Court would have to ignore the corporate form or pierce the corporate veil.

In Pennsylvania, a contract signed by a corporate officer or agent does not have to be signed in the name of the corporation if the officer or agent had actual or apparent

authority to bind the corporation and it was the intention of the parties to bind the corporation. 15 Pa.C.S. 1506 (a). In *Brauner v. Corgan,* 173 A.397, 399 (Pa. 1934), a lease was properly executed by Corgan as President of a particular corporation. Another separate agreement was also signed by Corgan without an indication as to whether he was signing in his corporate capacity. The lease explicitly referred to the other agreement. The Court held that the corporate execution of the lease was also a corporate execution of the other agreement.

If all of the averments in Plaintiffs' Amended Complaint are accepted as true, it is clear that it is impossible for the Court to resolve this action without addressing the rights and interests of Shady Oak. In the instant case, Shady Oak signed a $3,000.00 per month lease with the Renzonis for use of the Delmont property that is effective on the same date as the Stock Purchase Agreement, the terms of which are identical to the lease that Shady Oak is obligated to execute under the Stock Purchase Agreement. Shady Oak received the benefit of the bargain under the Stock Purchase Agreement through its use of the Delmont property under the terms of the Commercial Lease. Shady Oak's failure to repudiate or disavow the Stock Purchase Agreement until the commencement of this litigation, along with its enjoyment of the benefits flowing to it, are each indicative of Shady Oak's acquiescence to be bound by the terms of the Stock Purchase Agreement. Moreover, arguments regarding Shady Oak's liability should be set forth at the summary judgment stage and are inappropriate for preliminary objections, as Defendants have not yet answered Plaintiffs' averments. Accordingly, Defendants' preliminary objections are overruled.

ORDER OF COURT

AND NOW, this 23rd day of December, 2013, after careful consideration of the preliminary objections filed on behalf of the Defendants and after a review of the briefs filed in support thereof and in opposition thereto it is hereby ORDERED and DECREED that Defendants' preliminary objections are overruled.

Furthermore, the Court grants Plaintiffs' Motion to Compel Defendants to provide Plaintiffs with full and complete responses and all documents to Requests l.B, l.C, 3, 6 and 7 of Plaintiffs Request for Production of Documents within twenty days of the date of this Order.

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

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LARRY MUSSELMAN, Agent for the LLM HOLDINGS TRUST
d/b/a LADAVE FARMS/1876 BED & BREAKFAST, Appellant
V.
THE ZONING HEARING BOARD OF ALLEGHENY TOWNSHIP, Appellee

ALLEGHENY TOWNSHIP, Intervenor

ZONING AND PLANNING

Nonconforming Uses

1. "Pre-existing nonconforming use" arises when a lawful existing use is subsequently barred by a change in the zoning ordinance.

2. The right to maintain a pre-existing nonconformity is available only for uses that were lawful when they came into existence and which existed when the zoning ordinance took effect.

Judicial Review or Relief

When trial court takes additional testimony in case, the trial court is required to consider the case *de novo* rather than to determine if the zoning hearing board committed an abuse of discretion.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 1703 of 2013

Appearances:

Robert B. Liotta,
Lower Burrell, for the Appellant
Larry D. Loperfito,
Vandergrift, for the Appellee
Gary Falatovich,
Greensburg, for the Intervenor

BY: RICHARD E. McCORMICK, JR., JUDGE

OPINION

By Richard E. McCormick, Jr., Judge:

This matter is before the Court on an appeal from a decision of the Allegheny Township Zoning Hearing Board ("Appellee") filed by LLM Holdings Trust, Larry Musselman, Trustee, LaDave Farms and the 1876 Bed & Breakfast ("Appellants") denying Appellants' request to continue their use of property located at 325 Markle Road, Apollo, in Allegheny Township, as a "Bed and Breakfast" business. Appellants claim that they should be entitled to continue to operate as a "Bed and Breakfast" based upon the land use theory relating to non-conforming uses that holds that a lawful, non-conforming use will be permitted if the use predated the subsequent prohibitory restriction. *Hager v. W. Rockhill Twp. Zoning Hearing Bd.,* 795 A.2d 1104 (Pa.Cmwlth. 2002).

The sole issue presented is whether the Appellants' building and property was operated as a "Bed and Breakfast" prior to June 1997, when Appellee adopted

amendments to its zoning ordinance which authorized the conduct of "Bed & Breakfasts" as a conditional use in Appellants' zoning district.

The factual and procedural background of this case is as follows. The property in question is located in the R2 Agricultural/Residential Zoning District. In June 1997, Allegheny Township ("the Township") adopted amendments to its zoning ordinance that authorized the conduct of "Bed & Breakfasts" as a Conditional Use in the R2 Zoning District. The June 1997 amendments treated "Bed & Breakfasts" as an accessory use in the R2 zoning district, subject to the requirements contained in section 250-110A(45) of the Township's zoning ordinance. On June 1, 2012, the Township sent an "Enforcement-Notice of Violation of Allegheny Township Code" to the Appellants asserting they were operating a "Bed & Breakfast" on the property. At the time of the Notice, the Appellants had not obtained a zoning permit, occupancy permit, certificate of nonconformance or conditional use approval for the "Bed & Breakfast" operation.

A hearing was held and the issue presented to the Zoning Board was whether the Appellants were entitled to non-conforming use treatment. Testimony and evidence was presented including, but not limited to, the testimony of Susan Musselman, Appellant Larry Musselman's ex-wife. Following the hearing, the Board found that the Appellants' property had not been used or operated as a "Bed & Breakfast" prior to June 1997, and therefore they were not entitled to non-conforming use treatment.

Appellants filed an appeal; and Appellants were granted leave to present additional evidence to this Court in the form of further cross-examination testimony from Susan Musselman. Consequently, having taken additional testimony in this case, this Court is required to consider the case *de novo* and to determine the case on its merits, rather than determine whether the Board has committed an abuse of discretion. *Richman v. Zoning Board of Adjustment,* 137 A.2d 280 (Pa. 1958); *Pantry Quik, Inc. v. Zoning Board of Adjustment,* 274 A.2d 571 (Pa.Cmwlth. 1971).

The Allegheny Township Zoning Ordinance defines a "Bed & Breakfast" as follows:

"A single-family dwelling occupied by its owner as the owner's principal place of residence where no more than four sleeping rooms are offered for transient overnight guests for compensation and where the only meal served on the premises and included with the overnight accommodations is breakfast."

The Appellants presented the following evidence in support of their contention that the property had been used as a "Bed & Breakfast" before the 1997 amendments to the zoning ordinance. A sign was located on the property that read "Welcome, 1876 Bed & Breakfast." Mr. Musselman testified that he received cash, checks and credit cards from people staying on the property.

Susan Musselman testified in support of the Township's position. She said that she was aware that an individual resided in a room on the property between 1999 and 2003. She acknowledged five individuals – David and Debbie Musselman, James L. Stewart, Thomas Ludwick, and John Palmieri – who stayed overnight on the premises and had a meal, but she was unaware that any of them provided compensation in exchange for those accommodations. Although persons stayed overnight at the

property from time to time, those "guests" fell into three categories: (1) they were personal guests of the Musselmans; (2) the accommodations and meals were provided or bartered in exchange for services rendered; or (3) they were attending an annual family reunion. When confronted with federal tax returns that showed income from activities related to the principal business of "Buildings & Equipment Management, Sales & Service," containing the notation "B & B, Buildings," Ms. Musselman denied knowledge of the contents of the tax returns. In some instances, she said that she signed blank IRS Forms before they were completely filled in, and she explained that the notation "B & B" was in her ex-husband's handwriting. In other words, after she was questioned about the entries on the federal income tax returns, she steadfastly maintained that she was unaware of any income being derived from the operation of a "Bed & Breakfast" prior to June 1997.

Appellants presented a significant amount of evidence in an attempt to discredit and call into question Ms. Musselman's credibility. Among the evidence was her forgery of her ex-husband's signature on a check for $92,000; her destruction of Trust property when she drove vehicles through fences and into buildings; and her revelation of confidential documents without authorization. Each of these acts was committed within the context of a contentious divorce. After careful consideration given to this testimony, and having had the opportunity to observe Ms. Musselman's demeanor on the witness stand, we find her testimony that she was unaware of any income being derived from the operation of a Bed and Breakfast during the time she resided on the property to be credible.

The Appellants bears the burden of proof to provide substantial evidence as to the existence of a use prior to the enactment of the Ordinance at issue. Given the totality of the evidence presented, we find that Appellants have failed to satisfy that burden. Accordingly, the appeal from the Decision of the Allegheny Township Zoning Hearing Board is denied.

ORDER OF COURT

AND NOW, to wit, this 24th day of February, 2014, based upon the rationale contained in the foregoing Opinion, it is hereby **ORDERED** and **DECREED** that the appeal from the Decision of the Allegheny Township Zoning Hearing Board is **DENIED**.

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

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PENNSYLVANIA DEPARTMENT OF TRANSPORTATION,
Respondent/Appellant
V.
JAMIE ARMSTRONG, Petitioner/Appellee

AUTOMOBILES
Administrative Procedure In General

1. A petition for the restoration of motorist's driving privileges, pursuant to 75 Pa.C.S.A. § 1775, is not a license suspension appeal, but a separate proceeding that allows motorist to pay off debts with monthly installments.

2. PennDOT lacks standing to challenge a petition under 75 Pa.C.S.A. § 1775, as the proper parties to such petition are the creditors who hold the unpaid judgments that resulted in the suspension of the petitioner's license.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION – LICENSE SUSPENSION
No. 5226 of 2013

Appearances:
William J. Kuhar, Jr.,
Pittsburgh, for the Respondent/Appellant
Timothy P. Dawson,
Adamsburg, for the Petitioner/Appellee

BY: DANIEL J. ACKERMAN, SENIOR JUDGE

OPINION OF COURT PURSUANT TO RULE 1925(a) OF THE PENNSYLVANIA RULES OF APPELLATE PROCEDURE

AND NOW, to wit, this 24th day of February, 2014, the Court hereby issues the following Opinion in support of the Order appealed from, indicating those places in the record where such reasons for the court's rulings can be found, pursuant to Pennsylvania Rule of Appellate Procedure No. 1925(a).

The Pennsylvania Department of Transportation (PennDOT) appeals this Court's Order, dated December 13, 2013, in which we granted Petitioner's application for leave to satisfy three (3) outstanding judgments by making monthly installment payments, pursuant to Section 1775(a) of the Pennsylvania Motor Vehicle Code. The relevant factual and procedural background of this case is as follows.

As a result of her involvement in a motor vehicle accident, three money judgments were entered against the Petitioner in 2006 and 2007. Under 75 Pa.C.S. § 1772(a), "The department [of transportation], upon receipt of a certified copy of a judgment, shall suspend the operating privilege of each person against whom the judgment was rendered except as otherwise provided in this section and in section 1775 (relating to installment payment of judgments)." Because Petitioner failed to satisfy the judgments, Petitioner's privilege to operate a motor vehicle in Pennsylvania was

suspended. Although the Commonwealth established that it sent the Petitioner official notices of the suspension -- dated and mailed on September 19, 2006, November 28, 2007, and December 18, 2007 – Petitioner did not receive the notices. She only recently became aware that she had a suspended driver's license after a police officer stopped her for operating a motor vehicle with a cracked windshield. (See Transcript of Proceedings, December 13, 2013, pp. 5, 10-11.)

Upon discovering that she had a suspended driver's license, Petitioner filed an "Application For Installment Payments" under Section 1775(a) of the Motor Vehicle Code. The matter was captioned "Pennsylvania Department of Transportation vs. Jamie Armstrong" and filed as an original pleading in a new action. Although it was erroneously captioned "Civil-License Suspension," this was not a license suspension appeal in the traditional sense, but an Application under Section 1775, which provides as follows:

1775. Installment payment of judgments.

(a) Order authorizing installment payment.—A judgment debtor, upon due notice to the judgment creditor, may apply to the court in which the judgment was rendered for the privilege of paying the judgment in installments and the court, in its discretion and without prejudice to any other legal remedies which the judgment creditor may have, may so order and fix the amounts and times of payment of the installments.

(b) Suspension prohibited during compliance with order.—The department shall not suspend a driver's operating privilege and shall restore any operating privilege suspended following nonpayment of a judgment when the judgment debtor obtains an order permitting payment of the judgment in installments and while the payment of any installment is not in default, provided that the judgment debtor furnishes proof of financial responsibility.

(c) Suspension for default in payment.—In the event the judgment debtor fails to pay any installment as specified by the order, then, upon notice of the default, the department shall suspend the operating privilege of the judgment debtor until the judgment is satisfied as provided in this chapter.

Petitioner's attorney presented the Application and a proposed Order (again erroneously referring to the underlying procedural mechanism as a "Statutory Appeal") to the Honorable Gary P. Caruso in the Civil Division of the Court of Common Pleas, at which time Judge Caruso temporarily stayed the suspension of Petitioner's driving privileges, pending the outcome of a hearing that was scheduled for December 13, 2013, before the undersigned, on the merits of the Application. Counsel for PennDOT and all three judgment creditors were given notice of the intent of the Petitioner to seek relief from the Court with this Application. (See Transcript of Proceedings, December 13, 2013, p. 10, 19-22.)

No representatives from any of the three judgment creditors either objected or appeared at the hearing held on December 13, 2013. In addition, in an abundance of caution, this Court included the following in our Order of December 13, 2013:

> "The Prothonotary is directed to send notice of this Order of Court to each of the judgment creditors who will be given a period of sixty (60) days in which to file any objection that they may have in regard to the amount of the installment payments."

Sixty days have passed and no objections have been filed by any creditor.

PennDOT's attorney, Ryan Kammerer, Esq., appeared at the hearing and initially moved to quash the action, maintaining that this Court did not have the authority to grant the relief requested. (See Transcript of Proceedings, December 13, 2013, p. 10.) After considerable discussion on the record, this Court determined that the Court of Common Pleas, as the Court in which the judgments were entered, is the appropriate venue for this type of proceeding, and we proceeded. (See Transcript of Proceedings, December 13, 2013, pp. 13-14.) Mr. Kammerer then suggested provisions, with reference to the applicable statute, which the Court might incorporate in its Order granting the Petitioner's relief. (See Transcript of Proceedings, December 13, 2013, pp. 15-16.) In addition, Mr. Kammerer conceded, "Honestly, the Department of Transportation doesn't, for lack of a better word, have a bone in the fight – a dog in the fight over this thing." (See Transcript of Proceedings, December 13, 2013, pp. 25-26.)

Satisfied that the judgment creditors had received notice of the Application, this Court granted Petitioner's Application to pay off her outstanding judgments by make monthly installment payments of $35 to each of the three creditors. In addition, this Court gave explicit permission to each of the creditors to file objections to the Order within sixty (60) days, thereby protecting their due process rights and ensuring their opportunity to be heard.

Consequently, under section 1775(b), PennDOT "*shall not* suspend a driver's operating privilege and *shall* restore any operating privilege suspended following nonpayment of a judgment when the judgment debtor obtains an order permitting payment of the judgment in installments and while the payment of any installment is not in default…." With the entry of the Order permitting installment payments, PennDOT is required to restore Petitioner's suspended operating privileges.

In summation, PennDOT's allegation of error, insofar as it refers to this matter as a *nunc pro tunc* appeal, is inaccurate. This was not a license suspension appeal, but a separate proceeding under section 1775 that allows for a judgment debtor to pay off her debts with monthly installment payments. When she is allowed to do so, one of the effects – in addition to the creditor getting paid – is that her operating privileges are restored.

Furthermore, PennDOT's contentions that this Court did not have the authority to enter its Order because (1) the creditors were not given notice, and (2) three separate applications for relief relating to each judgment should have been filed, are meritless. As Commonwealth Attorney Kammerer said at the hearing, PennDOT does not have

a dog in this fight; in other words, PennDOT does not have the requisite standing to raise these issues.

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

JAWDAT A. NIKOULA and ANTOINETTE N. NIKOULA,
Husband and wife, Plaintiffs
V.
SCOTT S. VALERIO, Defendant

REAL ESTATE

Adverse Possession; Possession and Dominion Over Property; Character of Property As Woodland; Elements Necessary to Satisfy Burden of Proof

1. One who claims title to real estate by adverse possession must prove by clear evidence that he had actual, continuous, exclusive, visible, notorious, distinct, and hostile possession of the land for twenty-one years.

2. Actual possession of land means dominion over property, the requirements of which will necessarily vary based on the nature of the property.

3. A person establishes actual possession of a woodland by residence or cultivation of a part of the tract of land to which the woodland belongs.

4. Evidence of Defendant's activities on disputed property, including mowing, seeding, planting shrubs, and burying pets, was sufficient to establish possession of the disputed property by showing physical ownership and dominion.

5. Open visible and notorious element of adverse possession satisfied by evidence that Defendant operated a commercial business open to the general public on the disputed property, in which pets were buried with highly visible markers placed.

6. Element of continuous possession satisfied by evidence that Defendant and predecessors regularly cut grass, removed trees, and maintained the property in excess of twenty-one years.

7. Defendant's exclusive possession of disputed property is established by evidence that Defendant regularly and continuously undertook activity in the disputed area, of a type that would characterize an owner's use, to the general exclusion of others.

8. Evidence that record owner never gave Defendant permission to use the disputed area is sufficient to establish element of hostile possession.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW
No. 75 of 2011

Appearances:
Bernard P. Matthews, Jr.,
Greensburg, for the Plaintiffs
Donald J. Snyder, Jr.,
Latrobe, for the Defendant

BY: ANTHONY G. MARSILI, JUDGE

OPINION

BY THE COURT:

A non-jury trial was held on August 14, 2013 in this ejectment and trespass action filed by the plaintiffs, Jawdat and Antoinette Nikoula against the defendant, Scott Valerio. This matter arises from a property line dispute relating to contiguous properties located between the southerly side of Route 136 (also known as West Newton Road) and the Radebaugh Branch of the former Pennsylvania Railroad, in Westmoreland County.

Following the conclusion of the non-jury trial, the Court entered an Order dated August 14, 2013, directing counsel for the parties to submit Findings of Fact, Conclusions of Law and a Proposed Order of Court to the undersigned, on or before September 13, 2013. The Court has received and reviewed the submissions of the parties, and hereby issues the within Opinion and Order of Court.

The Court heard testimony from the parties and a witness at trial. Defendant, Scott Valerio, called by plaintiff's counsel, as on cross, testified before the Court. Counsel for plaintiff then called plaintiff, Jawdat Nikoula to testify at trial. Counsel for defendant called a witness, defendant's wife, Laura Valerio, to testify at the trial. The parties stipulated to all Exhibits at trial. The Exhibits included: Plaintiff's Exhibits 1 through 19 and Defendant's Exhibits A through I. Further, the parties stipulated that the testimony of Joseph Valerio, Gerard Valerio and David Valerio would not be presented by counsel for defendant, as it would be cumulative, and essentially the same as defendant, Scott Valerio's testimony regarding the maintenance and mowing of the disputed property. The multiple exhibits that were entered into evidence at the non-jury trial, included, but were not limited to, the deeds to the properties, surveys, overhead aerial views, burial plot records for the pet cemetery, letters and numerous photos.

The Court also conducted a view of the subject disputed area of the property on August 14, 2013, with the attorneys of record and the parties. The Court has also weighed and considered the information received via said viewing of the property in issuing the within Opinion. After reviewing the testimony and evidence in this matter and for the following reasons, the Court concludes that defendants have proven, by clear and convincing evidence, their affirmative defense in this matter, by proving all elements of adverse possession as to the disputed property.

This matter involves a dispute between the parties as to the boundary line between their contiguous properties located in Hempfield Township, Westmoreland County. Plaintiffs acquired their parcel of property (hereinafter, "Nikoula" property) by Deed dated November 9, 1998, as recorded in Deed Book Volume 3635, Page 375, in the Office of the Recorder of Deeds in Westmoreland County. (See: Plaintiff's Exhibit 13). As per information from the pleadings in this matter, Plaintiffs acquired this 14.322 acre parcel of property from Plaintiff/wife's parents, who had previously acquired the property by virtue of a Deed dated January 27, 1956, and recorded in Deed Book Volume 1575, Page 6, in the Office of the Recorder of Deeds in Westmoreland County. (See: Plaintiff's Exhibit 13). The Nikoula property was a tract that was conveyed from a larger property owned by the Kepples in 1956 to the Nikoulas' predecessors in title. (See: Plaintiffs' Exhibit 13). It is also noted that there was another Deed[1] in the Nikoula's chain of title.

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[1] A Deed dated May 25, 1973, conveyed the same tract or parcel (Nikoula property) from Joseph E. Nader and Joan Nader, his wife, to Joseph E. Nader and Joan Nader, his wife, stating that the purpose of said Deed was to revert the real estate herein to acreage. (See: Plaintiffs' Exhibit 13). This Deed was dated May 25, 1973 and recorded in Deed Book Volume 2127, Page 175, in the Office of the Recorder of Deeds in Westmoreland County.

Defendant acquired his parcel of property (hereinafter, referred to as "Valerio" property) from his parents, David and Betty Lou Valerio, by Deed dated July 1, 1995, in Deed Book Volume 3352, Page 175, in the Office of the Recorder of Deeds in Westmoreland County. (See: Defendant's Exhibit E). Defendant's parents, David and Betty Lou Valerio acquired the land from the Estate of Elizabeth R. Kepple, by Deed dated May 6, 1963, and recorded in Deed Book Volume 1857, Page 751, in the Office of the Recorder of Deeds in Westmoreland County. (See: Plaintiffs' Exhibit 11).

The Valerio property contains 2.068 acres, and was marked as Parcel "A" in the Valerio Subdivision, prepared by Robert T. Regola, dated May 1995, and recorded in Plan Book Volume 90, Page 2274, in the Office of the Recorder of Deeds in Westmoreland County. (See: Plaintiffs' Exhibit 10). The Valerio parcel, contains a pet cemetery business, known as "Pet Haven Cemetery" that was started in 1969 by David Valerio. (See: Trial Transcript, p.38; and Defendant's Exhibit A). In 1995, Defendant Scott Valerio acquired the business from his father, David Valerio. (See: Defendant's Exhibit B).

The tracts of land conveyed to Plaintiffs and Defendant were both subdivided from the same larger tract known as the "Kepple" tract. The Plaintiffs' parcel is the senior tract, having been sold in 1956; with Defendant's tract being conveyed later, by deed in 1963. (See: Plaintiff's Exhibits 11 and 12). In 2003, Tri-County Engineering performed a survey using the deed description for the 1956 conveyance of the Nikoula property from the Kepples to the Nikoulas' predecessors in title and first noted the discrepancy in the boundary lines. Thereafter, Plaintiffs sent letters dated August 5, 2003 and November 6, 2003, to Defendant, to alert him to the issue. (See: Plaintiffs' Exhibits 17, 18 and 19).

Defendant then hired a surveyor, Richard R. Bourg, Jr., of Regola and Associates, in November of 2004, to conduct a boundary retracement survey (See: Plaintiff's Exhibit 15). Mr. Bourg, in a letter to defendant dated December 13, 2004, confirmed that there was a boundary overlap, or discrepancy, as initially indicated in the survey completed by John Vozel of Tri-County Engineering. (See: Plaintiff's Exhibits 14, 15 and 16). Mr. Bourg prepared a Deed Plot dated November 11, 2004 as to the discrepancy. (See: Plaintiff's Exhibit 16).

Based upon the above information, in 2011, Plaintiffs filed this lawsuit as an action with two Counts, Count I for Ejectment, and Count II for trespass and injunctive relief[2]. At trial, counsel for the parties agreed that the parties do not dispute the boundary line as set forth in the survey of Tri-County Engineering, dated January 21, 2010, a copy of which was marked as Plaintiff's Exhibit 2. Accordingly, plaintiffs have set forth a prima facie case in support of ejectment and trespass. The defense asserted to both Count I for Ejectment and Count II for trespass by the defendant is adverse

[2] Plaintiffs' Count II of the Complaint is for Trespass/Injunctive Relief, wherein Plaintiffs demand that the Defendant remove the pet cemetery that is on plaintiffs' property; that the defendant be permanently and forever enjoined and restrained from encroaching upon plaintiffs' property; that the plaintiffs be awarded damages for the said trespass and for restoration of plaintiffs' property following defendant's removal of the said artificial edifices; and that defendant shall pay the plaintiffs all sums he received from customers for the pet grave markers placed on plaintiffs' property.

possession of said disputed property. The trial was focused on the issue of adverse possession and whether defendant met his burden of proving all elements therein.

It has long been the rule of this Commonwealth that one who claims title by adverse possession must prove that he had actual, continuous, exclusive, visible, notorious, distinct, and hostile possession of the land for twenty-one years. *Conneaut Lake Park v. Klingensmith,* 66 A.2d 828 (Pa. 1949). Each of these elements must exist; otherwise, the possession will not confer title. *Piston v. Hughes,* 62 A.3d 440, (Pa. Super. 2013). Adverse possession is an extraordinary doctrine which permits one to achieve ownership of another's property by operation of law. Accordingly, the grant of this extraordinary privilege should be based upon clear evidence. *Showalter v. Pantaleo,* 9 A.3d 233 (Pa. Super. 2010), citing *Edmondson v. Dolinich,* 453 A.2d 611 (Pa. Super. 1982).

In general, actual possession of land means dominion over the property. *Recreation Land Corp. v. Hartzfeld,* 947 A.2d 771 (Pa. Super. 2008), citing *Bride v. Robwood Lodge,* 713 A.2d 109 (Pa. Super. 1998). The requirements for "actual" possession of a property will necessarily vary based on the nature of the property. Id. Our case law has developed a rather strict standard for proving adverse possession of woodland. Id. A person establishes actual possession of a woodland by 'residence or cultivation of a part of the tract of land to which the woodland belongs'." Id., *Bride,* supra. The issue of whether a parcel of land is "woodland" appears to be a threshold factual question for the trial court to decide in the first instance. Id. (See also *Piston v. Hughes,* 62 A.3d 440, 443 (Pa. Super. 2013), quoting, *Bride, supra, at 112,* (stating that "[w]hat constitutes adverse possession depends, to a large extent, on the character of the premises.").

Based upon the foregoing, the Court initially must make a threshold factual determination as to the character of the subject property, in particular the disputed strip of land at issue. Plaintiffs have owned their tract for 15 years, however they have never resided on said property, as the property contains approximately 14 acres of unimproved and undeveloped land. It should be noted that the land near the disputed area is unenclosed by any fence or other type of enclosure or barrier. It is undisputed that there are no structures or any type of residence on said land. It is clear from the Court's view and the evidence at trial (See: Defendant's Exhibits J1- J7; and Plaintiffs' Exhibit 1), that the majority of the subject 14 acre property contains thick trees and woods.

In this case, based upon the evidence at trial, and the Court's first-hand view of the subject property, the subject property is located along a very busy two-lane highway, with both commercial businesses and residences along both sides of said highway. This is not a case of vast forested land where actual possession of the whole is called into question. As noted, although it appears that the plaintiffs' larger tract currently contains thick trees and woods, the disputed tract constitutes only a tiny portion of plaintiff's overall tract and contains no woodlands. Finally, plaintiff's land did not always contain large trees, similar to any type of woodland. In fact, the Court notes that Defendant's clear testimony at trial, indicated that in the 1970s, when he was a child growing up on said property, he recalls the neighboring property as "an

overgrown farm pasture with bushes and shrubs." (TT. p. 79). Further, Defendant recalled riding dirt bikes and ATVs along the property line to get to baseball practice in Carbon. (TT. pp. 78-79).

Moreover, the disputed subject property, or strip of land at issue in this case, constitutes a miniscule portion of plaintiffs' 14+ acre parcel, and measures approximately 27.57 feet in width at the widest point, according to the Tri-County Engineering LLC, Survey dated January 20, 2010. Most importantly, said disputed strip of land is clearly and unequivocally *not* woodland-type property. Therefore, this Court finds that the subject disputed land does not constitute woodlands, such that defendant would be subject to more stringent standard, in reference to proving "actual" possession.

This case is unique. Even the portion of the tract that contains thick trees and shrubs, is not a typical 50 to 100 acre tract of woodlands located in a remote, non-populated, hard-to-access rural region; rather, it is a thick area of trees on land that is adjacent to a busy highway, with the surrounding area containing many commercial businesses and residences.

ACTUAL POSSESSION

The evidence at trial showed that defendant's parents, David and Betty Valerio constructed a house on the original Valerio property in 1963 and moved into said house in November 1963. (Def. Exh. D, at pp. 11-12). Beginning in 1963, David Valerio removed trees and cut the grass on his property, including within the disputed area. (Def. Exh. D, pp. 12-13). David Valerio also seeded and landscaped the entire pet cemetery area including the disputed area from 1969 until he sold it in 1995 to his son, defendant herein. (Def. Exh. D, pp. 18-21). David Valerio would mow the entire pet cemetery property with his tractor, including the disputed area, approximately once per week, and his wife, used a push mower to mow in between the graves. (Def. Exh. D, at pp. 12-13, 20). David Valerio also planted shrubs and placed white concrete benches and patio stones in the disputed area. (Def. Exh. D, at pp. 42-43; 81-82).

With regard to Defendant Scott Valerio's actual possession of the disputed property, the Court notes that between 1977 and 2013, defendant continuously mowed the property at the pet cemetery including within the disputed area (Trial Transcript, pp. 42-43). In 1977, defendant began mowing said property at the age of 12. He continued to mow the property until he left his parent's home in approximately 1991. In 1991, defendant moved out of his parents' home but continued to cut the grass at the pet cemetery, and in the disputed area. (TT, pp. 31, 42). In 1995, Defendant purchased the property and the business from his father, David Valerio, and mowed the property from that time forward. (Def. Exh. B, E). It has been stipulated that defendant's older siblings, three brothers, David Valerio, Jr., Gerard Valerio and Joseph Valerio also maintained and mowed the original Valerio property. (TT. p. 10; Def. Exh. D, at p. 20).

Defendant also planted shrubs, placed benches, placed pet graves and continuously restored the surface of the disputed area since 1977, by seeding and remediating the land, due to traversing the land for burials. (TT. pp. 42-43; 70-72). Defendant's wife, Laura Valerio, also witnessed defendant, and assisted defendant, beginning in 1986 in planting shrubs in the disputed area and placing concrete benches there. (TT. pp. 57-

58). Defendant and his brothers assisted their father, David Valerio, in the 1970's in grading the pet cemetery area and in measuring and laying out cemetery plots that included the disputed area. (TT. pp. 70-71). Importantly, defendant's pet cemetery business has animal graves and some graves have markers within the disputed area, as set forth in Plaintiff's Exhibits #1, 2 and 3. Therefore, equally relevant to the issue of actual possession, Defendant and Defendants' parents buried pets at the pet cemetery continuously from 1969 until the present time.

As noted, all of the aforementioned activities described were done first by David and Betty Valerio, and later, by their son, defendant, Scott Valerio. Therefore, the actual possession by defendant Scott Valerio may be "tacked on" to the actual possession by his predecessors, also his parents, David and Betty Valerio, due to the fact that there is privity between them. The possession of successive occupants may be tacked, but only where there is privity between them. *Glenn v. Shuey,* 595 A.2d 606, at 612, (Pa. Super. 1991), citing *Wittig v. Carlacci,* 537 A.2d 29 (1988). For our purposes, "privity" refers to a succession of relationship to the same thing, whether created by deed or other acts or by operation of law. Id. The *Wittig* court noted: "Each predecessor must have claimed title to the property in dispute, and in transferring to his successors must have purported to include it." Id. Here, based upon the foregoing, it is clear to this Court that there was privity between David and Betty Valerio and their son, Scott Valerio, vis-à-vis their activities on the disputed property, in particular mowing said land, seeding and planting shrubs, and burying pets on the land, all of which clearly demonstrated defendants' actual possession of said disputed property by showing physical ownership and dominion of said disputed property.

OPEN, VISIBLE AND NOTORIOUS

The Court will now analyze the element of adverse possession referred to as open, visible and notorious. To establish adverse possession, possessory acts must be sufficiently visible and obvious to put a reasonable owner on notice that her property is being occupied by a non-owner with the intent of claiming possessory rights. *Glenn,* supra. The record owner is "charged with seeing what reasonable inspection would disclose."[3]

As noted extensively above, in this case, defendant and defendant's parents as predecessors before him, continuously mowed and maintained the area of the disputed property, and further, operated a commercial business that year by year, began to grow and spread into the disputed area, by the expansion of burial plots or graves for pets. This business was open to the public; and the customers who purchased burial plots and/or the general public were permitted to come onto defendant's property at any time to visit the pet graves and place flowers. (TT. pp. 38-39). In other words, there was unrestricted access to the pet cemetery property, including the disputed area of land at issue in this case. Based upon the unique facts of this case, the Court finds that there could not be a situation that was **more** open and notorious than what occurred in this case, i.e., the act of burying pets on defendant's property, with highly visible markers, benches and memorials, which over time, naturally gravitated towards the perimeter of defendant's land, into the disputed property area. (See: Plaintiff's Exh. 3).

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[3] William B. Stoebuck & Dale A. Whitman, *The Law of Property* §11.7, at 856 (3d ed. 2000).

The evidence at trial indicated that even though plaintiffs took ownership of their property in 1998, they had never been on their property in the area of the disputed property until the parties viewed the property with the Court *on the day of trial, as part of this proceeding*. (TT, pp. 47; 49-50). **More importantly, plaintiffs presented no evidence to dispute the testimony of the defendant and his predecessors in title as to any activity that defendant or his predecessors may have undertaken in the disputed area.** (TT, pp. 52-53).

The Court is not persuaded by plaintiff's argument that they did not have access in any manner to the subject disputed area of their property, due to the denseness of the trees and the location of said property. This Court agrees that the property, in particular the disputed area of the property is in a somewhat unique location; however, as noted previously, the disputed area of the property was, at all times, from 1969 forward, open to the general public as a cemetery where people could go and visit their pets. There was nothing preventing plaintiffs from accessing the disputed area of the property, in particular once they became aware of a discrepancy in the property line in approximately 2003. In fact, plaintiffs waited another eight years before instituting litigation as to the disputed property line. In the meantime, defendant continued his pet cemetery business. (See: Plaintiff's Exhibits 4, 5, 6, 7, 8, and 9). The fact that plaintiffs never chose to inspect or view their property during their fifteen years of ownership (prior to 2003) should not be held against defendant and his claim for adverse possession.

