

PITTSBURGH LEGAL JOURNAL

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OPINIONS

The Pittsburgh Legal Journal provides the ACBA members with timely, precedent-setting, full text opinions, from various divisions of the Court of Common Pleas. Each opinion, which is published in this section, begins with a brief description or a "head-note" of the opinion that follows. These opinions can be viewed in a searchable format on the ACBA website, www.acba.org.

ALLEGHENY JURY VERDICT REPORTER

The Pittsburgh Legal Journal provides the ACBA members with a quarterly report of jury verdicts from the Civil Division of the Court of Common Pleas of Allegheny County. The verdicts which appear in the Pittsburgh Legal Journal, a supplement of the Lawyers Journal, under the heading "Allegheny Jury Verdict Reporter" are provided by court staff from the assignment room.

Each jury verdict is then assigned for review of the pleadings and preparation of a brief summary of the case and identification of the parties, counsel, and witnesses.

No attempt is made to select, choose, emphasize, highlight, or categorize the results of lawsuits tried to verdict, either by plaintiff, defendant, result, or any other category. The purpose of this project is to report all results tried by jury to verdict.

CAPSULE SUMMARIES

The Pittsburgh Legal Journal provides the ACBA members with precedent-setting, "Capsule Summaries" or a brief description of opinions from the Family Division of the Court of Common Pleas of Allegheny County.

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**In the Interest of: S.B. a Minor,
A.B. a Minor, B.G. a Minor,
and D.G. a Minor**

Grandmother's Standing—Custody Action

1. Biological grandmother of four children who were adjudicated dependent has automatic standing to assert custody claim under 23 Pa.C.S. §5313.

2. Pennsylvania Supreme Court's recognition of grandparents' automatic standing to assert a custody claim to grandchildren does not extend to adjudicatory phase of a dependency hearing.

(Joan Shoemaker)

Lisa M. Petruzzi for Intervenor, Norma Jean Burkhart.
Sarah Hart for Office of Children, Youth and Families.
William Petula for S.B., A.B., B.G., and D.G.
Benjamin Zuckerman for Mother.

No. 06-2293; No. 06-2292; No. 06-2296; No. 07-1411 In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division—Juvenile Section.

**OPINION
OF THE COURT**

Colville, J., February 19, 2008—This appeal follows this court's January 10, 2008 Order of Court recognizing the standing of the intervenor, Norma Jean Burkhart, as biological grandmother to the four dependent children in each of the above-captioned matters. Specifically, this court recognized "grandmother, Norma Jean Burkhart, as an individual with automatic standing pursuant to 23 Pa.C.S. §5313 and *R.M. v. Baxter*, 777 A.2d 446 (Pa. 2001) to assert a custody claim [with respect to the dependent children in the above-captioned matters]. This recognition of standing is not intended to be extended to dependency adjudication proceedings pursuant to *In re L.C., II*, 900 A.2d 378 (Pa.Super. 2006)." The Allegheny County Office of Children, Youth and Families appeals the above-described January 10, 2008 Order of Court asserting that it is contrary to applicable appellate case law.

23 Pa.C.S. §5313 states as follows:

When grandparents may petition.

(a) **Partial custody and visitation.** If an unmarried child has resided with his grandparents or great-parents for a period of 12 months or more and is subsequently removed from the home by his parents, the grandparents or great-parents may petition the court for an order granting them reasonable partial custody or visitation rights, or both, to the child. The court shall grant the petition if it finds that visitation rights would be in the best interest of the child and would not interfere with the parent-child relationship.

(b) **Physical and legal custody.** A grandparent has standing to bring a petition for physical and legal custody of a grandchild. If it is in the best interest of the child not to be in the custody of either parent and if it is in the best interest of the child to be in the custody of the grandparent, the court may award physical and legal custody to the grandparent. This subsection applies to a grandparent.

(1) who has genuine care and concern for the child; (2) whose relationship with the child began with the consent of a parent of the child or pursuant to and order of court; and (3) who

for 12 months has assumed the role and responsibilities of the child's parent, providing for the physical, emotional and social needs of the child, or who assumes the responsibility for a child who has been determined to be a dependent child pursuant to 42 Pa.C.S. Ch. 63 (relating to juvenile matters) or who assumes or deems it necessary to assume responsibility for a child who is substantially at risk due to parental abuse, neglect, drug or alcohol abuse or mental illness. The court may issue a temporary order pursuant to this section.

23 Pa.C.S. §5313.

In *R.M. v. Baxter*, 777 A.2d 446 (Pa. 2001) our Supreme Court granted allocatur to determine whether 23 Pa.C.S. §5313 confers standing upon a grandparent to file a complaint for custody and/or visitation of a grandchild after the child has been adjudicated dependent. The trial court had held that the grandparent lacked standing under those circumstances and dismissed the grandparent's complaint. The Superior Court reversed the trial court holding that the statute conferred automatic standing upon the grandparent, and the Supreme Court affirmed that holding of the Superior Court. In so doing, the Supreme Court placed no limitations, restrictions, or other requirements upon a grandparent's automatic standing to seek the physical and legal custody of a dependent grandchild.¹

Subsequent to the Supreme Court's decision in *Baxter*, the Superior Court revisited the question in *In re L.C., II*, 900 A.2d 378 (Pa.Super. 2006). In *L.C., II*, the court recognized the grandparent's automatic right to seek custody of a dependent child [per 23 Pa.C.S. §5313, *Baxter*, and *In re Adoption of Hess*, 530 Pa. 218, 608 A.2d 10 (Pa. 1992) (wherein the Supreme Court granted grandparents petition to intervene in the adoption proceedings for their grandchildren after the parental rights of the natural parents had been terminated)]. The Superior Court, nonetheless, concluded "contrary to grandmother's assertion, however, these cases are inapposite as they concern custody actions not adjudications of dependency." While the Superior Court in *L.C., II* went on to analyze the matter based upon statutory construction principles (grounded in its finding that dependency hearings are closed to the general public, the definition of a "party" pursuant to 42 Pa.C.S.A. §6338 (a), and a recent revision to the Notice of Hearing provision of the Juvenile Act), ultimately the *L.C., II*, court confined its holding to the conclusion that "the trial court simply and properly denied grandmother's standing to participate as a party in [the dependent child's] hearing to adjudicate dependency." *L.C., II* at 383. Accordingly where the *Baxter* holding recognizes a grandparent's automatic right to standing to assert a physical or legal custody claim over a dependent grandchild without limitation, the *L.C., II* court, in effect, concluded that the automatic right to standing did not arise during the adjudicatory phase of the dependency proceeding, but rather not until after the child was, in fact, adjudicated dependent. As such, no direct conflict between *L.C., II* and *Baxter* exists and both may be applied consistently.

It is the consistent application of *Baxter* and *L.C., II* that the undersigned attempted to achieve by recognizing grandmother's automatic right to standing to assert her custody claim over her dependent grandchildren, but not recognizing the right to standing with respect to the adjudicatory phase of the dependency proceedings.

In oral argument before this court several of the parties asserted that subsequent Superior Court decisions further

limit the holding of *Baxter*. In particular, the parties have cited *In re B.S.*, 2007 WL 1300236 (Pa.Super. 2007); and *In re F.B.*, 2007 WL 1514872 (Pa.Super. 2007). Of course, neither *B.S.* nor *F.B.* may “overrule” the Supreme Court’s decision in *Baxter*. As such, to the extent counsel rely upon either *B.S.* or *F.B.* as authority that directly contradicts the holding of *Baxter*, this court may not accept those proffered authorities for that proposition.

In *B.S.*, the Superior Court concluded that the grandparent did not have standing to assert a custody claim over a dependent child, and in so holding the court stated, “This court held in *L.C., II* that the appellant paternal grandmother did not have standing to participate in delinquency [sic] proceedings under the Juvenile Act.” As stated earlier, although *L.C., II* restricted a grandparent’s automatic right to standing to assert a custody claim over a dependent child in dependency proceedings (recognized by *Baxter*), *L.C., II* explicitly did so only with respect to the adjudicatory phase of those dependency proceedings. *B.S.* appears to have extended the holding of *L.C., II* to non-adjudicatory phases of the dependency proceeding. The parties opposing grandmother’s petition to intervene in the instant matter proffer *B.S.* to support the proposition that grandmother should be denied standing in all dependency proceedings. Such an interpretation of the holding of *B.S.* would palpably contradict the holding of the Pennsylvania Supreme Court in *Baxter*. Of course, such an interpretation, I cannot adopt.

Similarly, although the analysis utilized in *F.B.*² is somewhat distinct from the analysis utilized in *B.S.*, the parties contesting grandmother’s intervention in the instant matter assert that *F.B.* supports the proposition that grandmother may be denied standing to assert a custody claim over dependent child. As that proposition is in direct contradiction with the Supreme Court’s holding in *Baxter*, this court cannot accept any interpretation of *F.B.* as supporting such a proposition.

For all of the above-described reasons, this court entered its January 10, 2008 Order of Court.

BY THE COURT:

/s/Colville, J.

¹ This court acknowledges that neither the *Baxter* court nor any subsequent Superior Court decision has directly addressed the question of whether this conferral of an automatic right to standing to seek physical or legal custody of a dependent grandchild implicitly confers *standing to intervene in the dependency matter*. This court, however, can conceive of no other plausible venue other than dependency court, or any other plausible methodology other than petitioning to intervene in a dependency court matter, that could adequately fulfill the mandates of 23 Pa.C.S. §5313, and the *Baxter* holding. While it might be theoretically possible to send grandparents off to a different division of the court (i.e. adult family division) with the instructions to attempt to assert a physical or legal custody claim over a dependent child, and thereby avoid permitting grandparents to intervene in dependency matters; to do so would require the courts to ignore the reality that the dependency matter and the dependency court are intended, designed, and—most importantly—best resourced to ensure the protection of the best interests of an otherwise abused or neglected child. To assess a custody claim of a dependent child outside dependency proceedings simply makes no sense.

