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# PITTSBURGH LEGAL JOURNAL

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# PLJ

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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.*

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## Reginald Hickman, Individually and as Administrator of the Estate of Catherine Hickman, Deceased v. Woodhaven Care Center, LLC, d/b/a Woodhaven Care Center, and Grane Healthcare Co., d/b/a Woodhaven Care Center

*Preliminary Objections—Validity of Agreement to Arbitrate—Scope of Authority Without Power of Attorney*

1. Wife's legal beneficiaries sued nursing home for negligence and statutory violations which allegedly caused her death. Nursing home sought dismissal of action based on husband's signature on Agreement to Arbitrate Disputes.

2. Husband without a power of attorney does not have authority to execute an Agreement to Arbitrate Disputes on behalf of his wife, who suffered a stroke and had no memory recall at the time of admission to nursing home.

3. For husband to bind wife, she would have had to authorize him to waive her right to sue in court or have taken action to cause a third party to believe that she authorized him to waive her rights. Marital relationship does not give rise to agency relationship or invest spouse with apparent authority.

*(Kenneth M. Argentieri)*

*Robert F. Daly* for Plaintiff.
*Alan S. Baum* for Defendants.

No. GD 07-017988. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION AND ORDER OF COURT**

Wettick, J., March 31, 2008—Defendants' preliminary objection in the form of a motion to compel arbitration of this wrongful death and survival action is the subject of this Opinion and Order of Court. The issues raised by this motion relate to the validity of a nursing home agreement to arbitrate executed by the resident's husband who did not have a power of attorney to act on his wife's behalf.

Defendants are Woodhaven Care Center, LLC, and Grane Healthcare Company. Plaintiff alleges that these defendants owned, operated, and/or managed Woodhaven Care Center and were engaged in the business of providing nursing care and assisted living personnel care services to the general public.

Catherine Hickman, now deceased, was a resident in Woodhaven Care Center. At the time of admission on May 25, 2005, she had already suffered a stroke and had no memory recall. She was nonverbal and rarely understood others. She required extensive assistance for most of her activities of daily living, including bed mobility, walks in the room, eating, and toileting.

Plaintiff's claims are based on twenty-five alleged acts of negligence described in ¶54 of the complaint, twenty-two alleged violations of provisions of chapters of Title 28 of the Pennsylvania Code governing nursing homes described in ¶58 of the complaint, and nineteen alleged violations of provisions in Title 42 of the Code of Federal Regulations governing nursing homes described in ¶58 of the complaint. Allegations include the failure to provide Ms. Hickman the prescribed Restorative Nursing Program consistently to assist in preventing her decline; the failure to establish and implement an appropriate care plan for Ms. Hickman, including an adequate plan of safety precautions against the risks of PEG tube failure and pressure ulcers; the failure to provide at least 2.7 hours of direct nursing care to Ms. Hickman each day as required by 28 Pa. Code §211.12; the failure to ensure that Ms. Hickman maintained acceptable perimeters of nutritional status, such as body weight and protein levels, as required by 42 C.F.R. §483.25; and the failure to ensure that Ms. Hickman received necessary treatment and services to promote healing of her pressure sores, prevent infection, and to prevent new sores from developing as required by 42 C.F.R. §483.25.

Writings attached to defendants' preliminary objections include a seven-page Extended Healthcare Services Agreement and a two-page Agreement to Arbitrate Disputes. The final page of the Services Agreement, which is set forth below, was signed by Mr. Hickman as "Responsible Person" and "Spouse":

> TERM: This Agreement and any attachments hereto will continue in full force and effect for any and all admissions to Center, unless terminated pursuant to the provisions herein or unless another Agreement is signed in which case the later signed Agreement shall govern.
>
> ACKNOWLEDGEMENTS: Resident acknowledges being informed of Resident's Rights and being provided with a copy of "Notice of Rights of Nursing Facility Residents." Resident acknowledges the receipt of a copy of the Resident Responsibilities and the opportunity to ask questions. The Resident Responsibilities is subject to change from time-to-time. Resident acknowledges being informed regarding Advance Directives and medical treatment decisions. Resident acknowledges that Resident has read and understands the terms of this Agreement and that Resident has had an opportunity to ask questions and to consult an attorney before signing this Agreement.
>
> RESIDENT:________________________________
>
> PRINTED NAME:___________________________
>
> RESPONSIBLE PERSON: Reginald Hickman
>
> (1) Spouse __X__
>
> (2) Guardian/POA _____
>
> (3) Family Member (specify) _____
>
> (4) Other (specify) _____
>
> PRINTED NAME: Reginald Hickman
>
> WOODHAVEN CARE CENTER
>
> By: Elizabeth Checkle
>
> Printed Name: Elizabeth Checkle

The Agreement to Arbitrate Disputes was also executed by Ronald Hickman. The final page of this Agreement reads as follows:

> The parties understand that as a result of this arbitration agreement, any claims that the parties may have against the other cannot be brought as a lawsuit in court before a judge or jury, and agree that all such claims will be resolved as described in this agreement.
>
> Resident understands that he/she has the right to consult legal counsel concerning this arbitration agreement; that execution of this arbitra-