Based upon the foregoing, the Court had determined that defendant has met the burden of proving that defendant and defendant's predecessor's use of the land as a pet cemetery and mowing and other activities were open, visible and notorious in this matter.

CONTINUOUS

In order for adverse possession to ripen into title, it is necessary to show that such possession has been continuous and uninterrupted for the full statutory period. *Glenn,* supra, citing *Tioga Coal Co. v. Supermarkets General Corp.,* 433 A.2d 483 (1981). In this Commonwealth, as in most jurisdictions, the statutory period is twenty-one years. See: 42 Pa.C.S.A. §5530(a)(1). The law does not require that the claimant remain continuously on the land and perform acts of ownership from day to day. Id. A temporary break or interruption, not of unreasonable duration, does not destroy the continuity of the adverse claimant's possession. Id. Moreover, the activity on the property need not occur every day for it to be "continuous" for purposes of adverse possession. *Ewing v. Dauphin County Tax Claim Bureau,* 375 A.2d 1373 (Pa. Comwlth. 1977).

From 1963 to present, defendant and/or his parents and siblings regularly cut the grass, removed trees, and generally maintained the property up to and along a property line that they believed was the correct property line. The disputed area was a grassy area that was part of a lot that contained defendant's family's residence until the area was subdivided from the house property in 1995, pursuant to a plan of subdivision. (See: Plaintiff's Exh. 10). From 1969 to present, defendant and his family operated a pet cemetery on their property and undertook improvements and regular maintenance

on the property, including the disputed area. Defendant and his predecessors undertook said activities, uninterrupted, since at least 1963. It was not until 2003 that plaintiffs or any other predecessor in title ever raised any objection.

In this case, the Court previously discussed the issue of privity and finds that it existed between defendant's predecessors, his parents and defendant himself. As previously mentioned, defendant's parents, David and Betty Valerio acquired their Deed in 1963. The activities described by David Valerio in his deposition testimony established that he immediately began mowing and maintaining the property. When David Valerio's usage of the disputed area of the property is tacked onto defendant Scott Valerio's usage of the same disputed area of the property, the Court finds that this easily exceeds the requisite twenty-one year statutory requirement for establishing adverse possession, whether beginning in 1963 or 1969, at the start of the pet cemetery business.

DISTINCT AND EXCLUSIVE

To constitute distinct and exclusive possession for purposes of establishing title to real property by adverse possession, the claimant's possession need not be absolutely exclusive. *Brennan v. Manchester Crossings, Inc.,* 708 A.2d 815 (Pa. Super. 1998), citing *Reed v. Wolyniec,* 471 A.2d 80 (Pa.Super. 1983). Rather, it need only be a type of possession which would characterize an owner's use. Id. For example, in *Reed*, the appellees, Robert and Audrey Reed, asserted title by adverse possession to a lot adjacent to their residence. The Reeds had maintained the lot by cutting the lawn and by planting and maintaining thereon various shrubbery and flowering plants. In affirming the trial court's determination that the Reeds had established title to the lot by adverse possession, Judge Wieand, writing for a unanimous court, opined:

> Thus, the exclusive character of appellees' [the Reeds] possession was not destroyed because the other persons occasionally passed unobserved over the lot. It was enough that appellees' possession was to the general exclusion of others and that they remonstrated with persons who attempted, without permission, to use the land. *Reed,* at 84.

In this case, defendant has clearly shown that he and his predecessors regularly and continuously undertook activity in the disputed area, including grass cutting and reseeding, that would be typical of someone owning the property, and it was to the general exclusion of others. Therefore, the Court finds that defendant has established this element of adverse possession by clear and convincing evidence.

HOSTILE

The word "hostile" as an element of adverse possession does not mean ill will or actual hostility, but simply implies assertion of ownership rights which are adverse to those of the true owner and all others. *Brennan v. Manchester Crossings, Inc.,* 708 A.2d 815 (Pa. Super. 1998), citing *Schlagel v. Lombardi,* 486 A.2d 491 (1984). Simply stated, the possession must be "such as to import a denial of the owner's title." Id., 3 Am.Jur.2d §50, at 143-144. If all elements of adverse possession claim, other than hostility, have been established, hostility element is implied. Id., *Schlagel,* at 495.

(See also: *Tioga Coal Co. v. Supermarkets General Corp.,* 546 A.2d 1 (Pa. 1988); *Palac v. DiSanto,* 622 A.2d 378 (Pa. Super. 1993); *Myers v. Beam,* 713 A.2d 61 (Pa. 1998)).

Plaintiffs argue that because the defendant mistakenly believed (because of his incorrect Deed) that the subject property was rightfully his, therefore, defendant's alleged ownership cannot be hostile. This Court disagrees. Adverse and hostile means that the possessor intends to take and use the subject property as his or her own to the exclusion of all others. In other words, the possessor behaves in a manner that demonstrates, as to the general public and all others, "this property is mine". This is exactly what defendant did. This Court has determined that it matters not whether the possessor's attitude is, "I am going to use this property as my own and do not care that someone else says it is his property", or if the possessor simply mistakenly believes that it is lawfully his property and therefore treats it as his own.

The facts of this case are not silent as to the element of hostility. The evidence at trial indicated that plaintiffs never gave permission for defendant or his predecessors in title to use the disputed area. (TT, pp. 54, 62). In fact, defendant never received permission from anyone to use the disputed area. (TT, p. 77).

The evidence did show that defendant, and his parents, as predecessors in title, were under the false impression, beginning in. 1963, that they owned the disputed area. In fact, the disputed area, by all accounts, was used by no one other than defendant, his siblings and his parents before him. The evidence at trial demonstrated, clearly and convincingly, that defendant and his parents, treated the property in the disputed area as if they owned it, i.e., they mowed the area continuously on a regular basis, and seeded the land, to remediate it, based upon the constant grave site burials for pets. In addition, defendant regularly planted shrubs and placed concrete benches on the property. And, of course, defendant operated his commercial business or pet cemetery on said property, and buried pets on his property, even in the disputed area itself. This Court has already indicated how said activities satisfied the open, visible and notorious element of adverse possession. In other words, the actual physical facts of the possession by defendant and his predecessors were present in this case continuously from 1963 to the present time. It is true, however, as indicated previously herein, that in 2003, plaintiff notified defendant of the discrepancy in the boundary line. Per defendant's testimony, this was the first notification of any such discrepancy. (TT. p. 34). Based upon the foregoing, the Court finds that the element of hostility has been established by clear and convincing evidence by defendant in this matter.

In reviewing the evidence in this case, the Court has reviewed the credibility of the parties. As the fact finder, the court is entitled to assess the credibility of the parties. *Millili v. Com., Dep't of Transp.,* 745 A.2d 111, 113 (Pa.Cmwlth. 2000). Overall, the court accepts the testimony of the defendant Scott Valerio, as well as the deposition testimony of David Valerio, in this matter, as being persuasive in reference to their respective ownership of the property and their activities in maintaining the property. The testimony of defendant and defendant's wife and defendant's father was highly detailed as to all of their respective activities on the subject property since 1963. In

particular, the Court was persuaded by defendant's testimony in his recollection and memories of living on the property, and maintaining the property as a teenager and thereafter, in his early adult years. The defendant has essentially spent his entire life on this property and clearly helped from a very early age in its maintenance and upkeep. Defendant went on to acquire the property and the family business, making it his life's work. Finally, defendant did not dispute the manner in which he learned of the boundary line dispute; but indicated his sincere and genuine belief as to his true ownership of said disputed area. The court found his testimony to be credible and persuasive. Finally, the Court finds that, while the Plaintiff's testimony was credible, he lacked knowledge of the history of activities on the subject property, and was unable to counter defendant's testimony.

Accordingly, the following Order of Court is hereby entered, as follows:

ORDER

AND NOW, this 28th day of October, 2013, after conducting a non-jury trial in the above matter, and upon careful consideration, and, consistent with the analysis contained in the foregoing decision; it is hereby ORDERED, ADJUDGED and DECREED, as follows:

1) Defendant has established, by clear and convincing evidence, all of the elements of adverse possession, such that Defendant is the rightful owner in fee simple absolute of the entire real property described in the July 1, 1995 Deed from David J. Valerio and Betty Lou Valerio to Defendant, Scott Valerio and recorded at Deed Book Volume 3352, Page 175, in the Office of the Recorder of Deeds in and for Westmoreland County. Further, the same property is described as Parcel A in the Valerio Subdivision dated May 1995, and recorded on June 27, 1995, in the Office of the Recorder of Deeds in and for Westmoreland County, and recorded at Plan Book Volume 90, Page 2274.
2) Judgment shall be entered in favor of Defendant, and against Plaintiffs, as to all Counts in Plaintiffs' Complaint.

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

COMMONWEALTH OF PENNSYLVANIA
V.
RONALD BEERS, Defendant

CRIMINAL LAW

Sentencing; Post-Conviction Relief Act; Eligibility for Relief and Timeliness of Conviction; Jurisdiction Limited; Exceptions; Constitutional Right Not Recognized At Time of Conviction

1. Any petition filed under the Post-Conviction Relief Act, including second and subsequent petitions, must be filed within one year of the date that the judgment of sentence becomes final, unless a specific exception applies.

2. Timeliness of PCRA petitions are jurisdictional in nature, and time restrictions may not be altered or disregarded to reach the merits of the petition.

3. Untimely filing of PCRA Petition can be excused if the right asserted is a constitutional right that was recognized by Supreme Court of the United States or Supreme Court of Pennsylvania after the time provided for filing a petition, and if the decision of the court has been held to apply retroactively.

4. Where sole issue raised in Defendant's untimely PCRA petition was a United States Supreme Court decision declaring that life sentences for juvenile offenders is unconstitutional, and where Defendant was nineteen at the time he committed his crime, no exception applies to excuse the untimely filing of PCRA petition, and petition will be denied.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 1075 C 1999

Appearances:
Allen P. Powanda, Assistant District Attorney,
Westmoreland County, for the Commonwealth
James P. Silvis,
Greensburg, for the Defendant

BY: RITA DONOVAN HATHAWAY, JUDGE

OPINION AND ORDER OF COURT

This matter is before this court for consideration of the Defendant's *pro-se* second PCRA Petition.

The defendant, Ronald Beers ("Beers") was convicted by a jury of first and third degree murder and related offenses in the shooting death of Glen "Obie" Ford, and was sentenced on September 28, 2000 to life without the possibility of parole. Beers appealed his sentence, which was affirmed by the Pennsylvania Superior Court (1750 WDA 2000). The Pennsylvania Supreme Court denied Beers' Petition for Allowance of Appeal on January 31, 2002 (618 WAL 2001) at which time Beers' sentence became final.

Beers timely filed his first PCRA Petition in the Court of Common Pleas of Westmoreland County on April 5, 2002. Counsel was appointed to represent Beers and, after a thorough review of the case, counsel filed a no-merit letter with the court.

Judge Richard E. McCormick issued an Order on May 28, 2003 concurring with PCRA's assessment of the case and notifying Beers of his intent to dismiss his PCRA Petition. Beers appealed Judge McCormick's Order on June 16, 2003, technically before Judge McCormick issued his final Order Dismissing the PCRA Petition. That Order was entered on June 18, 2003. Beers was represented on appeal by new counsel; however, his appeal was unsuccessful and the Order of Court Dismissing his PCRA Petition was affirmed by the Pennsylvania Superior Court on April 27, 2004 (1366 WDA 2003). His subsequent Petition for Allowance of Appeal was denied on January 25, 2005. (399 WAL 2004).

Although the record is unclear, it also appears that Beers filed a Federal Habeas Corpus Petition in the United States District Court for the Western District of Pennsylvania. The final disposition of that action is also unclear from the official record in Westmoreland County; however, the record does indicate that the official records were returned to Westmoreland County from the United States District Court on or about January 27, 2007.

Beers filed a second PCRA Petition in the Court of Common Pleas of Westmoreland County on August 28, 2012. Although the instant PCRA is a second petition and is clearly untimely, counsel was appointed to review the claims raised by Beers. A No-Merit letter was submitted to this court from PCRA counsel James P. Silvis, Esq., and a letter written in response to that No-Merit letter was received from Beers on December 2, 2013. A hearing on Beers' PCRA Petition was scheduled and held on March 24, 2014.

Beers' present petition for post-conviction relief under the Post-Conviction Relief Act (42 Pa.C.S. §9541, *et. seq.*) is his second such petition. Any petition filed under the Post-Conviction Relief Act, including second and subsequent petitions, must be filed within one year of the date that the judgment of sentence becomes final. *42 Pa.C.S. §9545(b)(2).* To be eligible for post-conviction relief, a PCRA petition, including second and subsequent Petitions, must be filed within one year from the date that the judgment became final. *42 Pa.C.S. §9545(b)(1); Pa.R.Crim.P. Rule 901.* "A judgment becomes final at the conclusion of direct review or at the expiration of time for seeking the review." ***Commonwealth v. Breakiron,*** 566 Pa. 323, 329, 781 A.2d 94, 97 (2001) (*citing* 42 Pa.C.S. §9545(b)(3)). The instant PCRA Petition, filed on or about August 28, 2012, is clearly untimely; therefore, unless an exception applies, Beers is not eligible for relief. Indeed, unless such an exception applies, this court lacks jurisdiction to entertain Beers' untimely-filed second PCRA petition.

Certain exceptions set forth in the Post-Conviction Relief Act can act to excuse the untimely filing of a PCRA petition:

> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) the failure to raise the claim previously was the result of

> interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

42 Pa.C.S.A. §9545(b).

"It is imperative to note that the timeliness requirements of the PCRA are jurisdictional in nature. Statutory time restrictions may not be altered or disregarded to reach the merits of the claims raised in the petition." ***Commonwealth v. Harris,*** 972 A.2d 1196, 1199 (Pa.Super.2009) (internal citations omitted). *See also,* ***Commonwealth v. McKeever,*** 947 A.2d 742 (Pa.Super. 2008).

Further,

> Title 42 Pa.C.S.A. § 9545(b)(1) requires that any PCRA petition, including a second or subsequent petition, must be filed within one year of the date that the petitioner's judgment of sentence becomes final, unless a petitioner pleads or proves that one of the exceptions to the timeliness requirement enumerated in 42 Pa.C.S.A. § 9545(b)(1)(i)-(iii) is applicable. The timeliness requirement is mandatory and jurisdictional; therefore, no court may disregard, alter, or create equitable exceptions to the timeliness requirement in order to reach the substance of a petitioner's arguments. *See* ***Commonwealth v. Davis,*** 916 A.2d 1206 (Pa.Super.2007).

Commonwealth v. McKeever, 947 A.2d 782, 784-785 (Pa.Super. 2008).

It is clear that Beers' PCRA Petition filed on or about August 28, 2012 is untimely filed; however, he suggests that an exception exists to excuse the untimely filing. The sole issue raised in this petition is founded in the United States Supreme Court's decision in ***Miller v. Alabama,*** ___ U.S. ___, 132 S.Ct. 2455 (2012)(*per curiam*) and ***Jackson v. Hobbs,*** ___ U.S. ___, 132 S.Ct. 2455 (2012)(*per curiam*). The question is whether the Supreme Court's holdings, announced on June 25, 2012, create a Constitutional right that was not recognized at the time of his conviction and sentencing or within one year from the date that his judgment of sentence became final. Hence, Beers claims that the untimely filing is excused under 42 Pa.C.S.A.

§9545(b)(1)(iii), and is in fact timely filed under 42 Pa.C.S.A. § 9545(b)(2).

Had Beers been a juvenile offender who was under eighteen years of age at the time of his offense, this argument might have merit. The United States Supreme Court in ***Miller,*** *supra,* and ***Jackson,*** *supra,* did not declare that all life sentences were unconstitutional, nor did the Court hold that all mandatory life sentences were unconstitutional. The limited holding issued by the divided United States Supreme Court applied only to mandatory life sentences imposed upon offenders who were eighteen years of age or younger at the time that the offense was committed. The rationale of the High Court was recently summarized by the Pennsylvania Supreme Court in ***Commonwealth v. Qu'Eed Batts,*** ___ A.3d ___, 2013 WL 1200252 (Pa. March 26, 2013).

However, the record is abundantly clear that Beers was age nineteen at the time that he committed his crime;[1] therefore, ***Miller v. Alabama,*** ___ U.S. ___, 132 S.Ct. 2455 (2012)(*per curiam*) and ***Jackson v. Hobbs,*** ___ U.S. ___, 132 S.Ct. 2455 (2012) (*per curiam*), as well as ***Batts,*** *supra,* are inapplicable to his case. Also fatal to Beers' position is the recent decision by the Pennsylvania Supreme Court, holding that the principles articulated in ***Miller,*** *supra,* did not apply retroactively to individuals whose sentences had become final prior to the date of the ***Miller*** decision. ***Commonwealth v. Cunningham,*** ___ A.3d ___, 2013 WL 5814388 (Pa. October 30, 2013). Beers' sentence became final in January of 2005; therefore, even had Beers been a juvenile at the time that he committed the instant offense, ***Miller*** would not apply.[2]

For this reason, it appears that there is no exception that applies to excuse the untimely filing of Beers' second PCRA Petition, and this court therefore lacks jurisdiction to entertain his untimely-filed second PCRA petition. Because this court lacks jurisdiction to consider Beers' novel argument that, although he was nineteen at the time that his offenses were committed, his "mental age" was that of a juvenile and, therefore, his sentences of life in prison without the possibility of parole should be vacated and a new sentence imposed, the following Order shall enter:

ORDER OF COURT

AND NOW, this 14th day of April, 2014, upon consideration of the defendant's *pro-se* Motion for Post Conviction Collateral Relief, and upon consideration of the No-Merit letter submitted by PCRA counsel, James P. Silvis, Esq., and after a hearing held on March 24, 2014 and upon a thorough review of the record in this case, it appears to this Court that there are no genuine issues of material fact, no entitlement to relief and no purpose to be served in further proceedings. It is therefore **ORDERED**

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[1] Beers' date of birth is March 11, 1979. The offense in this case was committed on November 3, 1998. Although he claims in the written response to Mr. Silvis' No Merit letter that "I was 18 at the time my crime was committed," it would appear that Beers was nineteen years of age at the time of his offense.

[2] In a written response to Mr. Silvis' No Merit Letter, Beers asserts that "although the court has ruled that this ruling (Cunningham) is not retroactive, I think that we all know that it is just a matter of time before that is overturned." This court, however, is not prepared to prognosticate as to future Supreme Court deci-

as follows:

1. For the reasons set forth in the foregoing Opinion, the Defendant's Petition for post-conviction relief filed pursuant to the Post Conviction Relief Act, (42 Pa.C.S. §9541, *et. seq*.) is hereby **DENIED**.

2. Based upon this court's consideration of the "No Merit Letter" submitted by Attorney James Silvis, and upon a thorough review of the record in this case, this court is satisfied that PCRA counsel has satisfied the requirements of ***Commonwealth v. Turner,*** 518 Pa. 491, 544 A.2d 927 (1988) and ***Commonwealth v. Finley,*** 330 Pa.Super. 313, 479 A.2d 568 (1984). Therefore, PCRA counsel's Petition to Withdraw as Counsel of Record is **GRANTED**.

3. **THE DEFENDANT IS NOTIFIED THAT ANY APPEAL TO THE SUPERIOR COURT OF PENNSYLVANIA FROM THIS COURT'S DISMISSAL OF HIS *PRO-SE* PCRA PETITION MUST BE FILED WITHIN THIRTY (30) DAYS FROM THE DATE OF THIS ORDER OF COURT.**

4. The defendant is further advised that based upon this court's determination that PCRA counsel has satisfied the ***Turner/Finley*** requirements, he is not entitled to the assistance of court-appointed counsel should he elect to appeal this court's decision to dismiss his PCRA Petition and to permit PCRA counsel to withdraw. The defendant is free to proceed on appeal *pro-se* or with private counsel of his choice. ***Commonwealth v. Turner,*** *supra;* ***Commonwealth v. Maple,*** 385 Pa.Super. 314, 559 A.2d 953 (1989).

BY THE COURT:
/s/ Rita Donovan Hathaway, Judge

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COMMONWEALTH OF PENNSYLVANIA
V.
KEENAN FRYE, Defendant

CRIMINAL LAW

Weight and Sufficiency of the Evidence In General

1. The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented.

2. It is not within the province of this Court to re-weigh the evidence and substitute its judgment for that of the fact-finder.

3. Commonwealth's burden may be met by wholly circumstantial evidence and "any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances."

4. Viewing the evidence in a light most favorable to the Commonwealth, as verdict winner, supports the jury's verdict because the jury acquitted him of other offenses including attempted homicide, aggravated assault, and recklessly endangering another person.

5. A true weight of the evidence challenge concedes that sufficient evidence exists to sustain the verdict but questions what evidence is to be believed.

6. The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses.

7. The Trial Court cannot substitute its judgment for that of the finder of fact.

8. The Trial Court may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice.

9. The evidence presented by the Commonwealth was of sufficient weight and nature to sustain the verdict(s).

CONTROLLED SUBSTANCES; SENTENCING AND PUNISHMENT

Extent of Punishment; Duration; Necessity; Minimum Term and Maximum Term

1. A flat sentence is generally an illegal sentence because the Judicial Code requires the imposition of a maximum and minimum sentence.

2. The Court's imposition of a five-year flat sentence in this matter was not illegal because the general requirement of both a minimum and maximum sentence found in 42 Pa.C.S.A. § 9756(b)(1) must yield to the specific requirement of a mandatory five-year minimum sentence found in 42 Pa.C.S.A. § 9712.1(a) and the five-year maximum sentence of 35 P.S. § 780-113(f)(2).

3. The five-year mandatory minimum sentence of 42 Pa.C.S.A. § 9712.1(a) did not conflict with the five-year maximum sentence of 35 P.S. § 780-113(f)(2) as both statutes could be construed together to give effect to both requirements via a flat five-year sentence.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 4269 C 2012

Appearances:

Jacquelyn A. Knupp, Assistant District Attorney,
Westmoreland County, for the Commonwealth
Emily L. Smarto,
Greensburg, for the Defendant

BY: RITA DONOVAN HATHAWAY, JUDGE

OPINION OF THE COURT ISSUED PURSUANT TO PA.R.A.P. 1925

The Defendant, Keenan Frye, was found guilty following a jury trial of Firearm Not to be Carried Without a License, (18 Pa.C.S. §6106(a)(1)), Possession With Intent to Deliver a Controlled Substance (35 Pa.C.S. §780-113(a)(30)), Possession of a Controlled Substance (35 Pa.C.S. §780-113(a)(16)), and Possession of Drug Paraphernalia (35 Pa.C.S. §780-113(a)(32)). The jury specially found that Frye possessed a firearm in connection with the charge of Possession With Intent to Deliver a Controlled Substance. He was sentenced on October 3, 2013 to five to ten years incarceration. He was thereafter re-sentenced on November 26, 2013 to a flat sentence of five years incarceration pursuant to the mandatory sentencing provisions of 42 Pa.C.S. §9712.1 and ***Commonwealth v. Kleinicke,*** 895 A.2d 562 (Pa.Super. 2006). Frye's Post-Sentence Motions were denied by Order of Court filed on January 24, 2014, and this appeal timely followed

ISSUES PRESENTED ON APPEAL

I. WHETHER THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE VERDICT OF GUILTY?

In his post-sentence motions and again on appeal, Frye alleges that the evidence presented by the Commonwealth was insufficient to sustain the jury's verdict of guilty as to the charges of Firearm Not to be Carried Without a License, (18 Pa.C.S. §6106(a)(1)), Possession With Intent to Deliver a Controlled Substance (35 Pa.C.S. §780-113(a)(30)), Possession of a Controlled Substance (35 Pa.C.S. §780-113(a)(l6)), and Possession of Drug Paraphernalia (35 Pa.C.S. §780-113(a)(32)). In reviewing a challenge to the sufficiency of the evidence, a reviewing court

> must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt. Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.
>
> The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

Commonwealth v. Mobley, 14 A.3d 887, 889-90 (Pa.Super. 2011) (quoting ***Commonwealth v. Mullett,*** 5 A.3d 291, 313 (Pa.Super. 2010)).

The Commonwealth's evidence at trial established that on October 17, 2012, Joshua Grimm arranged to meet the Defendant, Keenan Frye, at a location in Mount Pleasant, Westmoreland County, Pennsylvania. The purpose of this meeting, according to Grimm, was to fight Frye because he believed Frye had assaulted a family member. He testified that he set up this meeting on the pretense that he was going to buy marijuana from Frye; however, as Grimm also testified, he never intended to really buy the marijuana from Frye. (TT 32-35)[1] Accompanied by four friends, Grimm went to the arranged location and met with Frye. His friends hid themselves nearby while Grimm met Frye and engaged in conversation. Frye handed Grimm what Grimm believed to be a bag of marijuana, and Grimm initiated a fight with Frye by spraying him with pepper spray. Grimm admitted that he and Frye struggled and Grimm knocked Frye down onto his back. As Grimm stood above Frye, warning Frye not to "put his hands" on Grimm's family, Grimm saw the muzzle of a gun and then saw gunfire from Frye's waistline and realized that he had been shot. (TT 35-45, 51). He ran back to his friends, shouting that he had been shot. Grimm was treated at Frick Hospital and UPMC in Pittsburgh for his gunshot wounds, and has made a full recovery.

Frye fled the area of the incident immediately after the shooting. Pennsylvania State Trooper Matthew Hartman testified that he was dispatched on October 17, 2012 at the beginning of his shift at approximately 11:00 p.m. to Mount Pleasant to respond to a reported shooting. After speaking with Officer Zilli of the Mount Pleasant Police Department, Trooper Hartman went to Frye's mother's apartment in an attempt to locate him. Although that initial attempt was unsuccessful, police did finally locate Frye, who was 18 years old, walking along Route 31 outside of Mount Pleasant Borough. (TT 118-124, 131, 214). Trooper Brian Pollock testified that he also responded to the dispatch, and he and his partner located Frye, who was dressed in dark clothing and carrying a backpack. Frye immediately raised his hands and said, "It's in my backpack, it's in my backpack." (TT 129-132). Inside the backpack, Trooper Pollock found a five-shot revolver that was fully loaded. As Trooper Pollock was examining the gun for safety, Frye stated "Be careful, there should be one live round in it." When Trooper Pollock noted that the gun was fully loaded, Frye stated, "I wasn't sure if his friends were going to come after me." (TT 134-135). During his cursory search of the backpack, Trooper Pollock also found what he believed to be bags of marijuana and ammunition. (TT 135-136). A more thorough search of the backpack was performed at a later time by Detective Timothy Sethman of the Westmoreland County Detective Bureau. In the backpack, Detective Sethman found a box containing 19 bullets (Winchester .28 Special 130 grain), a black nylon Uncle Mike's holster, a purple cloth Crown Royal bag containing two spent bullet casings, two separate bullet casings, Frye's Pennsylvania photo identification card, a digital scale, an opened box of clear plastic baggies, a zipper hooded Air Jordan jacket, and

[1] Numerals in parenthesis preceded by the letters "TT" refer to specific pages of the transcript of the trial in this matter, held July 9, 10 and 12, 2013 before this court, and made a part of the official record herein.

a clear plastic bag containing six individual clear plastic baggies of marijuana. (TT 160-172, 197).[2]

Detective Anthony Marcocci testified as an expert in narcotic investigations and illegal drug sales. Det. Marcocci acknowledged that the weight of the marijuana did not preclude the possibility that Frye could have possessed the marijuana for personal use. However, considering the amount of the marijuana and the manner in which it was packaged, as well as the paraphernalia (the plastic baggies and the digital scale) that was found in Frye's possession and which was located in close proximity to the marijuana, and finally, the fact that Frye was in possession of a gun, Det. Marcocci opined that Frye possessed the marijuana with the intent to deliver it to another person or persons rather than for his own personal use. (TT 233-236).

Viewing the evidence in a light most favorable to the Commonwealth, as verdict winner, certainly supports the verdict of the jury. This is especially true given the fact that Frye was also charged with Criminal Attempt (Homicide) (18 Pa.C.S. §901(a)), two counts of Aggravated Assault (18 Pa.C.S. §2702(a)(1) and (4)), and Recklessly Endangering Another Person (18 Pa.C.S. §2705), all of which the jury found him not guilty, presumably based upon the defense of self defense. Clearly the jury listened to all of the evidence and evaluated the credibility of the various witnesses and arrived at a verdict they thought proper. That verdict is clearly supported by the sufficiency of the evidence, and Frye is not entitled to a new trial on this basis.

II. WHETHER THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE?

Frye also raises a challenge to the weight of the evidence. "A true weight of the evidence challenge concedes that sufficient evidence exists to sustain the verdict but questions which evidence is to be believed." ***Commonwealth v. Galindes,*** 786 A.2d 1004, 1013 (Pa.Super.2001) (citation omitted). In determining whether a verdict is against the weight of the evidence, the court is guided by the standards set forth in ***Commonwealth v. Champney,*** 574 Pa. 435, 832 A.2d 403 (2003), *cert denied,* ***Champney v. Pennsylvania,*** 542 U.S. 939, 124 S.Ct. 2906, 159 L.Ed.2d 816, 72 USLW 3768 (2004): "The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice." ***Champney,*** 574 Pa. at 444, 832 A.2d at 408 (2003) (internal citations omitted).

The evidence presented by the Commonwealth in this matter has been summarized above. This evidence was of adequate weight to support the verdict of the jury, and a reviewing court should not disturb the verdict of the jury when the evidence was both of sufficient weight and nature to sustain the verdicts of guilty. For this reason, Frye is not entitled to a new trial.

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[2] The laboratory analysis of the vegetable material found in Frye's backpack found that the material was in fact marijuana and weighed 34.6 grams. (TT 197).

III. WHETHER THE SENTENCE AS IMPOSED CONSTITUTES AN ILLEGAL SENTENCE?

Frye's final allegation of error suggests that the sentence imposed by this court constituted an illegal sentence. Frye does not provide any basis for the alleged illegality of the sentence in his concise statement of matters complained of on appeal to which this court can articulate a statement. A review of the record indicates, however, that there can be no challenge to the legality of the sentence based upon any denial of the right to a jury trial based upon the decisions of ***Alleyne v. United States,*** ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) and ***Commonwealth v. Watley,*** 81 A.3d 108 (Pa.Super. 2013), as the question as to whether Frye possessed a firearm was specifically asked of the jury at the time of trial. (TT 313).

The jury in this case specifically found that Frye possessed a firearm in connection with the charge of Possession with Intent to Deliver a Controlled Substance (TT 318), and Frye was sentenced to a sentence of five to ten years incarceration pursuant to 42 Pa.C.S. §9712.1.[3] However, because marijuana is a non-narcotic Schedule I drug, the maximum sentence permitted for Frye's conviction for Possession with Intent to Deliver Marijuana was five years of imprisonment. This court granted Frye's Motion to Modify Sentence after conceding that the maximum sentence of ten years incarceration exceeded the statutory maximum allowable for Possession with Intent to Deliver Marijuana (35 Pa.C.S. §780-113(a)(30)). Frye was thereafter resentenced to a term of 5 years incarceration pursuant to the mandatory sentencing provision of 42 Pa.C.S. §9712.1.

It is acknowledged that the sentence of five years incarceration that was imposed is a flat sentence, which generally is considered to be an illegal sentence.

> "[W]e have long concluded that where the trial court violates the Sentencing Code by failing to impose both a minimum and maximum sentence pursuant to 42 Pa.C.S.A. § 9756(b), the sentence is illegal and must be vacated. *See* ***Commonwealth v. Mitchell,*** 986 A.2d 1241, 1244 (Pa.Super.2009) (holding that imposition of flat sentence, without minimum sentence, is illegal); ***Commonwealth v. Barzyk,*** 692 A.2d 211, 215 (Pa.Super.1997) (observing that Sentencing Code requires the trial court to impose both a maximum and minimum sentence, and where a trial court neglects to include a minimum

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[3] 42 Pa.C.S. §9712.1. (Sentences for certain drug offenses committed with firearms) provides, in pertinent part:

> **(a) Mandatory sentence.**--Any person who is convicted of a violation of section 13(a)(30) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, when at the time of the offense the person or the person's accomplice is in physical possession or control of a firearm, whether visible, concealed about the person or the person's accomplice or within the actor's or accomplice's reach or in close proximity to the controlled substance, shall likewise be sentenced to a **minimum sentence of at least five years of total confinement.**

42 Pa.C.S.A. § 9712.1 (emphasis added).

> sentence, the appropriate remedy is to vacate the judgment of sentence and remand for resentencing)

Commonwealth v. Robinson, 7 A.3d 868, 870 (Pa.Super. 2010). However, our Supreme Court recently held that the imposition of a flat sentence pursuant to 42 Pa.C.S. §9712.1 under circumstances such as the ones presented here does not constitute an illegal sentence.

In ***Commonwealth v. Ramos,*** 83 A.3d 86 (Pa. 2013), the Pennsylvania Supreme Court considered the exact issue that is presented in the instant case, and a procedural history that is nearly identical. The Pennsylvania Supreme Court analyzed the various, seemingly competing provisions of the Sentencing Code using standard principles of statutory construction, noting:

> Our rules of statutory construction globally instruct that a special provision in a statute "shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail." 1 Pa.C.S. § 1933. As applied to this case, the minimum-maximum provision of Section 9756(b)(1) is the general provision because it applies to all criminal sentences. In contrast, the other two sections relevant to this case are specific provisions: the five-year mandatory minimum sentence of Section 9712.1(a) applies only to the subset of criminals who have been convicted of 35 P.S. § 780-113(a)(30) while in physical possession of a firearm, and the five-year maximum sentence of Section 780-113(f)(2) applies only to the subset of criminals who have been convicted of three subsections of Section 780-113(a), including Subsection 30. Accordingly, given the conflict herein, it would appear that the five-year mandatory minimum and maximum sentence provisions would prevail over the general minimum-maximum provision. Moreover, the five-year mandatory minimum sentence provision and the five-year maximum sentence provision do not conflict with each other as they can be construed to give effect to both via a flat, five-year sentence, as imposed in this case.

Commonwealth v. Ramos, 83 A.3d 86, 92-93 (Pa. 2013). The *Ramos* Court held that the provisions of 42 Pa.C.S. §9712.1, being the more recent and specific statute, would prevail under a statutory construction analysis.