² *F.B.* focuses its analysis on the history and application of the principle of *loco parentis*. In fact, *F.B.* makes no reference whatsoever to either 23 Pa.C.S. §5313 or *Baxter*.

Leslie Brown v. Steven Brown

Counsel Fees as a Sanction

1. Counsel for the wife requested a supersedeas concerning the award of sanctions imposed upon her.

2. Typically, the granting of a request for supersedeas in domestic relations matters is within the discretion of the court pursuant to Pa.R.A.P. 1731(b).

3. The court recognized that the purpose of Pa.R.A.P. 1731(b) is to prevent a litigant from using an appeal to avoid an underlying support obligation. In this matter the purpose of the award was to sanction egregious conduct on the part of counsel for the Wife and the granting of a supersedeas was more appropriately within Pa.R.A.P. 1731(a) which describes the automatic supersedeas that would be entered upon the filing with the clerk of the lower court an amount of one hundred twenty percent of the amount found due by the trial court. A supersedeas was, therefore, permitted under section (b) of this rule.

(Christine Gale)

Mildred B. Sweeney for Plaintiff/Wife.

Robert J. Tate for Defendant/Husband.

Norma Chase for Appellant, Mildred B. Sweeney.

No. FD 03-4139-003. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

OPINION

Wecht, J., February 20, 2008—This Opinion addresses the issue of whether an appeal of an order awarding counsel fees as a sanction in a domestic relations action gives rise to an automatic supersedeas under Pa.R.A.P. 1731 (a) or is rather susceptible to a discretionary supersedeas under Pa.R.A.P. 1731 (b).

Background

On November 15, 2007, this Court imposed a \$750 attorney fee sanction against Plaintiff’s counsel, Mildred B. Sweeney, Esquire [“Sweeney”]. On December 14, 2007, this court denied Defendant [“Husband”]’s request for additional sanctions against Sweeney. Both Sweeney and Husband appealed, and those consolidated appeals currently are pending before the Superior Court, docketed at 2288 WDA 2007 and 26 WDA 2008. This Court has addressed those appeals in its Opinion of February 11, 2008.

On February 6, 2008, Husband presented a Motion for Enforcement of Order of Court and Award of Sanctions. Husband’s Motion requests that Sweeney pay the \$750 sanction that this Court assessed by its Order dated November 15, 2007. Husband argues that it has been more than sixty days since the November 15 Order, and that Sweeney should pay now, particularly inasmuch as the November Order required payment within seven days. Husband also requests additional counsel fees incurred in preparing and presenting his Motion for Enforcement. Also on February 6, 2008, Sweeney presented a Motion for Supersedeas.

After careful deliberation, this Court has decided to grant Sweeney’s Motion for Supersedeas, and to deny Husband’s Motion for Enforcement. This Opinion sets forth the reasoning behind the Court’s decision.

Discussion

Sweeney’s motion requests supersedeas under Pa.R.A.P. 1731. That rule provides as follows:

(a) **General rule.** Except as provided by subdivision (b), an appeal from an order involving solely the payment of money shall, unless otherwise

ordered pursuant to this chapter, operate as a supersedeas upon the filing with the clerk of the lower court of appropriate security in the amount of 120% of the amount found due by the lower court and remaining unpaid. Where the amount is payable over a period of time, the amount found due for the purposes of this rule shall be the aggregate amount payable within 18 months after entry of the order.

(b) Domestic relations matters. An appeal from an order of child support, spousal support, alimony, alimony *pendente lite*, equitable distribution or counsel fees and costs shall operate as a supersedeas only upon application to and order of the trial court and the filing of security as required by subdivision (a). The amount and terms of security shall be within the discretion of the trial court.

Under Pa.R.A.P. 1731 (a), the posting of security operates as a supersedeas. *Markey v. Marino*, 521 A.2d 942, 946 (Pa.Super. 1987). By contrast, section (b), which relates to domestic relations matters, vests the propriety of supersedeas in the discretion of the trial court. Pa.R.A.P. 1731 (b). Here, while Sweeney and Husband differ on whether supersedeas should issue, counsel for both Sweeney and Husband appeared before this Court in Motions Session and agreed that the request for supersedeas herein is governed by Pa.R.A.P. 1731 (b).

Upon close review, this Court has concluded that counsel are incorrect, and that Pa.R.A.P. 1731 (a) should apply. The purpose of section (b) appears to be to prevent a party in a domestic relations case from using an appeal as a device for avoiding an obligation to pay required monies. In analyzing a child support case (under a prior version of the rule), the Superior Court indicated that a grant of supersedeas would bring an absurd result because a parent who was not receiving child support would be unable timely to enforce his or her rights. *Groner v. Groner*, 476 A.2d 957, 959-60 (Pa.Super. 1984). The *Groner* court also reviewed *Simpson v. Simpson*, 3 D&C 2d 665 (C.P. Phila. 1954), a case in which the court refused to grant supersedeas in an appeal of an alimony *pendente lite* award because the purpose of APL was to allow the wife to continue with the case, and because a supersedeas would defeat the purpose. *Groner*, 476 A.2d at 959-60.

In the instant case, the Court did not award counsel fees for the purpose that counsel fees generally are awarded in domestic relations cases. Customarily, the purpose of the award is to level the playing field and allow both parties to enjoy adequate representation. Here, by contrast, the counsel fee award essentially was a sanction. As such, the November 15 Order should be considered under Pa.R.A.P. 1731 (a), and the security alone is enough to operate as supersedeas.¹

Because the supersedeas will be granted and will stay Sweeney's payment obligation pending appeal, it follows that Husband's motion seeking enforcement of that payment obligation, and further sanctions for nonpayment, should be denied.

Accordingly, this Court will grant Sweeney's motion for supersedeas and deny Husband's motion for enforcement and sanctions. An Order follows.

ORDER OF THE COURT

AND NOW, this 20th day of February, 2008, in accordance with the foregoing Opinion, it is hereby ORDERED that:

1. Sweeney's Motion for Supersedeas is GRANTED. Sweeney's payment into court of \$900.00, once made, shall operate as a supersedeas pending appeal.

2. Defendant's Motion for Enforcement of Order of Court and Award of Sanctions is DENIED.

SO ORDERED.
BY THE COURT:
/s/Wecht, J.

¹ If the November 15 Order was to be considered under Pa.R.A.P. 1731 (b), it might not meet the standard for a grant of supersedeas. "[S]uch orders are treated like any other non-monetary orders where the party seeking supersedeas must affirmatively apply to the court." *Cruse v. Cruse*, 737 A.2d 771, 773 (Pa.Super. 1999). The substantive test for a non-monetary order requires that the petitioner: (1) makes a strong showing on the likelihood of prevailing on the merits of the appeal; (2) shows that without the supersedeas, the petitioner will suffer irreparable harm; (3) shows that the stay will not substantially harm other parties; and (4) shows that the stay will not harm the public interest. *Pa. Pub. Util. Comm'n v. Process Gas Consumers Group*, 467 A.2d 805, 808-09 (Pa. 1983). *Accord*, *Young J. Lee, Inc. v. Comm. of Pa.*, 474 A.2d 266, 272 (Pa. 1983) ("We now require a person seeking a stay to make a strong showing that he is likely to prevail on the merits as well as to show irreparable harm and that the stay will not substantially harm other interested parties or the public interest."). If a petitioner makes a strong showing on the second, third, and fourth prongs of this test, the court "should not be...inflexible" in applying the first prong, and "may exercise its discretion to grant a stay if the movant has made a substantial case on the merits." *Process Gas Consumers*, 467 A.2d at 809 & n.8 (quoting *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

On the first prong, as shown in this Court's February 11, 2008 Opinion, there has not been a strong showing that Sweeney is likely to prevail on the merits. As to the second prong, there is no showing that Sweeney would be irreparably harmed by paying the \$750 now. Because Sweeney will pay the sum to another attorney, it seems highly likely that, if she does prevail on the merits, she will be able to recover the money. While there may be no harm to Husband or to the public interest if supersedeas is granted (prongs three and four), Sweeney's inability to satisfy either prong one or prong two would end the inquiry.

James L. Pascoe, Mayor v. Borough Council of the Borough of Carnegie, Pennsylvania

*Mayor's Voluntary Resignation—Acceptance of Resignation
by Borough Council*

1. Mayor has no authority to rescind his voluntary resignation after effective date.

2. Borough Council need not accept a resignation in order for it to be effective.

(Joan Shoemaker)

Ira Weiss for Plaintiff.
 Vincent A. Tucceri and Joseph G. Lucas for Defendant.

No. GD 07-23350. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

DECISION

Friedman, J., March 3, 2008—This Decision is filed pursuant to Pa. R.C.P. 1038. See also Pa. R.C.P. 227.1(c)(2).

This declaratory judgment action raises the issue of whether or not a resignation, voluntarily made, with a specified effective date, may be rescinded after that date has passed.

Plaintiff, the Mayor of Defendant Borough, submitted his letter of resignation dated October 23, 2007 and indicated his resignation was to be effective that same date. He then rescinded the resignation two days later. Borough Council never acted formally on the resignation. On December 3, 2007, the Honorable Christine Ward, sitting as the Motions Judge, preliminarily enjoined the Borough Council “from naming a Mayor to replace Plaintiff pending final resolution of the underlying controversy in this matter.” The pleadings were closed, the case placed at issue, and the parties then filed joint stipulations of fact and argued the case by briefs. The case was assigned to the undersigned for Decision.

The Court concludes that the Plaintiff’s resignation from the position of Mayor of the Borough of Carnegie was effective as of the date Plaintiff himself specified, October 23, 2007, and that there was no power to rescind that resignation after the effective date had passed. The Court also concludes that the Borough Code (“the Code”) does not expressly cover the question of whether or not Council must accept a resignation in order for it to be effective.

The Code lists the Powers and Duties of Council in 53 P.S. Sec. 460005 and 460006 respectively. There is no mention in either section of any need or requirement that Council rule on someone’s resignation in any manner. In addition, the more recent cases touching on the issue suggest that the Plaintiff is bound by the date he elected as his resignation date. In addition, logic would also dictate that, if someone resigns as of a certain date, he cannot change his mind after that date has passed.

The Court concludes that the preliminary injunction must be dissolved and a declaration entered in favor of Defendant. See Order filed herewith.

Pursuant to the Rules of Court cited above, this Decision constitutes the verdict of this Court; there will be no separate verdict slip filed.

BY THE COURT:
 /s/Friedman, J.

Dated: March 3, 2008

ORDER OF COURT

AND NOW, to-wit, this 4th day of March 2008, after consideration of the stipulated facts and the briefs of counsel submitted in lieu of an evidentiary hearing and oral argument, the Court concludes that the declaration sought by the Plaintiff must be DENIED for the reasons set forth in the attached Decision of the Court, and the Court instead declares that the resignation of the Plaintiff as the Mayor of the Borough of Carnegie was effective as of October 23, 2007, and that the said office has been vacant since that date.

BY THE COURT:
 /s/Friedman, J.

Commonwealth of Pennsylvania v. Antonio Ashley

Mandatory Sentence—Possession of Firearm During Drug Offense—Search—Seizure

1. Where defendant had ability to control gun in close proximity to controlled substance that was basis for conviction of drug offense, mandatory sentence of 42 Pa.C.S. §9712.1(a) is applicable.

2. Where apartment resident consented to police entry on premises and led police to gun in plain view, gun was properly seized as evidence.

(Joan Shoemaker)

Michael Streily for the Commonwealth.
 William Kaczynski for Defendant.

No. CC 200617192. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Durkin, J., February 28, 2008—The Defendant was charged with Possession with the Intent to Deliver a Controlled Substance,¹ and two (2) counts of Possession of a Controlled Substance.² On August 14, 2007, the Defendant proceeded non-jury, and was convicted on all charges. On November 5, 2007 the Defendant was sentenced to serve a term of imprisonment of not less than 5 years nor more than 10 years.

A timely Notice of Appeal was filed on November 29, 2007. A Concise Statement of Matters Complained of on Appeal was filed on February 21, 2008. The concise statement asserts that the Court erred in imposing the 5-year mandatory sentence under 42 Pa.C.S. §9712.1, the Court erred in denying the Defendant’s motion to suppress, and the evidence was insufficient to sustain the convictions for possession with intent to deliver cocaine and possession of cocaine and marijuana.

On September 26, 2006, the police were called to the apartment of the Defendant and Charmaine Holloway for a domestic dispute, possibly involving a gun. When the police arrived, they found Ms. Holloway and the Defendant outside. Ms. Holloway told the officers that the Defendant had a gun inside the residence, invited the police inside the apartment, and showed them the gun on top of a kitchen cabinet where the police then recovered a stolen .380 caliber firearm.

Both Ms. Holloway and the Defendant were then arrested. As this was occurring, Ms. Holloway asked an officer to place a set of earphones she was wearing on top of a mantle in the living room. As the officer was complying with this request, he saw in plain view a bag of marijuana. Once inside the police car, Ms. Holloway requested that the police secure the apartment. In the process of doing that task, the police saw and seized from the top of a cabinet in the kitchen a bag containing 34 smaller bags of crack cocaine. Part of the bag containing the crack had been hanging off the top of the cabinet.

At trial, the evidence introduced showed that a total of 2.5 grams of crack cocaine was seized from the kitchen, .19 grams of marijuana was recovered from the top of the living room mantle, and \$170 in currency was found on the Defendant along with a cellular telephone. Finally, the Commonwealth produced an expert witness. The expert testified that in light of all the evidence gathered from the Defendant and the Defendant’s home, the cocaine in this matter was possessed with the intent to deliver it.

Under 42 Pa.C.S. §9712.1(a):

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.

All that 42 Pa.C.S. §9712.1(a) requires in order to trigger the applicable sentence is that the Defendant have the ability to control a gun that is in close proximity to the controlled substance that served as the basis for the conviction for violating 35 P.S. §780-113(a)(30). In this case, the evidence showed that the Defendant had controlled the stolen gun in the past, and that the gun was found in the same kitchen of the Defendant's apartment as was the 2.5 grams of crack cocaine. Consequently, this Court did not error in imposing its sentence.

As to the challenge raised by the Defendant that this Court erred in denying suppression of the evidence seized, the scope of review of a suppression court's ruling is confined primarily to questions of law. A suppression court's decision must stand unless its legal conclusions are in error. *Commonwealth v. Gommer*, 665 A.2d 1269, 1270 (Pa.Super. 1995) The evidence was clear that Ms. Holloway consented to the police's entry, and re-entry of the premises. She not only invited the police into the apartment, but also led them to the gun. The tasks that she requested the police perform led to the recovery of contraband that was in plain view. This Court, therefore, did not commit error in denying the motion to suppress filed by the Defendant.

As to the Defendant's sufficiency of the evidence claim:

A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt.... When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

Commonwealth v. Dale, 836 A.2d 150, 153 (Pa.Super. 2003) quoting *Commonwealth v. Widmer*, 744 A.2d 745, 751 (Pa. 2000) (citations omitted) The trier of fact may infer that a party intended to deliver drugs "from an examination of the facts and circumstances surrounding the case." *Commonwealth v. Kirkland*, 831 A.2d 607, 611 (Pa.Super. 2003) Examination of all the facts introduced at trial, coupled with the testimony of the Commonwealth's expert, establishes that the Commonwealth clearly met its burden of proof as to all the charges, and this issue is thus without merit.

For all of the above reasons, the Judgment of Sentence in this matter must be AFFIRMED.

BY THE COURT:
/s/Durkin, J.

Date: February 28, 2008

¹ 35 P.S. §780-113(a)(30)

² 35 P.S. §113(a)(16)

Commonwealth of Pennsylvania v. Silas Joseph Adams

First Degree Murder—Conspiracy—Credibility of Witnesses

1. Proof that defendant was one of three individuals who attacked and killed the victim and proof of conspiracy between the three individuals to cause serious bodily injury or death to victim were sufficient to convict defendant of first degree murder.

2. Use of illicit drugs by a witness or the witness's level of intoxication at the time of the events to which that witness is testifying does not disqualify a witness from testifying but is a consideration for the jury in determining the witness's credibility.

3. Court's instruction to jury regarding credibility of witnesses and special instruction to the jury regarding witness's use of crack cocaine was proper.

4. Denial of motion for a mistrial was proper where statement by witness that defendant was a crack dealer was not prejudicial in the context of all of the facts of the case and Court cautioned jury to disregard the statement and not consider it as evidence.

(Joan Shoemaker)

Michael Streily for the Commonwealth.
Suzanne Swan for Defendant.

Nos. CC 200400739 and 200401066. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., March 4, 2008—On April 27, 2005, the appellant, Silas Joseph Adams, (hereinafter referred to as "Adams"), was found guilty of first-degree murder following a jury trial. He was also found guilty of the charges of criminal attempt to commit homicide, aggravated assault, aggravated assault and attempting to cause bodily injury to a police officer and recklessly endangering another person. In a separate non-jury trial, Adams was also found guilty of violation of the Uniform Firearms Act, person not to possess a firearm. On July 20, 2005, Adams was sentenced to life without the possibility of parole as a result of his conviction of first-degree murder and to an aggregate consecutive sentence of sixteen to thirty-two years for his convictions on the remaining charges.

Adams filed timely post-sentencing motions, which were denied by operation of law pursuant to Pennsylvania Rule of Criminal Procedure 720(b)(3). Adams was given notice of the denial of his post-sentencing motions by operation of law and filed a timely appeal to the Superior Court from the denial of those motions. Adams was directed pursuant to Pennsylvania Rule of Appellate Procedure 1925(b) to file a concise statement of matters complained of on appeal and has complied with that directive.¹

In his statement of matters complained of on appeal, Adams has suggested that the Trial Court erred in failing to grant his motion for a mistrial after a Commonwealth witness testified that Adams sold crack cocaine and that this statement was highly prejudicial thereby stripping him of his presumption of innocence. In addition, Adams maintains that the Commonwealth failed to provide any evidence of the fact that the bullets or casings found at the scene of the shooting came from the gun that he possessed at the time of his arrest. Adams also suggested that the Commonwealth failed to demonstrate that he was the individual who caused the victim's death or acted in concert with others who may

have caused that death. Adams next maintains that one of the Commonwealth witnesses was under the influence of crack cocaine at the time of the shooting and that while she was near-sighted and wore prescriptive glasses, she did not have the glasses on and, therefore, her testimony was unreliable and inconsistent with prior statements she had given. Adams also maintains that another Commonwealth witness, who also was under the influence of crack cocaine, gave testimony that was inconsistent not only with her prior statements but, also, with the testimony of the other eyewitness. Finally, Adams maintains that his defense witness provided sufficient testimony to establish that Adams never shot at the police officer that was the alleged victim of the aggravated assault. In order to understand these contentions of error, it is necessary that a brief review of the facts be made.

On December 27, 2003, the victim, Ivan Pegues, (hereinafter referred to as "Pegues"), drove his red Pontiac Grand Am to 7372 Hamilton Street, which is the residence of Yvonne Luckey, (hereinafter referred to as "Luckey"). This residence was known in the neighborhood to be a crack house where individuals who wanted to smoke crack cocaine could go to either purchase or to smoke crack cocaine or both. Luckey was an acknowledged crack cocaine user who smoked that substance on a daily basis. Pegues parked his car on Hamilton Street, went into the residence and was seated in the living room with Adams, having an animated, if not heated, discussion. Luckey observed both of these individuals and also noticed that Adams possessed an SKS assault rifle. Luckey had a brief conversation with Monaca Patterson, (hereinafter referred to as "Patterson"), a friend of hers and also another crack cocaine user. Patterson told Luckey that she observed two black males who were across the street, acting in a suspicious manner. Luckey received more crack cocaine and went back upstairs to her bedroom on the second floor.