> Accordingly, under 1 Pa.C.S. § 1933, the general provision of 42 Pa.C.S. § 9756(b)(1), regarding minimum and maximum sentences, must yield to the specific sentencing provisions of Section 9712.1(a) and Section 780-113(f)(2), respectively requiring a five-year mandatory minimum sentence and a maximum sentence of no more than five years for a violation of Section 780-113(a)(30). As such, the trial court properly imposed a flat, five-year prison sentence for Ramos's PWID conviction.

Ramos, 83 A.3d at 94 (Pa. 2013). As the same issue is presented in this case, the flat sentence of five years incarceration is not illegal, and Frye is not entitled to a new sentence on this basis.

CONCLUSION:

For the foregoing reasons of fact and of law, the Defendant is not entitled to either a new trial or a resentencing.

BY THE COURT:
/s/ Rita Donovan Hathaway, Judge

Date: April 1, 2014

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JANET L. RYAN REALTY, INC., t/d/b/a CENTURY 21-AMERICAN HERITAGE REALTY and BEYNON & COMPANY, INCORPORATED, Plaintiffs
V.
SANDRA LANGTON, Defendant

BROKERS

Compensation; Sufficiency of Services of Broker; Performance of Services Within Time Specified

1. The Real Estate Licensing and Registration Act (RELRA) provides for suspension or revocation of a broker's license if the broker fails to specify a definite termination date in a listing contract.

2. Real estate broker was not entitled to commission when the sale of the property occurred more than one year after the termination date set forth in the listing agreement.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION – LAW
No. 562 of 2012

Appearances:
Jay N. Silberblatt,
Pittsburgh, for the Plaintiffs
Denis P. Zuzik,
Greensburg, for the Defendant

BY: GARY P. CARUSO, PRESIDENT JUDGE

DECISION AND ORDER

This case is before me on motions for summary judgment filed by the plaintiffs and the defendant. The defendant, Sandra Langton, ("Sandra") and her husband, Steven E. Langton, were the owners of a building in New Kensington, Westmoreland County, Pennsylvania (the "Property") as tenants by the entireties. On February 12, 2009, Mr. Langton, without joinder of his spouse, executed a listing contract with the defendant, Janet L Ryan Realty, Inc. t/d/b/a Century 21-American Heritage Realty ("Century 21"), using the agency's pre-printed Commercial Listing Contract. Although Sandra did not execute this listing agreement, she testified at her deposition that she was aware of and in agreement with it. The listing contract gave Century 21 the exclusive right to sell the Property for a term of one year commencing on February 12, 2009, and terminated the contract at the expiration of the said one year listing period. The contract also provided that the agreement may be terminated at any time after 183 days have elapsed from the commencement date by the owner giving ten days notice in writing delivered to the broker by certified mail with return receipt requested. The contract provided for a sales and/or leasing commission of 8 1/3 percent.

Unfortunately, Steven Langton died on February 17, 2009. At no time did Century 21 procure Sandra's signature on any listing agreement although the original agreement executed by her husband did indicate that it was binding upon his "heirs,

executors, administrators, successors and assigns". Technically, Ms. Langton would not be an heir or successor of Mr. Langton since she was a tenant by the entireties at the time the original listing agreement was signed.

Century 21 did obtain a buyer for the property and Sandra entered into an agreement of sale with an entity called American Industrial Felt and Supply Corporation ("AIF"). This sales agreement was dated April 6, 2009, and listed Century 21 as the listing broker and the plaintiff, Beynon & Company as the selling broker. AIF is a corporation owned entirely by Patricia Dent and the agreement was executed by its president, Michael Dent, the son of Patricia Dent. The sales agreement provided that the closing was to take place on or before 20 days after the inspection period which itself was to expire 120 days after April 6, 2009, or on October 3, 2009. Accordingly, the last date for the closing would have been October 23, 2009.

On the same date as the sale agreement, the parties executed a lease which permitted AIF to take possession of the Property for a monthly rental of $4,000.00. The term of the lease was from April 1, 2009, to September 1, 2009, Paragraph 17 of this lease agreement provided that the commissions are "N/A".

When AIF had trouble obtaining financing for its purchase of the Property, Century 21 prepared an Addendum/Endorsement to the agreement of sale extending the time period for which AIF could obtain mortgage approval to January 3, 2010, and the date for settlement to on or before January 23, 2010. It also indicated that AIF would continue to lease the property beginning October 3, 2009, until the date of settlement at an increased rental of $6,000.00 per month and that the Broker's fee "on both the Lease & Sale will remain at 8 1/3 percent, to be split equally between the Brokers". This Addendum/Endorsement was executed by the parties on October 1, 2009.

The sale to AIF failed to close by January 23, 2010, apparently because the corporation was never able to secure mortgage financing. By documents generated by AIF and executed February 8, 2010, and effective February 8, 2010, and February 28, 2010, AIF and Sandra terminated the Agreement of Sale and the Lease.

As set forth in the original listing contract, its term automatically expired on February 12, 2010. However, the listing agreement contained a clause that stated:

> "If within one year of the termination of this agreement, the Owner enters into an Agreement of Sale, or transfers/exchanges the property with any person to whom the property was shown, presented or submitted by the Broker, the sale or transfer shall be conclusively presumed to have been made by the Broker and the commission shall be paid by Owner to Broker."

This one year period would have expired on February 12, 2011. Shortly after that date, on April 5, 2011, the Property was sold to an entity listed on the deed of record as Dent Properties.[1] Dent Properties is a completely separate entity from AIF but is

[1] The complaint avers that the Buyer is Dent Holdings LLC. The deed of record indicates that the buyer was Dent Properties, LLC. Michael Dent in his deposition explained that Dent Properties was the incorrect name of the company and that the Property was acquired by Dent Holdings LLC. For purposes of this opinion, I will refer to this entity simply as Dent Properties.

owned in equal shares by Michael Dent, the president of AIF; his mother, Patricia Dent; and Robert Dent, the father of Michael Dent and spouse of Patricia Dent. Michael Dent signed the agreement of sale on behalf of AIF. He also executed the following documents all on behalf of Dent Properties:

1. The deed to Dent Properties dated April 5, 2011; and
2. The mortgage from Dent Properties to Sandra also dated April 5, 2011. The acknowledgment of this mortgage indicates that he was signing as president of Dent Properties and, along with Patricia J. Dent and Robert Dent, the mortgage note dated April 5, 2011.[2]

Despite a demand to do so, Sandra refused to pay commissions to these plaintiffs and suit was filed against her to recover a leasing commission of $6,500 and a sales commission of $35,416.00. Ms. Langton has filed a counterclaim requesting repayment of the rental commissions withheld by the plaintiffs from rental payments received ($2,500.00). As stated above, the plaintiffs and Sandra have filed motions for summary judgment.

Regardless of which date I determine the listing agreement to be cancelled, i.e., September 17, 2009, or February 12, 2010, the plaintiffs argue that they are entitled to their commission even though the sale to Dent Properties occurred more than one year after the termination date.[3] The plaintiffs contend that the sale to Dent Properties was in fact a sale to "any person to whom the property was shown, presented or submitted by the broker...". The plaintiffs would have me conclude as a matter of law that the "person" referred to in this section of the listing agreement was in fact Michael Dent, the president of AIF, and the president and part owner of Dent Properties. Since the sale to Dent Properties took place more than one year after the listing agreement was terminated, I cannot "conclusively presume"[4] that the sale to Dent Properties was made by these Brokers and that the commission should be paid by Sandra to these Brokers. Nevertheless, the plaintiffs argue that I should still find that they are entitled to the commission even without the conclusive presumption.

For me to make a finding as a matter of law that the above-referred to claim is enforceable beyond the one year period would result in my condoning a violation of the Real Estate Licensing and Registration Act 63 P.S.§455.101 et. seq. ("RELRA"). This is because, as the Superior Court had noted in its opinion in *Salove Company v. Enrico Partners, L.P.,* 2011 Pa. Super. 128 23 A.3d 1066 (2011), that the RELRA provides for suspension or revocation of a broker's license if they fail to specify a definite termination date in a listing contract 63 P.S.§455.604 (a) (10).

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[2] It is interesting to note that the sales agreements between Sandra and Dent Properties was dated April 5, 2011, the same date as the closing of the sale of the Property.

[3] Sandra at her deposition sent a certified mail notice on September 18, 2009 to Century 21 which was acknowledged to be received by Dave Allen of Century 21 at his deposition. The notice advised Mr. Allen that Ms. Langton would like to terminate her listing contract with Century 21. Therefore, it is possible to conclude that the listing agreement was terminated on September 17, 2009, and even if not so terminated, would have terminated automatically on February 12, 2010.

[4] As a footnote, I am not sure of the legal definition of a "conclusive presumption".

The plaintiffs argue that there was a specific termination date in the listing contract, i.e., the one year automatic termination period referred to above. Therefore, they argue that there is no violation of the Act. They argue that the only indefinite period would be that which would apply if the Property was sold to the same person it was shown to while listing was in force. I cannot agree. If I were to follow the plaintiffs' logic then, as argued by Sandra in her brief and at oral argument, many years could have passed and if the Property was sold to Michael Dent or any entity he was involved in, then these real estate agents would be entitled to a commission because they showed the property to Michael Dent during the term of their listing agreement. Thus, the effect of such a clause is to cause the listing contract to fail to have a definite termination date. Furthermore, the listing contract was prepared by Century 21 and therefore should be construed more strictly against Century 21.

Century 21 had the power to include specific language controlling this type of situation. I am not even sure that the words "any person to whom the property was shown..." would apply to the two entities in this case, AIF and Dent Properties, since they do not have complete common ownership. However, based on my determination that the referred to clause is not enforceable because it violates RELRA, I do not have to make the determination that Dent Properties is, in fact, the same "person" as AIF.

The final matter for determination is whether or not the plaintiffs are entitled to the balance of their commissions they claim are due from the rental payments or conversely whether Ms. Langton is entitled to a $2,500 judgment representing a "refund" for the commissions already withheld from rental payments made by AIF during the term of its occupancy of the Property. The listing contract provides as follows:

> "In the event that the Property herein listed shall be leased during the term of this contract by the Broker or by the Owner or any other person, the Owner agrees to pay Broker a commission of 8 1/3 percent of the gross lease value. This commission shall be earned and payable in full at the time of the signing of the lease or concurrent w/ lease fees. In the event this listing is placed under lease and the property is subsequently sold to the tenant during the term of the lease or any renewal, then the agreed commission shall be due broker."

There is no question that AIF occupied the Property and made rental payments to Sandra. There is no question that the listing contract provided for the above-stated lease commission payment. This commission language was in addition to the 8 1/3 percent sales commission language that was included in the same paragraph directly prior to the lease commission language. There is also no question that the sum of $2,500.00 was withheld from the rental payments and not paid to Ms. Langton apparently without objection from her.[5]

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[5] Sandra argues in her brief that she never acquiesced in plaintiffs receiving rent and withholding a rental commission based upon her note dated on or about April 26, 2010, when she asked her attorney, James Irwin, "will I still need to give rent $ to Dave & RT". I do not agree that this note is evidence that Ms. Langton never "acquiesced" in the withholding of rental commissions especially when the note was written in April 2010 and AIF first occupied her Property on April 1, 2009.

Accordingly, I will enter the following Order:

ORDER OF COURT

AND NOW, this 25th day of November 2013, it is hereby ORDERED and DECREED that the plaintiffs' and defendant's motions for summary judgment are sustained in part and denied in part. The defendant's counterclaim is hereby dismissed with prejudice. Counts 2 and 3 of the plaintiffs' complaint are dismissed. A judgment is entered on behalf of the plaintiffs and against the defendant, Sandra Langton, in the amount $6,500.00 together with costs on Count 1.

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

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COMMONWEALTH OF PENNSYLVANIA
V.
MELVIN KNIGHT, Defendant

CRIMINAL LAW

Public or Official Acts, Proceedings, Records, and Certifications; Swearing Jury; Objections and Exemptions; Time and Form of Objection; Necessity of Specific Objection or Objections In General

1. In general, a Defendant must make a timely objection to a matter at trial or face waiver of the issue on appeal.

2. Although the District Attorney had a recollection of the jury being sworn, counsel for the Defendant did not have such a recollection, and therefore it was inappropriate to consider the issue waived for purposes of appeal.

JURY

Oath

1. A Defendant in a criminal case cannot waive the swearing of the jury.

2. After hearing testimony from the jurors, the court reporters, the minute clerk, and other Courtroom witnesses, and after examining the relevant portions of the transcript to the trial, the Court concluded the jury was sworn, but the court reporter was not in the Courtroom at the time of the swearing, and the minute clerk failed to record the Court swearing the jury.

3. Because the Court determined the jury oath was given, it denied the Defendant's post-trial objection.

SENTENCING AND PUNISHMENT

Rebuttal

Once a Defendant places his character for being peaceable and non-violent at issue, it is proper for the Commonwealth to offer evidence in rebuttal.

CRIMINAL LAW

Out-of-Court Statements and Hearsay In General; Use of Documentary Evidence; Right of the Accused to Confront Witnesses

1. The admissibility of evidence is within the sole discretion of the trial court.

2. Certain hearsay statements that might otherwise be admissible as exceptions to the hearsay rule are inadmissible if they are testimonial in nature because they violate the Defendant's rights conferred under the Confrontation Clause.

3. Non-testimonial out-of-court statements are not subject to the same limitations imposed by the Confrontation Clause.

4. In order for a statement to be testimonial for purposes of the Confrontation Clause, it needed to be ex-parte in-court testimony or its functional equivalent.

5. Examples of ex-parte in-court testimony or its functional equivalent include and are not limited to affidavits, custodial examinations, prior testimony that the Defendant was unable to cross examine, or similar pre-trial statements that declarants would reasonably expect to be used prosecutorially, extra judicial statements contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions, and statements made under circumstances which would lead an objective witness to believe the statement would be available for use at a later trial.

6. Records from the Westmoreland County Prison of the Defendant were not testimonial in nature and were otherwise admissible because the records the Commonwealth used were not prepared in anticipation of litigation.

7. Because the records of the Westmoreland County Prison concerning the Defendant were not testimonial in nature, the Court held it was not an error to admit those records through the testimony of Warden John Walton through the business records exception to the hearsay rule.

CONSTITUTIONAL LAW

Juries

The minimal Standard for Constitutional Due Process to the criminally accused is a fair trial by a panel of impartial and "indifferent" jurors.

CRIMINAL LAW

Grounds for Change of Venue or Venire; Pre-Trial Publicity, Media Coverage and Occurrences Extraneous to Trial; Prejudice

1. The mere presence of pre-trial publicity does not create a presumption of prejudice that requires a change in venue.

2. Pre-trial prejudice is presumed if (1) the publicity is sensational, inflammatory, and slanted toward conviction rather than factual and objective; (2) the publicity reveals the Defendant's prior criminal record, or if it refers to confessional, admissions or reenactments of the crime by the accused; and (3) the publicity is derived from police and prosecuting officer reports.

3. Even when pre-trial prejudice is presumed, a change of venue or venire is not warranted unless the Defendant also shows the pre-trial publicity was so extensive, sustained, and pervasive that the community must be deemed to have been saturated with it and there was insufficient time between the publicity and the trial for any prejudice to dissipate.

4. In testing whether there was a sufficient cooling period, a court must investigate what a panel of prospective jurors said about exposure to the publicity in question.

5. In determining the efficacy of any cooling period, a court will consider the direct effects of publicity, something a Defendant need not allege or prove.

6. Although it is conceivable that pre-trial publicity could be so extremely damaging that a court might order a change of venue no matter what the prospective jurors said about their ability to hear the case fairly and without bias, it would be an unusual case.

7. Normally, what prospective jurors tell the Court about their ability to be impartial is a reliable guide whether the publicity is still so fresh in their minds that it removed their ability to be objective.

8. The trial judge is given wide discretion in this area.

9. Because the Court conducted a lengthy voir dire process that ultimately resulted in the impaneling of sixteen fair and impartial individuals that were acceptable to both the Commonwealth and the defense, the Defendant did not establish the necessary prejudice from pre-trial publicity required for a change of venue or venire.

Authority of the Court to Permit Separation or Sequestration of the Jury; Custody and Conduct of the Jury

1. The decision whether to sequester a jury is left to the sound discretion of the trial court.

2. The decision to sequester the jury can be made at any time during trial.

3. There are certain circumstances where adverse pre-trial publicity attendant to the trial is so pervasive, intense, and prejudicial that the law will presume the jury's deliberations were affected by it.

4. In highly publicized or sensational cases a number of alternatives are available to the court to preserve the integrity of the fact-finding process. In most cases, admonitions to the jury such as those which appear in the ABA Projection Minimum Standards for Criminal Justice, suffice.

5. The efficacy of cautionary instructions is presumed unless actual prejudice is demonstrated.

6. In order to establish prejudice a Defendant must show the case was subject to unusual or prejudicial publicity or that the jurors are subject to extraneous influences or pressures.

7. Although one Juror self-reported seeing a newspaper article concerning his divorce attorney, and was ultimately dismissed from the jury, there were no other occasions when this became an issue.

8. As a result the Defendant failed to prove the requisite prejudice for the Court's refusal to sequester the jury and as a result, he was not entitled to a new trial.

Relevance; Reception and Admissibility of Evidence; Photographs Arousing Passion or Prejudice; Gruesomeness; Prejudicial Effect and Probative Value

1. The admissibility of evidence is within the discretion of the trial court.

2. The Trial Court's discretion concerning the admissibility of evidence may only be reversed upon the showing of an abuse of discretion that results in prejudice to the Defendant.

3. An abuse of discretion is not merely an error of judgment but is rather the overriding misapplication of the law, or the exercise of judgment that is manifestly unreasonable or the result of bias, prejudice, ill will or partiality as shown by the evidence of record.

4. If the Trial Court overrides or misapplies the law then discretion is abused.

5. The Court must apply a two-pronged test to determine the admissibility of photographs of a murder victim.

6. First the Court must determine whether the photograph is inflammatory or is so gruesome it would tend to cloud the jury's objective assessment of the guilt or innocence of the particular defendant.

7. If the Trial Court determines the photo is inflammatory, it next must determine whether the photo has evidentiary value.

8. The admission of the autopsy photographs during the Defendant's trial was proper because it was necessary for the jury to be informed of the nature of the Defendant's acts and to understand the history and development of the case.

9. The autopsy photos were relevant to the Commonwealth's aggravating factor of torture.

10. The autopsy photos while graphic and disturbing were not inflammatory, and the probative value of the photos outweighed their prejudicial effect.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 851 C 2010

Appearances:

John W. Peck, District Attorney, Charles Washburn, Assistant District Attorney, and Leo Ciaramitaro, Assistant District Attorney,
Westmoreland County, for the Commonwealth
Jeffrey Miller,
Johnstown, and
James Geibig,
Greensburg, for the Defendant

BY: RITA DONOVAN HATHAWAY, JUDGE

OPINION AND ORDER OF COURT

This matter comes before the court for consideration of the defendant's Post-Sentence Motions that have been filed in the above-captioned case.

FACTUAL HISTORY:

The charges in this matter arise from incidents that occurred between February 8, 2010 and February 11, 2010 in Greensburg, Westmoreland County, Pennsylvania, which culminated in the brutal torture and murder of Jennifer Daugherty. Melvin Knight ("Knight") was one of six co-defendants charged in connection with these crimes, and one of three co-defendants who was notified that the Commonwealth would be seeking the death penalty if convicted. On April 12, 2012, Knight admitted to his participation in these acts and entered a general plea of guilty to the charges contained in the Criminal Information. Specifically, Knight pled guilty to First-Degree

Murder,[1] Second Degree Murder,[2] Criminal Conspiracy to Commit Murder,[3] Conspiracy to Commit Kidnapping,[4] and Kidnapping.[5] Knight's pleas were not entered based upon any agreement with the Commonwealth. A penalty phase trial commenced on August 13, 2012, after which Knight was sentenced to death. The facts as set forth herein are derived from testimony presented at the penalty phase trial of this matter that occurred between August 13 and August 30, 2012.

On or about February 8, 2010, a mentally-challenged woman named Jennifer Daugherty traveled from Mt. Pleasant, Pennsylvania to Greensburg, Pennsylvania by bus for the purpose of visiting with friends and attending a doctor's appointment. When her step-father, Robert Murphy, dropped her off at the bus station, it was the last time a family member saw Jennifer Daugherty alive. (TT 1015-1018).[6]

Amber Meidinger, Knight's girlfriend and co-defendant, testified against Knight at trial. Indeed, Meidinger was the key witness in the Commonwealth's case against Knight. Meidinger prefaced her testimony by telling the jury that she had asked to speak to the District Attorney against the advice of her attorneys, and to testify at trial because she wanted "to testify to the truth about what happened in the case," and to give closure to Jennifer's family. (TT 506, 507-512). She admitted that she had provided the police with inaccurate accounts of the events in the past in an effort to protect herself, Knight and their unborn child. (TT 515-517). However, Meidinger told the jury why she had decided to incriminate herself and to testify at trial:

> There's not too much I can do in this situation, and looking back on what happened and all the things that happened in this case, the least that I can do, instead of being selfish and worrying nothing but myself, I need to stand up and say what actually happened. Because coming from me, being a mom, I would want to know what happened to my kid, and all I'm here is to tell the truth of what happened instead of ...

(TT 517-518). Meidinger indicated that she had been made no promises for her testimony, and that she had received no deals, plea offers or preferential treatment in exchange for her testimony. (TT 511-512)[7]

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[1] 18 Pa.C.S. §2502(A)

[2] 18 Pa.C.S. §2502(B)

[3] 18 Pa.C.S. §903(a)(1)

[4] 18 Pa.C.S. §903(a)(1).

[5] 18 Pa.C.S. §290l(a)(3).

[6] Numerals in parenthesis preceded by the letters "TT" refer to specific pages of the transcript of the testimony presented at trial before this court, held August 13-31, 2012, and made a part of the record herein.

[7] On December 4, 2013, Meidinger pled guilty pursuant to a negotiated agreement to Third Degree Murder, Conspiracy to Commit Murder, Conspiracy to Commit Kidnapping and Kidnapping, and was sentenced on that date to an aggregate sentence of forty to eighty years incarceration. The Commonwealth dismissed Count 1 (First Degree Murder) and Count 2 (Second Degree Murder) in consideration of her testimony in the trials of co-defendants Angela Marinucci, Melvin Knight and Ricky Smyrnes. The evidence presented at the time of the guilty plea established that this agreement was only reached after lengthy negotiations that commenced following the conclusion of all three trials.

Meidinger testified that she had met Melvin Knight while residing in a shelter in Washington, Pennsylvania, where they began a romantic relationship. (TT 518-519). The couple was somewhat transient, moving from Washington to Latrobe to New Kensington and eventually, in late January, to Greensburg. (TT 520-523). Meidinger testified that she met Marinucci and the other co-defendants for the first time at the bus garage in Greensburg on February 8, 2010. With them was Jennifer Daugherty, who Meidinger recognized as someone she had previously met when the two had been receiving services at West Place in Greensburg. (TT 524-531). Meidinger testified that she had a conversation with Jennifer Daugherty at the bus garage wherein Daugherty told Meidinger that she was going to marry Ricky Smyrnes. (TT 531-532). Meidinger perceived tension between Marinucci and Daugherty because Marinucci appeared to become frustrated when she overheard Daugherty's statements to Meidinger. (TT 531-523).

After meeting Knight and Meidinger, Marinucci walked with them back to the Knights Inn, where they had been staying. Marinucci confided that she was in a relationship with a married man, who Meidinger later learned to be Smyrnes. While at the Knights Inn, Marinucci engaged in a cellular telephone conversation with Smyrnes which was overheard by Meidinger because it was on the speaker. Therein, Marinucci said to Smyrnes, "You better not be with that bitch." (TT 534-535). Meidinger testified that she later learned that Marinucci was referring to Daugherty. (TT 535-536).

Meidinger and Knight eventually rejoined Ricky Smyrnes at the apartment later that evening. Also present were Robert Masters, Peggy Miller (his fiancé), "Jason," (last name unknown) and later, Jennifer Daugherty. (TT 537-543). After "Jason" had left, Meidinger testified that Daugherty wanted to be intimate with Ricky Smyrnes, but that Smyrnes was not interested and, in fact, that he became angry with Daugherty. (TT 543-544).

On Tuesday, February 9, 2010, Meidinger left the apartment with her caseworker to obtain some clothing. When she returned to the apartment, she learned that Jennifer Daugherty was supposed to go to a doctor's appointment at 3:00 p.m. in order to get medication; however, she decided not to keep the appointment. This angered Smyrnes and Knight, which led to a heated discussion between Knight, Smyrnes, Meidinger and Daugherty. (TT 550-551). Meidinger testified that Daugherty retreated to the bathroom, and took a shower. It was then that Smyrnes called Marinucci on a cell phone and told her that Daugherty had tried to have sex with him the night before. Marinucci responded by stating that was not right, because "nobody is having sex with her man." (TT 551-552). The group then decided that it would be funny to make fun of and embarrass Daugherty. Meidinger, Knight, Miller, Masters and Smyrnes rifled through Daugherty's purse. They removed cash, an Access card, a gift card and Daugherty's cell phone from her purse, and then poured toothpaste and mouthwash on her clothing and her purse. (TT 552-555). This childish humiliation of Daugherty continued throughout that day, until Melvin Knight became physical with her when she began resisting their "fun." Meidinger testified Knight grabbed Daugherty by the shirt, knocked her into a wall and began choking her. (TT 556-561).

Meidinger testified that Marinucci arrived at the apartment a short time later, upset because Daugherty had tried to sleep with Smyrnes. Marinucci confronted Daugherty, but when Daugherty stated that she had done nothing wrong, Marinucci pushed Daugherty into the bathroom towel rack three times, hitting her chest and head. (TT 561-563). Meidinger asked Daugherty if she "had a thing for Melvin," and when Daugherty denied any interest in Knight, Meidinger continued the physical assault that Marinucci had started. (TT 563-564). Knight then dragged a crying Daugherty out of the bathroom and he and Smyrnes began pouring water and spices on her head. Smyrnes then forced Daugherty to take a shower, proclaiming that "she stunk." (TT 564-566). When Robert Cathcart (the original tenant on the apartment's lease) phoned to inform the residents of the apartment that he was coming to remove his property, Smyrnes and Knight forced Daugherty into the attic so that Cathcart would not know that she was there, and Smyrnes told her that something would happen if she made any noise while Cathcart was in the apartment. When Cathcart needed to retrieve items that were in the attic, Knight moved Daugherty from the attic to the bathroom. (TT 566-569). Notably, the police responded to a disturbance at the apartment during Cathcart's visit when an altercation erupted between Cathcart, Smyrnes and Knight. They spoke with the men outside, and did not have cause to enter the apartment. (TT 570-571).

It was then that Smyrnes and Knight brought Daugherty out of the bathroom, where the humiliation continued. They forced her to take off her pajamas and then threw them outside onto the porch roof. Knight cut Daugherty's hair off with scissors and then he and Smyrnes made Daugherty clean up the mess that he had made. (TT 572-581). Meidinger testified that Knight then grabbed Daugherty, took her into the living room, stuffed a sock into her mouth, and raped her. (TT 581-583).

Marinucci then decided to call her home and tell her family that she wanted to spend the night at the apartment. (TT 584-585). Meidinger, Knight, Smyrnes and Marinucci walked to Marinucci's home to get her medications, and Smyrnes left Masters and Miller at the apartment, telling them to "not let Jen leave, and if they let her leave there would be consequences, something bad would happen." (TT 585-586). After collecting the medications, Smyrnes received a phone call from Peggy Miller, telling him that Daugherty was trying to get out of the house. Smyrnes instructed Miller to keep Daugherty in the house, and Smyrnes and Knight ran to the apartment, where they, along with Marinucci and Meidinger, confronted Daugherty and began beating her. (TT 586-590). They gave her Marinucci's Seroquel pills, and then left her in the living room while they went to bed. (TT 590-591).

Meidinger testified that on Wednesday morning, Smyrnes, Knight and Marinucci left the apartment to cash a check. Smyrnes instructed Miller, Masters and Meidinger to keep Daugherty in the apartment, because if Daugherty left, "consequences" would be on them. (TT 592-593). When the three returned to the apartment, Marinucci confronted Daugherty about drinking the soda pop that had been in the refrigerator. Daugherty denied doing anything wrong, stating Marinucci had told her that she could drink it. (TT 594). Marinucci then pushed Daugherty to the floor and began hitting her. When Daugherty kneed Marinucci in the stomach in self-defense, Marinucci ran to

Smyrnes, stating that Jen had killed her baby. (TT 595-596).[8] Smyrnes then confronted Daugherty stating, "If you want to kill my kid, why should I let you live?" (TT 596). Marinucci demanded that Ricky choose between her and Daugherty, and it was then that Smyrnes called the first of the "family meetings" to discuss Daugherty. (TT 596-598). According to Meidinger, Smyrnes asked advice from the others about what kind of mother Daugherty would be. (TT 599).

Meidinger testified that at this point on Wednesday afternoon, Daugherty appeared to be scared and "out of it," having been beaten, raped and drugged. (TT 599-600). At a second "family meeting," Marinucci suggested that Daugherty should be fed various "drinks." (TT 600-601). Marinucci then urinated in a cup, and Meidinger forced Daugherty to drink Marinucci's urine. To "encourage" this, Meidinger testified that she hit Daugherty with a towel rack. (TT 601-603). A second "drink" was made, containing Meidinger's feces and more urine. Again, Meidinger struck Daugherty in the head with a towel bar until she had consumed the foul mixture. (TT 603-605). Meidinger and Knight then made yet another "drink" that included Clorox detergent, water and some of Meidinger's prescribed medication. Again, Daugherty was forced to drink the concoction, and Meidinger testified that Jen was crying and throwing up during this process. (TT 605-606).

Knight and Smyrnes brought Daugherty from the bathroom into the living room, and decided to bind Daugherty with Christmas tree lights, and Marinucci urged them to plug them in to make sure that they worked, because she wanted Daugherty to look like a Christmas tree. (TT 607-608). When the lights would not blink, Smyrnes, Knight and Meidinger removed the bulbs from the strands and used the light strings and some Christmas garland as ropes to tie Daugherty up. (TT 608-609). A third "family meeting" was then held, and Smyrnes asked whether they should kill Daugherty. At that time, each member of the "family," Smyrnes, Knight, Meidinger, Marinucci, Miller and Masters, voted to kill Jennifer Daugherty. (TT 609-611). Smyrnes then asked Daugherty if she wanted to live.

> Ricky implies why should I let you live when you killed my baby...
> She said she didn't do anything, and she didn't mean to do anything,
> and Ricky forced her to write a suicide letter.

(TT 612). Smyrnes stated that "he was going to put this letter in her pocket, and whenever somebody finds her, it would look like she tried to kill herself so we couldn't get into trouble, wouldn't get into trouble." (TT 613).

Meidinger testified that Knight took a knife from Smyrnes, and Smyrnes told him, "You know what to do." (TT 636). Knight grabbed the bound Daugherty and took her into the bathroom, placing her on her knees in front of the shower. Meidinger witnessed Knight as he asked Daugherty if she was ready to die, and then as he stabbed Daugherty in the chest multiple times with a knife. (TT 615-617). After Knight stabbed Daugherty, Meidinger turned on the lights and observed Daugherty gasping. Meidinger testified that Knight then opened the bathroom door,

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[8] The testimony presented at trial established that Marinucci was not in fact pregnant during the time of the incident.

> and he states the bitch ain't dead yet. And through the ruckus Angela [Marinucci] had stated, just kill her, I want her out of here. So Melvin hands me the knife and he goes into the kitchen, I don't know what he grabbed or what he was doing in the kitchen, but Ricky had taken the knife off of me and went into the bathroom... Ricky had grabbed the knife off of me and went into the bathroom and cut her wrists.

(TT 617). Meidinger testified that Knight also stabbed Daugherty in the neck, and that after Smyrnes slit Daugherty's wrists, Smyrnes and Knight wrapped the Christmas lights around Daugherty's throat and choked her with the lights. (TT 619-620).

Smyrnes called yet another "family meeting" to decide what they would then do with Daugherty's body. Masters suggested that they place her body on the train tracks. Marinucci suggested that they burn the body in front of a church. Meidinger suggested that they put the body in a car. Finally, Smyrnes stated that he was going to obtain a garbage can and wheel the body somewhere close. (TT 621-622). When he returned with a garbage can, Daugherty's body was placed into a plastic bag and into the can. Knight and Smyrnes used bleach to clean the floors and towels to wipe up the blood. Knight and Smyrnes then left the apartment with the garbage can. When they returned, they told the others that they had placed Daugherty's body under a truck. (TT 622-624). It was early on the morning of Thursday, February 11, 2010.

Daugherty's body was discovered by Daniel Grant, an employee of Cleveland Brothers Equipment Co., Inc., on the morning of February 11, 2010. He had found a garbage can stuffed underneath his work truck that he had parked in the parking lot of the Greensburg Salem Middle School the night before because of the significant amounts of snow that had accumulated on the roads due to a winter storm. When Grant tried to drag the trash can from underneath the vehicle, the lid came off the trash can and he saw that there was a body inside the can. (TT 149-151). He notified 9-1-1, and law enforcement responded immediately. Lt. Chad Zucco testified that when he arrived on the scene, he illuminated the interior of the garbage can and was able to observe what appeared to be a body, jeans and some sort of Christmas lights. (TT 153-154). The investigation commenced, and the body was later identified as that of Jennifer Daugherty.

The forensic and scientific testimony that was presented at trial was consistent with the testimony that was received from the lay witnesses at trial. Dr. Cyril Wecht testified as an expert witness in the field of forensic pathology. Dr. Wecht performed the autopsy on the body of Jennifer Daugherty. He testified that he received the body while it was still in a trash can. He noted that the body had been placed head-first into the can, and was partially covered with plastic bags. He also noted that there were strands of Christmas lights with the bulbs removed wrapped around the neck and binding the wrists. The ankles were bound with a "whitish type material, blue decorative particles." (TT 678-679). Dr. Wecht observed multiple incised wounds and numerous abrasions and contusions on Daugherty's body. (TT 683-696). Dr. Wecht also noted that the toxicology report that was performed as part of the autopsy revealed Sertraline (Zoloft) and Seroquel in Daugherty's system. (TT 706-708).