Shortly before midnight, Pegues left Luckey's residence, got in his car and was driving down Hamilton Street and was about to make a left-hand turn onto Collier Street when three individuals opened fire on his car and shot at it and him more than forty times. Patterson, who left Luckey's house almost immediately after Pegues, was walking down the street when she saw Adams off to her left with the assault rifle and then heard four shots. She went to the ground, got beneath a car and did not look up until all of the shooting had ceased. Luckey, who remained in her residence, after hearing the first shot, went to the window and observed Adams running down the street firing his assault weapon.

Detectives Kavals and Mercurio, (hereinafter referred to as "Kavals" and "Mercurio"), of the Pittsburgh Police Department, were on routine patrol on North Dunfermine Street when they heard thirty to forty gunshots. They proceeded to the intersection of Hamilton and Collier Street and found the red Grand Am that had been bullet-ridden. Kavals looked into the car expecting to find a victim only to discover that the Pontiac Grand Am had been abandoned along with a forty caliber semi-automatic weapon. Kavals then tried to locate the driver of the Pontiac Grand Am, but he could not. Pegues' body was found in a yard several hundreds of feet away from the shooting. His partner, Mercurio, began to run toward Formosa Way in an effort to locate the shooters. Several moments later a couple of more shots were fired and Mercurio radioed Kavals that three black males were running toward Braddock Avenue. Kavals got back in his car and was in constant radio communication with his partner. He proceeded down Hamilton onto North Braddock and as he was approaching Kelly Street he saw his partner, who told him that the three individuals had split up. Kavals then proceeded down Kelly Street when he observed Adams

walk from between two houses and fire two shots. Kavals radioed to his base radio operator that he was being fired upon by Adams.

Adams continued to run between homes and streets until he reached an apartment building on Bennett Street and went to the third floor and broke into an apartment occupied by two teenage girls and three small children. Adams was seen by other Pittsburgh police officers that participated in this chase take the assault rifle and attempt to hide it on the outside porch. When the officers went into the apartment, Adams was standing behind one teenage girl and went onto the floor when he was directed to do so. He was subsequently handcuffed and then placed under arrest.

Adams' initial claim of error is that the Commonwealth failed to provide any evidence that the shell casings and bullet fragments which were recovered from the scene of the shooting of Pegues were from a weapon that Adams possessed. Pegues was shot at the intersection of Hamilton and Collier Street and all of the witnesses who testified indicated that they thought that there were anywhere between thirty and forty shots fired. The police recovered a total of twenty-seven shell casings, twenty-five of which were located on Hamilton Street and two of which were located on Kelly Street. In addition, there were a number of bullet fragments that were retrieved from the vehicle in an area where the vehicle was and from Pegues body. The two shell casings that were recovered from Kelly Street, where Kavals was fired upon, were fired from the assault rifle used by Adams. While it is true that the shell casings recovered at Hamilton Street were not fired from Adams' gun, the same cannot be said for the fragmented bullets recovered from the scene and Pegues' body. Dr. Robert Levine, a criminalist specializing in firearms identification, testified that the fragmented bullets came from an assault rifle and while he could not say that they came from the gun that Adams possessed, he could not exclude that possibility either.

Kavals and Mercurio, who were in close proximity to the shooting scene, heard thirty or forty shots and immediately went to the area where they thought the shots came from and saw three black males running from the scene. Patterson saw Adams in the possession of an assault rifle as she was walking down the street and heard the first of the thirty to forty shots that were fired. Luckey, when she heard the first shot, looked out her window and saw Adams running toward the Pontiac Grand Am, firing his weapon. The record in this case clearly reveals that there were three shooters, because of the types of casings and ammunition that were recovered from the scene and that Pegues was the obvious target of the initial shooting. After Pegues had been shot, his assassins ran away together until they encountered the police, at which point in time they separated. The Commonwealth's evidence clearly established a common plan between the three shooters to kill Pegues. The evidence collected both at the scene and at the apartment where Adams was apprehended, connected him to that shooting.

Adams next contends that the Commonwealth failed to prove beyond a reasonable doubt that Adams was the individual who killed Pegues or that he acted as an accomplice. As previously noted, there were three individuals who attacked and ultimately killed Pegues. That was demonstrated by the shell casings and bullet fragments that were recovered by the police. The bullet fragments that were recovered during the course of the autopsy, while not being positively identified as being discharged from the weapon which Adams possessed, were consistent with the type of ammunition that that weapon would use. The manner in which the assault on Pegues occurred clearly established the conspiracy between the three individuals to cause serious bodily

injury or death to Pegues. Pegues' death was accomplished because of that conspiracy.

Adams' next two contentions of error deal with the credibility of two of the Commonwealth's witnesses, Luckey and Patterson. Adams maintains that neither of these individuals were credible since they had been smoking crack cocaine all day and that Luckey, who was near-sighted and required glasses, did not have them on the night of the shooting when she was looking out the window and therefore could not have seen what she is alleged to have seen. With respect to Patterson, she also was abusing crack cocaine and had not slept in twenty-four hours. Her version of who left Luckey's house first was inconsistent with Luckey's and inconsistent with prior statements that she had given to the police. All of this information was given to the jury to consider in terms of whether or not any of all of the statements made at the time of trial were to be believed by the jury.

The Pennsylvania Supreme Court in *Commonwealth v. Fletcher*, 561 Pa. 266, 750 A.2d 261, 296 (2000) recognized that the use of illicit drugs did not disqualify a witness from testifying but, rather, was a consideration for the jury in determining that witness' credibility.

Appellant next claims that the trial court erred in not striking the testimony of Angelic Kirkman during the penalty phase on the basis that the witness was incompetent. Kirkman testified that she was smoking crack cocaine in a parked car with another woman when she observed appellant shoot the victim and that she overheard appellant make certain remarks while shooting the victim. The trial court asked the witness whether the drugs she had used that night affected her ability to perceive and relay what she saw. The witness indicated that the drugs did affect her perceptions but then stated that she had *not* heard any remarks the appellant made while shooting the victim. Appellant moved to strike her testimony in its entirety.

The trial court overruled the objection and properly determined that it was for the jury to evaluate Kirkman's credibility against the backdrop of admitted drug use on the night of the killing and her testimonial inconsistencies. These factors went to the weight of her testimony, not her competency. *Commonwealth v. Parks*, 453 Pa. 296, 301, 309 A.2d 725, 728 (1973), *cert. denied*, 414 U.S. 1074, 94 S.Ct. 589, 38 L.Ed.2d 481 (1973) (a witness is not incompetent *per se* merely because it is established that he is a drug addict and had taken drugs prior to the incident to which he testifies); *Commonwealth v. Farrell*, 319 Pa. 441, 444, 181 A. 217, 218 (1935) ("the use of narcotics may impair mind and memory, the extent of the impairment is for the jury's measurement."). Accordingly, the trial court did not abuse its discretion in failing to strike this testimony.

Similarly, in *Commonwealth v. Drew*, 500 Pa. 585, 459 A.2d 318, 321-322 (1983), the Court recognized that a witness' level of intoxication at the time of the events to which that witness is testifying is a matter for the jury's consideration in determining the credibility of that witness and any conflicts in the testimony of that witness and any other witnesses.

As stated in *McCormick on Evidence*,

Any deficiency of the senses, such as deafness, or color blindness or defect of other senses which would substantially lessen the ability to perceive

the facts which the witness purports to have observed, should of course be provable to attack the credibility of the witness, either upon cross-examination or by producing other witnesses to prove the defect....

[Abnormality]...is a standard ground of impeachment. One form of abnormality exists when one is under the influence of drugs or drink. If the witness was under the influence at the time of the happenings which he reports in his testimony or is so at the time he testifies, this condition is provable, on cross [examination] or by extrinsic evidence, to impeach.

McCormick, *Evidence*, §45 (2d edition. 1972)

We have consistently held that intoxication on the part of a witness at the time of an occurrence about which he has testified is a proper matter for the jury's consideration as affecting his credibility. As we stated in *Commonwealth v. Yost*, 478 Pa. 327, A.2d 956, 961 (1978),

"If...mental condition at that time had been impaired so as to affect his ability to remember what he saw or heard, evidence as to his condition would be relevant. *Commonwealth v. Ware*, 459 Pa. 334, 329 A.2d 258 (1974). Such impairment may be shown on the basis of use of drugs or alcohol at such time, but questions on their use at other times are impermissible."

There was considerable conflict as to critical facts between the versions given by Ms. Blair and appellant. Ms. Blair testified that appellant went into the basement to get a gun and stayed down there for twenty (20) minutes. Appellant claims she walked to the other side of the kitchen, opened the basement door, reached in a bag and secured the weapon. Appellant testified that it was only a few seconds between the time her husband put the cord around her neck and when she shot him. The inferences to be drawn from Ms. Blair's testimony suggested a considerably longer period of time elapsing between any confrontation appellant may have had with her husband and the actual shooting.

The testimony suggested that appellant had been drinking and playing cards with friends for approximately seven (7) hours. The record also establishes that the Commonwealth had evidence to be used if the fact of her drinking had been contested by appellant, that her blood alcohol at the time of arrest was .18. It is therefore clear that the jury could appropriately consider the effect of the alcoholic consumption in resolving the conflicts in the testimony between Ms. Blair's testimony and that of appellant.

In considering the credibility of these two witnesses it should be noted that Patterson told Luckey that there were two black males lurking between some housing in dark clothing. Luckey confirmed this when she looked out the window after the shooting had begun. Adams joined these two other individuals when he ran down the street shooting at Pegues' vehicle. Both Kavals and Mercurio, after hearing the shots and arriving to the area where they believed the shots were fired, saw three black males in dark clothing fleeing from the scene. While both Luckey and Patterson had abused crack cocaine the entire day, the physical facts and observa-

tions made by Kavals and Mercurio, provide a sufficient basis to suggest that the testimony, which was given at the time of trial, was credible. Judge Coville in his charge to the jury, instructed as to how the jury should analyze the issue of the credibility of all of the witnesses. (Trial Transcript, Volume V, pp. 141-142). With respect to the testimony of Luckey and Patterson, he gave a special instruction regarding their use of crack cocaine and the fact that Luckey was not wearing her glasses. (Trial Transcript, Volume V, p. 166).

Adams has also suggested that the testimony provided by Miles Jones, (hereinafter referred to as "Jones"), demonstrated at Adams was not shooting at Kavals. The jury heard both Kavals and Jones and obviously decided to resolve the issue of credibility in favor of Kavals. Kavals testified that he saw Adams, whom he knew from previous meetings and that he was less than twenty-five feet away from him when he fired the first shot. He also saw him lower the barrel of the assault rifle and taking dead aim at him. Kavals also testified that he ducked down underneath the steering wheel in order to provide as much protection against the shots that were being fired at him by Adams. In considering the testimony of Jones and Kavals, the jury had evidence that these assault weapons were being used to murder Pegues and that Jones and his co-conspirators were fleeing from the police. In addition to Kavals' testimony, Mercurio testified that he heard the radio dispatch being sent by Kavals saying that he was being fired upon. Obviously the jury resolved the credibility issue in favor of Kavals and discounted Jones' testimony.

Finally, Adams has suggested that the Court erred in failing to grant a request for a mistrial when Luckey testified that Adams was a crack dealer. Luckey was asked on direct examination on how she knew Adams and she replied that he sold crack cocaine on and off. Adams' trial counsel immediately objected to that testimony and made a motion for a mistrial, which motion was denied by the Trial Court although the Trial Court did suggest that it thought that that statement might be prejudicial. The Court instructed the jury that they were to disregard the last answer and they were not to consider it as evidence in this case.

A motion for a mistrial is a matter addressed to the discretion of the Court. *Commonwealth v. Jones*, 542 Pa. 464, 668 A.2d 491 (1995). A Trial Court need only grant a mistrial where the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial. When Luckey's statement is viewed in the context of all of the evidence, it is clear that Adams was not deprived of his right to a fair trial nor was his presumption of innocence stripped from him. Adams now maintains that that statement stripped him of his presumption of innocence since it labeled him as a criminal. This statement, when examined in the abstract, might have been prejudicial, however, when examined in the context of the facts of this case, it was nothing more than stating the obvious. The district attorney in his opening statement, identified 7273 Bennett Street, Luckey's residence, for what it was, a crack house. He stated that they would hear testimony that numerous people went to that house solely for the purpose of smoking crack cocaine but not everyone there did. The testimony also showed that Pegues was a drug dealer and, in fact, had supplied Luckey with crack cocaine on that evening. In addition, there was testimony that Adams and Pegues were seated on the couch in an animated discussion and that Adams had in his possession a clearly identifiable assault rifle. When viewed in the context of the entire proceeding, it is clear that there were people who were at Luckey's house smoking crack cocaine and there were the people who were selling it. While Luckey's statement that Adams was a crack dealer might appear prejudicial in the abstract, it was not in the context of

all of the facts of this case and the Court properly cautioned the jury to disregard that statement and not to consider it as evidence.

Cashman, J.

Date: March 4, 2008

¹ Adams' file was reassigned for the purpose of filing an opinion in light of the fact that Adams' Trial Judge, the Honorable Robert E. Colville, assumed senior status and was made a Senior Judge of the Superior Court of the Commonwealth of Pennsylvania.

Commonwealth of Pennsylvania v. Jason Silliman

Motor Vehicle Stop—Grounds for Investigatory Stop

1. An investigatory stop is justified when police have a reasonable suspicion that criminal activity is afoot and police can point to specific and articulable facts which reasonably support that suspicion.

2. When defendant drove onto construction site at 2:15 a.m. in area where thefts of equipment and piping recently occurred and defendant turned off his headlights, officer had a basis for a reasonable suspicion to stop defendant's vehicle.

(Joan Shoemaker)

Michael Streily for the Commonwealth.

Joseph A. Paletta for Defendant.

No. CC 200609281. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., March 7, 2008—The sole issue presented in the instant appeal is whether or not the arresting officer had specific and articulable facts giving rise to reasonable suspicion that criminal activity was afoot, thereby permitting him to stop the motor vehicle being driven by the appellant, Jason Silliman's, (hereinafter referred to as "Silliman").

On April 8, 2006, Jason Safar, (hereinafter referred to as "Safar"), a ten-year veteran of the Monroeville Police Department, was on routine patrol along Speelman Lane in the Borough of Monroeville. Safar was approaching the municipal water authority building which was then under construction, and noticed a dirty, black Jeep that was approaching the partially constructed building. Since it was 2:15 in the morning, Safar slowed down to continue to observe this Jeep. The Jeep proceeded to the municipal building and then turned around and headed toward Speelman Lane, when it turned off its lights. Safar flashed his high beams to allow it to turn onto Speelman Lane at which point in time the driver of the Jeep turned his lights back on.

Safar followed the Jeep and pulled it over in light of the fact that he believed that this vehicle may have been at the construction site in an attempt to steal construction equipment or copper tubing. There had been a number of those thefts that had occurred recently in Monroeville and he was concerned that there was no legitimate purpose for which this vehicle was on that construction site at 2:15 in the morning. The fact that the driver of the vehicle turned his lights off when it was approaching Speelman Lane, led Safar to believe that he was attempting to avoid detection.

Safar approached the driver's side of the vehicle and spoke with Silliman and noticed a strong odor of alcohol and other indicia of intoxication. Safar had Silliman perform some field sobriety tests, all of which he failed. Silliman submitted to a blood alcohol test and that test revealed a blood alcohol content of .154%. Following a non-jury trial, Silliman convicted of two counts of driving under the influence of alcohol and sentenced to six months probation, two months of which were to be served through the Intermediate Punishment Program, fined seven hundred fifty dollars, was required to attend and to complete driving school, and also to have an alcohol evaluation performed by the probation department.

Silliman maintains that the Safar had no reasonable suspicion to believe that criminal activity was afoot and, as such, that the stop of Silliman's vehicle was illegal. Safar testified that the stop of the vehicle was not predicated on any motor vehicle violation but, rather, his suspicion that criminal activity was afoot. In *Commonwealth v. Gleason*, 567 Pa. 111, 785 A.2d 983, 989 (2001), the Pennsylvania Supreme Court set forth the basis upon which a motor vehicle stop might be made.

If the alleged basis of a vehicular stop is to permit a determination whether there has been compliance with the Motor Vehicle Code of this Commonwealth, it is incumbent [sic] upon the officer to articulate specific facts possessed by him, at the time of the questioned stop, *which would provide probable cause to believe that the vehicle or the driver was in violation of some provision of the Code.*

This standard recognized the power vested in a police officer pursuant to the provisions of the Motor Vehicle Code.¹ In the instant case, Safar acknowledged that this was not a stop made as a result of a violation of the Motor Vehicle Code but, rather, based upon suspicions that Safar had that criminal activity was afoot.

It is well-established that a police officer may conduct a brief, investigative stop of an individual if the officer observed unusual conduct which leads him to reasonably conclude, in light of his experience that criminal activity might be afoot. *Commonwealth v. Preacher*, 827 A.2d 1235 (Pa.Super. 2003). In *Commonwealth v. Melendez*, 544 Pa. 323, 676 A.2d 226, 228 (1996), the Court detailed the circumstances under which an individual would not be subject to an unreasonable search or seizure.

In *Commonwealth v. Rodriquez*, 532 Pa. 62, 71, 614 A.2d 1378, 1382 (1992), this court stated:

In accordance with the protections afforded our citizens under *Article I, Section 8*, we have recognized only two instances where police may "seize" an individual[;] both require an appropriate showing of antecedent justification: first, an arrest based upon probable cause, *Commonwealth v. Duncan*, 514 Pa. 395, 525 A.2d 1177 (1987); second, a 'stop and frisk' based upon reasonable suspicion, *Commonwealth v. Hicks*, 434 Pa. 153, 253 A.2d 276 (1969).

In sum, there are two circumstances in which warrantless seizures of a person are constitutionally permissible. The first is where police have probable cause to believe that a crime is being or is about to be committed. The second is that a limited seizure may be effected where there is a reasonable police belief that criminal activity is afoot.

Hicks, 434 Pa. at 160, 253 A.2d at 279, interpreting *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)...

The remaining possibility for a legal seizure of the person of Melendez is that the stop constituted a stop and frisk under the *Terry-Hicks* line of cases. However, unless police have "specific and articulable facts" which lead them to suspect criminal activity, *Terry v. Ohio*, 392 U.S. at 21, 88 S.Ct. at 1880, 20 L.Ed.2d at 906, they may not stop and search any person without a warrant. Since the Commonwealth offers no "specific and articulable facts" here, there was no justification for even the limited intrusion of a *Terry* stop.^{FN5}

FN5. If, on the other hand, police have articulable and reasonable suspicion of criminal activity, they may conduct a brief investigatory stop for the purpose of learning what they can, and during the course of this stop, should they be reasonably concerned for their safety, they may conduct a pat-down of the suspect's outer garments for weapons. *Terry v. Ohio*, 392 U.S. 1, 85 S.Ct. 1868, 20 L.Ed.2d 889 (1968). It is always uncertain what may be learned from a *Terry* stop, however, for there is no requirement that the person stopped answer any questions which are put to him, and in that event, the police are without authority to do more than make their presence known and, if appropriate, conduct a surveillance of the suspected activity.