Following his autopsy, Dr. Wecht concluded that the cause of Daugherty's death was the combination of all her injuries, but was primarily due to the "stab wounds of the chest wall that penetrated into the left lung and into the heart producing a substantial amount of hemorrhage." (TT 709). Dr. Wecht opined that Daugherty's injuries were inflicted shortly before her death (TT 710) and that the combination of all of the injuries that he observed on Jennifer Daugherty's body would have been inflicted with the intent to cause pain and suffering. (TT 725-727). Dr. Wecht further testified that he believed that Daugherty would have remained conscious after the infliction of these wounds, while bleeding, for a couple of minutes, would then have lost consciousness, and within four to six minutes would have died. (TT 727-728).

ISSUES PRESENTED FOR CONSIDERATION:

1. WHETHER THE JURY PANEL WAS SWORN PRIOR TO THE COMMENCEMENT OF TESTIMONY IN THE TRIAL?

Knight first alleges that he is entitled to a new penalty phase trial because the jury had not been sworn prior to the commencement of trial. Neither the court, nor the attorneys for either side in this case, were aware of the possibility of this issue until after the penalty verdict had been rendered and the jury discharged. Indeed, it was only after the jury, the parties and the court staff had departed the courthouse and the staff was at a local restaurant that the minute clerk, Betty Mansour, mentioned to the judge that she did not think the jury had been sworn prior to testimony. (TT 1880, 1897). The court brought this issue to the attention of the attorneys, and it was addressed in camera on August 31, 2012, prior to the sentencing hearing.

There is really very little recent precedent to guide the court in this matter. The Commonwealth suggests that the defendant's failure to make a timely objection as to this issue constitutes a waiver on appeal. This court brought the matter to counsels' attention *sua sponte* at the earliest time possible given the concerns raised by Mansour at what might be considered the thirteenth hour. The defendant then raised the issue in post-sentence motions, not having voiced timely objections at the time that the oath was allegedly not administered to the jury, or prior to verdict.

> "A defendant must make a timely and specific objection at trial or face waiver of her issue on appeal." ***Commonwealth v. Schoff,*** 911 A.2d 147, 158 (Pa.Super.2006) (citing Pa.R.A.P. 302(a)); *see also* ***Kaufman v. Campos,*** 827 A.2d 1209, 1212 (Pa.Super.2003) ("In order for a claim of error to be preserved for appellate review, a party must make a timely and specific objection before the trial court at the appropriate stage of the proceedings; the failure to do so will result in waiver of the issue.").

Commonwealth v. Olsen, 82 A.3d 1041, 1050 (Pa.Super. 2013). Certainly, had defense counsel noted that the jury had not been sworn at the time, and failed to voice a timely objection in the hopes of creating an issue on appeal, the court would find an intentional waiver of this issue. *See, e.g.,* ***United States v. Turrietta,*** 696 F.3d 972

(10th Cir. 2012). However, the ultimate issue is whether the jury was in fact sworn. While the District Attorney specifically recalled the oath being administered, neither of the attorneys for the defense had a distinct recollection as to whether or not the oath was given. Therefore, it would be inappropriate to consider the issue waived for failure to make a timely objection. The Pennsylvania Supreme Court in 1935 held that a defendant cannot affirmatively waive the swearing of the jury. "A part, and an absolutely necessary part, of jury trial is a sworn jury. This cannot be waived or dispensed with; without it there is no trial by jury." ***Commonwealth v. Robinson,*** 317 Pa. 321, 336, 176 A. 908, 915 (Pa. 1935).[9] Further,

> In a trial by jury in a criminal case, it is well settled that there are some matters which a defendant can waive and other matters and safeguards, which are so fundamental in nature, and implicit in trial by jury, that even the defendant cannot waive in a capital case. ***Commonwealth v. Petrillo,*** 340 Pa. 33, 34-46, 16 A.2d 50. A defendant in a trial by jury in a criminal case, cannot constitutionally waive a swearing of the jury. ***Commonwealth v. Robinson,*** 317 Pa. 321, 176 A. 908.

Com. ex rel. Tate v. Banmiller, 393 Pa. 496, 496, 143 A.2d 56, 57 (Pa. 1958).

Assuming that the issue has not been waived for purposes of review, this court must necessarily evaluate the record in its entirety, including the testimony presented at the evidentiary hearing held on Knight's post-sentence motions. Mansour testified on August 31, 2012, that she had first questioned whether the jury had been sworn to herself in the early morning hours of the day before testimony concluded (August 29, 2012), but admitted that she had not brought the matter to the attention of the court. (TT 1897-1898). She testified that she had then forgotten about the issue until after the penalty verdict had been rendered, and related that she believed that she had not sworn the jury in prior to testimony beginning because she had no personal recollection of it, and when she checked her book, it was not recorded there. (TT 1898-1899). Mansour reported that it was possible that she had sworn the jury in and that she had either forgotten or failed to make the entry in the book, but she maintained that she was "usually pretty thorough with things and I document it as soon as I do it."

MR. MILLER: Is it possible that you had forgotten or failed to make the entry?

MANSOUR: It's possible, but I'm pretty accurate with that book.

MR. MILLER: Is it possible that you had forgotten that the oath was given and you just don't recall having done that?

MANSOUR: It's possible, but I'm, usually pretty thorough with things and I document it as soon as I do it.

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[9] Of course, the Supreme Court in that case also noted that a defendant could not waive a trial by jury either, demonstrating that what "fundamental rights" may be waived is a matter subject to changing interpretation. This court is cognizant that the ***Robinson*** case is remote, and that this issue has not been addressed by our state appellate courts in recent history.

(TT 1899-1900). Mansour further testified that typically, when she administered the oath to the jurors, she would stand within a few feet of her desk and read the oath from a note card. (TT 1900). This is different from when she would swear a witness, at which time she did not read from a card. (TT 1900-1901).

This court's recollection is that the jury was sworn at the beginning of the trial. (TT 1880). Indeed, this court stated for the record on August 31, 2012:

> THE COURT: So, now I am just going to put on the record that last night, after trial, my Court Clerk brought to my attention that she thought that I had not sworn in the jury prior to the testimony. I have informed counsel of that. And my recollection is that I did swear them in. My recollection is that we had a lot of things going on here in chambers, we had to release an alternate juror, and that when I walked into the courtroom and our jury was seated, my recollection is that I said to counsel, I looked down at counsel table, and normally I say counsel is this the jury that you have selected, and I said something like is this the jury that you got or is this the jury that you chose, something that sounded stupid to me, and I thought why did I say that, I must be nervous, and I have a recollection of the jury being sworn in.
>
> My recollection is also that my court reporter was not yet set up at that time but, you know, so it's not on her record. She has checked her record and she is very accurate and does not have it on her record, jury sworn. That is my recollection.

(TT 1880-1881). Court Reporter Kathryn Sileo was one of two stenographers assigned to this case, and she was the stenographer who was working on August 20, August 30 and August 31, 2012. It should be noted that during the August 31, 2012 in camera proceeding, Sileo never corrected the court's expressed recollection that she had not been in the courtroom and set up as the trial commenced. Nor did she advise the court at that time that her rough notes indicated that the jury had been escorted into the courtroom, even though she had already reviewed her notes prior to that time.

Defense counsel Jeffrey Miller, Esq. and James Geibig, Esq., reported to the court that they had no independent recollection of whether or not the jury had been sworn:

> MR. MILLER: Just for the record, I don't have any recollection one way or the other.
>
> THE COURT: And Mr. Geibig?
>
> MR. GEIBIG: Same thing, Your Honor. I mean, I did take notes and I haven't reviewed my notes, I don't know if I put them in my notes or not. But as I sit here now, I have no independent recollection.

THE COURT: Yeah. And my recollection, as I looked down at all five counsel and Mr. Knight sitting at counsel table, I can like see in my mind Mr. Geibig writing and then looking up at me like what are you bothering me for. You know, I just have that recollection in my mind. I can see them all and thinking whatever wording I used, instead of is this the jury you selected, whatever word I used, I thought that was stupid, what did I say that for, you know. And just watching them being sworn in.

(TT 1903-1904). District Attorney John Peck did recall the swearing of the jury:

MR. PECK: Judge, you know, the more we're talking about it, in my own memory I sort of do have a recollection of them standing and me hearing them individually saying I do. Because it struck me as strange for that reason, that I had never heard people's individual voices, and that morning I heard two or three people say I do, and sort of remember it sounds like people are getting married, I thought, at the time. Because I never had -- I don't have any recollection of a jury ever responding with the oath. I don't pay attention. So, although it's not the greatest recollection, but having spoken about it, I think they were sworn.

(TT 1901-1902).

Det. Jerry Vernail testified on August 31, 2012 that he had been present at all times in the courtroom, as he was one of the prosecuting officers. He testified that he had been in the courtroom on August 20, 2012 when testimony began and that he had a specific recollection of the jury being sworn. He stated, "I remember seeing Betty [Mansour] read it from a card which she doesn't — that's not a normal thing. All through the trial she has that memorized, and the specific jury oath she read from a card." (TT 1883). Vernail recalled that she was standing in front of where he was seated, and specifically remembered "looking up at Juror Number 6 thinking how well he was dressed and that he took this seriously. I remember it. I'm certain I remember it." (TT 1882-1889).

Emily Freed, a law school graduate who had been interning for the District Attorney's Office, testified that she had been in the courtroom for the penalty phase trial of Melvin Knight. She testified that she was present in the courtroom on August 20, 2012 at the time that testimony was scheduled to commence. She further testified that she was present and had a specific recollection of the jury being sworn, because she had helped to do background research on the jurors and was interested in seeing who was ultimately selected for the jury. Freed recalled seeing Mansour standing in front of the bench, reading the oath from what appeared to be a piece of paper. (TT 1891-1894).

Following the filing of the Defendant's post-sentence motions, the court scheduled a hearing on this issue. At that time, the Commonwealth presented the testimony of the

fourteen jurors who ultimately made up the jury in this matter. Juror #1 testified that she specifically remembered being sworn in as a prospective juror before jury selection began and again the day that trial started. (PSM 10).[10] She recalled feeling anxious, and thinking when the oath was administered, that "it was under way." (PSM 10). Although she could not recall the exact words, she remembered that "a small woman" who was in the courtroom working with papers read the oath to the jury, that prior to that occurring they had been in the jury room, and that she could not recall whether or not the court reporter was in the room at that point. (PSM 13-14). She recalled the difference between the first and the second oaths, with the first being given to the prospective jurors as a group, and that at that time she was sitting in the first row in the courtroom, that she was the third juror questioned and that after she had waited for a few minutes, she was told that she would be Juror No. 1. (PSM 17). She further testified that if the jury had not been sworn in prior to the start of testimony she would have felt it was not normal, and would have questioned it. (PSM 22-23).

Juror Number 2 testified that she recalled coming to the courthouse as a prospective juror and remembered taking an oath prior to the beginning of jury selection. (PSM 25, 28). She also remembered the second time that she was administered an oath:

> I do remember, um, coming in and, of course, everything was new trying to take in who everyone was, um, so I remember being very nervous. Um, and I remember going into the juror box and sitting in the chair and I remember standing – having to stand back up and I remember raising my right hand. I don't remember a great deal of detail, but I do remember taking the oath because, you know, I remember thinking how serious what I was saying was.

(PSM 25). She also testified regarding the two oaths: "Once in the back when I was sitting back there before going in and then once when I was sitting in the chairs." (PSM 26, 28). Juror 2 also remembered that during deliberations, the jurors kept in mind the oath that they had taken: "When we were talking about the gravity of the situation, that we took an oath and that we were doing our job according to the oath to uphold the law of Pennsylvania and that's how we could make the decision that we had made." (PSM 27). She could not recall the exact words that were said, but she clearly remembered them being said: "I don't recall the details of it but I recall standing up and raising my right hand. I don't recall the details, the words per se, but I do recall standing up." (PSM 27).

Juror Number 3 testified that she believed she remembered being in the courtroom and being sworn in as a prospective juror. (PSM 34). She definitely remembered taking an oath immediately prior to the trial actually starting:

> I remember thinking at the time, um, now we're really in it, This is really happening. It was stood up [sic], raise our hands (indicating), this is really serious. I remember having this odd little thought because I think, you know, I'm a very thinky sort of person. This is

[10] Numerals in parenthesis preceded by the letters "PSM" refer to specific pages of the Post Sentence Motion Hearing that was held on May 23, 2013 before this court, and made a part of the record herein.

> not politically correct. They're asking us to swear and this is an oath and I wonder if people who don't go with oaths object to swearing. I just remember having that thought. It was very fleeting. I didn't have any objection, but I remember having that thought.

(PSM 34-35). Juror No. 3 testified that she had no doubt whatsoever that she had taken an oath as a juror the morning that the trial began. (PSM 36). She recalled being brought into the courtroom, and that that the oath was followed by a lengthy period of jury instructions, where the judge was reading to them. (PSM 41-42).

Juror Number 4 testified that she remembered an oath being administered to prospective jurors prior to her filling out a questionnaire and being asked questions by the attorneys and the judge in the jury room. (PSM 45). She also recalled being given an oath at the commencement of trial, and that the oath was administered by the minute clerk (PSM 46). "I just remember being in my juror seat and I remember that particular day I usually carry a bottle of water because I had sinus issues then and I remember having to fumble with that to, like, get up and do that." (PSM 46). She could not say with certainty whether the court reporter was in the courtroom when the jury walked in that morning. She could not recall the exact words of the oath, but did recall that the jury referenced it in their discussions. Finally, Juror No. 4 distinguished between the two oaths, with the first having been given in "the pew chairs" "prior to when we first went to meet with you guys back in the chambers the first day," (PSM 48, 49), and the second while she was in her "juror seat." (PSM 46)[11]

Juror Number 5 testified that he recalled the oath being administered to prospective jurors prior to them filling out a questionnaire (PSM 52), although he recalled it occurring "downstairs." (PSM 54). He also recalled being administered an oath after being brought into the courtroom as a juror at the commencement of trial. (PSM 52, 54-55). He recalled this specifically because "I remember standing there in the front row saying please don't pass out." (PSM 53). He recalled that "the lady was sitting in front of the judge here" gave the oath. (PSM 55). He did not recall the court reporter being in the courtroom: "I remember seeing them[12] during the trial for the two weeks but not at that, in fact, time." (PSM 56).

Juror Number 6 testified that he also remembered having taken an oath as a prospective juror, but could not recall whether there was another oath administered at the start of trial. (PSM 58-60).

Juror Number 7 testified that she remembered taking an oath when she was sworn in as a prospective juror, before she was asked any questions. She also specifically

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[11] The court notes that the public seating area at the rear of Courtroom Number 5, where this matter was tried, consists of rows of bench seating that resemble the pews that one might see in a church. The court further notes that it is in this area that potential jurors are typically seated prior to and during the jury selection process. Potential jurors review and fill out the written jury questionnaire while they are seated in this area, and are taken into the jury room at the rear of the courtroom for individual voir dire. Because the jurors selected in this case were sent home immediately after being selected and told to return for the first day of testimony, the jury would not have been seated as a group in the jury box prior to August 20, 2012.

[12] There were two different court reporters who were assigned to the courtroom for the penalty phase trial of this matter: Kathryn Sileo and Bonita Bell.

recalled having taken a second oath at the commencement of trial, before the judge's instructions, because "that was the point the reality of the situation set in... I knew I was coming here for the trial. I knew what type of trial it was. Just standing there in that moment it kind of galvanized the situation (indicating [raising right hand up])." (PSM 61-62). She also distinguished the two oaths, the first having occurred when the prospective jurors were sworn in as a group and she was seated at the back of the courtroom, and the second time having occurred when she was in the jury box. (PSM 63-64). She recalled that, shortly after they took the oath in the jury box, the judge began giving them instructions. (PSM 64). Regarding the actual oath, Juror No. 7 recalled "to the best of your ability to deliver a verdict, to honestly consider the information. I don't know the verbiage." (PSM 64-65). Finally, she did not recall a court reporter being in the courtroom at the time that the oath was administered. (PSM 65).

Juror Number 8 testified that he remembered taking an oath with his fellow jurors the morning that the trial began, but could not recall taking another oath prior to jury selection. (PSM 67-71).

Juror Number 9 testified that he remembered taking an oath to tell the truth prior to the jury selection process beginning. (PSM 73). He stated that he remembered that at the time, he was sitting in the front row of the public seating area in the courtroom. (PSM 75). He also remembered taking another oath the morning of August 20, 2012 with his fellow jurors. He stated that he had recalled that specifically because he thought to himself, "Oh, shit, the trial is about to start." (PSM 74). He recalled that it was the first time that all of the jurors were together, that they walked in and sat down, and that the oath was given by a lady in a skirt who was sitting at the desk where the minute clerk would sit. (PSM 76). Further, he remembered seeing the court reporter throughout the trial, but did not recall her being in her seat at that time. (PSM 76-77).

Juror Number 10 testified that she did not remember being given an oath prior to the jury selection process, but did clearly recall being given an oath prior to the start of trial. (PSM 80-81). She specifically remembered this because she does not like having to stand in front of people, that she gets nervous about that and she recalled the feeling of being anxious. (PSM 81). She also remembered that prior to the oath, she had been called into the judicial chambers to be asked about some contact that a lawyer had with her that morning. (PSM (81-82). She remembered that the oath had been administered while the jury was in the jury box, and was given by a woman who was standing in front of the judge near the witness stand. (PSM 82-84). She did not recall whether there was a court reporter present, but did recall that in the oath, they jury promised to "Listen to the facts of the trial and to, um, give a verdict based on that." (PSM 84). She believed that the judge began to speak after the oath had been administered.

Juror Number 11 testified that she recalled that an oath was given to prospective jurors when they were brought to the courtroom to participate in the jury selection process. (PSM 86). She also remembered being brought into the courtroom on the day that the trial began and being given another oath. She remembered thinking "it wasn't

like the television shows. You don't get to see what the jury does in the television shows and thinking that the trial is actually real and it's starting." (PSM 87). She remembered that during the first oath, they were sitting in the courtroom, but at the time of the second oath, they were seated in the jury box (PSM 88-89). She remembered that the oath was given by a woman who sat at a desk right in front of the judge, and that she had walked to the front of the jury box when she gave the oath. (PSM 89-90). Juror No. 11 also remembered seeing a court reporter throughout the trial, but could not recall whether the court reporter was in the room that morning. (PSM 90).

Juror Number 12 testified that he remembered taking the oath as a prospective juror prior to jury selection. (PSM 92-93). He also specifically remembered the details of the morning that the trial commenced, including meeting in the jury room, lining up to come into the courtroom, and then being told that they could relax, and the delays that ensued. He clearly recalled finally being brought into the courtroom and being administered an oath. "I remember vividly raising my right hand, standing there and being sworn," and thinking that it was different than on television. (PSM 94-95). He did not remember the court reporter being in her position but believed that the judge was present. He indicated that a woman who had been sitting in front of the judge read the oath. "She got up from her chair, faced us and told us to raise our right hand and go from there." (PSM 97-98).

Juror Number 13 also recalled taking an oath as a prospective juror (PSM 101, 103). She also believed that she remembered taking an oath on the first day of trial, but thought that occurred in the jury room. (PSM 102-103). She remembered thinking, "Why are we doing this a second time?" (PSM 104, 108). She also recalled that a girl who sat at the desk in front of the judge gave the oath. (PSM 104)

Juror Number 14 (originally Juror 16) testified that he remembered taking an oath as a prospective juror. He also recalled being administered an oath on the first day of trial (PSM 110, 113). He specifically recalled taking the oath at the beginning of trial for two reasons: "Not being familiar with the jury process I was thinking why am I taking the oath twice, but I guess that's a normal situation. And then the second is once I took the oath I said, well, I'm all in because that means that officially, I'm here." (PSM 111). He recalled that he was in the jury box when the oath was given, but could not recall who gave the oath. He also did not recall a court reporter being in the room when the jury came in that morning. "I do not recall that, but I do recall sometimes when we came in here there was a reporter here and sometimes when we came in there was not a reporter here." (PSM 114-115).

Kathryn Sileo testified at the post-sentence motion hearing that she had been employed as a court reporter for Westmoreland County for thirty three years, and that she was one of two court reporters that covered the trial of Melvin Knight. (PSM 117-118). She explained generally the process by which she writes the testimony and other things said in court, and explained the process by which the official transcript is prepared and filed. (PSM 122-126). She testified that she prepared and filed an official transcript in this matter sometime in October 2012. Sileo acknowledged that she had also been ordered by this court to produce a copy of her rough draft, or unedited

transcript, of the proceedings held on August 20, 2012, and to provide it to the court and to the Commonwealth. (PSM 127, Defendant's Exhibit A).[13] In fact, it became necessary for the Court to issue an Order directing Sileo to do so after it was discovered that Sileo had produced and provided the rough transcript to defense counsel without any notice to the court that she was doing so and without providing an identical transcript to the Commonwealth or the court. At that time, Sileo was also directed to provide all parties and the court with a copy of the raw notes of testimony from that date.

It is interesting to note that, throughout much of the rough, unedited transcript from August 20, 2012, Sileo specifically records her movements. For example, she notes that the morning's proceedings began in the judicial chambers (for the interview of a juror): "In chambers. Eight 56," noted at 8:56:12 AM (Defendant's Exhibit A at page 1). She also notes when the in-chambers discussions resumed with the interview of J. Allen Roth, Esq.: "Back in chambers. Nine 20.," noted at 9:16:58 AM and 9:17:00 A.M. (Defendant's Exhibit A at page 14). She notes at 9:23:04 AM that Attorney Roth left chambers, and that she re-entered the courtroom thereafter: ". Back in courtroom at 9:26.," noted at 9:26:34 AM. (Defendant's Exhibit A at page 17). She again notes a movement when she returns to the judicial chambers: ". Back in conference room.," noted at 9:31:04 AM., and the interview with another juror began at "Nine 31.," noted at 9:31:36 AM. (Defendant's Exhibit A at page 17). The interview with Juror No. 10 and the discussions that followed appear to have concluded at approximately 9:33:32. Her next stenographic notation was at 9:34:04 AM, when, at the post-sentence motion, Sileo testified that she was back in the courtroom, which, according to her interpretation of the rough, unedited draft, took only 32 seconds to accomplish, whereas the previous movement back into the courtroom took approximately three and one-half minutes. Her next stenographic notation merely states, "Nine 36," without any further stenographic information. However, the actual time that this notation was typed by Sileo was at 9:36:24 a.m. (Defendant's Exhibit A at page 20). It is also notable that Sileo is somewhat inconsistent in making these "mental notes" in the transcript regarding her personal movements.

Sileo also documents the times that the jury entered and exited the courtroom, although again, this documentation is not consistently recorded specifically. For example, Silo notes that the judge directed the jurors to be escorted out of the courtroom for the morning break: "Everyone please remain seated until the jurors are escorted out," noted at 11:11:56 AM (Defendant's Exhibit A at page 86). She also notes the time that the jury was again seated in the jury box following the break: "Jury in now at 11:31.," noted at 11:31:34 AM. (Defendant's Exhibit A at page 87). She notes that the parties were again in chambers for discussions with a juror after lunch: "In chambers at 1:40," noted at 1:40:00 PM (Defendant's Exhibit A at the second page 1).[14]

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[13] By Order of Court dated May 20, 2013, Sileo was ordered to print copies of her raw stenographic notes for proceedings occurring on August 20, 2012, as well as her rough notes for that same day, and provide those copies to the Court, the Commonwealth and the defense.

[14] It appears that for some reason, Sileo separates the pagination for Defendant's Exhibit A with both the morning and the afternoon sessions beginning with page 1, even though they are contained in the same bound transcript.

Sileo also clearly notes the conclusion of the in-chambers discussions at 1:44:54, and, according to her self-described system, indicates that she was back in the courtroom, set up and ready to go, at "One 46.," which was actually noted at 1:46:32. (Defendant's Exhibit A at the second page 6). While there are no specific stenographic notes describing the movement at this time, more than one and one-half minutes appear to have passed before that occurred. Sileo does note that this court directed that the jury be brought in at 1:47:12 PM, and appears to note that something is occurring, although her stenographic notations are not clear. She does not indicate that the jury was brought into the courtroom; however, she does note that the testimony resumed. (Defendant's Exhibit A at the second page 7). This court has no problem with a court reporter making these "mental notes;" however, it seems that the insertion of information, as trivial as it may seem, into the official court transcript should never occur if there is no corresponding "mental note" in the court reporter's raw notes to support that information.

Although Sileo had never told the court that she distinctly remembered being in the courtroom when the jury was brought in, she testified at the post-sentence motions hearing as a witness for the defense that she was indeed the courtroom and the jury swearing did not occur. (PSM 120). She testified that there is no record of the administration of an oath to the jury in the official transcript because she "never took it down." (PSM 120). Sileo testified that her transcript reflects that some testimony was taken and extended discussions occurred in the judicial chambers regarding various juror issues prior to the start of trial. She further testified that her transcript reflects that she reentered the courtroom at 9:34 a.m. and that she was waiting in the courtroom when the court instructed the tipstaff, Mrs. Tenerowicz, to bring the jury into the courtroom. (PSM 139). Sileo testified specifically that she was in the courtroom, in her chair at 9:34:04. (PSM 140).

Sileo's recollection was that it was during this time that the jury was escorted into the courtroom. (PSM 140-141). Even though this information was not documented in either Sileo's raw stenographic notes or in her rough unedited draft, she chose to unilaterally insert this information in the official transcript of the proceedings. (TT 66).[15] She testified that she did not hear the judge ask the attorneys if this was the jury that they had chosen and she did not hear the minute clerk give the oath to the jury. (PSM 142-143). She also testified that there was no possibility that the jury was sworn between the time of the in-chambers discussions and the opening instructions and that she simply was not in the courtroom, set up and ready to type. (PSM 143).

Sileo acknowledged that Defendant's Exhibit A, the raw, unedited transcript, was generated by her computer software and contained a running time stamp on the side of the paper. (PSM 145). She further acknowledged that her machine had the capability of utilizing a microphone to audio record the courtroom proceedings, but that she did not utilize that function because her software did not support it. (PSM 144-145). She also acknowledged that she typically made unilateral decisions about "what doesn't

[15] Sileo's preparation of the official transcript occurred after the question of whether or not the jury was sworn became an issue herein.

make it in a transcript with regard to things that are said... or not said." (PSM 149-151). Indeed, in this case, she acknowledged that in preparing the official court transcript, she made decisions to exclude certain discussions that she had typed on the record from the final official transcript, and also made decisions to add headers and other information that she had not, in fact, transcribed at the time that they occurred. (PSM 149-157). Sileo explained that she would type "mental notes" to remind her of what had been occurring and where it had been occurring to aid her in preparing the official transcript, such as "in chambers," "back in conference room" and "back in courtroom." (PSM 152-157).

Sileo made a unilateral decision about inserting something into the official court transcript that no where was reflected in her raw notes, and which she was already aware was a material issue in the case. She acknowledged that she did not type "in courtroom" when she returned to the courtroom after the final in-camera juror discussion, and that her testimony regarding being in the courtroom and not hearing the jury being sworn was based upon her review of her notes and upon her memory. (PSM 162-163). Again, however, there is no documentation in her raw notes or in her rough draft to indicate that her memory is accurate. She also acknowledged that anything that occurred in the courtroom when she was not actually in the courtroom would not be reflected in her stenographic notes, because she would not have heard it. (PSM 163). Finally, Sileo noted that because these oaths are just normal courtroom procedure, she does not type the actual words of the jury oath at the start of trial, just as she does not type the actual words of the witness oath prior to testifying.

Importantly, Sileo stated that, had she noted that the jury had not been sworn at the start at trial, she would have brought that to the court's attention immediately. She did not do that. (PSM 171-174). "If I had realized the jury wasn't sworn I would have brought it to the judge's attention. I didn't realize it because I wasn't - - I never took down the jury oath." (PSM 189). Sileo also acknowledged that a number of other things that are typically said at the beginning of a jury trial are conspicuously missing from the transcript in this matter. (PSM 192-193). She ultimately agreed that one of two things had occurred: either the jury was not sworn, or she was not in the courtroom at the time that it occurred. (PSM 174, 188-189).

Court Assistant Betty Mansour also testified as a witness for the defense at the post-sentence motions hearing in this case. She explained that she would typically record all of the details of a trial in a journal-like book that she kept at her desk in the courtroom.[16] She testified that she typically would record an event such as the jury swearing in this book, and it was from this book that the final copy of the Order of Court was prepared. (PSM 198-200, 225). She testified that it was on the evening of August 30, 2012 that she advised the court that she did not believe that the jury had been sworn in prior to the start of trial. (PSM 201). She testified that she went back to the courthouse to consult her book, and saw that she had made no notation of the jury being sworn. (PSM 201).

[16] This book is not an official court record, and was available for Mansour's personal convenience during courtroom proceedings. While some court assistants utilize this type of journal, most have long since abandoned the practice.

Mansour testified that it was early in the morning of August 29, 2012 that she first questioned whether the jury had been sworn in, but did not bring it to the court's attention because she thought perhaps the procedural posture of the case made it different from other trials. "I felt that perhaps there was a different procedure since this was the death penalty phase and that they were not to be sworn, and then with six attorneys being in the courtroom and it wasn't questioned I just kind of put the thought aside." (PSM 203). Mansour then testified as to the procedure by which a jury is sworn, with her reading the oath from a card. (PSM 204-205). Mansour testified that she believed that she remembered swearing in the potential panel of jurors prior to voir dire, but had no recollection of administering the oath to the final jury panel before the trial started. She allowed for the possibility that she might have made a mistake and forgotten to record this event in her book, but did not believe that she had done so. (PSM 205). She acknowledged that she also had failed to record the fact that the jurors had been brought into the courtroom that morning. (PSM 214). She also acknowledged that there was an entry in the book at the beginning of August 20, 2012 that had been "whited out" but she had no recollection of what the entry had been. (PSM 224-225). She also acknowledged several other minor errors or omissions that she had made that were brought to her attention and that required correction. (PSM 225-227).

Mansour first testified that she had no recollection of the jury actually being brought into the courtroom, and admitted that the jury might have already been seated in the courtroom when she took her position at her desk (PSM 214-216). She then contradicted herself and maintained that she was at her desk when the jury was brought in that morning and also insisted that the court reporter had been in the courtroom as well. (PSM 217). Finally, Mansour admitted to the court that she really didn't have a clear recollection, that there was "so much confusion going on" and that she couldn't remember clearly because "there was a lot of things going on," "the whole trial was very tense," and because the parties and staff had come in and out of the courtroom on numerous occasions that morning before the jury was brought in, "everything was off. The whole schedule was off." (PSM 217-218).

This court has laboriously considered all of the testimony presented on this issue, and has reviewed in detail all of the available transcripts from August 20, 2012, August 31, 2012 and May 23, 2013. Importantly, this court had the opportunity to observe the witnesses as they testified in court, and was able to note each witness' demeanor and credibility. After thoughtful consideration of all information in the record, and, notably, what is not in the record, there is only one conclusion that can be reached: the jury was, in fact, sworn, but the court reporter was not in the courtroom to record the initial opening of court, and Mansour neglected or forgot to record that information in her "book" as she normally did. The court comes to this conclusion without considering the specific recollection of the District Attorney that the jury was in fact sworn, and also completely disregarding the court's own recollection of the circumstances surrounding the jury swearing.[17]

[17] The court also notes that there were five experienced attorneys and one judge in the courtroom at the commencement of trial. Even without the testimony of the fourteen jurors, this court is certain that at least one of these legal professionals would have noted if the oath had not been given.

All fourteen jurors were credible. All, save two, had a distinct recollection of having been administered the first oath prior to the start of jury selection. All, save one, had a specific recollection of having taken an oath prior to the commencement of trial. The jurors remembered taking the oath on the day that the trial began, while they were seated in the jury box, because of the emotional response they had at the time, when the magnitude of what was about to begin suddenly occurred to them. It is true that the jurors could not recall the exact verbiage contained in the oath, but it is very likely that neither the court nor the attorneys, who hear the oath on a regular basis, could accurately quote the oath verbatim. Notably, though, the jurors were able to describe procedurally what actually occurs at the beginning of trial when the jury oath is administered in a manner which, had it not occurred, would have impossible for them to do. They were able to describe in detail Mansour and her actions in reading the oath to them while they were in the jury box, including the fact that she read from a card. These are details that they could not have described had the oath not been given in this case, just as it is in every case. The jurors were able to factually distinguish circumstances surrounding the administration of the two different oaths, even though they could not say with certainty the exact words that were used. They identified two distinct areas where they were seated – one administered while seated in the "pews" in the rear of the courtroom usually designated as the public seating area, and one while in the jury box itself, located at the front of the courtroom, with their fellow jurors. The jurors, not being court employees who see this procedure on a regular basis, would be unable to provide the detailed information that they provided from the witness stand had the events not been witnessed by them.

The jurors also were unable to say with certainty whether the court reporter, Kathryn Sileo, was present at the time that they entered the courtroom on August 20, 2012 and were administered the oath. Some jurors testified that they were aware that a court reporter was present during the course of the trial because they had to walk directly past her and her machine in order to enter the jury box. Some also noted that, during trial, they were always aware that a court reporter was in the room, taking down testimony. However, none could say for certain that the court reporter was seated in the courtroom when they were brought into the jury box on August 20, 2012, at what has become a crucial moment. This is notable because it corroborates, and perhaps explains, the very absence of information from the beginning of a trial that is routinely contained in a transcript. The court reporter's raw notes and rough draft do not indicate that the jury had been brought into the courtroom, nor do they show court being opened by the tipstaff, nor do they reflect the opening remarks by the Commonwealth's attorney that normally occur.[18] Indeed, after more than two minutes of nothing being recorded, the transcript starts with the opening jury instructions that are read by the judge. Conspicuously absent are the opening of court, the opening remarks and, crucially, the swearing of the jury.

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[18] As noted previously, the court reporter's raw notes and the rough, unedited draft do reflect other times throughout the trial where the jury is brought into the courtroom or witnesses are sworn, even though the process and everything said therein are not transcribed verbatim. There is no such notation whatsoever in any record for the morning of August 20, 2012.

Detective Jerry Vernail and Emily Freed, Esq., who was at the time of trial an intern with the District Attorney's Office, testified on August 31, 2012 that they recalled the jury having been sworn, and their testimony also corroborates the testimony of the jurors on May 23, 2013 insofar as the details of the swearing-in are consistent. This court found the testimony of Vernail and Freed to be extremely credible. Even if Vernail and Freed had no recollection at all, though, the testimony of the jurors overwhelmingly proves that the jury was sworn.

It is important to note that none of the Commonwealth's witnesses had any motive to lie about recalling the administration of the oath. Certainly this court does not suggest that either Sileo or Mansour intentionally fabricated any testimony that they provided, but it was obvious that both women were very reluctant to acknowledge that they could have made any sort of error. However, both women did admit that they could have made a mistake in this regard. Sileo admitted that nowhere in her rough notes does she indicate when she re-entered the courtroom after the conclusion of the in-camera testimony and discussions, and she acknowledged that her testimony regarding her presence in the courtroom was based solely upon her recollection and was not supported by one of her "mental notes" made at the time. She also admitted that she had inserted the notation that "THEREUPON, THE JURY WAS ESCORTED INTO THE COURTROOM A T 9:36 A.M." on page 66 of the final official transcript based upon her own recollection long after the fact and not by a specific note to that effect that was recorded contemporaneously with the occurrence of that event, as is seen elsewhere in her rough notes. The insertion of something into the official transcript that has no support or basis in her raw notes renders the official court transcript on this issue inaccurate.

Mansour was likewise hesitant to admit any error, but finally acknowledged that she had made several mistakes that required correction during the trial, and also admitted that there was quite a bit of confusion with so many things going on that morning and that, because of the number of disruptions that occurred at the beginning of the day, the whole schedule was off. Given the highly unusual circumstances that were presented that morning, coupled with the added pressure that came with the presentation of a death penalty case, it is certainly understandable how clerical mistakes could be made.

This court takes full responsibility for allowing the proceedings to commence without the presence of the official court reporter, as appears to be the case here. However, this court cannot understand nor accept a court reporter's practice of inserting important information into the official record where no specific corresponding stenographic notation exists in the court reporter's raw notes or the rough unedited draft. This practice seems to contravene the necessity of having a court reporter present in the first place. The court reporter must produce an accurate transcript of what has occurred in the courtroom based upon stenographic notations made contemporaneously with courtroom activity, and should never rely, as appears to be the case here, on his or her independent recollection of the events made at some point in the future. No court reporter should be permitted to unilaterally decide what portions

of courtroom discussions are preserved in the official transcript. It is not the court reporter's job to determine what is relevant and what is not. Therefore, it is this court's view that unless something is specifically excluded from the record at the time, a court reporter should not be permitted to unilaterally add to or delete from the official record of proceedings. This is particularly important where no contemporaneous audio recording has been made.

Because this court has determined that the testimony overwhelmingly proves that the jury was, in fact, sworn prior to the start of the penalty trial, it is unnecessary to determine whether the failure of a jury to be sworn constitutes a fundamental error of prejudicial magnitude or mere harmless error. For this reason, Knight is not entitled to a new penalty phase trial.[19]

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[19] This court is mindful of the most recent federal Constitutional discussion of this issue as articulated in ***United States v. Turietta,*** 696 F.3d 972 (10th Cir. 2012), and is persuaded by much of the Tenth Circuit Court of Appeals' analysis. Article I, Section 6 of the Pennsylvania Constitution affords a criminal defendant the right to a trial by jury, and Article I, Section 9 guarantees an accused the right to a "speedy public trial by an impartial jury of the vicinage."

> The minimal standards of constitutional due process guarantees to the criminally accused a fair trial by a panel of impartial and "indifferent" jurors. ***Commonwealth v. Stewart,*** 449 Pa. 50, 52, 295 A.2d 303 (1972), *cert. denied,* 417 U.S. 949, 94 S.Ct. 3078, 41 L.Ed.2d 670 (1974).

Commonwealth v. Reeves, 255 Pa.Super. 409, 422, 387 A.2d 877, 884 (Pa.Super. 1978). Knight has not alleged that the jury that was empanelled in this case was not impartial or indifferent. Further, it would appear that, in Pennsylvania, the requirement that the jury be "sworn" is a statutory and a procedural one, rather than a constitutional one. Pa.R.Crim.P. Rule 640. Even if the evidence did not establish that the jury was, in fact, sworn, the defendant herein has also failed to establish how he has been prejudiced by such a failure. "[E]rrors which do not contribute to the verdict should not be reversed unless their effect is fundamentally unfair." ***United States v. Turrietta,*** 696 F.3d 972, 984 (10th Cir. 2012) (*citing* ***Rose v. Clark,*** 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). The Tenth Circuit Court of Appeals in ***Turrietta*** noted that the practice of administering an oath to a jury is a sound one: "A juror impressed with the seriousness of his charge is more likely to be attentive at trial and, in turn, more likely to carry out his duty faithfully, with due respect for the ideals underlying the criminal process." ***Turrietta***, 696 F.3d at 978. There is no indication in the record, and indeed there is no allegation by the defendant, that the jurors individually failed to appreciate the gravity of the process and of their duties as jurors. In fact, their testimony on May 23, 2013 suggests otherwise. The record shows that the jury was repeatedly reminded of the importance of their duty. Further, juries are presumed to follow the judge's instructions. ***Commonwealth v. Teems,*** 74 A.3d 142, 148 (Pa.Super. 2013); ***Commonwealth v. Mollett,*** 5 A.3d 291 (Pa.Super. 2010).

This court clearly reminded the jury of the importance of their duty and, indeed, their oath, during the final instructions, stating:

> The simple but important question that you must decide is whether the Commonwealth convinces you of the existence of the aggravating circumstance to the degree that, if this were a matter of importance in your own life, you would act on the matter confidently, without hesitation or restraint. The answer to that question must arise from your conscientious review of the facts and the law, the application of your good common sense, **and your recognition of the importance of the oath that you took as a juror to try this case fairly, impartially and honorably.**

(TT 1828)(emphasis added). Having failed to establish prejudice to the degree that, but for any alleged failure to swear in the jury, the verdict would have been different, the defendant's requested relief in the form of a new penalty phase trial would necessarily fail.

2. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE COMMONWEALTH TO PRESENT CERTAIN RECORDS FROM THE WESTMORELAND COUNTY PRISON DURING THE PENALTY PHASE TRIAL?

At trial, Knight presented evidence to establish certain character traits, specifically, that Knight was a caring, non-violent person who was more of a follower than a leader. Such evidence was introduced in mitigation to suggest to the jury that Knight was a joiner, who, although complicit in the murder of Jennifer Daugherty, was merely following the lead and direction of co-defendant Ricky Smyrnes. To rebut this character evidence, the Commonwealth sought to introduce evidence of Knight's behavior while incarcerated at the Westmoreland County Prison.

Pa.R.E. Rule 404 sets forth the permitted use of character evidence:

> **(a) Character Evidence.**
>
> *(1) Prohibited Uses*. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
>
> *(2) Exceptions for a Defendant or Victim In a Criminal Case*. The following exceptions apply in a criminal case:
>
> (A) a defendant may offer evidence of the defendant's pertinent trait, **and if the evidence is admitted, the prosecutor may offer evidence to rebut it;**

Pa.R.E. Rule 404 (emphasis added). A plurality of the Pennsylvania Supreme Court approved the use of specific instances of conduct that rebut a defendant's proffered good character evidence.

> The admissibility of evidence is solely within the discretion of the trial court and we will reverse on appeal only upon abuse of that discretion. ***Commonwealth v. Thomas,*** 552 Pa. 621, 717 A.2d 468, 477 (1998), *cert. denied,* 528 U.S. 827, 120 S.Ct. 78, 145 L.Ed.2d 66 (1999). During the penalty phase, the Commonwealth may offer evidence to rebut a defendant's mitigating evidence of good character. ***Commonwealth v. Harris,*** 550 Pa. 92, 703 A.2d 441, 451 (1997), *cert. denied,* 525 U.S. 1015, 119 S.Ct. 538, 142 L.Ed.2d 447 (1998) (upholding Commonwealth's introduction of several statements made by an appellant to rebut appellant's character evidence that he was a nice person and amenable to rehabilitation); ***Commonwealth v. Abu-Jamal,*** 521 Pa. 188, 555 A.2d 846, 858 (1989), *cert. denied,* 498 U.S. 881, 111 S.Ct. 215, 112 L.Ed.2d 175 (1990) (holding that Commonwealth's introduction of statements made by appellant and his Black Panther membership to rebut appellant's character evidence that he was a peaceful and genial man).

Commonwealth v. Rice, 568 Pa. 182, 207-208, 795 A.2d 340, 355 (2002). The defendant placed his character for being caring, non-violent and not a leader into evidence; therefore, it was proper for the Commonwealth to offer evidence in rebuttal.

Knight suggests that it was improper to permit the Commonwealth to introduce such evidence through Warden John Walton by means of the Business Records Exception to the hearsay rule. Such introduction, he suggests, violated the Confrontation Clause of the United States Constitution. Certain hearsay statements that might otherwise be admissible as exceptions to the hearsay rule are inadmissible if they are testimonial in nature because they violate a defendant's rights conferred under the Confrontation Clause. Non-testimonial out-of-court statements are not subject to the same limitation, however. ***Crawford v. Washington,*** 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

> In ***Crawford v. Washington,*** 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court explained that non-testimonial statements were not subject to a Sixth Amendment analysis provided they were otherwise admissible under the applicable state's hearsay rule. Specifically, the *Crawford* Court explained:
>
> > Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does [***Ohio v.***] ***Roberts*** [448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. ***Crawford***, 541 U.S. at 58, 124 S.Ct. 1354.

Commonwealth v. Kunkle, 79 A.3d 1173, 1190 (Pa.Super. 2013)(victim's statements were properly admitted under the state of mind exception to the hearsay rule and additionally, were non-testimonial in nature and thus ***Crawford*** would not apply).

Knight has failed to demonstrate that the records maintained by the Westmoreland County Prison were prepared in anticipation of litigation so as to render them testimonial in nature. His reliance on ***Melendez-Diaz v. Massachusetts,*** 557 U.S. 305 (2009) is misplaced, as the records at issue directly related to forensic analysis of items associated with the defendant's criminal case.

> In ***Melendez-Diaz,*** the Supreme Court addressed whether certificates "reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant" were "testimonial" for purposes of the Confrontation Clause. ***Melendez-Diaz,*** at 307, 129 S.Ct. 2527. The Court noted:
>
> > The Sixth Amendment to the United States Constitution ... provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In ***Crawford***, after reviewing the Clause's historical

> underpinnings, we held that it guarantees a defendant's right to confront those "who 'bear testimony' " against him. [***Crawford***, at 51, 124 S.Ct. 1354]. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Id.,* at 54 [124 S.Ct. 1354].

Our opinion described the class of testimonial statements covered by the Confrontation Clause as follows:

> "Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." [***Crawford,*** at 51-52, 124 S.Ct. 1354]. (internal quotation marks and citations omitted).
>
> *Id*., at 309-10, 129 S.Ct. 2527.

Commonwealth v. Dyarman, 73 A.3d 565, 568-569 (Pa. 2013). *See also,* ***Commonwealth v. Yohe,*** 79 A.3d 520 (Pa. 2013). In this case, the evidence presented by the Commonwealth was clearly created and maintained as business records for the Westmoreland County Prison and not in anticipation of Knight's penalty trial, or any other litigation. For these reasons, the admission of this evidence was not improper, and Knight is not entitled to a new trial on this basis.

3. WHETHER THE TRIAL COURT ERRED IN DENYING KNIGHT'S REQUEST FOR A CHANGE OF VENUE AND JURY SEQUESTRATION?

Knight alleges that the trial court erred in denying his pre-trial motion for a change of venue or, in the alternative, sequestration of the jury during the penalty phase trial. As a related issue, Knight suggests that the trial court's denial of his motion for mistrial that occurred during the proceedings was error, also justifying the grant of a new trial. Although raised in his post-sentence motions, Knight fails to address these issues in either his Memorandum in Support of Post-Sentence Motions, or in his Supplemental Memorandum in Support of his Post-Sentence Motions. While his failure to include these issues in either memorandum could be construed as either abandonment or waiver of the issues, this court has elected to address them in the interest of justice.

Knight, along with his co-defendants, repeatedly sought a change of venue in this case based upon "extensive media coverage." It is certainly clear that the local news coverage of the kidnapping and death of Jennifer Daugherty by Knight and his co-defendants (dubbed the "Greensburg Six") was indeed extensive, particularly in the months following the incident. While media coverage of the cases waned substantially thereafter, this court also has acknowledged that the publicity surrounding these cases typically increased leading up to and following any scheduled court proceeding associated with the cases. This was especially true when one of the six co-defendants, Angela Marinucci, was tried and convicted in Westmoreland County in May of 2011, more than one year prior to the penalty phase trial in this case. However, the mere presence of pretrial publicity alone does not create a presumption of prejudice that would necessitate a change of venue. ***Commonwealth v. Casper,*** 481 Pa. 143, 392 A.2d 287 (1978).

The Pennsylvania Supreme Court has set forth the standards by which a request for change of venue is considered:

> The trial court's decision on appellant's motions for change of venue/venire rests within the sound discretion of the trial judge, whose ruling thereon will not be disturbed on appeal absent an abuse of that discretion. In reviewing the trial court's decision, our inquiry must focus upon whether any juror formed a fixed opinion of the defendant's guilt or innocence as a result of the pre-trial publicity.
>
> A change in venue becomes necessary when the trial court concludes that a fair and impartial jury cannot be selected in the county in which the crime occurred. Normally, one who claims that he has been denied a fair trial because of pretrial publicity must show actual prejudice in the empanelling of the jury. In certain cases, however, pretrial publicity can be so pervasive or inflammatory that the defendant need not prove actual juror prejudice.
>
> Pretrial prejudice is presumed if: (1) the publicity is sensational, inflammatory, and slanted toward conviction rather than factual and objective; (2) the publicity reveals the defendant's prior criminal record, or if it refers to confessions, admissions or reenactments of the crime by the accused; and (3) the publicity is derived from police and prosecuting officer reports.
>
> Even where pre-trial prejudice is presumed, a change of venue or venire is not warranted unless the defendant also shows that the pre-trial publicity was so extensive, sustained, and pervasive that the community must be deemed to have been saturated with it, and that there was insufficient time between the publicity and the trial for any prejudice to have dissipated. In testing whether there has been a sufficient cooling period, a court must investigate what a panel of prospective jurors has said about its exposure to the publicity in question. This is one indication of whether the cooling period has

> been sufficient. Thus, in determining the efficacy of the cooling period, a court will consider the direct effects of publicity, something a defendant need not allege or prove. Although it is conceivable that pre-trial publicity could be so extremely damaging that a court might order a change of venue no matter what the prospective jurors said about their ability to hear the case fairly and without bias, that would be a most unusual case. Normally, what prospective jurors tell us about their ability to be impartial will be a reliable guide to whether the publicity is still so fresh in their minds that it has removed their ability to be objective. The discretion of the trial judge is given wide latitude in this area.

Commonwealth v. Robinson, 581 Pa. 154, 194-196, 864 A.2d 460, 484 (2004) (internal citations omitted).

The court, along with counsel for the Commonwealth and for the defense, engaged in a lengthy voir dire process that ultimately resulted in the selection and impaneling of a jury of twelve persons and four alternate jurors. Some prospective jurors had heard of the case; others had not. During the selection process, prospective jurors who indicated that they had seen or read about the case were questioned about their exposure to media accounts and were asked whether they had formed any preconceived ideas about the Defendant's role in the murder of Jennifer Daugherty. The jurors were informed that they would not be considering Knight's guilt, but only determining what penalty he would receive. The extensive questioning process ultimately resulted in the selection of sixteen fair and impartial individuals who were acceptable to both the Commonwealth and the defense. Knight did not establish that the pretrial publicity was such that he would suffer prejudice because of it or that the jury was neither fair nor impartial. It is clear, therefore, that the court's pretrial denial of Knight's Motion for Change of Venue was correctly denied.

Knight also requested that the jury be sequestered during the penalty phase trial. In support of that request, counsel argued that

> It is inconceivable that we could select a jury in this county, send them home in the evening, and expect that no one they come into contact with would ask them about it, that no one would talk about it over the course of three of four weeks that we might anticipate this case drawing out, that they would never say a word to those that live with them, that those folks would never say a word to the jurors, and that the jurors would become so excluded in this society that they would abstain from going on the Internet, turn off the radio and television, that they would essentially of their own discipline return themselves to the stone ages and not be exposed to any of the media accounts or communications that take place in everyday life. For that reason, Your Honor, the jury needs to be sequestered.

(TT 24-25).

The decision as to whether to grant or deny a motion to sequester the jury is left to the discretion of the trial court. Rule 642 of the Pennsylvania Rules of Criminal Procedure specifies that, "The trial judge may, in the judge's discretion, order sequestration of trial jurors in the interests of justice." *Pa.R.Crim.P. 642(a)*. The decision to sequester the jury can be made at any time during trial. *Pa.R.Crim.P. Rule 642 (c)*.

> [T]he disposition of a motion to sequester the jury is within the discretion of the trial court. And the decision of the court will not be reversed unless the court "abused its discretion or committed an error of law which controlled the outcome of the case." However, there are, of course, certain circumstances where adverse publicity attendant to the trial is so pervasive, intense and prejudicial that the law will presume the jury's deliberations were affected by it.
>
> In highly publicized or sensational cases a number of alternatives are available to the court to preserve the integrity of the factfinding process. In most cases, however, admonitions to the jury such as those which appear in the ABA Projection Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press § 3.5(e) (Tentative Draft, 1966) will suffice. And in such cases appellate courts will presume the efficacy of cautionary instructions unless actual prejudice is demonstrated.

Commonwealth v. Jermyn, 516 Pa. 460, 482-483, 533 A.2d 74, 84-85 (Pa.1987) (internal citations omitted). *See also,* ***Commonwealth v. Tolassi,*** 489 Pa. 41, 413 A.2d 1003 (Pa. 1980).

In order to establish prejudice, a defendant must show that the case was subject to unusual or prejudicial publicity or that the jurors are subject to extraneous influences or pressures. ***Commonwealth v. Jackson,*** 481 Pa. 426, 392 A.2d 1366 (1978). Here, Knight apparently suggests the presence of "extraneous influences" because one juror was made aware of a newspaper article printed in the Greensburg Tribune Review newspaper during the course of the trial. Even though the court granted his motion to remove the juror (TT 736-737), because his motion for a mistrial was denied (TT 663), Knight appears to suggest that his right to due process before an impartial jury was violated.

On August 20, 2012, prior to the commencement of trial, an attorney named J. Allen Roth was seen speaking to a female juror (Juror No. 15) outside the courtroom while she was waiting to be interviewed by the court on another issue. Attorney Roth was admonished by this court for having inappropriate contact with a juror in a criminal matter. (TT 61-64). At that time, it was brought to the court's attention that Attorney Roth had also entered the courtroom the previous week during the jury selection process, and had approached another female juror, complimenting her on her appearance. (TT 64-65).[20] On August 23, 2012, Juror No. 11 advised the court that he

[20] Attorney Roth had absolutely no legal interest or role in the proceedings, nor was he a participant in any manner in the proceedings.

had seen an article that appeared in the Greensburg Tribune Review newspaper the previous day, entitled "Lawyer accused of contact with Knight jurors," that related the incident involving Attorney Roth and Jurors No. 15 and 10. Juror No. 11 related that Attorney Roth was his divorce attorney and that is what caught his interest in the article. He then advised the court that he had seen Attorney Roth approach Juror No. 10 during the jury selection process, and that he had told Juror No. 10 that Attorney Roth was his divorce lawyer when she told him that Attorney Roth had said something to her about how she looked. (TT 639-641). Juror No. 11 indicated that he had spoken to none of his fellow jurors about the article in the paper. He admitted that he had ignored the judge's instructions about not reading anything that was published about the Knight case, but stated that because it involved his divorce attorney, he did so anyway. (TT 642-644). He advised that he had not read the whole article. (TT 648-649). He stated that even though he had seen the article about Attorney Roth in the paper, he could be a fair and impartial juror, and that his main concern was for his own divorce case. (TT 645).

The jury was instructed repeatedly to refrain from reading or listening to any media accounts of the case and to refuse to discuss the case with anyone, including family members. Other than the incident involving Juror No. 11, who self-reported seeing the newspaper article about his divorce attorney and who was ultimately dismissed from the jury, there were no other occasions when this became an issue during the trial of this matter. Knight has failed to establish that he suffered actual prejudice by the court's refusal to grant his motion to sequester or his motion for mistrial. For these reasons, he is not entitled to a new trial on this basis.

4. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE COMMONWEALTH TO PRESENT AUTOPSY PHOTOGRAPHS DURING THE PENALTY PHASE TRIAL?

It is well-settled that the admissibility of evidence is within the sound discretion of the trial court:

> "The admissibility of evidence is at the discretion of the trial court and only a showing of an abuse of that discretion, and resulting prejudice, constitutes reversible error." ***Commonwealth v. Sanchez,*** 614 Pa. 1, 36 A.3d 24, 48 (2011) (citations omitted), *cert denied,* — U.S. —, 133 S.Ct. 122, 184 L.Ed.2d 58 (2012). "An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record." ***Commonwealth v. Hanford,*** 937 A.2d 1094, 1098 (Pa.Super.2007) (citation omitted), *appeal denied,* 598 Pa. 763, 956 A.2d 432 (2008). Furthermore, "if in reaching a conclusion the trial court over-rides or misapplies the law, discretion is then abused and it is the duty of the appellate court to correct the error." ***Commonwealth v. Weakley,*** 972 A.2d 1182, 1188

(Pa.Super.2009) (citation omitted), *appeal denied,* 604 Pa. 696, 986 A.2d 150 (2009).

Commonwealth v. Fischere, 70 A.3d 1270, 1275 (Pa.Super. 2013). Our Supreme Court has determined that the admissibility of photographs of a murder victim at trial is treated no differently. ***Commonwealth v. Marinelli,*** 547 Pa. 294, 690 A.2d 203 (1997). However, in exercising that discretion, the trial court must apply a two-pronged test to determine whether the admission of such photographs is proper:

> The trial court must apply a two-part test prior to admitting photographs into evidence over objection by a party. First, the court must determine whether the photograph is inflammatory. ***Commonwealth v. Eichinger,*** 591 Pa. 1, 915 A.2d 1122 (2007). This Court has interpreted inflammatory to mean the photo is so gruesome it would tend to cloud the jury's objective assessment of the guilt or innocence of the defendant. ***Commonwealth v. Dotter,*** 403 Pa.Super. 507, 589 A.2d 726 (1991). Next, if the trial court decides the photo is inflammatory, in order to permit the jury to view the photo as evidence, it must then determine whether it is has essential evidentiary value. ***Eichinger,*** 915 A.2d at 1142 (Pa.2007).

Commonwealth v. Funk, 29 A.3d 28, 33 (Pa.Super. 2011).

In this case, Knight suggests that because he entered a guilty plea on all charges, admission of the photographs taken at Jennifer Daugherty's autopsy were improper, having no probative value and serving only to create prejudice and inflame the jury. (TT 18-20). This is not dissimilar to the facts in ***Commonwealth v. Eichinger,*** 591 Pa. 1, 915 A.2d 1122 (2007), a case in which the defendant did not contest the fact of his guilt, but did oppose the imposition of the death penalty. There, admission of autopsy photos during the penalty trial was deemed to be proper. As in ***Eichinger,*** the jury in the instant matter was impaneled to determine the penalty to be imposed after Knight's guilt had already been established in a separate proceeding. However, in order to evaluate aggravating and mitigating circumstances, it was certainly necessary for the jury to be informed of the nature of Knight's acts and to understand the history and natural development of the case. See ***Eichinger*** at 1142, *citing* ***Commonwealth v. Saranchak,*** 675 A.2d 268 (Pa. 1996) ("[the photographs] served to inform the jury as to the nature of Eichinger's acts. Any autopsy testimony that related to these photographs was also clearly admissible under *Saranchak* as necessary to explain the history and natural development of the facts of the case.") This was of particular importance, as the Commonwealth had listed torture as one of the aggravating factors that the jury was to consider. This court carefully considered the photographs that were admitted at trial and determined that, while some of the photographs were certainly graphic and disturbing, especially to lay persons, they were not "inflammatory" as defined in the test, and further determined that the probative value of the photographs outweighed the prejudicial effect that viewing the photographs may have had on the jury. For these reasons, Knight is not entitled to a new trial on this basis.

CONCLUSION:

For the foregoing reasons of fact and of law, the defendant's Post-Sentence Motions are hereby **DENIED**.

BY THE COURT:
/s/ Rita Donovan Hathaway, Judge

ADDENDUM TO OFFICIAL COURT TRANSCRIPT

All interested persons are advised that they should reference the opinion of this court dated July 16, 2014 regarding the material contained on page 66 of the within transcript. Specifically, lines 18 and 19 state: "THEREUPON, THE IN CHAMBERS CONFERENCE CONCLUDED AND THE FOLLOWING WAS HELD IN OPEN COURT," and lines 21 and 22 state, "THEREUPON THE JURY WAS ESCORTED INTO THE COURTROOM AT 9:36 A.M." This is an inaccurate representation of what was contained in the court reporter's raw notes and rough, unedited draft. Additionally, certain information contained in the court reporter's raw notes and rough, unedited draft was omitted from the official court transcript filed in this matter.

BY THE COURT:
/s/ Rita Donovan Hathaway, Judge

FEDERAL INSURANCE COMPANY a/s/a
GREENSBURG THERMAL, LLC, Plaintiff
V.
CANNON BOILER WORKS, INC., QSL PLUS, INC.,
QSL PLUS INSPECTION, INC., MISTRAS GROUP, INC.,
and CHRISTIAN D. HOSBACH, Defendants

PLEADING

Demurrer or Exception; Admissions by Demurrer; Facts Well Pleaded

In ruling on preliminary objections, the court admits as true all well-pleaded, material, and relevant facts, and all inferences deducible from them.

Demurrer or Exception; Grounds for Demurrer to Declaration, Complaint, Petition, or Statement; Insufficiency of Facts to Constitute Cause of Action

Demurrer may be sustained only in those cases which clearly fail to state a claim upon which relief may be granted.

PRODUCTS LIABILITY

Elements and Concepts; Nature of Injury or Damage; Economic Losses; Damage to Product Itself

1. The economic loss doctrine provides that no cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage.

2. When a product malfunctions as a result of a defect, and causes damage to itself, in addition to causing the plaintiff to suffer costs of repair, replacement, or lost profit, but causes no personal injury or injury to other property of the plaintiff, the losses are purely economic and are not recoverable in tort.

3. The economic loss doctrine has evolved from courts recognizing that different principles underlie contract and tort claims.

4. Tort claims arise from policy considerations of protecting society's interest in being free from harm, while contract claims arise from society's interest in the performance of promises.

5. The subject of the bargain is the product or project, rather than component parts of such a product or project.

6. The economic loss doctrine barred negligence claim when no damages were alleged for personal injury or for damage to property other than the steam lines and welding that allegedly did not perform as agreed upon.

FRAUD

Deception Constituting Fraud and Liability Therefor; Fraudulent Representations; Falsity and Knowledge Thereof; Statement Recklessly Made; Negligent Misrepresentation

1. An exception to the economic loss doctrine exists when one who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, and is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

2. Exception to economic loss doctrine did not apply when court found that defendants were not in the business of providing information for pecuniary gain and that duties stemmed from a contractual relationship.

CONTRACTS

Construction and Operation; Parties; Rights Acquired By Third Persons; Agreement for Benefit of Third Persons

Plaintiff's breach of implied warranty failed when there was no privity of contract between plaintiff and QSL defendants.

PRINCIPAL AND AGENT

Rights and Liabilities as to Third Persons; Power of Agent; Liabilities Incurred; Liabilities of Agent; Contracts in Name of or for Benefit of Principal

1. Agent for a principal cannot be personally liable on a contract between the principal and a third party unless the agent specifically agrees to assume liability.

2. Claims of individual liability dismissed from action when complaint failed to aver that individual defendant was acting in any other capacity other than as an agent at the time of the acts giving rise to plaintiff's cause of action or that individual defendant agreed to assume liability.

PLEADING

Declaration, Complaint, Petition or Statement; Statement of Cause of Action; In General

1. A complaint is required to give each defendant notice of both the plaintiff's claim and the grounds for each claim.

2. Court ordered complaint to be amended to set forth more specific allegations and claims for damages and precise monetary amounts with which plaintiff claimed each defendant was responsible.

DAMAGES

Means of Damages; Breach of Contract; Mode of Estimating Damages In General

Damages in a contract action cannot be lumped together.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 4021 of 2010

Appearances:

Kenneth B. Grear,
Media, Pa., for the Plaintiff

Lawrence D. Kerr,
Greensburg, for the Defendant Cannon Boiler Works, Inc.

Michael J. Cremonese and Katherine M. Wrenshall,
Pittsburgh, for the QSL Defendants

BY: CHRISTOPHER A. FELICIANI, JUDGE

OPINION AND ORDER OF COURT

This matter is before the Court on Preliminary Objections to Plaintiff's Fifth Amended Complaint, filed on behalf of Defendant, Cannon Boiler Works, as well as Preliminary Objections to the same Complaint filed on behalf of Defendants QSL Plus, Inc., QSL Plus Inspections, Inc., Mistras Group, Inc. and Christian D. Hosbach (hereinafter "QSL Defendants"). Plaintiff has filed responses to both sets of objections. Upon review of the Preliminary Objections and accompanying briefs, as well as the Responses to the Preliminary Objections, the Court enters an Order sustaining all preliminary objections. A brief history of the case and the Court's reasoning follows.

Federal Insurance Company ("Federal") is an alleged subrogee of Greensburg Thermal, LLC, having provided property insurance coverage to Greensburg Thermal, LLC at the time of the events at issue. Federal has filed a Complaint which alleges that a steam line at Greensburg Thermal's steam generation facility suffered from defective

welding and a leak at a weld joint. These alleged defects are further alleged to have caused damage to property of Plaintiff's insured, giving rise to the Plaintiff's claim. Plaintiff's fifth Amended Complaint sets forth counts based on negligence, negligent misrepresentation, breach of express and/or implied warranty, and breach of contract.

The first preliminary objection raised on behalf of the QSL defendants (and also by Cannon Boiler), is that the Plaintiff's negligence claims at Counts I and II of the Plaintiff's Complaint must fail because such claims are barred by the economic loss doctrine. The objection is in the nature of a demurrer. Preliminary Objections in the nature of a demurrer may be made based on an alleged legal insufficiency pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(4). When such motions are made, the Court admits, as true, all well-pleaded, material and relevant facts, and all inferences deducible from them. *Willet v. Pennsylvania Medical Catastrophe Fund,* 549 Pa. 613, 620, 702 A.2d 850, 853 (1997). Demurrer may be sustained only in those cases which clearly fail to state a claim upon which relief may be granted. *Id*.

The economic loss doctrine provides that "no cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage." *Excavation Technologies, Inc. v. Columbia Gas Co. of Pennsylvania,* 604 Pa. 50, 53, 985 A.2d 840, 841(2009)(quoting *Adams v. Copper Beach Townhome Communities, L.P.,* 816 A.2d 301, 305 (Pa. Super. 2003). When a product malfunctions as a result of a defect, and causes damage to itself, in addition to causing the plaintiff to suffer costs of repair, replacement or lost profit, but causes no personal injury or injury to other property of the plaintiff, the losses are purely economic and are not recoverable in tort. *REM Coal Co., Inc. v. Clark Equipment Co.,* 386 Pa. Super. 401, 563 A.2d 128 (1989). The economic loss doctrine has evolved from courts recognizing that different principles underlie contract and tort claims. Tort claims arise from policy considerations of protecting society's interest in being free from harm, while contract claims arise from society's interest in the performance of promises. *Longport Ocean Plaza Condo. Inc. v. Robert Cato & Assocs., Inc.,* 2002 WL 436742 at 2 (quoting *Spring Motors Distributors v. Ford Motor Co.,* 98 N.J. 555, 489 A.2d 660, 672 (N.J.1985) and *Alloway v. General Marine Indus., L.P.,* 149 N.J. 620, 695 A.2d 264, 267-268 (N.J.1997)).

In the instant case, Plaintiffs' Fifth Amended Complaint alleges that all defendants were responsible for construction, inspection and installation of steam line welds at the steam generation facility in Greensburg. Plfs' Fifth Amended Compl. at para. 11. The Complaint further alleges that as a result of defendants' negligent acts of design and quality assurance, the welds were not completely fused, and suffered porosity. Plf's Fifth Amended Compl. at para. 14. Plaintiff alleges that as a result of defendants' alleged negligence, "the steam line suffered damage and required repair and replacement." Plf's Fifth Amended Compl. at para. 15. There are no damages alleged for personal injury or for damage to property other than the steam lines. Thus the Complaint appears to allege purely economic losses, and does not appear to serve the public policy of keeping society free from harm. Under this analysis, the economic loss doctrine would apply to bar the negligence claim.

Plaintiff has filed a response in which he alleges that the economic loss doctrine does not apply because the damages claimed are "other damages" associated with repair and replacement of property *other than* the welds or inspection of the welds. Plaintiff's argument is that these "other damages" are in fact damages to the steam lines, as differentiated from the welds to the steam lines. Counsel for the QSL Defendants has aptly pointed out, however, that Pennsylvania case law supports that the subject of the bargain is the product or project, rather than component parts of such a product or project. In support of this, counsel for the QSL Defendants cites to the case, *Wellsboro Hotel Co. v. Prins.,* F. Supp. 170, 171 (E.D. Pa. 1995), *rev'd on other grounds by Bilt-Rite Contractors, Inc. v. The Architectural Studio,* 866 A.2d 270 (Pa. 2005). In *Wellsboro,* plaintiff, the Wellsboro Hotel, sought recovery for cracking, chipping and crumbling of paint on the masonry walls after application of defendant's allegedly defective product, designed to "protect porous masonry surfaces." The district court concluded that Wellsboro Hotel's claim was for failed economic expectations, and therefore was not recoverable in strict tort. The court noted that the claim was based on the alleged failure of the product to perform as warranted. Therefore, the claim was more akin to concerns of contract law, rather than tort law.

Similar reasoning guides this court with regard to the issue now before it. Federal Insurance's claim is that the steam line and welding did not perform as agreed upon, and therefore the claim is more akin to a claim in contract, rather than in tort. The fact that a component part of the project (the weld) constituted a defect in the product as a whole (the steam line) does not convert the claim from one of failed expectations of the product to a claim based on the policy of keeping society free from harm. Rather, as in *Wellsboro,* the injury is to the product itself, giving rise to repair and replacement costs, as opposed to personal injuries or some other type of damage.