An investigatory stop is justified only if the detaining officer can point to specific and articulable facts, which in conjunction with the rational inferences derived therefrom, give rise to a reasonable suspicion that criminal activity is afoot. In determining whether or not reasonable suspicion exists, one must examine the totality of the circumstances to see if such reasonable suspicion existed. *Commonwealth v. Riley*, 715 A.2d 1131 (Pa.Super. 1998). The basis for Safar's stop of Silliman's vehicle was Safar's knowledge of thefts of equipment and copper piping occurring at construction sites that recently were occurring in the Monroeville area, the fact that the municipal water building was currently under construction and construction equipment and copper piping were at that site, that it was 2:15 in the morning when Safar observed Silliman driving on property that was not open to the public and that he then turned off his headlights to avoid detection. When reviewed in the totality of the circumstances, it is clear that Safar was able to provide specific and articulable facts which coupled with the reasonable inferences drawn therefrom, formed the basis for his reasonable suspicion to stop Silliman's vehicle.

Cashman, J.

Dated: March 7, 2008

¹ 75 Pa.C.S.A. §6308(b) provides as follows:

(b) Authority of police officer.—Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

CAPSULE SUMMARIES

Judy L. Sigal v. Harry J. Sigal

Marital Settlement Agreement—Enforcement of Child Support and Post-High School Educational Provisions—Child as Intended Third Party Beneficiary—Statute of Limitations

1. The parties' marriage settlement agreement resolved child support and provided that Father pay \$400.00 per week until their daughter's majority and \$400.00 per week for her college expenses thereafter.

2. Mother brought a petition to enforce the agreement and the hearing officer set arrears at \$97,968.00 and awarded Mother counsel fees of \$1,500.00.

3. The court granted Father's exceptions, vacated the recommendation and remanded. The court instructed that there should be no recommendation regarding post-high school support provisions in the absence of the daughter's joinder to the action.

4. At the time of the remand hearing daughter, who had graduated from high school in 2002 and college in 2006, had not been joined in the action by either parent.

5. The hearing officer held that Mother's claim for child support was barred by the statute of limitations and that the claim for post-high school education could only be enforced by the daughter. Father's claim, that the support provision was unconscionable, was dismissed.

6. On exceptions from this hearing officer's recommendation, the court held that Father's failure to plead the statute of limitations in new matter per Pa. R.C.P. 1030 did not impair his ability to raise the issue. Mother was not prejudiced and was on notice that Father would assert the defense. The support rules govern the enforcement of support provisions in agreements unless the agreement specifically provides otherwise. 23 Pa.C.S.A. §3105(a); Pa. R.C.P. 1910.1(6).

7. Mother's unexcused delay in seeking to enforce the agreement contravenes the purpose of the statute of limitations, which is to require that, where there are wrongs to be addressed, the matters should be addressed without unreasonable delay.

8. Language in the agreement providing that, "independent legal action may be brought to enforce the terms of this Agreement...until it shall have been fully satisfied and performed" does not constitute a waiver of the statute of limitations. Legal action must be brought in accordance with applicable law.

9. Mother filed her Petition for Enforcement on June 29, 2006, and daughter was graduated from high school in May 2002. Mother's claim for child support was barred by the four year statute of limitations applicable to written contracts. 42 Pa.C.S.A. §5525(a)(8).

10. Court held that daughter was the intended beneficiary (not an incidental beneficiary) of the post-high school support provisions, relying on the fact that Father made the payments directly to her. Mother lacked standing to enforce the agreement for daughter's benefit.

11. Father's college support obligation ended on May 2006, at daughter's graduation from college, and her claim remains viable until May 2010.

12. There was no error in failing to award Mother counsel fees, in part because Mother delayed in bringing the enforcement action and because daughter's action was not yet properly before the court.

(Hilary A. Spatz)

Carol L. Hanna for Plaintiff.

Stuart E. Savage for Defendant.

FD 98-008779 (002). In the Court of Common Pleas of

Allegheny County, Pennsylvania, Family Division.
Kaplan, J., February 27, 2008.

Leslie A. Brown v. Steven C. Brown

Counsel Fee as Sanction

1. Husband and Wife had been involved in a contentious divorce which included proceedings regarding equitable distribution and the Husband's noncompliance with support obligations. When Husband noticed Wife's counsel with a motion to schedule a support modification hearing, Wife's counsel initially asked him to defer presentation of the motion, which counsel for Husband declined. On October 5, counsel for Husband requested that a hearing be scheduled and notified counsel for Wife on October 9 of a hearing for December 13. Approximately five weeks later, counsel for Wife presented a motion for continuance of the December 13 hearing, requiring an appearance at motions' court as it was presented within thirty days of the hearing date. Counsel for Wife alleged that she had two previously scheduled court commitments that had both been scheduled *prior to* the initial presentation date of October 5. The judge granted the continuance so as not to disrupt other trial judges' dockets, but since counsel for Wife waited well over a month and did not attempt any private resolution of the conflict in scheduling, ordered that counsel for Wife pay \$750 as a sanction to Husband. Counsel for Wife then requested reconsideration, which was denied together with Husband's request for further counsel fee.

2. The trial court determined that an appeal regarding the imposition of the counsel fee sanction was allowable by the Superior Court as it was independent of any further action required of the parties typically seen in orders that include a counsel fee sanction. Counsel for Wife would also have no opportunity to challenge the order if it were not reviewable.

3. The trial court had the inherent authority to impose counsel fees as a sanction for egregious conduct of litigants or their counsel. The judge determined that there was no basis for objecting to the scheduling of the date, counsel for Wife knew of her conflicting commitments at the time of the initial presentation of the request for a hearing, did not advise opposing counsel of inconvenient dates, waited over a month to request a continuance, and never attempted to resolve matters privately. The trial court determined that this lack of professional courtesy and diligence constituted dilatory conduct as it caused the support matter to be delayed, which was prejudicial to Husband, and wasted the time of opposing counsel as well as that of the Court.

4. The order of sanctions was not inconsistent with the granting of a continuance as a granting of a continuance was effectuated so as not to inconvenience other tribunals.

5. Further counsel fees were not awarded at the time of the motion for reconsideration as counsel for Wife did follow proper procedure in requesting reconsideration and, thus, should not be punished for this request that did not cause any delay in the underlying support proceeding.

(Christine Gale)

Mildred B. Sweeney for Plaintiff/Wife.

Robert J. Tate for Defendant/Husband.

Norma Chase for Appellant, Mildred B. Sweeney.

No. FD 03-4139-009. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

Wecht, J., February 11, 2008.

JURY VERDICTS

Craig Barlow v. Isaac Hamilton

Court: Common Pleas
 Case Number: GD 06-000204
 Jury Verdict: For Defendant
 Date of Verdict: 9/24/07
 Judge: Colville
 Pltf's Atty: Jeffrey A. Pribanic
 Def's Atty: Joseph A. Hudock, Jr.
 Type of Case: Motor Vehicle Accident
 Experts: Plaintiff(s): None
 Defendant(s): Jon B. Tucker, M.D.

Remarks: Defendant t-boned Plaintiff's vehicle when Defendant slid into an intersection after failing to stop at a stop sign. Plaintiff had stopped in the intersection when momentarily blinded by sunlight reflecting from ice. Plaintiff alleged he suffered injuries to the head, neck, back and right arm which required medical treatment. He alleged his medical bills exceeded \$7,000.00. Defendant's doctor opined that while Plaintiff sustained a neck injury in the collision, it had fully resolved. The jury found both Plaintiff and Defendant were negligent in the collision and awarded zero damages.

Julia Berry v. Rosing, Inc.

Court: Common Pleas
 Case Number: GD 04-011251
 Jury Verdict: For Plaintiff in the amount of \$10,000.00
 Date of Verdict: 3/13/07
 Judge: O'Reilly
 Pltf's Atty: Matthew R. Wimer; Jamie K. Zurasky
 Def's Atty: Bruce S. Gelman
 Type of Case: Negligence/Failure to Insure
 Experts: Plaintiff(s): Harvey Slater, M.D.
 Defendant(s): None

Remarks: Defendant Rosing, Inc. operated a restaurant and bar, Rosing Lounge, where Plaintiff worked as a cook. Plaintiff suffered severe burns to her feet and legs at work, when the plastic container Plaintiff was pouring hot grease into for storage melted and spilled onto her. Plaintiff filed this action alleging Defendant failed to obtain insurance pursuant to the Pennsylvania Workers' Compensation Act and alleging that Defendant's negligence caused her injuries. Plaintiff presented evidence of economic damages of \$13,660.24, and also sought non-economic damages. Defendant argued Plaintiff was not an employee but an independent contractor with sole responsibility for and control of the kitchen of its establishment. Defendant further argued Plaintiff was contributorily negligent. The jury found in favor of the Plaintiff and awarded her \$10,000.00.

Karen Diaz v.

Donald Bonin, Penske Truck Leasing Corporation and Penske Truck Leasing Co., L.P. and National Equipment Services, Inc.

Court: Common Pleas
 Case Number: GD 05-017498
 Jury Verdict: For Plaintiff in the amount of \$41,212.47
 Date of Verdict: 1/17/07
 Judge: O'Reilly

Pltf's Atty: Marc P. Weingarten; Jerry A. Lindheim
 Def's Atty: Victor J. Sullivan, Jr.
 Type of Case: Motor Vehicle
 Experts: Plaintiff(s): Subrata Barua, M.D., (Greensburg, PA); Louis Catalano, M.D.
 Defendant(s): Howard J. Senter, M.D.

Remarks: Plaintiff alleged that Defendant Bonin, driving a truck owned by one or more of the corporate defendants, negligently, carelessly and/or recklessly changed lanes directly into Plaintiff's path, causing her serious injuries including a cervical disc herniation and carpal tunnel syndrome requiring two surgeries. Both vehicles were traveling west on Route 30; when Bonin abruptly attempted to transfer from the left lane into the right lane, which was occupied by Plaintiff. Plaintiff alleged that, in addition to not checking his side mirror before switching lanes, Bonin had significantly diminished hearing capacity, which may have prevented him from hearing Plaintiff sound her horn to warn him of her presence. Jury found for Plaintiff and awarded \$41,212.47 for past medical expenses only.