Plaintiff advances a second argument in an effort to defeat application of the economic loss doctrine: that because Plaintiff has made an allegation of professional malpractice supported by Plaintiff's filing of a certificate of merit, the economic loss doctrine should not apply. Plaintiff argues that this exception to the economic loss doctrine has support in the case of *Bilt-Rite Contractors, Inc. v. The Architectural Studio,* 581 Pa. 454, 866 A.2d 270 (2005). More specifically, Plaintiff cites to *Bilt-Rite* for the proposition that in cases in which there are allegations of professional malpractice, an exception to the economic loss doctrine applies, regardless of whether or not a contract exists. Plaintiffs argue that in the instant case, they have supported their Fifth Amended Complaint with a certificate of merit, and that allegations are based in professional malpractice and are, therefore, not to be barred by the economic loss doctrine. Plaintiffs analogize their cause of action to an action based on professional malpractice in medicine or law.

QSL Defendants respond that although *Bilt-Rite* sets forth an exception to the economic loss doctrine, the doctrine applies only to negligent misrepresentation claims under Section 552 Restatement (Second) of Torts. This provision provides:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business

> transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Bilt-Rite Contractors, Inc. v. The Architectural Studio, 581 Pa. 454, 459, 866 A.2d 270, 273 (2005) (quoting Restatement (Second) of Torts, § 552). QSL argues that the *Bilt-Rite* exception only applies in cases in which information is negligently supplied by one in the business of supplying information, for example, design professionals, not to a defendant in the business of providing information for pecuniary gain.

A review of Count II of the Plaintiffs' Complaint reveals that the Plaintiffs' claim for negligent misrepresentation is based on the idea that Defendants misrepresented that welds were properly installed and adequately inspected for leaks when, in fact, they were not. In reviewing the Plaintiffs' Complaint, this Court finds that defendants are not in the business of providing information for pecuniary gain. Rather, the duties stemmed from and are derived from a contractual relationship with Greensburg Thermal, LLC. In addition, the Court looks to Pennsylvania Rule of Civil Procedure 1042.1 for guidance as to the professionals that are specifically contemplated as subjects of professional liability actions. Rule 1042.1 lists as "licensed professionals": any individual licensed pursuant to an Act of Assembly as a certain type of health care provider, an accountant, an architect, a chiropractor, a dentist, an engineer or land surveyor, a nurse, an optometrist, a pharmacist, a physical therapist, a psychologist. In addition, a "licensed professional" includes an attorney at law and any professional described previously in the rule, but licensed in another state. *See* Pa. R.C.P. 1042.1. Notably absent in the rule is any individual who performs welding or welding inspection services. Accordingly, the Court finds that the exception to the economic loss doctrine does not apply, and QSL's preliminary objections to Counts I and II of the Plaintiffs' Complaint are sustained, and such counts shall be stricken.

QSL Defendants also allege that Plaintiffs' breach of implied warranty claim must fail as a matter of law. QSL Defendants base this on the allegation that the Amended Complaint is devoid of allegations that Greensburg Thermal entered into a contract with the QSL Defendants. QSL Defendants cite to the case *General State Authority v. Sutter Corp.,* 403 A.2d 1022 (Pa. Cmwlth. 1979) as authority for the proposition that without privity of contract, Plaintiffs' breach of implied warranty claim fails as a matter of law.

In response, Plaintiffs allege that paragraph 11 of the Complaint, as well as counts II and IV of the Complaint, when read as a whole, allege facts that support that QSL was in privity with Plaintiffs. Paragraph 11 alleges that all defendants were responsible for construction, installation and inspection of steam line welds. Count II makes reference to nondelegable duties owed by all defendants based on alleged misrepresentations as to the adequacy and inspection of steam line welds, and Count IV alleges breach of defendants' "contract/third-party beneficiary contract" with plaintiffs' insured. Plaintiffs do not make any argument that they could supplement their fifth Amended Complaint by alleging a specific contract provision to address the alleged lack of privity.

Put simply, the Court finds the QSL Defendants' reliance on *General State* to be persuasive. A party cannot proceed directly against a party with whom they are not in privity, when the cause of action is based upon breach of implied warranty, and when the claim for breach of warranty does not involve the Uniform Commercial Code or Section 402A of the Restatement (Second) of Torts (relating to product liability claims). *General State* is clear that it is not enough that one party desires a third party to be a beneficiary of a contract. On the contrary, both parties must so intend and indicate this intention in the contract. Plaintiffs' have failed to allege such a contract provision and have not alleged facts that would give rise to the privity required to maintain a claim for breach of implied warranty as to QSL. Accordingly, the QSL Defendants' preliminary objection in this regard is SUSTAINED, and any count for alleged breach of express and/or implied warranty as to QSL Defendants shall be stricken.

QSL Defendants have also filed a preliminary objection alleging that Plaintiffs have failed to properly plead a claim for breach of contract, because there are no allegations that QSL Defendants entered into a contract with subrogor Greensburg Thermal. Because the Court finds that the Plaintiffs' Complaint is not specific as to the basis for the breach of contract claim, and because Plaintiff may be able to support a cause of action based on contract if properly pleaded, the Court hereby SUSTAINS the Preliminary Objection based on failure to properly plead breach of contract, and provides leave to the Plaintiff to amend the Complaint within thirty (30) days to include facts sufficiently specific to plead a breach of contract claim and to attach any contract upon which such a claim is based.

QSL Defendants' final preliminary objection alleges that Christian Hosbach cannot be personally liable to the Plaintiff because he is protected from liability by the corporate shield. QSL Defendants argue that an individual acting as an agent for a disclosed principal is not personally liable on a contract between the principal and a third party unless the agent agrees to assume liability. In response, Plaintiffs argue that facts pleaded as to Hosbach support a theory of personal liability, and further, that any issue as to monetary coverage for Hosbach is independent of the analysis of sufficiency of pleadings.

The Plaintiff's Fifth Amended Complaint indicates that at all times relevant, Defendant Hosbach acted as the apparent and/or ostensible agent of defendants Cannon and/or QSL and/or Mistras. Thus, it does not appear from the Complaint (nor was it alleged at oral argument) that Defendant Hosbach was acting in any other capacity besides as an agent at the time of the acts giving rise to the Plaintiff's cause of action. Defendants are correct that an agent for a principal cannot be personally liable on a contract between the principal and a third party unless the agent specifically agrees to assume liability. *See Bennett v. A.T. Masterpiece Homes at Broadsprings, LLC, 2012* 40 A.3d 145, 150 (Pa. Super. 2012). As Plaintiffs are not contending that Defendant Hosbach specifically agreed to assume liability, the Preliminary Objection made on this basis is hereby SUSTAINED, and any claim made by the Plaintiff that Christian Hosbach is personally liable is hereby DISMISSED.

Defendant Cannon Boiler Works has also filed Preliminary Objections seeking to dismiss negligence and negligent misrepresentation claims based on the gist of the action doctrine. The Court, for the reasons set forth above, GRANTS these preliminary objections, and Counts I and II of the Plaintiff's Complaint shall be stricken.

Defendant Cannon Boiler Works has filed a Preliminary Objection to Count III of the Plaintiff's Complaint (which count alleges breach of express and/or implied warranty as to all defendants), based on the failure to attach a writing. Plaintiff, in response to the preliminary objection, makes reference to the fact that "documents specific to plaintiff's claims of damages and the policies are too voluminous for inclusion [in the Response]." *See* Plf's Resp. to Deft. Cannon's Preliminary Objections, at p. 3. Defendant Cannon, however, is correct, that pursuant to Pennsylvania Rule of Civil Procedure 1019(i), when a claim is based on a writing, the pleader must attach a copy of the writing or the material part of the writing. The fact that a particular writing is voluminous, does not obviate Pa.R.C.P 1019(i) requiring that the writing be attached. Accordingly, Cannon Boiler's Preliminary Objection with regard to Count III of the Plaintiff's Complaint is hereby SUSTAINED, with leave granted to the Plaintiff to file an amended Complaint within thirty (30) days, attaching a copy of the insurance policy and any other documents that form a basis for the claim of subrogation.

Finally, Defendant Cannon Boiler has filed a preliminary objection, alleging that Plaintiff's Complaint is not sufficiently specific, in that it makes allegations as to all defendants, without making more specific allegations as to which defendants did what. Simply put, the Court agrees that more specific allegations are needed in order to make pleading meaningful. A complaint is required to give each defendant notice of both the plaintiff's claim and the grounds for each claim. *Unified Sportsmen of Pennsylvania v. Pennsylvania Game Com'n (PGC),* 950 A.2d 1120, 134 (Pa. Cmwlth. 2008)(quoting *Sevin v. Kelshaw,* 611 A.2d 12332, 1235 (Pa. Super. 1992)). In the instant case, the Complaint is unclear as to which particular Defendant acted in a way giving rise to each claim. Further, Plaintiffs should identify provisions of the contract(s) which are alleged to give rise to their claims for breach. Finally, Defendant Cannon Boiler is correct that claims for damages made in a contract action cannot be lumped. *See,* e.g. *Hildebrant v. Kline,* 66 Pa. D. & C. 431, 1949 WL 2992 (C.P. 1949); *Yanko v. Donaldson,* 65 Pa. D. & C. 341, 1949 WL 2883 (C.P. 1949); *Urbanus v. Turowski,* 14 Pa. D. & C. 546, 1930 WL 4630 (C.P. 1930). Therefore, Defendant Cannon Boiler's Preliminary Objection in this regard is hereby SUSTAINED, with leave granted to the Plaintiff to file an amended Complaint within thirty (30) days which sets forth more specific allegations and claims for damages and the precise monetary amounts with which Plaintiff's claim each Defendant is responsible.

Accordingly, the Court enters the following Order:

ORDER OF COURT

AND NOW, to wit, this 4th day of June, 2014, upon consideration of the Preliminary Objections to Plaintiffs' Fifth Amended Complaint and brief in support, filed on behalf of Defendants QSL Plus, Inc., QSL Plus Inspection, Inc., Mistras

Group, Inc., and Christian D. Hosbach, as well as Defendant Cannon Boiler Works, Inc.'s Preliminary Objections and Brief in Support, as well as the Plaintiffs' responses thereto, it is hereby **ORDERED and DECREED** as follows:

1. Preliminary Objections to Counts I and II of the Plaintiffs' Fifth Amended Complaint are hereby SUSTAINED and Counts I and II of Plaintiffs' Fifth Amended Complaint shall be stricken;

2. The QSL Defendants' Preliminary Objection to Count III of the Plaintiffs' Fifth Amended Complaint is SUSTAINED, and any count for alleged breach of express and/or implied warranty as to QSL Defendants shall be stricken.

3. With regard to the QSL Defendants' Preliminary Objection based on failure to properly plead breach of contract, the Court hereby SUSTAINS the Preliminary Objection, with leave granted to the Plaintiff to amend the Complaint within thirty (30) days to include facts sufficiently specific to plead a breach of contract claim and to attach any contract upon which such a claim is based;

4. The QSL Defendants' Preliminary Objection seeking to dismiss any claim of individual liability against Christian D. Hosbach based upon protection by the corporate form is hereby SUSTAINED and any such claims shall be stricken from the Plaintiffs' Fifth Amended Complaint;

5. Defendant Cannon Boiler's Preliminary Objection with regard to Count III of the Plaintiff's Complaint is hereby SUSTAINED, with leave granted to the Plaintiff to file an amended Complaint within thirty (30) days, attaching a copy of the insurance policy and any other documents that form a basis for the claim of subrogation.

6. Defendant Cannon Boiler's Preliminary Objection alleging insufficient specificity in the Plaintiffs' Fifth Amended Complaint is hereby SUSTAINED, with leave granted to the Plaintiff to file an amended Complaint within thirty (30) days which sets forth more specific allegations and claims for damages, as more particularly described in the foregoing Opinion appended hereto.

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/ Judge Christopher A. Felicani

THE MUNICIPAL SANITARY AUTHORITY OF
THE CITY OF NEW KENSINGTON, Plaintiff
V.
THE MUNICIPAL AUTHORITY OF THE CITY OF NEW KENSINGTON
and JAMES MATTA, Manager of THE MUNICIPAL AUTHORITY
OF THE CITY OF NEW KENSINGTON, Defendants

MANDAMUS

Nature and Scope of Remedy

1. A judgment in a case seeking peremptory mandamus may only be made when the plaintiff's right to judgment is clear.

2. Judgment may only be entered when there is no genuine issue of material fact, and where judgment is proper as a matter of law.

3. Denial of Motion for Peremptory Mandamus was warranted because it was clear that sewage authority which brought mandamus action did not have legal right under the Water Services Act to receive water meter readings from water authority without compensating water authority for billing data.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 4060 of 2013

Appearances:
Charles J. Dangelo,
Greensburg, and
Aaron M. Kress,
New Kensington, for the Plaintiff
David A. Regoli,
Murrysville, for the Defendants

BY: CHRISTOPHER A. FELICIANI, JUDGE

OPINION AND ORDER OF COURT

Presently before the Court is a Motion for Peremptory Judgment in Mandamus in the above matter, filed on behalf of the Plaintiff, the Municipal Sanitary Authority of the City of New Kensington, Pennsylvania (hereinafter "Sewage Authority"). The Plaintiff seeks: (1) a writ of mandamus ordering the Defendant, The Municipal Authority of the City of New Kensington (hereinafter "Water Authority,") and its manager, James Matta, to provide meter reading data to the Sewage Authority without charging a fee; and (2) an order requiring the Defendants, to return money received under protest for such meter readings. For the reasons set forth below, this Court denies the Motion for Peremptory Judgment in Mandamus.

For approximately thirty years prior to June of 2012, the Sewage Authority and Water authority operated under a Billing Services Agreement, which provided that the Water Authority would act as the billing and collecting agent for the Sewage Authority. By letter dated June 23, 2012, the Sewage Authority informed the Water

Authority that it intended to terminate the billing services agreement and hire Pennsylvania Municipal Services Company (PMSC) to provide billing and collection services for accounts beginning on January 1, 2013. The Water Authority has a statutory duty to provide data to the Sewage Authority for the purpose of calculating rates for sewage services. 53 P.S. § 3102.503. Thus, the Sewage Authority continues to depend upon meter reading data from the Water Authority to properly bill its customers. In October of 2012, the Water Authority wrote to the Sewage Authority to inform the Sewage Authority that it would charge $2.99 per meter reading, resulting in an annual charge of $64,400.00. The Sewage Authority objected to the charges, and the Water Authority agreed to reduce the charge to $1.50 per meter reading, resulting in annual charges of $32,300. The Sewage Authority continued to object to the charges, but made payments under protest, with the payments being held in escrow pending final resolution of the dispute. It is these funds paid under protest, as well as the right to receive them, that are in dispute.

The issue before the Court is whether the Water Services Act (Act) of April 14, 2006, P.L. 85, No. 28, 53 P.S. §3102.101, et seq., grants the power to a water authority to charge fees for supplying meter readings to a sewage authority. It is undisputed that Section 503 of the Act provides that a water authority is required to provide meter reading data to a sewage authority upon request. At issue is the meaning of Section 505 of the Act, which provides as follows:

> **§ 3102.505. Payment for billing and collecting services**
>
> **(a) General rule.--**An authority imposing sewer, sewerage or sewage treatment rentals, rates or charges shall pay to a water utility the reasonable additional clerical and other expenses incurred in providing billing and collecting services.

53 P.S. § 3102.505.

Sewage Authority notes that although Section 505 of the Act authorizes payment of "reasonable additional clerical and other expenses," such payment is only contemplated when those expenses are incurred in providing "billing and collecting services." Sewage Authority argues that since it hired PMSC to provide billing and collecting services for its accounts, Water Authority is no longer the billing and collecting agent. Based on this reasoning, such charges cannot be imposed upon Sewage Authority.

Water Authority, by contrast, argues that it continues to provide billing and collecting services. Water Authority points out that although it is no longer the *sole* billing and collection agent, it continues to provide "billing and collecting services" by supplying PMSC with data that it must first convert from raw data to the specific electronic format requested by Sewage Authority. This additional work is done by employees of Water Authority each billing cycle. Further, Water Authority cites to cases which predate the enactment of the Water Services Act, but construe identical language, which cases are cited as support for the proposition that a water utility is permitted to impose a reasonable and justifiable fee for the meter reading data it provides. Water Authority cites to these cases as evidence that Sewage Authority is misguided in believing that it is entitled to the data free of charge. In response, Sewage

Authority argues that cases cited by Water Authority are distinguishable, because those cases addressed a question of jurisdiction: whether the issue of the value of meter readings should be addressed in a Public Utility Commission proceeding when an agreement already addressed that payment should be made.

A judgment in a case seeking peremptory mandamus may only be made when the Plaintiff's right to judgment is clear. *Equitable Gas Co. v. City of Pittsburgh,* 507 Pa. 53, 58, 488 A.2d 270, 272 (1985); *WeCare Organics, LLC v. Zoning Hearing Bd. of Schuylkill County,* 954 A.2d 684, 691 (Pa. Commw. Ct. 2008). That is, it is proper to enter judgment in a peremptory mandamus only where there is no genuine issue of material fact, and where judgment is proper as a matter of law. *Lincoln Intermediate Unit No. 12 v. Com., Dept. of Educ.*, 123 Pa. Commw. 102, 105, 553 A.2d 1020, 1022, 51 Ed. Law Rep. 989 (1989). The moving party bears the burden of showing that there is no issue of material fact, and the record must be viewed in a light most favorable to the non-moving party. *Shaler Area School Dist. v. Salakas*, 494 Pa. 630, 432 A.2d 165 (1981); *Salem Tp. Mun. Authority v. Township of Salem*, 820 A.2d 888 (Pa. Commw. Ct. 2003).

The issue now before the Court is a question of law: whether Water Authority may charge fees based on performing "billing and collecting services" for purposes of Section 505 of the Water Services Act, when Water Authority's duties include gathering meter reading data and putting such data into a specific and more detailed format to be delivered to Sewage Authority's specified billing agent. Thus, more pointedly, the Court must address the question of what was meant by the statute's use of the phrase "billing and collecting services," as this phrase is not specifically defined in the Act.

The Court finds that gathering meter reading data and putting such data into a more detailed format falls within the ambit of "billing and collecting services" for purposes of the statute. The Court disagrees with Sewage Authority's position that the statutory language does not grant Water Authority the power or discretion to charge for providing meter reading data. On the contrary, "billing and collecting" services usually include those services that are used in compiling a list of charges due on an account, and then gathering payments related to such charges. In the instant case, meter reading data, and the converting of such data into a format to be used in billing customers, forms the basis for compiling the list of charges that constitute a bill. As Sewage Authority aptly observes at page nine of Sewage Authority's brief, one of the purposes of the Water Services Act is to foster cooperation between water and sewage authorities, because it makes sense to meter consumption of clean water rather than to meter sewerage flow. In fact, the Water Services Act explicitly permits Water Authority to charge for "billing and collecting services" because it doesn't make sense for such work to be duplicated by two entities. This efficiency interest is addressed by Section 503 which requires Water Authority to "supply to [the Sewage] authority . . . a list of all water meter readings and flat-rate water bills issued during the preceding calendar month and the basis of each flat-rate customer's water charge *for use by the [Sewage] authority in calculating or computing its rentals, rates or charges for furnishing sewer, sewerage or sewage treatment service to the water customers*." 53 P.S. 3102.503 (emphasis added). Water Authority's performing additional clerical

work to support the creation and collection of sewage bills constitutes "billing and collecting services" and thus entitles Water Authority to be compensated under the Act.

Thus, the Court finds that mandamus in the instant action is not warranted, and accordingly, the Court enters the following Order:

ORDER OF COURT

AND NOW, to wit, this 9th day of May, 2014, for the reasons set forth in the foregoing Opinion, the Plaintiff's Motion for Peremptory Mandamus is hereby DENIED.

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/ Christopher A. Feliciani, Judge

COMMONWEALTH OF PENNSYLVANIA
V.
ERIC J. HALL, Defendant

WITNESSES

Credibility and Impeachment; Character and Conduct of Witness; Accusation or Conviction of Crime

1. Evidence of prior convictions can be introduced for the purpose of impeaching the credibility of a witness if the conviction was for an offense involving dishonesty or false statement, but if the date of conviction or the last day of confinement is not within ten years of the trial date, the presiding judge must determine whether the value of the evidence substantially outweighs the prejudicial effect.

2. In making the determination of whether the value of the evidence substantially outweighs the prejudicial effect, the court must consider five factors: (1) the degree to which the commission of the prior offense reflects upon the veracity of the defendant-witness; (2) the likelihood, in view of the nature and extent of the prior record, that it would have a greater tendency to smear the character of the defendant and suggest a propensity to commit the crime for which he stands charged, rather than provide a legitimate reason for discrediting him as an untruthful person; (3) the age and circumstances of the defendant; (4) the strength of the prosecution's case and the prosecution's need to resort to this evidence as compared with the availability to the defense of other witnesses through which its version of the events surrounding the incident can be presented; and (5) the existence of alternative means of attacking the defendant's credibility.

CRIMINAL LAW

Trial; Province of Court and Jury In General; Weight and Sufficiency of Evidence

The weight given to trial evidence was solely the province of the jury and it was not error for the court to allow display of properly admitted autopsy photographs during two different prosecution witnesses' respective testimony.

Review; Harmless and Reversible Error

Even if witness's testimony was improper hearsay, it was cumulative of other evidence properly admitted, so hearsay testimony was harmless error.

Evidence; Hearsay in General; Evidence as to Information Acted On

Police officer's testimony as to what others told him was not hearsay, and was admissible, since testimony was offered only to explain the officer's course of conduct.

Evidence; Documentary Evidence; Authentication and Foundation

Defendant's text messages were admissible as admissions insofar as text messages were properly authenticated just as non-electronic documents would need to be.

Evidence; Post-Arrest Silence

Fact witness's testimony concerning Defendant's statements about reluctance to speak to the police about information concerning murder of victims did not implicate Defendant's Fifth Amendment right to remain silent and did not unfairly prejudice Defendant.

Evidence; Photographs

Admission into evidence of jail intake photographs of Defendant was not error since photographs were used to show Defendant's change in appearance from time of arrest until time of trial, and were not impermissibly used to suggest prior criminal record.

WITNESSES

Credibility and Impeachment; Irrelevant, Collateral or Immaterial Matters

It was not error for trial court to permit police officer to testify on rebuttal to impeach Defendant's trial testimony that the officer never asked him about guns in Defendant's house.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
No. 6 C 2012

Appearances:
John W. Peck, District Attorney, and James Lazar,
Assistant District Attorney,
Westmoreland County, for the Commonwealth
Michael DeMatt,
Greensburg, for the Defendant

BY: RITA DONOVAN HATHAWAY, JUDGE

OPINION OF THE COURT
ISSUED IN COMPLIANCE WITH PA.R.A.P. RULE 1925(A)

The Defendant, Eric J. Hall was convicted on September 18, 2013 of two counts of Criminal Homicide and related charges. He was sentenced on December 17, 2013 to two consecutive life sentences. This appeal timely followed.

FACTUAL HISTORY:

The evidence presented at trial established the following: Anthony ("Tony") Henderson and Noelle Richards were a young couple living at a residence located on Fox Road in Washington Township, Westmoreland County. The property was very rural and was not immediately accessible from SR 66, the nearest main road. On August 28, 2011, at approximately 8:00 p.m., Anthony and Noelle went to a Dairy Queen in nearby Delmont to purchase food and an ice cream cake to take back to their home. (TT 422-437, 1024-1025).[1] They concluded their purchase and left the restaurant at 8:08 p.m. (TT 1025).

Shortly thereafter, at approximately 8:30 p.m., the trio of Michael DiVincenzo, Greg DiVincenzo and Sam Denillo traveled Tony and Noelle's house to purchase marijuana from Tony. Michael testified that Sam Denillo drove the three of them to Washington Township in his Black Jeep. Michael had been to Tony's house on a prior occasion with another friend, Paul Hoover, who was staying with Tony and Noelle, so he knew the way. Michael testified that on that prior occasion the gate at the top of the lengthy driveway had been closed, and Hoover had to open it and close it behind them. However, on this trip, the gate was already open, and they proceeded directly down the driveway to the rear of the house. (TT 81-88, 178)

Michael DiVincenzo and Denillo approached the sliding glass doors off the back patio and knocked, but that no one answered. He could see the light from a television but because the glass was covered by vertical shades that were closed, he couldn't tell whether anyone was inside. (TT 89-90) Michael continued to knock at the sliding glass

[1] Numerals in parenthesis preceded by the letters "TT" refer to specific pages of the transcript of the trial of this matter, held September 9-13 and 16-18, 2013 before this court, and made a part of the record herein.

door, and also checked around the rest of the house to see if there were any lights on in another portion of the house. He also decided to call Paul Hoover to see if he knew where Tony was, but as he was talking with him, he saw that someone was coming to the door. (TT 90-92). The sliding glass door opened, and an unfamiliar man emerged holding a baseball bat.[2] He immediately swung the baseball bat and hit Sam Denillo on the side of his head, and Denillo fell to the ground. The man then started toward Gregory DiVincenzo, swinging the bat at him as well, but Gregory was able to block the blow with his arm. Michael told him that they would just leave, but the man chased after Michael, who ran to get away from him. He gave up the chase after a short time, and went back inside the house. Intending to flee the area, Michael and Gregory DiVincenzo managed to get Sam Denillo back into the vehicle. Michael realized that he had lost his cell phone, and had Gregory call his number. Michael then noticed that the man had come back outside the house and was laying flat on his stomach as if he were searching for something. He stood up, and Michael could hear what sounded like his cell phone ringing from an area near the man's midsection. Michael asked the man to please throw him his cell phone, that they would just leave, but the man just stared at him blankly. (TT 92-100, 183-189).

The trio left the Henderson property, driving down Fox Road to its intersection with SR 66, while Gregory DiVincenzo called 9-1-1 from the vehicle to summon medical help for Sam Denillo. The call was received by Westmoreland 9-1-1 at 8:44 p.m. (TT 1024). Denillo was groggy and bleeding from his mouth. While they were waiting for the police and an ambulance, a dark colored Jeep Grand Cherokee sped past them at a high rate of speed, made a left turn onto SR 66 without stopping at the stop sign, and drove off toward Delmont. Believing it to be the same person who had assaulted them, Gregory DiVincenzo called 9-1-1 again and reported his observations about the vehicle. (TT 101-103, 190-193). This second call was received by Westmoreland 9-1-1 at 8:49 p.m. (TT 1024). Denillo was flown by medical helicopter to Allegheny General Hospital in Pittsburgh, where he was admitted for three days, underwent surgery for a broken jaw, and treated for a concussion and bleeding in his ear. (TT 156-167).

Michael DiVincenzo later identified the defendant, Eric J. Hall, from a series of photos that were presented to him by members of the Westmoreland County Detective Bureau, and also at the time of trial, as being the bat-wielding individual who assaulted Sam Denillo and attempted to assault him and his brother on that evening. Sam Denillo had little or no memory of the events. Gregory DiVincenzo was unable to positively identify Hall's photograph from the series of photos shown to him by the police, but he was able to make a positive identification of him at the preliminary hearing and at trial. (TT 110-112, 157-169, 193-195).

As the DiVincenzo brothers and Sam Denillo were waiting on the side of Fox Road for an ambulance, Corey Lutz and his friend Joe Giarusso, in separate vehicles, were turning from SR 66 onto Fox Road on their way to Anthony Henderson's house. Lutz and Giarusso were both friends of Tony's and they had made plans earlier in the day

[2] Michael DiVincenzo described the bat as being yellow and somewhat pinkish on the end.

to come to his house and visit that evening. Lutz noticed the three men in the Jeep parked at the intersection. (262-265, 275-276). When Lutz arrived at the Henderson home, he first noticed that the gate at the top of the driveway was not locked as it customarily was, and that it appeared to be damaged. When he reached the rear of the house, he noticed that the grill had been overturned into the driveway, furniture was out of place, there were broken items on the patio, and the sliding glass door was open. (TT 265-269). He noted that this was all unusual.

Lutz entered into the house through the sliding glass door and discovered the bodies of Anthony Henderson and Noelle Richards in the finished basement living area. (TT 270-272, 284-286). Lutz indicated that he believed that Noelle might have been breathing slightly, but that she wouldn't respond to him. He observed that she had blood on her head and was slumped over on the couch. He related that he saw Tony Henderson's body lying on the floor by the coffee table in front of the fireplace in a large pool of blood. (TT 270-274). The food from Dairy Queen was still on the coffee table, and Lutz recalled that he could smell "fresh food, like, a hamburger with a bite taken out of it, a thing of French fries that wasn't even dipped into the ketchup yet... I remember looking down and noticing that they didn't even get to eat." (TT 273). He immediately called 9-1-1; the police received the dispatch while they were assisting the DiVincenzos and Sam Denillo at the intersection of Fox Road and SR 66. (TT 106-107). Lutz's call was received by Westmoreland 9-1-1 at 8:56 p.m. (TT 1024).

Forensic pathologist Dr. Cyril Wecht testified that Tony Henderson had sustained three gunshot wounds (two in his head and one in his forearm), and also had a multitude of wounds to his head that suggested he had been beaten with some sort of blunt force instrumentality. (TT 611-625). Indeed, Dr. Wecht testified that the injuries suggested that he had received repeated blows, administered with substantial force, to the back of his head (TT 643-644). Dr. Wecht testified that the injuries inflicted upon Tony Henderson, other than the gunshot wounds, were consistent with a baseball bat being that blunt force instrumentality. Dr. Wecht opined that these injuries would not have necessarily been fatal had Tony Henderson received prompt medical intervention and neurological treatment. (TT 629-630). Dr. Wecht explained that the cause of death would have been "the multiplicity of all injuries producing an adverse effect as I have explained, then with focusing more on the two gunshot wounds of the head would have been the major injuries contributed to by the multiple lacerations leading to loss of blood and thereby hastening the development of shock and death." (TT 631).

Dr. Wecht also performed the autopsy on the body of Noelle Richards. Dr. Wecht explained that she had also sustained three gunshot wounds, all to her head, as well as a laceration around her right ear that was caused by blunt force instrumentality. (TT 633-640). He opined that Noelle would have died within thirty minutes of sustaining the fatal gunshot wounds to the head. (TT 640). Dr. Wecht testified that Noelle Richards' cause of death was "the three gunshot wounds of the head and face with some contribution from the laceration caused by a blunt force instrument of some kind in the right temporal region. All of those producing that trans-sellar fracture would have been the cause of her death." (TT 640-641).

During the initial investigation into the deaths of Anthony Henderson and Noelle Richards, law enforcement had no suspects, as neither DiVincenzo brother nor Sam Denillo knew the identity of the bat-wielding man who attacked them on August 28, 2011. However, on August 29, 2011, Anna Stouffer found a black tri-fold wallet on the ground to the rear of her van, which was parked on the street outside her residence at 221 Church Street in Ligonier Borough. She knew that a red car had been parked behind her van the night before. She also knew that the red car was associated with the residents of 217 Church Street. (TT 656-659, 671). Ms. Stouffer looked inside to see if she could identify the owner, and saw that the license belonged to an Anthony James Henderson. She did not know this person, so she took the wallet to the Ligonier Borough Police Department. The time was 2:25 p.m. on August 29, 2011. (TT 659-667).

Jeremy Springer, who worked with Eric Hall and his brother, Jay, testified that on August 29, 2011, Eric Hall had assisted him in removing a roof at his residence. Eric Hall arrived at approximately 7:00 a.m. in a green Jeep, and his brother arrived separately. As they worked on Springer's roof, Eric Hall kept receiving text messages on his cell phone. When asked who was contacting him, he stated it was his "guy from Delmont." (TT 957). Springer recalled that after Eric Hall had left for the day, he texted Hall around 7:00 p.m. to thank him for coming out and helping with the roof. He noted that he did not receive a prompt response as usual, and did not receive another text from Hall until approximately 9:45 p.m. (TT 955-959).

Springer also related that the next day, on August 29, 2011, Hall reported for work as usual. Over the lunch break, when Springer and Hall were eating together, Hall told Springer a story that began with, "You won't believe what happened to me last night." (TT 962) Hall then proceeded to tell Springer that he had gone to see his friend in Delmont, and that when he had gotten there, there were two dead people in the house. He said that he had gone to the back door when he got no response to his knocking at the front door, that he went in the back door and saw Tony on the floor with what he thought was a gunshot wound, and Tony's girlfriend lying on the couch with dried blood on the side of her face. Not knowing what to do, and fearful that the person who had done this was still there, Hall told Springer that he locked the back door. He then stated that he heard a car drive up, and was afraid, so he hid. He told Springer that he then heard Tony's phone ringing, and as he hid, he happened upon a baseball bat that was lying on the ground. He stated that he picked up the bat and unlocked he door, and said that he said, "hey" to the men he saw at the back door. Hall told Springer that he thought he could get away, so he came out swinging the bat and thought he hit the bigger man in the head. He related that the men scattered, and he grabbed what one of them dropped and ran back inside the house. Hall told Springer that he grabbed Tony's phone (because it had been ringing, and because he had contacted Tony earlier in the day and he didn't want his number to be on there when the police looked at it) and Tony's wallet (because he didn't know if he had touched it accidentally and his fingerprints might be on it.) (TT 962-969).

He told Springer that he then left the house and drove back toward Ligonier. He did tell Springer that on the way to Ligonier, he stopped at Donegal Lake, removed the batteries from the two cell phones that he had taken from the house, and threw them

into the lake. He did this, he said, because he had seen on television that if the battery was removed from a phone, the phone couldn't be traced. He also told Springer that he had removed all of his clothing, including his shoes, had thrown them and the wallet into a garbage bag, and discarded them at a dumpster at a methadone clinic. He also related that he stopped at Walmart on the way home to buy Clorox and wiped his Jeep down in case there was any blood traces from his shoes or the clothing he had been wearing. He stated that he still had the bat, but days later told Springer that he had thrown it into the woods. Springer urged Hall to speak with law enforcement, but Hall stated that he wanted to wait to do that. (TT 969-978). Jeremy Springer testified that, after consulting with his attorney and telling her what Hall had revealed to him, he contacted the County Detectives Bureau and told them about Hall's "story."