Paula H. Eury and Peter Eury, her husband v. Rebecca D. Edelman

Court: Common Pleas
 Case Number: GD 05-028261
 Jury Verdict: For Plaintiff Paula Eury in the amount of \$4,954.56
 Date of Verdict: 3/26/07
 Judge: O'Reilly
 Pltf's Atty: John W. McTiernan
 Def's Atty: Jason A. Hines; Stephen J. Summers
 Type of Case: Motor Vehicle
 Experts: Plaintiff(s): Anthony C. Bilott, D.C.; M.M. Prasad, M.D.; Helen Roppolo, M.D.
 Defendant(s): Jon B. Tucker, M.D.

Remarks: Plaintiffs alleged that Defendant ran a red light, striking Plaintiff's vehicle broadside and causing her to sustain serious injuries to her neck and back. Defendant argued that Plaintiff Paula Eury, a limited tort insured, did not suffer serious injuries sufficient to entitle her to non-economic damages as well as economic damages. The jury found that Defendant was at fault, but that Plaintiff had not suffered a serious injury, and awarded Plaintiff Paula Eury \$4,954.56, for economic losses only.

GGR of Delaware, Inc.

t/d/b/a Broker's Settlement Services v. Magyar Holdings, Inc. and Gregory Pellathy v. William F. Gruber & Charles T. Reiff, Additional Defendants

Court: Common Pleas
 Case Number: GD 05-019265
 Jury Verdict: For Plaintiff in the amount of \$73,112.37
 Date of Verdict: 10/4/07
 Judge: Horgos
 Pltf's Atty: Thomas E. Weiers, Jr.; Richard W. Saxe, Jr.
 Def's Atty: Edward F. Voelker, Jr.
 Type of Case: Breach of Contract
 Experts: Plaintiff(s): None
 Defendant(s): None

Remarks: Plaintiff filed this lawsuit alleging Defendant Magyar, the franchisee, breached a franchise agreement by failing to pay royalties as required. Plaintiff alleged Defendant Magyar and Defendant Pellathy, its guarantor, owed money damages due to the breach. In addition, Plaintiff alleged Defendant Magyar breached a second agreement which required it to operate an affiliated business in conformity with the Pennsylvania Real Estate Settlement Procedures Act. Defendants denied liability and maintained that Plaintiff breached the franchise agreement by failing to render certain services. Defendants filed counterclaims against Plaintiff and a Complaint against Additional Defendants, Plaintiff's principals. Defendants alleged breach of contract, tortious interference with business relations and unfair competition against Plaintiff and Additional Defendants, the latter based on the allegation that Plaintiff and its principals contacted Defendants' clients and made false, defamatory and misleading statements. The jury found in favor of Plaintiff.

Cara A. Hoehn v. Gildas A. Kaib, Jr.

Court: Common Pleas
 Case Number: GD 06-003872
 Jury Verdict: For Plaintiff in the amount of \$5,000.00
 Date of Verdict: 3/12/07
 Judge: Friedman
 Pltf's Atty: Douglas C. Hart
 Def's Atty: Robert S. Bootay III; Gregory W. Bevington; Jessa C. Demas; Fred C. Jug, Jr.
 Type of Case: Contract
 Experts: Plaintiff(s): None
 Defendant(s): None

Remarks: Plaintiff Cara A. Hoehn purchased a home from Defendant Gildas A. Kaib. Plaintiff viewed the home at least three times prior to taking possession at which time she noticed several air fresheners and deodorizers placed throughout. She soon noticed a pervasive odor later determined to be from cat urine and feces. Plaintiff filed this lawsuit under the Real Estate Sellers Disclosure Law as well as the Unfair Trade Practices and Consumer Protection Law. Only the disclosure law issue was heard by the jury. (The Unfair Trade Practices case was decided by Judge Friedman in favor of Plaintiff.) Plaintiff argued that Defendant did not disclose on his Seller Disclosure Statement that the home had previously been inhabited by as many as fifty cats. Defendant denied knowing of any odors and claimed he was unaware of cats previously being on the property. Defendant further argued that even if an odor existed, it did not constitute a material defect. The jury determined a material defect did exist on the property and that Defendant attempted to conceal the material defect. The jury awarded Plaintiff \$5,000.00.

**Christine Hunsinger and Douglas Hunsinger,
 husband and wife v.**

Port Authority Transit of Allegheny County

Court: Common Pleas
 Case Number: GD 05-033147
 Jury Verdict: For Plaintiff Christine Hunsinger the sum of \$160,000.00 and for Plaintiff Douglas Hunsinger the sum of \$2,500.00
 Date of Verdict: 9/7/07
 Judge: Friedman
 Pltf's Atty: Suzanne S. Weiss

Def's Atty: Gregory A. Evashavik
 Type of Case: Motor Vehicle
 Experts: Plaintiff(s): Heidi L. Fawber (life care planner); Richard Paul Bonfiglio, M.D.
 Defendant(s): Jon B. Tucker, M.D.

Remarks: Plaintiff-wife, a pedestrian, was struck by a PAT bus as she crossed the street. Plaintiffs alleged Defendant's driver negligently failed to yield to Plaintiff-wife, who is blind and walks using a white cane. The bus ran over Plaintiff-wife's foot and knocked her to the ground. Defendant denied liability and contended Plaintiff-wife walked into the bus. Plaintiffs alleged wage loss of nearly \$10,000.00 and past and future medical expenses including \$51,000.00 for a future hip surgery. Judge Friedman granted Plaintiffs' motion for directed verdict on liability. The jury awarded Plaintiffs \$162,500.00.

Dolly J. King v. Kelly E. Hill and Jeffrey Welsh

Court: Common Pleas
 Case Number: GD 05-006648
 Jury Verdict: For Defendant Hill
 Date of Verdict: 3/28/07
 Judge: Scanlon
 Pltf's Atty: Peter J. King
 Def's Atty: Thomas A. McDonnell and Erin M. Braun (for Defendant Hill)
 Type of Case: Motor Vehicle
 Experts: Plaintiff(s): Robb E. Fishman, D.C.
 Defendant(s): None

Remarks: Plaintiff was stopped at a yield sign at an intersection when she was struck from behind by a vehicle occupied by Defendants, who fled the scene. Plaintiff obtained the license plate number from the police, who were pursuing the Defendants in connection to a burglary. Plaintiff was unable to determine who was driving the vehicle, owned by Defendant Hill and her mother. Plaintiff argued that if Defendant Welsh had been driving, he was acting as Hill's agent. Plaintiff sought damages for her vehicle and the personal injuries she suffered as a result of the accident. Defendant Hill argued that Defendant Welsh, was driving but denied he was acting as her agent. The jury found in favor of Defendant Hill. Defendant Welsh could not be located for trial.

**Dawn Mapel and Michael Mapel, wife and husband,
 individually, and as Co-Administrators of the
 Estate of Andrea Rose Mapel, Deceased v.
 St. Clair Memorial Hospital, a Pennsylvania corporation;
 Deborah Ann Lenart, M.D., individually; and
 Patricia J. Bulseco, M.D., P.C., a Pennsylvania
 Professional Corporation**

Court: Common Pleas
 Case Number: GD 04-018288
 Jury Verdict: For Plaintiff in the amount of \$895,000.00 against Defendant Lenart
 Date of Verdict: 9/13/07
 Judge: Della Vecchia
 Pltf's Atty: Todd D. Bowlus; Harry S. Cohen; John W. Jordan, IV
 Def's Atty: Linton L. Moyer (Deborah Ann Lenart, M.D.); John C. Conti and Lisa Dauer (St. Clair Memorial Hospital); Alan S. Baum (Patricia J. Bulseco, M.D., P.C.); James A. Wood (Patricia J. Bulseco, M.D.)

Type of Case: Medical Malpractice
Experts: Plaintiff(s): Richard L. Stokes, M.D. (Reston, VA); Sandra Reznik, M.D., Ph.D. (Larchmont, NY); James L. Kenkel, Ph.D. Defendant(s): Jay Goldberg, M.D. (Philadelphia, PA); F. John Bourgeois, M.D. (Staunton, VA); Kimberly Comport, R.N., M.S.N., CNS (Mars, PA); Ronald L. Thomas, M.D.

Remarks: Plaintiffs filed this wrongful death and survival action alleging professional negligence of Defendants after Plaintiff-wife suffered a ruptured uterus during childbirth resulting in the baby's death. The uterus ruptured while she attempted a vaginal birth after caesarean or "VBAC." Plaintiffs alleged Defendants deviated from the standard of care by failing to detect that Plaintiff-wife's uterus had ruptured and her baby was in peril. Plaintiffs also alleged Defendant doctors failed to disclose the risks of VBAC. Defendants maintained they recommended an emergency C-section and that Plaintiff-wife refused. Defendant hospital maintained its employees acted properly at all times in assessing Plaintiff-wife's condition. Defendant Dr. Lenart maintained that she acted reasonably and adhered to the standard of care during the delivery. Defendant Bulseco maintained she was not involved in the management of Plaintiff-wife's labor and that informed consent does not apply with regard to non-surgical childbirth. The jury found in favor of Plaintiffs and against Defendant Lenart and awarded \$25,000.00 in wrongful death damages and \$870,000.00 in survival action damages. Delay damages in the amount of \$152,592.17 were added, for a total of \$1,047,592.17.