Law enforcement verified that Eric Hall had visited the methadone clinic on Monday, August 29, 2011 at approximately 5:43 a.m. (TT 1002-1003). The Commonwealth also presented video footage from the Latrobe Walmart, showing that Eric Hall then visited that store at approximately 6:24 a.m., purchased cleaning materials and extensively cleaned his car in the Walmart parking lot. (TT 895-910). The bottle of Soft Scrub cleanser that Hall purchased was recovered in a search of the teal/blue/green Jeep Cherokee that was driven by Hall on the night of August 28, 2011. (TT 682-684) Also recovered from the Jeep were numerous blood samples, which were later matched through DNA analysis to Sam Denillo and Anthony Henderson. (TT 733-741). Analysis of text messages on Eric Hall's phone indicated that he had borrowed a 9mm Taurus firearm from his mother but had not returned it and had in fact discarded it. (TT 1018-1020). Analysis of the bullet casings and fragments recovered at the scene of the murder indicated that the ammunition used was 9mm ammunition, likely used in a 9mm automatic firearm. (TT 800-801).

Eric Hall maintained that he had gone to Anthony Henderson's home to purchase drugs, and that when he arrived at Tony's driveway, he was nearly run off the driveway by a large dark SUV/truck coming in the opposite direction. (TT 1100-1101). When he approached the back door, he noted that the dog was sniffing at something in the driveway. He saw it was a wallet, and picked it up. He also picked up a cell phone that was also on the ground. He noted that the patio area was in disarray. (TT 1103-1106). He entered the house and discovered the bodies of Noelle Richards and Tony Henderson. He observed that a vehicle had arrived at the house, and "guys started pouring out of it." (TT 1113). He locked the back door, thinking that the people who had murdered Tony and Noelle had come back for him. He found a baseball bat at the end of the couch and decided to attack these individuals. He swung the bat at these individuals, hitting two of them. When he had chased them away, he searched the ground for a gun, and picked up something hard. He went back inside the house until these men left, and then departed, taking the cell phone, the wallet, the bat and the hard object with him. (TT 1113-1120) He testified that he gave no thought whatsoever to calling the police. (TT 1120). He testified that he drove back to Ligonier, and when he was on SR 30, he threw the bat and the cell phones out the window. (TT 1123-1124). When he arrived home, he took a shower and discarded his clothing in a trash can that had been placed by the curb to be picked up in the

morning. Hall testified that he woke early the next morning for work, went to the methadone clinic in Greensburg, and then stopped at Walmart in Latrobe so he could clean up the Jeep. Hall stated that he had thrown up in the Jeep the night before, and needed to clean the vehicle before picking his brother up for work. (TT 1123-1130). Hall also admitted that he had thrown away the 9mm Taurus firearm that he had borrowed from his mother so that the police would not find it. (TT 1135-1138, 1204-1212).

DISCUSSION OF ISSUES PRESENTED ON APPEAL

1. DID THE TRIAL COURT ERR IN ADMITTING EVIDENCE OF THE DEFENDANT'S PRIOR CONVICTION FOR CRIMINAL TRESPASS?

Hall's first allegation of error asserts that the trial court erred in permitting the admission of Hall's 2003 Convictions for Criminal Trespass, Theft by Unlawful Taking and Receiving Stolen Property to impeach his credibility. The defense filed a Motion in Limine prior to the start of trial, seeking to have evidence of those *crimen falsi* convictions excluded as evidence in the event that Hall elected to testify at his trial.

Rule 609 of the Pennsylvania Rules of Evidence provides for the impeachment of a witness by use of prior criminal convictions:

> **(a) In General.** For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or *nolo contendere*, must be admitted if it involved dishonesty or false statement.
>
> **(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:
>
> (1) its probative value substantially outweighs its prejudicial effect; and
>
> (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

Pa.R.E. Rule 609. Subsection (b) seeks to limit impeachment by means of prior criminal convictions that are too remote. Hall's 2003 conviction occurred in January 2003; because this trial occurred in September 2013, that prior conviction was more than ten years old and therefore nor *per se* admissible under Pa.R.E. 609. After hearing argument by the defense and the Commonwealth, this court determined that the prejudicial effect of the evidence of prior *crimen falsi* convictions was substantially outweighed by the probative value of that evidence. The defense did not renew its motion to preclude the admission of this evidence and, in fact, chose to elicit testimony from the defendant himself regarding these prior convictions. As Hall chose to testify

as to the nature of these prior convictions in his direct examination, any challenge to the admission of that evidence is waived, leaving only a challenge to the propriety of the court's ruling on the Motion in Limine. (TT 1088-1089). ***Commonwealth v. Rivera,*** 603 Pa. 340, 983 A.2d 1211 (Pa. 2009).

> [E]vidence of prior convictions can be introduced for the purpose of impeaching the credibility of a witness if the conviction was for an offense involving dishonesty or false statement, and the date of conviction or the last day of confinement is within ten years of the trial date. If a period greater than ten years has expired the presiding judge must determine whether the value of the evidence substantially outweighs its prejudicial effect.

Commonwealth v. Randall, 515 Pa. 410, 415, 528 A.2d 1326, 1329 (Pa.1987). This court denied the defense motion, but indicated that the ruling might be reconsidered depending upon the nature of the evidence that was introduced at trial. (TT 18-19).

Prior to its decision in *Randall,* the Pennsylvania Supreme Court had established a list of five factors to be considered by trial courts in determining the admissibility of prior convictions greater than ten years old as a means of impeachment.

> In making the determination as to the admissibility of a prior conviction for impeachment purposes, the trial court should consider: (1) the degree to which the commission of the prior offense reflects upon the veracity of the defendant-witness; (2) the likelihood, in view of the nature and extent of the prior record, that it would have a greater tendency to smear the character of the defendant and suggest a propensity to commit the crime for which he stands charged, rather than provide a legitimate reason for discrediting him as an untruthful person; 3) the age and circumstances of the defendant; 4) the strength of the prosecution's case and the prosecution's need to resort to this evidence as compared with the availability to the defense of other witnesses through which its version of the events surrounding the incident can be presented; and 5) the existence of alternative means of attacking the defendant's credibility.

Commonwealth v. Randall, 515 Pa. 410, 413, 528 A.2d 1326, 1328 (Pa.1987), *citing* ***Commonwealth v. Roots,*** 482 Pa. 33, 393 A.2d 364 (1978). *See also,* ***Commonwealth v. Bighum,*** 452 Pa. 554, 307 A.2d 255 (1973). In weighing the prejudicial effect of the introduction of *crimen falsi* convictions greater that ten years old against the probative value of those convictions, the Pennsylvania Supreme Court has instructed trial courts to continue to consider the factors that previously had made up the test utilized for this purpose:

> These factors were originally developed by our Court in *Commonwealth v. Bighum,* 452 Pa. 554, 307 A.2d 255 (1973), and *Commonwealth v. Roots, supra,* but were abrogated in *Randall* in favor of the bright-line general rule adopted therein, which is set forth in Rule 609. We held in *Randall*, however, that the *Bighum*/*Roots*

> factors were still relevant when weighing the probative value against the prejudicial effect of admitting *crimen falsi* convictions that did not fall within the ten-year window of the rule.

Commonwealth v. Rivera, 603 Pa. 340, 366, n.17, 983 A.2d 1211, 1227, n. 17 (Pa. 2009).

This court considered the fact that, if Hall chose to testify, his testimony would be of significant importance in the case. Hall had recounted his "story" to Jeremy Springer, telling him how he had been at the Henderson residence the night that Tony and Noelle had been murdered, that he had found their bodies, that he had attacked the DiVincenzo brothers and Sam Denillo with a baseball bat because he thought that they were the perpetrators of the homicide coming back for him, and that he had disposed of evidence that he had removed from the crime scene. In light of this evidence, had Hall decided to testify in his own behalf, his credibility would be a critical issue, and the existence of the prior *crimen falsi* convictions would reflect directly upon his veracity. The existence of these prior convictions was not of such a nature that they would tend to simply smear Hall's character, but simply impeach his credibility. Because the prosecution's case against Hall was largely circumstantial, the need to attack his veracity would have been crucial if he decided to testify. This court also considered that the convictions at issue were ten and a half years old, not so far beyond the ten-year limitation to render them so remote as to be irrelevant and, although there was another *crimen falsi* conviction available to the Commonwealth for impeachment purposes, determined that the cumulative value of the *crimen falsi* convictions for purposes of impeachment substantially outweighed any prejudicial effect that might result from the use of those convictions for impeachment purposes. For these reasons, the trial court did not err in denying Hall's pretrial Motion in Limine to exclude the 2003 *crimen falsi* convictions for criminal trespass, theft by unlawful taking and receiving stolen property, and he is not entitled to a new trial on this basis.

2. DID THE TRIAL COURT ERR IN PERMITTING AUTOPSY PHOTOGRAPHS TO BE DISPLAYED TO THE JURY?

It is well-settled that the admissibility of evidence is within the sound discretion of the trial court:

> "The admissibility of evidence is at the discretion of the trial court and only a showing of an abuse of that discretion, and resulting prejudice, constitutes reversible error." "An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record." Furthermore, "if in reaching a conclusion the trial court over-rides or misapplies the law, discretion is then abused and it is the duty of the appellate court to correct the error."

Commonwealth v. Fischere, 70 A.3d 1270, 1275 (Pa.Super. 2013) (internal citations omitted).

In this case, the Commonwealth sought to admit copies of photographs of the bodies of Anthony Henderson and Noelle Richards at autopsy. Defense counsel objected to the admission of these photographs through Detective Raymond Dupilka rather than through forensic pathologist Dr. Cyril Wecht, arguing that Det. Dupilka was not a forensic pathologist and therefore was not qualified to identify particular types of injuries. He also suggested that by displaying the photographs multiple times through more than one witness, the jury might be influenced to give the photographic evidence undue weight. (TT 533-535). As Det. Dupilka was the investigator who was present during the autopsies and had taken the photographs in question, and who had been qualified without objection as an expert in crime scene investigation, processing and forensics, this court determined that he could testify, within his expertise, as to the injuries depicted in the photographs. "In order for a photograph to be admitted into evidence it must be properly authenticated by the testimony of a witness, with sufficient knowledge, that the photograph is a fair and accurate depiction of the relevant scene." ***Commonwealth v. Rovinski,*** 704 A.2d 1068, 1074 (Pa.Super. 1997), *citing* ***Commonwealth v. Sinwell,*** 311 Pa.Super. 419, 423-24, 457 A.2d 957, 959 (1983). Det. Dupilka, then, was the best witness to testify as to the authenticity of the photographs, the circumstances under which the photographs were taken, and as an expert, could testify to what, in his training and experience, the photographs depicted.

The Pennsylvania Supreme Court has determined that the admissibility of photographs of a murder victim at trial is treated no differently than any other evidence. ***Commonwealth v. Marinelli,*** 547 Pa. 294, 690 A.2d 203 (1997). However, in exercising its discretion, the trial court must apply a two-pronged test to determine whether the admission of such photographs is proper:

> The trial court must apply a two-part test prior to admitting photographs into evidence over objection by a party. First, the court must determine whether the photograph is inflammatory. ***Commonwealth v. Eichinger,*** 591 Pa. 1, 915 A.2d 1122 (2007). This Court has interpreted inflammatory to mean the photo is so gruesome it would tend to cloud the jury's objective assessment of the guilt or innocence of the defendant. ***Commonwealth v. Dotter,*** 403 Pa.Super. 507, 589 A.2d 726 (1991). Next, if the trial court decides the photo is inflammatory, in order to permit the jury to view the photo as evidence, it must then determine whether it is has essential evidentiary value. ***Eichinger,*** 915 A.2d at 1142 (Pa.2007).

Commonwealth v. Funk, 29 A.3d 28, 32 -33 (Pa.Super.2011). In addition, the Pennsylvania Supreme Court has observed that:

> A criminal homicide trial is, by its very nature, unpleasant, and the photographic images of the injuries inflicted are merely consonant with the brutality of the subject of inquiry. To permit the disturbing nature of the images of the victim to rule the question of admissibility

> would result in exclusion of all photographs of the homicide victim, and would defeat one of the essential functions of a criminal trial, inquiry into the intent of the actor. There is no need to so overextend an attempt to sanitize the evidence of the condition of the body as to deprive the Commonwealth of opportunities of proof in support of the onerous burden of proof beyond a reasonable doubt.

Commonwealth v. Tharp, 574 Pa. 202, 222-223, 830 A.2d 519, 531 (Pa.2003), *citing* ***Commonwealth v. McCutchen,*** 499 Pa. 597, 454 A.2d 547, 549 (1982). The defendant did not object based upon the inflammatory nature of the photographs, however. He suggested instead that the repeated display of the photographs would cause the jury to place "undue weight" to the injuries depicted within the photographs. It is solely the province of the jury, however, to determine the weight to be afforded each piece of evidence presented and each witness who testifies at trial. "The weight given to trial evidence is a choice for the factfinder." *Commonwealth v. Stays,* 70 A.3d 1256, 1267 (Pa.Super. 2013), *citing* ***Commonwealth v. Jarowecki,*** 923 A.2d 425, 433 (Pa.Super. 2007). The testimony of Det. Dupilka authenticating the photographs and testifying about the circumstances under which the photographs were taken and, within his area of expertise, what injuries were depicted in the photographs was proper, even though Dr. Wecht testified in more detail and within his area of expertise of forensic pathology as to the nature of the injuries he observed during the autopsy. Hall is not entitled to a new trial on this basis.

3. DID THE TRIAL COURT ERR IN ALLOWING HEARSAY EVIDENCE FROM ANNA STOUFFER, JEREMY SPRINGER AND DET. ROBERT WEAVER TO BE ADMITTED AT TRIAL?

Hall next asserts that the trial court erred in admitting certain hearsay statements from three Commonwealth witnesses. Hearsay, of course, is a statement "(1) the declarant does not make at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). Unless specifically provided by the Pennsylvania Rules of Evidence or any rules prescribed by the Pennsylvania Supreme Court, or by other statute, hearsay is generally inadmissible. Pa.R.E. 802.

Hall first suggests that he is entitled to a new trial because the trial court erred in permitting hearsay statements offered through the testimony of Anna Stauffer, the woman who found Anthony Henderson's wallet on the morning of August 29, 2010 and who transported the wallet to the Ligonier Township police station. Specifically, Hall refers to testimony elicited by his own attorney on cross-examination. (TT 672-73). Ms. Stauffer was asked how it was that she learned that Carly Hall (the defendant's wife) lived at the residence at 217 East Church Street, and she responded that she really couldn't recall, and speculated that perhaps a neighbor had told her that. This court overruled the objection then voiced by defense counsel as to the hearsay nature of the testimony, noting that the witness had primarily stated that she could not remember where she had gained that information.

This testimony, albeit both hearsay and speculative, was elicited by Hall's own attorney on cross-examination, and was harmless.

> It is well established that an error is harmless only if we are convinced beyond a reasonable doubt that there is no reasonable possibility that the error could have contributed to the verdict... This burden is satisfied when the Commonwealth is able to show that: (1) the error did not prejudice the defendant or the prejudice was de minimis; or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial [e]ffect of the error so insignificant by comparison that the error could not have contributed to the verdict.

Commonwealth v. Green, 76 A.3d 575, 582 (Pa.Super.2013), *quoting* ***Commonwealth v. Laich,*** 566 Pa. 19, 777 A.2d 1057, 1062–63 (2001) (internal citations omitted).

This testimony from Anna Stauffer is merely cumulative, considering the other testimony presented at trial, including testimony from Hall's landlord and Hall's own admission that he and Carly resided at 217 East Church Street both before and after their marriage. Additionally, Westmoreland County Detectives testified that the search warrants executed at Hall's residence were executed at 217 East Church Street. There is no possibility that, given the nature of the other testimony presented at trial, the admission, insofar as the statement could be deemed to have been admitted, could not have prejudiced the defendant to a degree that the error could have contributed to the verdict in this case. Essentially, the statement was really a non-statement, as the witness stated that she could not recall where she got the information in question.

Next, Hall suggests that he is entitled to a new trial based upon hearsay statements elicited from Commonwealth witness Jeremy Springer. Springer testified that he was in a car with Hall approximately two weeks after the murders when he overheard a conversation between Hall and his wife Carly. Springer testified that he could only hear Hall's side of the conversation, but that after the conversation concluded, Hall told him that Carly had called to ask whether he had lost his wallet. Springer further testified that Hall told him:

> He had stated that she asked him if that was his wallet. He said, no, I have my wallet on my, why? She said the neighbor just found a wallet outside on the sidewalk and didn't know if it was yours. He had then said, no, I have my wallet. Then he hung up the phone and a few minutes later he called her back and said I think that is my wallet. Then he made reference that might have been Tony's wallet if it fell out when he was cleaning up his Jeep.

(TT 975). Defendant objected to the hearsay nature of the testimony.

Certainly, out-of-court statements made by the Defendant himself are hearsay, but are nonetheless admissible under Pa.R.E. Rule 803.25 (An Opposing Party's Statement). It is clear than, that any statements made by Hall to Jeremy Springer were

admissible hearsay as they were made by the defendant himself. Insofar as Eric Hall related to Springer what Carly's call was about, such statements made by Carly Hall to Eric Hall arguably are hearsay as well, as they are out-of-court statements, creating the potential for a "hearsay within hearsay" situation. "Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms to an exception to the rule." Pa.R.E. 805. However, as this court noted at the time of trial, the statements made by Carly Hall were not offered for the truth of the matter asserted in those statements, but merely to establish that they were said at all, as an explanation for Hall's response and his statements to Springer. Carly Hall's statements are not hearsay, as they were not offered for the truth of the matter asserted, and because Eric Hall's statements are admissible under the exception for statement of a party opponent, there was no error in admitting this testimony at trial.

Finally, Hall suggests that he is entitled to a new trial based upon certain hearsay testimony elicited from Det. Robert Weaver regarding actions that Hall's mother, Deborah Finley, took after Hall's home was searched. (T 1011-1012). Initially, Det. Weaver was explaining the course of conduct of the investigation and why certain actions were taken on the part of the police. In so doing, the following exchange occurred:

Q: Now, if I could direct your attention to the following day. Did you have occasion to speak with someone you would identify as the defendant's mother?

A: Yes.

Q: And who is that?

A: Deborah Finley.

Q: And could you tell us how it was arranged that you would speak with Ms. Finley that day?

A: Earlier that morning of the 8th Ms. Finley had contacted Amber Noel from the police department in Ligonier and asked her to meet with her and talk to her about a situation, and at that time she informed Amber that - -

MR. DEMATT: Objection, hearsay.

MR. LAZAR: Your Honor, this is information that he is relaying simply to explain what he did that day and why he would have done that.

THE COURT: The objection is overruled.

A: Deborah Finley had told Officer Noel that on the morning of the 8th her son Eric Hall had contacted her and told her that the police had searched his home.

(TT 1010-1011). Defense counsel Mr. DeMatt promptly objected again as to the additional layer of hearsay that was contained in Det. Weaver's response. The objection was by implication sustained, and the jury was instructed to disregard Det. Weaver's last statement. (TT 1012).

The initial question to Det. Weaver introduced for the purpose of explaining the course of conduct of the police investigator. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). Thus, any "out of court statement offered not for its truth but to explain the witness's course of conduct is not hearsay." ***Commonwealth v. Johnson,*** 615 Pa. 354, 386, 42 A.3d 1017, 1035 (Pa. 2012), *quoting* ***Commonwealth v. Rega,*** 593 Pa. 659, 933 A.2d 997, 1017 (2007). Therefore its admission was not in error. While Det. Weaver's answer to the follow-up question also explained his course of conduct, it also constituted a triple layer of hearsay, as correctly noted by Attorney DeMatt, and the jury was instructed to disregard that particular statement. No error occurred, therefore, and the defendant is not entitled to a new trial based upon this theory.

4. DID THE TRIAL COURT ERR IN ALLOWING THE ADMISSION OF TEXT MESSAGES TO AND FROM THE DEFENDANT'S CELL PHONE?

The defendant next argues that the trial court erred in allowing the Commonwealth to present various text messages[3] that were sent from and received by Hall's cell phone. As stated previously, the admissibility of evidence is within the sound discretion of the trial court:

> "The admissibility of evidence is at the discretion of the trial court and only a showing of an abuse of that discretion, and resulting prejudice, constitutes reversible error." "An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record." Furthermore, "if in reaching a conclusion the trial court over-rides or misapplies the law, discretion is then abused and it is the duty of the appellate court to correct the error."

Commonwealth v. Fischere, 70 A.3d 1270, 1275 (Pa.Super. 2013) (internal citations omitted).

The admissibility of text messages and other electronic communications into evidence is a relatively new question in Pennsylvania and in other jurisdictions. The Pennsylvania Superior Court first addressed the admissibility of text messages in ***Commonwealth v. Koch,*** 39 A.3d 996 (Pa.Super. 2011), *appeal granted,* 615 Pa. 612, 44 A.2d 147 (2012). There, the Commonwealth sought to introduce text messages located on a defendant's cell phone that purportedly referenced drug-related activity in

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[3] "Text messages are defined as 'writings or other data transmitted electronically by cellular telephones' that constitute an electronic communication for purposes of the Wiretap Act." ***Commonwealth v. Koch,*** 39 A.3d 996, 1003 (Pa.Super. 2011), *appeal granted,* 615 Pa. 612, 44 A.2d 147 (2012), *quoting* ***Commonwealth v. Cruttenden,*** 976 A.2d 1176, 1181 (Pa.Super.2009), *appeal granted,* 610 Pa. 454, 21 A.3d 680 (2011).

an effort to prove the defendant's involvement in drug trafficking (Possession with Intent to Deliver, 35 Pa.C.S. §780-113(a)(30)). After reviewing similar cases in Pennsylvania and other jurisdictions involving electronic communications, the Superior Court noted that

> e-mails and text messages are documents and subject to the same requirements for authenticity as non-electronic documents generally. A document may be authenticated by direct proof, such as the testimony of a witness who saw the author sign the document, acknowledgment of execution by the signer, admission of authenticity by an adverse party, or proof that the document or its signature is in the purported author's handwriting. *See McCormick on Evidence,* §§ 219–221 (E. Cleary 2d Ed.1972). A document also may be authenticated by circumstantial evidence, a practice which is "uniformly recognized as permissible."

Commonwealth v. Koch, 39 A.3d 996, 1004 (Pa.Super. 2011) *appeal granted,* 615 Pa. 612, 44 A.3d 1147 (2012). (internal citations omitted). The Superior Court further noted that

> Pennsylvania Rule of Evidence 901 provides that authentication is required prior to admission of evidence. The proponent of the evidence must introduce sufficient evidence that the matter is what it purports to be. Pa.R.E. 901(a). Testimony of a witness with personal knowledge that a matter is what it is claimed to be can be sufficient. Pa.R.E. 901(b)(1). *See also* Comment, citing ***Commonwealth v. Hudson,*** 489 Pa. 620, 414 A.2d 1381 (1980). Furthermore, electronic writings typically show their source, so they can be authenticated by contents in the same way that a communication by postal mail can be authenticated. Circumstantial evidence may suffice where the circumstances support a finding that the writing is genuine. ***In the Interest of F.P., a Minor,*** 878 A.2d 91 (Pa.Super.2005).

Koch, *supra* at 1002 -1003 (Pa.Super. 2011).[4] Therefore, as long as Detective Weaver was able to properly authenticate the text messages, they were admissible.

The Commonwealth presented ample evidence at trial to establish that a Blackberry cell phone had been seized from Eric Hall, and that cell phone used a particular phone number ending in 4402. (TT 822-824, 916). There was also testimony establishing that Hall's mother, Deborah Finley, had a cell phone that used a telephone number ending in 3605, and that Det. Weaver talked to Ms. Finley on that phone. (TT 917-918). Det. Weaver testified that, pursuant to a search warrant, he received text message content data from Eric Hall's Blackberry phone, and that the content of the text messages

[4] This court is aware that the Pennsylvania Supreme Court granted *allocator* in ***Koch*** to consider whether the Superior Court erred in holding that the text messages had not been properly authenticated and had also erred in determining that the text messages were, in fact, offered for the truth of the matter asserted and therefore were inadmissible. ***Commonwealth v. Koch,*** 615 Pa. 612, 44 A.3d 1147 (2012). As of the date of this opinion, no decision has been rendered by the Pennsylvania Supreme Court as to those issues.

located on Hall's phone clearly established that it was primarily Eric Hall who was using that Blackberry phone. (TT 917-922). Further, a pre-trial review of the text messages to which the defense objected, between Eric Hall and Deborah Finley regarding the gun that he had obtained from her, occurring between September 3, 2011 and September 14, 2011, in conjunction with the context of the other text messages sent from and received by Hall's cell phone, clearly authenticated these text messages as having been sent from Eric Hall and Deborah Finley for purposes of their admission into evidence pursuant to Pa.R.E. Rule 901. For these reasons, the admission of the text messages from Eric Hall's Blackberry cell phone was proper, and he is not entitled to a new trial on this basis.

5. DID THE TRIAL COURT ERR IN ALLOWING TESTIMONY FROM JEREMY SPRINGER REGARDING THE DEFENDANT'S UNWILLINGNESS TO SPEAK WITH POLICE?

Hall next alleges that the trial court erred in permitting Jeremy Springer to testify regarding certain conversations that he had with Hall. Jeremy Springer testified that, on several occasions, he urged Hall to go to the authorities with the information that he had regarding the murders of Anthony Henderson and Noelle Richards:

SPRINGER: I asked him, you know, maybe we should go and talk to someone. That I would go with him even to be there with him to tell his side of the story and what was done, because I said, you know, there may be something you saw that they could ask you to help with their investigation. He just was very nervous and didn't want to. He said he wanted to wait. He didn't know what he wanted to do yet.

MR. PECK: How did the fact that you knew somebody who had been a witness to whatever degree to a homicide affect you if you had this information?

SPRINGER: It was very hard on me. In a couple of weeks I tried to get Eric to go to the authorities several times because it was playing a toll on me. I knew something. I really wanted him to tell his side of the story because, you know, two people had been murdered and if he knew anything, and he may not think he knows anything, but, you know, something may recollect and he may be of some help to them. I really, you know, wanted him to do it himself.

MR. PECK: How many times did you make a request that he contact the proper authorities?

SPRINGER: I would guess a half a dozen, six, seven times. I was very close one day to having him go and speak to

someone, but then when I got there to pick him up and take him he decided against it.

MR. PECK: Did he give you a reason why he declined to go with you? I take it you were taking him to a police station or a police officer?

SPRINGER: Correct.

(TT 977-978). Defense counsel objected at that point, suggesting that the Commonwealth's line of questioning constituted an impermissible reference to the defendant's Fifth Amendment right to remain silent. After argument, this court overruled the objection. Mr. Springer indicated that his reason for not going with Springer to talk to the police was because "He said that his brother said that he should not go. He wanted to wait." (TT 282).

The Fifth Amendment to the U.S. Constitution guarantees that no person shall be compelled in any criminal case to be a witness against himself. *US Const. Amend. V.*

> In [***Miranda v. Arizona,*** 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966)], the Supreme Court established a conclusive presumption that all confessions or admissions made during a period of custodial interrogation are, intrinsically, compelled in violation of the Fifth Amendment's privilege against self-incrimination. *Miranda v. Arizona,* at 467, 865 S.Ct. at 1624. *See also, Oregon v. Elstad,* 470 U.S. 298, 310, 105 S.Ct. 1285, 1300, 84 L.Ed.2d 222 (1985). The threshold requirements necessitating Miranda warnings are custodial interrogation and government involvement.

Commonwealth v. Ramos, 367 Pa.Super. 84, 89, 532 A.2d 465, 467 (Pa.Super. 1987). Indeed,

> Both the United States Constitution and the Pennsylvania Constitution protect every person against being compelled to be a witness against himself or herself. U.S. Const. Amend. V; Article I, § 9. Pennsylvania courts generally interpret Article I, Section 9 of the Pennsylvania Constitution to provide the same protection as the Fifth Amendment to the United States Constitution. *See* ***Commonwealth v. Arroyo,*** 555 Pa. 125, 134–135, 723 A.2d 162, 166–167 (1999), citing ***Commonwealth v. Morley,*** 545 Pa. 420, 429, 681 A.2d 1254, 1258 (1996), and ***Commonwealth v. Swinehart,*** 541 Pa. 500, 512–518, 664 A.2d 957, 962–965 (1995). The privilege of the Fifth Amendment is protected by the now famous *Miranda* rights. ***State v. Leach,*** 102 Ohio St.3d 135, 807 N.E.2d 335, 337 (2004), *see also Miranda,* 384 U.S. at 479, 86 S.Ct. 1602 (holding that certain procedural warnings shall be read to a person being interrogated while in custody). Essentially, there are four relevant time periods at which a defendant may either volunteer a statement or remain silent: (1) before arrest; (2) after arrest but before the warnings required

> by *Miranda* have been given; (3) after *Miranda* warnings have been given; and (4) at trial.

Commonwealth v. Molina, 33 A.3d 51, 57 (Pa.Super. 2011). In ***Molina,*** the Pennsylvania Superior Court

> addressed for the first time in this Commonwealth, whether reference to a non-testifying defendant's pre-arrest silence is constitutionally permissible as substantive evidence of guilt. Following an analysis of applicable precedent from this and other jurisdictions, the panel majority in *Molina* held that "the Commonwealth cannot use a non-testifying defendant's pre-arrest silence to support its contention that the defendant is guilty of the crime charged as such use infringes on a defendant's right to be free from self-incrimination." *Molina* at 62. Therefore, pursuant to *Molina*, a non-testifying defendant's pre-arrest silence is deemed constitutionally protected, such that the government may not use such silence as substantive evidence of the defendant's guilt. *Id*. at 56–57.

Commonwealth v. Adams, 39 A.3d 310, 318 (Pa.Super. 2012). However, the courts have also held that where a defendant testifies at trial, his pre-trial silence can be used for impeachment purposes without violating his Fifth Amendment rights. ***Commonwealth v. Bolus,*** 545 Pa. 103, 110, 680 A.2d 839, 843 (1996). The available case law regarding pre-arrest silence typically involves defendants' silence in the face of non-custodial police investigation and inquiries. *See, e.g.,* ***Jenkins v. Anderson,*** 447 U.S. 231,100 S.Ct. 2124, 65 L.Ed.2d 86 (1980); ***Commonwealth v. Spotz,*** 582 Pa. 207, 870 A.2d 822, 831 (2005); ***Commonwealth v. Bolus,*** 545 Pa. 103, 110, 680 A.2d 839, 843 (1996); ***Commonwealth v. Adams,*** 39 A.3d 310 (Pa.Super.2012), *appeal granted,* 616 Pa. 437, 48 A.3d 1230 (2012).

In this case, however, Hall's statements regarding his reluctance to talk to police officials were not made to police officers, but rather to Jeremy Springer. Hall initiated the conversation with Springer and volunteered the information that placed him at the scene of the murders, although he portrayed himself as an innocent witness who had merely happened upon the scene. Springer did not "interrogate" Hall, nor did he restrain him in any type of custody pending police intervention. Jeremy Springer was not a law enforcement officer, nor did he hold any position of authority that could compel Hall in any way to incriminate himself in this case. Indeed, believing that Hall had valuable information as a witness, Springer, a civilian, testified that he urged Hall to go and tell his story to the authorities so that he could be of assistance to them in solving the murders. Springer was asked to relate why Hall told him that he did not wish to do so. Any statements (or any lack thereof) made by Hall to Springer do not implicate Fifth Amendment protections, as there was no involvement by the government or any agent thereof compelling those statements to be made: Hall was not in custody, there was no interrogation, and there was no state action. There was only the urging of Springer, a civilian friend, for Hall to help solve the murders with the information he told Springer that he had.

Rather than an impermissible use of pre-trial invocation of his right to remain silent, this testimony was offered to explain Jeremy Springer's his course of conduct. Springer explained that he thought Hall had important information to give to the police, and after Hall resisted Springer's urging to give police this information, he met with his personal attorney to ask advice about what to do. Some time thereafter, Springer and his attorney met with law enforcement authorities and informed them of his conversation with Hall and the story that Hall had related to him. (TT 983-984).

The Pennsylvania Superior Court's holding in ***Molina***

> "does not impose a *prima facie* bar against *any* mention of a defendant's silence" but rather "guard[s] against the exploitation of [a defendant's] right to remain silent by the prosecution." ***Molina*** at 63 (emphasis added). Specifically, ***Molina*** stated that "the mere revelation of a defendant's pre-arrest silence does not establish innate prejudice [where] it was not used in any fashion that was likely to burden defendant's Fifth Amendment right or to create inference of admission of guilt." ***Molina*** at 56, *citing* ***Commonwealth v. DiNicola,*** 581 Pa. 550, 866 A.2d 329, 337 (2005).

Commonwealth v. Adams, 39 A.3d 310, 318 (Pa.Super. 2012). This fleeting reference to Hall's apparent reluctance to speak with a law enforcement officer (because his brother told him not to do so) was not used by the Commonwealth to improperly infringe upon Hall's Fifth Amendment rights or create an admission of guilt, and in no way prejudiced him such that the verdict in this matter was compromised. Therefore, Hall is not entitled to a new trial on this ground.

6. DID THE TRIAL COURT ERR IN ALLOWING THE ADMISSION OF THE DEFENDANT'S JAIL INTAKE PHOTOGRAPH?

Hall next asserts that he is entitled to a new trial because the trial court erred in allowing the Commonwealth to introduce the jail intake photograph taken of Hall on the date of his arrest in December 2011. The purpose of offering this evidence was to demonstrate the change in the appearance of Hall from the time of his arrest and the date of trial, as there appeared to be a somewhat marked loss of weight while the defendant had been incarcerated. However, after some discussion, counsel for the defendant withdrew his objection to the admission of the photograph in its entirety, as the height, weight and build type listed in the photograph indicated that Hall was indeed of small stature, regardless of the photographic depiction. (TT 1038) Detective Weaver testified that the defendant was much smaller at trial than when he first encountered Hall in early September 2011 and through the investigation until Hall's arrest in December 2011. (TT 1039-1040). Defense counsel cross-examined Detective Weaver regarding this photo, wherein Det. Weaver acknowledged that Hall was 160 pounds, 5'11" in height, and that his build was small. (TT 1049). Det. Weaver further acknowledged that there was not much change in Hall's appearance from the time of the murders until his arrest in December 2011. (TT 1048).