**Norma J. Matheys as Executrix of the
Estate of Robert Matheys v.
Abdulrab Aziz, M.D., Mordecai Klein, M.D. and
Specialist in Cardiovascular Medicine, P.C.**

Court: Common Pleas
Case Number: GD 04-1216
Jury Verdict: For Defendants
Date of Verdict: 3/23/07
Judge: Scanlon
Pltf's Atty: Gary M. Lang
Def's Atty: Bernard R. Rizza (for Defendant Aziz); Deborah D. Olszewski (for Defendant Klein)
Type of Case: Medical Malpractice
Experts: Plaintiff(s): Robert M. Stark, M.D. (Greenwich, CT); James E. Lowe, M.D. (Durham, NC); James L. Kenkel, Ph.D. (economist) Defendant(s): Fredrick A Heupler, M.D. (Cleveland, OH); Marc P. Sakwa, M.D. (Troy, MI); Linda D. Gillam, M.D. (Hamden, CT); Edward J. Mathis, Ph.D. (Plymouth Meeting, PA)

Remarks: Plaintiff's Decedent underwent heart by-pass surgery at UPMC-Shadyside Hospital. He was discharged in stable condition but three days later was taken to Forbes Regional Hospital due to altered consciousness and chest pain. Echocardiograms revealed pericardial effusion. When Mr. Matheys complained of pain in his left scapular region Defendant Klein diagnosed cardiac tamponade, or excess fluid accumulated within the pericardial sac so as to compress the heart. Mr. Matheys was flown to UPMC-Shadyside and underwent surgery to drain the fluid. He went into cardiac arrest and a second surgery revealed a perforated aorta. Plaintiff alleged Defendants' failure to diagnose and proper-

ly treat her husband caused months of cognitive impairments and physical disability and his death several months later. Plaintiff's damages included a Medicare lien in the amount of \$158,994.43 and future lost income of \$304,748.74 as well as pain and suffering. Defendants argued that they properly diagnosed Mr. Matheys' condition and did not deviate from the standard of care. The jury found in favor of Defendants.

**Joetta A. O'Neal and Leroy O'Neal, her husband v.
Anna Whiteherse; Joetta A. O'Neal and
Leroy O'Neal, her husband v.
Tudi Mechanical Systems, Inc. and Wesley Rosso**

Court: Common Pleas
Case Number: GD 02-024544; GD-04-001998; consolidated at GD-02-024544
Jury Verdict: For Defendants
Date of Verdict: 12/4/06
Judge: Della Vecchia
Pltf's Atty: Stephen Drexler
Def's Atty: Gregg A. Guthrie (for Defendant Whiteherse); Scott Milhouse (for Defendants Tudi Mechanical and Rosso)
Type of Case: Motor Vehicle
Experts: Plaintiff(s): Peter J. Jannetta, M.D. (neurosurgeon) Defendant(s): Richard B. Kasdan, M.D. (neurologist)

Remarks: Plaintiffs filed separate lawsuits as a result of two motor vehicle accidents which occurred on April 30, 2001 and May 6, 2002. Plaintiff-wife alleged she developed a debilitating pain syndrome, trigeminal neuralgia, from the 2001 accident which was aggravated by the 2002 accident. Plaintiff-wife underwent two brain surgeries for the syndrome. Plaintiffs' expert, the foremost authority on the syndrome, testified it was precipitated by the first accident and worsened by the second. Defense expert Dr. Kasdan testified Plaintiff did not report symptoms of the trigeminal neuralgia until three and a half months after the first accident and therefore it was not related to the accident. Plaintiffs claimed unreimbursed medical bills of \$44,000.00. Both Defendants admitted negligence at trial. The jury found in favor of Defendants, finding the negligence was not the factual cause of any harm to Plaintiff.

Barbara A. Stark v. Ralf McComb

Court: Common Pleas
Case Number: GD 06-004842
Jury Verdict: For Plaintiff in the amount of \$13,315.00
Date of Verdict: 9/14/07
Judge: Colville
Pltf's Atty: John Lucas
Def's Atty: William R. Haushalter
Type of Case: Motor Vehicle Accident
Experts: Plaintiff(s): Koran Gurcak, D.C.; Dr. Dana Keys-Frezzell Defendant(s): William D. Abraham, M.D.

Remarks: While Plaintiff was stopped in traffic, Defendant rear-ended Plaintiff's vehicle, pushing it into another vehicle. Plaintiff alleged the collision caused her to suffer injuries including a head injury and a disc herniation in the cervical spine. Plaintiff's alleged damages included medical specials of over \$15,000.00. Defendant admitted liability but argued the collision occurred at low speed and caused only minor vehicle damage. Defendant also maintained that

Plaintiff had been diagnosed with degenerative disc disease prior to the within collision and had been under the care of a chiropractor for a year before the date of this accident. The jury found in favor of the Plaintiff and awarded \$13,315.00.

**Matthew Blashford v.
William Blashford**

Court: Common Pleas
Case Number: GD 97-019800
Jury Verdict: For Defendant
Date of Verdict: 5/23/07
Judge: O'Reilly
Pltf's Atty: James B. Cole
Def's Atty: C. Leon Sherman; Thomas J. Campbell
Type of Case: Negligence
Experts: Plaintiff(s): None
Defendant(s): John B. Talbott, M.D.;
Leonard C. Hribar (Pennsylvania Game
Commission)

Remarks: Plaintiff underwent a right foot amputation after allegedly suffering a seizure while hunting and shooting himself in the foot. Plaintiff alleged that after a seizure he often suffered from confusion for a day or more. The night before his injury, he suffered a seizure in his father's presence. Plaintiff filed this lawsuit against Defendant, his father, alleging that Defendant was negligent in providing Plaintiff with a shotgun when Defendant knew he suffered from seizure disorder and knew Plaintiff was not in the proper mental or physical condition to safely use a shotgun after having suffered the seizure the night before. Defendant denied he was in any way negligent. The jury found in favor of Defendant.

**Pamela L. Creese, Administratrix of the Estate of
Deborah Jean Creese, Deceased Plaintiff v.
3609 Forbes Oakland Associates, LLC, t/d/b/a
3609 Forbes Oakland Partners LP and Strand Upstage, Inc.
t/d/b/a Upstage and/or Upstage Lounge v.
Steel City Glass, Inc., Additional Defendant**

Court: Common Pleas
Case Number: GD 06-017341
Jury Verdict: For Plaintiffs in the amount of
\$3,194,085.00
Date of Verdict: 11/19/07
Judge: Friedman
Pltf's Atty: James J. Ross; David C. Zimmaro
Def's Atty: Miles Kirshner
Type of Case: Premises Liability
Experts: Plaintiff(s): Daniel E. Della-Giustina,
Ph.D. (codes and safety compliance)
(Morgantown, WV); James L. Kenkel,
Ph.D. (economics)
Defendant(s): None

Remarks: Plaintiff's decedent was a patron at the Upstage Lounge, which is located on the second floor of a building owned by Defendant 3609 Forbes Oakland Associates. Outside the lounge was a landing containing six-foot high windows. The window glass had been broken out of one window and the space was covered only by Styrofoam. Ms. Creese stumbled and fell through the Styrofoam, landing on her head on the sidewalk below. She died six days later. Plaintiff's mother filed this lawsuit on behalf of herself and Decedent's three minor children, alleging Defendant Lounge failed to provide a safe premises for its patrons and failed to warn patrons of the dangerous condition. Prior to trial, the

case settled as to Defendant building owner. The Court directed a verdict in favor of Additional Defendant. The remaining Defendant, Upstage Lounge, contended it had no responsibility for the premises outside the lounge itself and that the condition was the responsibility of the building owner. The jury found in favor of Plaintiff and awarded the sum of \$3,194,085.00.

**Michael C. Bohichick v.
Mark Bishop**

Court: Common Pleas
Case Number: GD 06-025996
Jury Verdict: For Defendant
Date of Verdict: 1/23/08
Judge: Scanlon
Pltf's Atty: Peter D. Friday
Def's Atty: Gregg A. Guthrie
Type of Case: Motor Vehicle
Experts: Plaintiff(s): Russell Gilchrist, D.O. (physical
medicine and rehabilitation/pain manage-
ment); Jay K. Jarrell (forensic economist)
Defendant(s): Howard J. Senter, M.D.
(neurosurgeon)

Remarks: Defendant rear-ended Plaintiff. Defendant admitted negligence and proceeded to trial on the issue of damages. Plaintiff alleged injuries to his neck and back including a disc tear at L4-5 which required Plaintiff to undergo transforaminal and epidural steroid injections as well as a percutaneous disc decompression (IDET). Dr. Gilchrist testified that Plaintiff's injuries and treatment were caused by the motor vehicle collision. Mr. Jarrell testified that Plaintiff's past and future economic losses ranged from \$129,000.00 to \$189,000.00. Defendant's medical expert Dr. Senter testified there was no objective or radiographic evidence that Plaintiff suffered an injury in the collision and in fact Plaintiff had a history of other injuries and treatment including for chronic low back pain. The jury found in favor of Defendant.

**Tom Clark Chevrolet Inc. v.
Roma Landscaping, Inc. and/or Roma Lawn Service
and Nursery, Inc.**

Court: Common Pleas
Case Number: GD 02-015046
Jury Verdict: For Defendant
Date of Verdict: 6/5/07
Judge: Scanlon
Pltf's Atty: Victor H. Pribanic; Charles A. Frankovic
Def's Atty: Scott A. Millhouse; Richard S. Canciello;
Meghan E. Jones-Rolla
Type of Case: Negligence
Experts: Plaintiff(s): Jack G. Murray, P.E.
Defendant(s): Timothy N. Kyper, P.E.

Remarks: Plaintiff sustained damage to its business premises and inventory when the property was flooded by a nearby creek. Plaintiff alleged the creek flooded due to the fill and debris placed in the creek by Defendant Roma Landscaping, which is located across the road from Plaintiff's business. Plaintiff claimed the dumping by Defendant caused the creek bed to narrow and overflow. Plaintiff's alleged damages amounted to more than \$300,000.00 which included 35 new vehicles destroyed and damage to light fixtures and the parking lot. Defendant denied that fill placement caused the flooding and contended the creek had a long history of flooding. The jury found in favor of Defendant.