Because defense counsel withdrew his objection to the admission of the photograph, and indeed, used the photograph and the information contained thereon, to his advantage at trial, he has waived this issue on appeal. For this reason, he is not entitled to a new trial on this basis. Even had defense counsel not withdrawn his objection, however, Hall would still not be entitled to his requested relief, as the photo was offered to show the change in Hall's appearance, rather than to impermissibly suggest the existence of a prior record. *See, e.g.,* ***Commonwealth v. Allen,*** 448 Pa. 177, 292 A.2d 373 (1972) (Rejecting the suggestion that any reference to a defendant's photograph is so prejudicial that an inflexible rule of reversal must apply); ***Commonwealth v. Luccitti,*** 295 Pa. 190, 145 A. 85 (1928) (photographs in possession of the police were introduced to demonstrate defendant's change in appearance). Hall himself testified that he had a prior record, and Det. Weaver testified on cross examination that Hall had been arrested on the date that the photograph was taken. Even had defense counsel not withdrawn his objection and waived this issue, the admission of the photo was not improper and the defendant was certainly not prejudiced thereby.

7. DID THE TRIAL COURT ERR IN PERMITTING DET. TERRY KUHNS TO TESTIFY ON REBUTTAL?

The defendant's final allegation of error suggests that the trial court erred in allowing the testimony of former Westmoreland County Detective Terry Kuhns to testify in rebuttal. Det. Kuhns' testimony was offered to impeach Hall's credibility.

> Impeachment evidence is evidence which is presented as a means of attacking the witness' credibility. Leonard Packel & Anne Poulin, *Pennsylvania Evidence* § 608 (1987). There are several principal ways to attack a witness' credibility: 'evidence offered to attack the character of a witness for truthfulness, evidence offered to attack the witness'*1056 credibility by proving bias, interest, or corruption, evidence offered to prove defects in the witness' perception or recollection, and evidence offered to contradict the witness' testimony.'

Commonwealth v. Palo, 24 A.3d 1050, 1055 -1056 (Pa.Super. 2011), citing *In Interest of M.M.,* 439 Pa.Super. 307, 317–318, 653 A.2d 1271, 1276 (Pa.Super.1995) (emphasis omitted). Hall testified on cross-examination that he was never asked about a gun during the search of his residence:

> MR. PECK: Do you remember being asked by one of the detectives whether or not you had a firearm in your house?
>
> MR. HALL: No.
>
> MR. PECK: So you don't recall ever being asked that?
>
> MR. HALL: Yes, I'm saying that's a lie.
>
> MR. PECK: That's another lie?
>
> MR. HALL: Okay, that's a lie, not another lie.

MR. PECK: That's a lie. So if a detective said that they asked you whether or not there was a firearm in the house that's not true?

MR. HALL: That never happened.

MR. PECK: Okay. Anything else you want to say about that?

MR. HALL: No. Go ahead.

MR. PECK: If the detective reported that you told him that you had no firearms in the house that night, that also would not be true?

MR. HALL: Correct.

(TT 1195-1196). Det. Kuhns was called as a witness to testify that he participated in the search of Hall's residence on September 7, 2011, and that he had a conversation with Hall prior to the search wherein he told Hall that the officers were looking for firearms, and asked Hall whether there were any firearms in the house, or whether he wanted to tell them about any firearms in the house. Det. Kuhns testified that Hall twice told him that there were no guns in the house. (TT 1218-1219).

It is true that impeachment on collateral issues is generally improper. "[A] witness may not be contradicted on 'collateral' matters, ... and a collateral matter is one which has no relationship to the case at trial." ***Commonwealth v. Guilford,*** 861 A.2d 365, 369 (Pa.Super. 2004), quoting ***Commonwealth v. Bright,*** 279 Pa.Super. 1, 420 A.2d 714, 716 (1980) (citations omitted); *accord* ***Commonwealth v. Johnson,*** 536 Pa. 153, 638 A.2d 940, 942–43 (1994). The issue of Hall's possession of a firearm, the execution of the search warrant at his home on September 7, 2011 and his credibility in relation to his concealment and destruction of evidence are certainly not collateral issues as they have a direct relationship to the case. For these reasons, no error occurred, and Hall is not entitled to a new trial on this basis.

CONCLUSION:

For the foregoing reasons of fact and of law, the issues raised on appeal are meritless and the grant of a new trial is not warranted.

BY THE COURT:
/s/ Rita Donovan Hathaway, Judge

Date: April 14, 2014

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VALERIAN A. KARLSKI and RENEE KARLSKI, his wife, Plaintiffs
V.
MICHAEL LEMENTOWSKI, MD., Defendant

HEALTH

Consent of Patient and Substituted Judgment; Consent of Patient; Surgical Procedures

1. Claims alleging a lack of consent for a surgical procedure constitute a battery committed upon a patient by a physician.

2. Whether a surgeon's contact with a patient is offensive or harmful so as to constitute a battery depends on whether the patient gave consent, as consent to being touched is a defense to battery.

3. Surgery performed without the patient's consent constitutes an intentional and offensive touching, and satisfies the elements of battery; no intent to harm the patient need be established.

4. Plaintiff had consented to hernia surgery, even though he claimed that he didn't have time to read the consent form that he was asked to sign, so summary judgment in Defendant surgeon's favor on lack of consent claim, or battery claim, was appropriate.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 88 of 2009

Appearances:
Valerian A. Karlski and Renee Karlski,
Pro Se
Darren M. Newberry,
Pittsburgh, for the Defendant

BY: DAVID A. REGOLI, JUDGE

OPINION AND ORDER OF COURT

This matter is before the Court on the Defendant's Motion for Summary Judgment. The Defendant seeks to dismiss Count II of the Plaintiffs' Complaint, which the Honorable Gary P. Caruso recognized as a lack of consent, or battery, cause of action. In his Motion for Summary Judgment, the Defendant argues that the Plaintiff consented to the surgery at issue and, thus, the Plaintiff's battery claim should be dismissed. The Court agrees, and for the reasons set forth below, hereby grants the Defendant's Motion for Summary Judgment. In order to fully understand the Court's reasoning herein, a recitation of the facts and procedural history is essential.

I. Factual History

The Complaint in this case was filed on July 12, 2011 and seeks damages for medical complications that allegedly arose after the Defendant, Michael Lementowski, M.D., performed a hernia operation on the Plaintiff, Valerian Karlski. The Plaintiffs' Complaint alleges causes of action for medical negligence, lack of informed consent and loss of consortium. As will be discussed *infra*, Judge Caruso dismissed Mr. Karlski's negligence and lack of informed consent claims. However, Judge Caruso determined that the Plaintiffs' Complaint also alleged a cause of action for lack of consent, and allowed the case to move forward on this basis.

In their Complaint, the Plaintiffs allege that Mr. Karlski first visited with the Defendant on December 28, 2006. At this appointment, the Defendant diagnosed Mr. Karlski with a hernia and scheduled him for preoperative tests to determine his fitness to undergo a hernia repair procedure. After the preoperative tests were performed, surgery was recommended and the Plaintiff was subsequently scheduled to have a hernia operation performed by the Defendant on January 17, 2007.

When the Plaintiff arrived at the hospital for the operation, he was placed in the pre-operating room. While in the pre-operating room, the Defendant entered and provided Mr. Karlski with the Consent to Operation form (hereinafter "consent form") to sign for the hernia operation. Mr. Karlski signed the consent form, but claims that he was given no time to read the form, either before or after he signed it. Mr. Karlski remained in the pre-operating room for approximately four (4) hours before being taken into the operating room. This sequence of events, including the damages claimed, forms the basis of the Plaintiffs' Complaint.

II. Procedural History

On August 19, 2011, the Defendant filed a Notice of Intention to Enter Judgment of Non Pros on the Plaintiffs' professional liability claim for their failure to file a certificate of merit pursuant to Pa.R.C.P. 1042.3. Judge Caruso then entered an Order directing the Plaintiffs to file a certificate of merit in accordance with Pa.R.C.P. 1042(a)(3). The Plaintiffs responded by filing the same, which indicated that "(1) the expert testimony of an appropriate licensed professional is unnecessary for prosecution of the Plaintiffs' claim based on a theory of res ipsa loquitor [...] and; (2) that Plaintiffs' claim is also based upon a lack of informed consent for the alleged surgery, for which the Certificate of Merit is also required [...]" *See* ***Certificate of Merit, October 28, 2011.***

On November 18, 2011, the Defendant filed a Motion for Non Pros and for Clarification as to Plaintiffs' Certificate of Merit, which sought non pros as to any of the Plaintiffs' claims that would rely on expert testimony. Said Motion also requested that the Plaintiffs be precluded from offering expert testimony as to standard of care and causation and that clarification be provided as to the Plaintiffs' statement in its Certificate of Merit regarding lack of informed consent. Before the Court could rule on this Motion, however, the Plaintiffs subsequently filed another Certificate of Merit on November 23, 2011. This second certificate provides, *inter alia,* "that the expert testimony of an appropriate licensed professional is unnecessary for prosecution of Plaintiffs' claim for lack of informed consent. [...]" *See* ***Certificate of Merit, November 23, 2011.***

The Defendant then filed a Motion to Preclude Expert Report and Expert Testimony on December 30, 2011, which Judge Caruso granted by ordering that the Plaintiffs are precluded from offering expert testimony or reports on the issue of the standard of care and causation. Said Motion did not request that the Court make any ruling regarding the claim of lack of informed consent.

On June 11, 2013, after all of the relevant pleadings were closed, the Defendant filed a Motion for Summary Judgment, requesting that the action be dismissed. The

Defendants argued that the Plaintiffs could not support their claims of professional negligence and lack of informed without expert testimony. After submission of briefs and oral argument, Judge Caruso entered an Order dismissing the claims of professional negligence, but denying the Defendant's motion as to the lack of informed consent claim.

The Defendant then filed a Motion for Judgment on the Pleadings in the nature of a demurrer on December 20, 2013, requesting that the Plaintiffs' claim for lack of informed consent be dismissed with prejudice.

On March 5, 2014, Judge Caruso entered an Opinion and Order granting the Defendant's Motion for Judgment on the pleadings with respect to the Plaintiffs' cause of action for lack of informed consent. However, Judge Caruso denied the Defendant's motion as to the cause of action for "lack of consent." Concluding that the Plaintiffs' Complaint alleges a claim for lack of consent, Judge Caruso reasoned in his accompanying Opinion that "the facts as pleaded [in Count II] state a cause of action for a battery in that, if the pleadings are believed, the surgery was done without the consent of the plaintiff." *See* ***Opinion and Order, March 5, 2014.***

As such, the only remaining cause of action against the Defendant is for lack of consent, *i.e*. battery.[1] The genesis of this cause of action is the Defendant's alleged failure to provide Mr. Karlski with sufficient time to read the surgical consent form or to explain the provisions thereof to him before surgery.

Subsequent to Judge Caruso's March 5, 2014 Order of Court, the depositions of both Plaintiffs were taken and recorded on May 7, 2014. The Defendant has since filed a second Motion for Summary Judgment, which this Opinion and Order of Court now addresses.

III. Analysis

In deciding the Defendant's Motion for Judgment on the Pleadings, Judge Caruso was bound by the following standard:

> A motion for judgment on the pleadings should be granted only where the pleadings demonstrate that no genuine issue of fact exists, and that the moving party is entitled to judgment as a matter of law. ***Pa.R.C.P. 1034.*** Thus, a trial court must confine its consideration to the pleadings and relevant documents and accept as true all well pleaded statements of fact, admissions, and any documents properly attached to the pleadings presented by the party against whom the motion is filed. The court may grant judgment on the pleadings only where the moving party's right to succeed is certain and the case is so free from doubt that trial would clearly be a fruitless exercise.

McAllister v. Millville Mut Ins. Co., 640 A.2d 1283, 1285 (Pa. Super. 1994).

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[1] The Court notes that there also remains a cause of action for loss of consortium; however, said cause of action need not be discussed herein as it is derivative of the underlying lack of consent claim. As such, the success of Ms. Karlski's loss of consortium claim is wholly dependent on her husband's right to recover. *See* ***Scattaregiav. Shin ShenWu,*** 495 A.2d 552, 553-554 (Pa. Super. 1985).

Instantly, however, it is a Motion for Summary Judgment which is before the Court. As such, the Court "must examine the entire record, including the pleadings, depositions, answers to interrogatories, any admissions to the record, and affidavits that were filed by the parties before ruling on a summary judgment motion." ***White v. Owens-Corning Fiberglas, Corp.,*** 668 A.2d 136, 142 (Pa. Super. 1995). The Court, therefore, has the benefit of reviewing the Plaintiffs' deposition testimony and transcript in deciding the instant Motion for Summary Judgment.

In his March 5, 2014 Order, Judge Caruso was confined to the facts as stated in the Plaintiffs' Complaint, including the allegations that Mr. Karlski did not consent to the surgery and was not provided sufficient time to read the consent form. However, after examining Mr. Karlski's deposition testimony, the Court finds that he did in fact consent to the hernia operation. Thus, the battery claim is fatally flawed.

It is important to note the distinction that has been drawn between a claim for lack of consent and a claim for lack of informed consent. According to the Pennsylvania Supreme Court, "a lack of consent claim is proven by establishing that no consent was given for the surgical procedure performed [...]"***Cooper ex rel. Cooper v. Lankenau Hosp.,*** 51 A.3d 183, 191 n. 8 (Pa. 2012). Whereas, "a lack of informed consent claim is proven by demonstrating that the physician failed to advise the patient of the material risks, complications and alternatives to surgery to permit the patient to make an informed decision regarding whether to undergo surgery." ***Cooper***, 51 A.3d at 191 n. 8.

Whether a surgeon's contact is "offensive or harmful so as to constitute battery depends on whether the patient gave consent, as consent to being touched is a defense to battery." ***Id*** at 191 (citation omitted). "Accordingly, surgery performed without the patient's consent constitutes an intentional and offensive touching, and satisfies the elements of battery." ***Id***. "No intent to harm the patient need be established." ***Id*** (citation omitted).

Instantly, the only remaining cause of action against the Defendant is lack of consent. As such, the sole question before the Court is whether Mr. Karlski consented to the hernia operation that was performed by the Defendant on January 17, 2007. Whether or not any such consent was informed is no longer relevant.

To make this determination, the Court reviewed the deposition testimony of Mr. Karlski, wherein he discussed his December 28, 2006 appointment with the Defendant. When asked whether, at said appointment, he agreed with the Defendant to undergo the hernia operation, Mr. Karlski testified as follows:

> Q: Did you tell Dr. Lementowski on that visit that you wanted to have the surgery, did you agree at that time or were you going to go think about it?
>
> A: I agreed to it, yeah. I mean he told me he says you need it repaired.
>
> Q: And you agreed at that first visit we're going to go ahead with it assuming I'm okay with my preop tests?
>
> A: Yes.

(Valerian Karlski, Deposition Transcript ("Dep.Tr.") pg. 63, lns. 23-25; pg. 64, lns. 1-7). In fact, Mr. Karlski testified that he conducted his own, independent research as to the surgery:

Q: Was this internet research that you did?

A: Internet research and I spoke to a couple people who I believe had mesh put in [addressing concern over use of mesh in surgery).

Q: When you did the internet research, did you put in hernia surgery?

A: Yes.

[...]

Q: And why were you doing this, what was the purpose of your doing internet research?

A: Well, because any time I have gone in for any kind of procedures that I consider invasive like that, I like to educate myself somewhat on what I'm going to be undergoing.

(Dep.Tr. pg. 59, lns. 4-21).

Furthermore, when asked about the day of the operation and his review of the consent form, Mr. Karlski testified as follows:

Q: Do you recall reading this [consent] form and signing it that morning?

A: I signed, obviously I signed, but I didn't read anything.

Q: But you had an opportunity to read it if you chose to?

A: No.

[...]

Q: What do you mean you didn't have an opportunity?

A: I was handed a form and told to sign it, told to sign it, asked to sign it.

Q: And did you tell them I wanted to read it?

A: No, I didn't.

Q: Why not?

A: Because I was told that it was just a consent for them to operate on me.

Q: What is a consent to operate as far as you knew?

A: That I was there to be operated on for a hernia and that I was consenting to allow Monongahela Valley Hospital and Dr. Lementowski [to] perform a hernia operation.

Q: Did you feel you needed to review it?

A: No.

Q: Because you knew what the surgery was, correct, it was a repair of the hernia?

A: That was my understanding, it was a basic inguinal hernia repair.

(Dep.Tr. pg. 79, lns. 4-25; pg. 80, lns. 1-7);

Q: I guess there's no question that had you wanted to read it [the consent form], you could have?

A: I don't think I could have because it was handed to me as I was being moved away to the best of my recollection.

Q: But surely if you would have said stop, I want to read this, there's no reason to believe they wouldn't have stopped and allowed you to read it if you would have said something?

A: I would assume they would have allowed me to.

(Dep.Tr. pg. 81, lns. 13-22). Mr. Karlski then made the following admissions when asked about the contents of the consent form:

Q: Number 1, you knew Dr. Lementowski was going to perform the surgery?

A: That was my understanding.

Q: So you knew that and that's what paragraph 1 [of the consent form] says?

A: Okay

Q: And you knew that you had a right inguinal hernia, which is written in here?

A: Correct.

Q: So you knew that. And you authorized the performance upon myself, that's you, the following procedure and the procedure is repair of the right inguinal hernia; correct?

A: Yes.

Q: So you authorized that surgery to be performed on that day at that hospital by Dr. Lementowski; correct?

A: Correct.

(Dep.Tr. pg. 86, lns. 14-25; pg. 87, lns. 1-6).

As indicated above, a surgical repair of Mr. Karlski's hernia was recommended by the Defendant at the initial December 28, 2006 appointment, wherein Mr. Karlski agreed to proceed with the operation. As such, he was agreeable to it approximately three (3) weeks in advance of the surgery date. In fact, prior to his operation, Mr. Karlski educated himself on hernia repair procedures through his own independent research.

Furthermore, there is no dispute that Mr. Karlski knowingly signed the consent form prior to the surgery. Although Mr. Karlski claims that he was not given sufficient time to read the consent form and that the contents thereof were not explained to him, his deposition testimony contradicts these claims. According to Mr. Karlski, he didn't feel he needed to review the consent form because he understood what procedure was being performed. (Dep.Tr. pg. 80, lns. 3-8). Mr. Karlski also admitted that at no point did he ask to read the consent form. Indeed, he even acknowledged that had he asked to read it, he "would assume they would have allowed" him time to do so. (Dep.Tr. pg. 81, lns. 13-22).

Mr. Karlski also agreed that the contents of the consent form were correct insofar as it stated that he was to have a right inguinal hernia performed by the Defendant on the date in question and that he authorized the same. To date, no evidence has been presented to suggest that anything other than a right inguinal hernia was in fact performed on Mr. Karlski or that it was performed by someone other than the Defendant.

Accordingly, the Court finds that Mr. Karlski knowingly consented to the hernia operation that was conducted by the Defendant. Insofar as the Plaintiffs' claim that this consent was uninformed or uneducated, said claim must fail as this would constitute a lack of informed consent, a cause of action which was previously dismissed. Therefore, as the Plaintiffs' cannot meet their burden of proof with respect to a lack of consent, or battery, cause of action, the Court hereby enters the following Order:

ORDER OF COURT

AND NOW, to wit, this 6th day of October, 2014, upon consideration of the Defendant's Motion for Summary Judgment and Brief in Support thereof, and upon consideration of the Plaintiffs' Motion to Dismiss the Defendant's Motion for Summary Judgment, and after oral argument on said Motions, it is hereby **ORDERED, ADJUDGED,** and **DECREED** that the Defendant's Motion for Summary Judgment is hereby **GRANTED**. Accordingly, the entirety of the Plaintiffs' Complaint, including Ms. Karlski's derivative claim for loss of consortium, is hereby **DISMISSED** with prejudice.

FURTHER, in accord with Pa.R.C.P. 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/ David A. Regoli, Judge

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ALISHA L. FORD, Plaintiff
V.
AMERICAN STATES INSURANCE COMPANY, Defendant

INSURANCE

Underinsured Motorist Coverage; Rejection of Underinsured Motorist Protection; Specific Compliance

1. The effect of omitted or additional words is a factor to be considered when determining whether a rejection form specifically complies with 75 Pa.C.S. § 1731.

2. Additions to the prescribed language, and deviation from the proximal relationship of the components, of the underinsured motorist rejection form required by 75 Pa.C.S. § 1731(c.1) fail to specifically comply with the statute and consequently render any rejection pursuant to such form void.

3. In order to be valid, UM or UIM rejection forms must comply with the requirements of section 1731(c.1) as follows: the UIM rejection must appear on a sheet separate from the UM rejection; the first named insured must sign the rejection; and the rejection must be dated.

4. Subject matter and placement of additional language are essential to determining whether an underinsured motorist rejection form specifically complies with section 1731.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION
No. 3733 of 2013

Appearances:
Robert J. Fisher, Jr.,
Pittsburgh, for the Plaintiff
Edward A. Schenck,
Pittsburgh, for the Defendant

BY: DAVID A. REGOLI, JUDGE

OPINION AND ORDER OF COURT

This matter is before the Court on cross-motions for summary judgment filed by both the Plaintiff and Defendant. At issue in each party's motion for summary judgment is the validity of an underinsured coverage rejection form ("UIM rejection form")[1] contained in the Plaintiff's auto insurance policy with the Defendant (the "Policy").[2] The Plaintiff seeks summary judgment in her favor on the basis that the Defendant's UIM rejection form is void for failure to "specifically comply" with the Pennsylvania Motor Financial Responsibility Law ("MVFRL"), 75 Pa.C.S.A. § 1731. The Court does not agree, and for the reasons set forth below, hereby denies the Plaintiff's Motion for Summary Judgment and, further, grants the Defendant's Motion for Summary Judgment.

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[1] UIM coverage affords benefits when another driver is at fault for injury but lacks sufficient insurance to cover all losses caused by the accident. *See* ***75 Pa.C.S.A. § 1731(c)***.

[2] It is stipulated that the Plaintiff was an insured under the Policy, which was in her mother's name. However, for the sake of this Opinion, the Policy will be referred to as the Plaintiff's policy.

I. Factual Background

The instant case arose from a motor vehicle accident that occurred on March 19, 2013 between the Plaintiff, Alisha L. Ford, and another vehicle driven by Carl Showalter. The Plaintiff, who was operating the insured vehicle, attempted to turn left with the right of way, when Mr. Showalter drove his vehicle through a solid red light and collided with the Plaintiff's vehicle. As a result of the collision, the Plaintiff suffered numerous injuries, including a fracture to her left ankle and a mild traumatic brain injury.

After the accident, the Plaintiff gave notice to the Defendant that she was pursuing an underinsured motorist claim under the Policy. Subsequently, on May 23, 2013, Mr. Showalter's insurance carrier tendered and paid to the Plaintiff his liability policy limits of $25,000.00. On that same date, the Defendant forwarded to the Plaintiff the UIM rejection forms contained in the Policy, wherein it rejected the UIM coverage sought by the Plaintiff.

The Defendant's UIM rejection form reads as follows:

> Rejection of Underinsured Motorists Protection
>
> By signing this waiver I am rejecting underinsured motorists coverage under this policy, for myself and all relatives residing in my household. Underinsured motorists coverage protects me and relatives living in my household for losses and damages suffered if injury is caused by the negligence of a driver who does not have enough insurance to pay for all losses and damages. I knowingly and voluntarily reject this coverage.

See ***Exhibit "2" to the Stipulations of Fact***. Below this paragraph is a signature line for the Policy's first named insured, which was signed and dated by the Plaintiff's mother, Audrey Ford, on August 10, 2011.

Subchapter C of the MVFRL, 75 Pa.C.S.A. § 1731, governs the availability and rejection of UIM coverage. Section 1731(c) of that Subchapter sets forth the following form to be used when an insured is rejecting such coverage:

> **REJECTION OF UNDERINSURED MOTORIST PROTECTION**
> By signing this waiver I am rejecting underinsured motorist coverage under this policy, for myself and all relatives residing in my household. Underinsured coverage protects me and relatives living in my household for losses and damages suffered if injury is caused by the negligence of a driver who does not have enough insurance to pay for all losses and damages. I knowingly and voluntarily reject this coverage.
>
> .....
> Signature of First Named Insured
>
> .....
> Date

75 Pa. C.S.A. § 1731(c) (West 2014). Section 1731(c.l) then provides that:

> Insurers shall print the rejection forms required by subsections (b)[3] and (c) on separate sheets in prominent type and location. The forms must be signed by the first named insured and dated to be valid. The signatures on the forms may be witnessed by an insurance agent or broker. Any rejection form that does not specifically comply with this section is void.

Id. at ***§ 1731(c.1)***.

Instantly, it is the Plaintiff's position that the Defendant's UIM rejection form is void under Section 1731(c.1) on the following two grounds: (1) the addition of the letter "s" to the term "Motorist" in the rejection form's title; and (2) the inclusion of the word "motorists" in the form's second sentence. The Defendant, however, argues that despite the additions, its rejection form still contains the exact language as set forth in Section 1731(c) and thus is valid. The Defendant further reasons that the addition of the word "motorists" does not introduce any ambiguity into the form, nor does it change the party's understanding of the intended coverage.

The question before the Court, therefore, is whether the Defendant's addition of the term "motorists" in its UIM rejection form "specifically complies" with Section 1731(c).

II. Analysis

The MVFRL does not define the phrase "specifically comply;" nor have many courts attempted to do so. What's more, the courts have not been uniform in determining whether additional language in a UIM rejection form specifically complies with Section 1731(c.1). *Compare* ***Jones v. Unitrin Auto & Home Ins. Co.,*** 40 A.3d 125 (Pa. Super. 2012) (holding that "additions to the prescribed language, and deviation from the proximal relationship of the components, of the UIM rejection form required by 75 Pa.C.S.A. § 1731 fail to specifically comply with the statute and is consequently void") *with* ***Unitrin Auto & Home Ins. Co. v. Heister,*** 2005 WL 2314372 (M.D.Pa. 2005) (examining the same additional language at issue in ***Jones*** and holding that the UIM rejection form nevertheless complied with Section 1731 because it still used the exact language required by Section 1731(c) where Section 1731(c.1) "nowhere indicates that additional clarifying language vitiates an otherwise valid UIM rejection form").

In support of her Motion for Summary Judgment, the Plaintiff cites several Superior Court cases interpreting and applying Section 1731(c). In both cases, the Superior Court held that the UIM rejection forms at issue were null and void. *See* ***Am. Int'l Ins. Co. v. Vaxmonsky,*** 916 A.2d 1106 (Pa. Super. 2006); ***Jones****, supra*. In ***Vaxmonsky***, the Superior Court concluded that a UIM rejection form did not specifically comply with Section 1731(c) due to its removal of the word "all" from the phrase "all losses and damages" as provided for in Section 1731(c).

In reaching its conclusion, the ***Vaxmonsky*** Court conducted more than just a perfunctory comparison of the language used in Section 1731(c) with the UIM rejection form. Rather, it examined "what effect, if any, the omission of 'all' has on the

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[3] Subsection (b) explains the optional uninsured motorist ("UM") coverage. ***75 Pa. C.S.A. §1731(b)***.

validity of the signed rejection form," wherein it reasoned that said omission "imposed ambiguity where none existed." ***Vaxmonsky***, 916 A.2d at 1109. The Superior Court's analysis in this regard suggests that the effect of an omitted (or, presumably, additional) word is a factor to be considered when determining whether a rejection form "specifically complies" with Section 1731(c).

The Plaintiff also relies on ***Jones,*** *supra,* wherein a majority of the Superior Court[4] concluded that a UIM rejection form was invalid due to its inclusion of the following sentence: "By rejecting this coverage, I am also signing the waiver on P. 13 rejecting stacked limits of underinsured motorist coverage." ***Jones***, 40 A.3d at 128. In reaching its holding, the ***Jones*** Court examined the additional sentence in terms of its "proximal relationship" between the required language of Section 1731(c) and the required signature and date lines following said language. ***Id.*** at 129. The Court reasoned that because the UIM rejection form was not "directly related to rejection of UIM coverage," it did not "specifically comply" with Section 1731(c) as required by Section 1731(c.1). ***Id.*** at 129-130. The Court then held that "additions to the prescribed language, *and* deviation from the proximal relationship of the components, of the UIM rejection form [...] fail to specifically comply with the statute and is consequently void." ***Id.*** at 131 (emphasis added).

In addition to both ***Vaxmonsky*** and ***Jones***, the Court finds guidance in the Supreme Court's decision in ***Winslow-Quattlebaum v. Maryland Ins. Group,*** 752 A.2d 878 (Pa. 2000). In ***Winslow-Quattlebaum***, the Court deemed it acceptable for an insurer to place both the UIM rejection form and the UIM stacking rejection form on the same page. The ***Winslow*** Court concluded that:

> In order to be valid, UM or UIM rejection forms must comply with the requirements of section 1731(c.1) as follows: the UIM rejection must appear on a sheet separate from the UM rejection; the first named insured must sign the rejection; and the rejection must be dated. Instantly, the UIM form was separate from the UM form and Winslow-Quattlebaum, the first named insured, signed and dated the form. There is, therefore, no basis on which to declare such waiver void as it complies with all the requirements of section 1731(c.1).

Winslow-Quattlebaum, 752 A.2d at 882. The Court thus reversed the Superior Court's holding that the insurer's UIM rejection form did not specifically comply with Section 1731(c.1) because it did not stand alone on its own page. *See* ***Winslow-Quattlebaum v. Maryland Ins. Group,*** 723 A.2d 681 (Pa. Super. 1998) (*rev'd*).

Furthermore, the Court finds persuasive the Third Circuit case of ***Robinson v. Travelers Indem. Co.,*** 520 Fed.Appx. 85 (3d Cir. 2013).[5] In ***Robinson,*** similar to the

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[4] Judge Cheryl Lynn Allen filed a Dissenting Opinion, in which she found that the rejection form specifically complied with the requirements of Section 1731(c) as it was printed separately from the UM rejection form, was signed and dated by the Appellant as the first named insured, and contained a verbatim recitation of Section 1731(c)'s language. ***Id.*** at 131.

[5] The Court finds this case especially persuasive given the relative lack of Pennsylvania authority on the specific issue presented in this case.

instant case, the insurer added the word "motorist" to the second sentence of its UIM rejection form to make the phrase read "underinsured motorist coverage," rather than "underinsured coverage." The Court concluded that despite the additional word, the insurer's UIM rejection form complied with Section 1731. In doing so, the Court referenced the Superior Court's decision in ***Vaxmonsky*** and reasoned that, "the 'additional word' was one word—a word that did not introduce ambiguity into the rejection form, and in fact made the phrase consistent with the rest of the MVFRL. *Cf., Vaxmonsky,* 916 A.2d at 1109[.]" ***Robinson,*** 520 Fed.Appx. at 88. The Court continued: "the addition of the word 'motorist' did not introduce ambiguity into the form, did not change the meaning or scope of the coverage, and—indisputably—did not contravene any party's understanding of the intended coverage." ***Id.*** at 89.

The ***Robinson*** Court then compared its decision with the Superior Court's decision in ***Jones***, finding that ***Jones*** did not command a different result:

> In *Jones*, the Superior Court examined a UIM rejection form that included an additional sentence, which referred to an entirely different statutory provision [...] The *Jones* court found that the UIM rejection form did not specifically comply with § 1731 because the additional text did not pertain to the rejection of UIM coverage, and appeared between the text and signature line prescribed in § 1731(c). Subject matter and placement of the additional language were essential in the *Jones* court's analysis [...]
>
> Neither concern is at issue in this case—the additional word "motorist" does not come between the language specified in § 1731(c) and the signature and date line. Moreover, the word "motorist" is directly related to the rejection of UIM coverage—indeed, the word "motorist" could be considered clarifying, as it makes the phrase consistent throughout the section. Thus, even under *Jones*, we believe that Robinson has no right to the UIM coverage that Tri-County knowingly and intentionally rejected.

Id. (internal citations omitted).

In the case at bar, the Defendant's UIM rejection form, akin to ***Robinson***, only contains the addition of one word—"motorists"—in its second sentence.[6] It does not include an additional paragraph or sentence, nor does it change the format or the spacing of the rejection form itself. Accordingly, there is no deviation from the "proximal relationship" between the required language of Section 1731(c) and the required signature and date lines following the language. Indeed, all of Section 1731(c)'s required language is included in the UIM rejection form, which was also properly signed and dated by the Plaintiff's mother, as the first named insured, directly below the rejection paragraph. *See* ***Winslow-Quattlebaum,*** 752 A.2d at 882.

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[6] While the Court notes that the Defendant used the plural version of "motorist" throughout the form, the Court does not feel that this alteration changes the instant analysis.

Furthermore, the term "motorists" is directly related to the rejection of UIM coverage and, in fact, makes the form consistent with the title and first sentence of Section 1731(c)'s form. *See* ***75 Pa.C.S.A. § 1731(c)*** ("REJECTION OF UNDERINSURED *MOTORIST* PROTECTION [...] By signing this waiver I am rejecting underinsured *motorist* coverage [...]") (emphasis added). As such, the addition of the word "motorists" to the form's second sentence does not impose any ambiguity; rather, it could be argued that its inclusion makes the waiver more uniform throughout the paragraph.

Lastly, there is no evidence that the first named insured, Audrey Ford, was confused by the addition of the word "motorists" or that she otherwise misunderstood the meaning of the UIM rejection form as a result. Rather, the Policy language is clear and unambiguous and plainly denotes that the Plaintiff is "rejecting underinsured motorists coverage." The Plaintiff, however, knowingly and voluntarily rejected said coverage and, consequently, did not pay for the same. As such, she is now seeking to recover a benefit for which she never bargained or paid. The Court cannot permit such a recovery, as it finds that the Defendant's UIM rejection form specifically complies with Section 1731(c) and is thus valid and enforceable. The Court, therefore, enters the following Order:

ORDER OF COURT

AND NOW, to wit, this 17th day of October, 2014, upon consideration of the Plaintiff's Motion for Summary Judgment and Brief in Support thereof, and upon consideration of the Defendant's Motion for Summary Judgment and Brief in Support thereof, and after oral argument on said Motions, it is hereby **ORDERED, ADJUDGED** and **DECREED** as follows:

1. With respect to the Plaintiff's Motion for Summary Judgment, said Motion is hereby **DENIED**.
2. With respect to the Defendant's Motion for Summary Judgment, said Motion is hereby **GRANTED**, as the Court finds that the Defendant's UIM rejection form specifically complies with 75 Pa.C.S.A. § 1731(c) and is therefore valid and enforceable. As such, the Plaintiff is barred from any underinsured coverage for the motor vehicle accident occurring on March 19, 2013 and the Plaintiff's Complaint in the instant matter is hereby **DISMISSED**.

FURTHER, in accord with Pa.R.C.P. 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/ David A. Regoli, Judge

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