> tion agreement is not a condition of admission or to the furnishing of services to the Resident by the Center, and that this arbitration agreement may be rescinded by written notice delivered to the Center within ten (10) days of signature. If not rescinded within ten (10) days, this agreement shall remain in effect for all subsequent stays at Center; even if Resident is discharged and readmitted to Center.
>
> The undersigned certifies that he/she has read this arbitration agreement and that it has been fully explained to him/her, that he/she understands its contents, and that he/she is the Resident or a person duly authorized by the Resident or otherwise to execute this agreement and accept its terms.
>
> Date: 5-26-05 Signature of Resident or Legal Representative
>
> Reginald Hickman
> Printed Name
>
> Rev. 8/03

Plaintiff contends that I must deny Woodhaven's motion to compel arbitration for several reasons: (1) Mr. Hickman had no authority to waive his wife's right to pursue claims in the courts, including her right to a jury trial; (2) any resident's waiver of a right to sue in court does not bind the resident's legal beneficiaries in wrongful death actions; (3) there was no consideration because the agreement to arbitrate was not a condition for admission and benefits only Woodhaven; (4) the Agreement is unenforceable because it provides for the resident to submit disputes to binding arbitration in accordance with the procedures of the National Arbitration Forum Code and the Code's procedures do not allow discovery essential to permit plaintiff to prove plaintiffs claims; and (5) Mr. Hickman had a confidential relationship with the nursing home in that it had an obligation not to approach him regarding a voluntary waiver of his wife's rights at a time when he would be expected to automatically sign the writing.

I initially consider plaintiffs contention that the Agreement to Arbitrate is a nullity because Mr. Hickman had no authority to execute the Agreement.

Mr. Hickman did not have a power of attorney or any other writing authorizing him to take any action on behalf of his wife.[1]

Under Pennsylvania law, Mr. Hickman could bind his wife if she had signed a writing expressly authorizing him to waive her right to sue Woodhaven in court. He could also bind his wife if his wife took action that would be reasonably expected to cause a third party claiming that Mr. Hickman was authorized to act on his wife's behalf to believe that she had authorized him to do so. Otherwise, his actions are not binding on his wife and her heirs.

The existence of an agency relationship does not arise from the marital relationship itself. Neither husband nor wife, by virtue of this relationship, has the power to act as agent for the other. See *Bradney v. Sakelson*, 473 A.2d 189, 191 (Pa.Super. 1984), and cases cited therein. Also, an agent cannot, simply by his or her own words, invest himself or herself with apparent authority; such authority emanates from the action of the principal and not of the agent. *Turnway Corp. v. Soffer*, 336 A.2d 871, 876 (1975).

In this case, Woodhaven cannot establish actual authority.[2] Ms. Hickman never took any steps to authorize Mr. Hickman to act on her behalf with respect to her admission to Woodhaven.

Woodhaven contends that actual authority is established through Mr. Hickman's testimony at page 17, lines 2-6:

> Q. Before your wife got sick, did you discuss if either one of you got sick, that the other one would take responsibility for that person, sign papers, bills, that kind of a thing?
>
> A. That was understood.

This testimony does not support a finding that Ms. Hickman authorized Mr. Hickman to sign a writing on her behalf giving up her right to sue in court.

Furthermore, there is no evidence that would support a finding of apparent authority.

> Apparent authority exists where a principal, by words or conduct, leads people with whom the alleged agent deals to believe that the principal has granted the agent the authority he or she purports to exercise. *Triage v. Prime Insurance Syndicate, Inc.*, 887 A.2d 303, 307 (Pa.Super. 2005).

In the present case, the alleged principal could neither speak nor comprehend her situation at the time she was admitted to Woodhaven. Consequently, the alleged principal did not, by words or conduct, lead Woodhaven to believe that she had granted her husband the authority to sign any papers on her behalf.

While no Pennsylvania appellate courts have considered the validity of a waiver of a right to sue by a spouse or other relative who has no power of attorney, several appellate courts in other jurisdictions have considered this issue in the context of a nursing home arbitration agreement. These courts have not enforced the waiver of the right to sue in court for the same reasons that I am not enforcing the waiver.

In *Sikes v. Heritage Oaks West Retirement Village,* 238 S.W.3d 807 (Tex. Ct. App. 2007), the wife and children of decedent Joel Sikes filed wrongful death and survival claims. The defendant relied on an arbitration agreement executed by the decedent's wife. The Court ruled that she lacked authority to sign the agreement on behalf of her husband because she was not his guardian and had never been given power of attorney. *Id.* at 810-11. The Court rejected the defendant's argument that the wife had acted with apparent authority, stating that apparent authority looks to the actions of the principal, Mr. Sikes, to determine if he participated in, had knowledge of, or acquiesced in his wife's signing on his behalf. *Id.* at 810. "Without actions by the principal, 'no mere combination of circumstances which may mislead persons into a false inference of authority, however reasonable, will serve as a predicate for apparent authority'" *Id.* (citation omitted). Here there was no evidence that Mr. Sikes, who was not incapacitated and was capable of signing the documents, took actions to induce the belief that his wife was his agent because there was no evidence that he was even present when the form was signed. *Id.*

In *Ashburn Health Care Center, Inc. v. Poole,* 648 S.E.2d 430 (Ga. Ct. App. 2007), the nursing home sought to compel arbitration of a wrongful death action. At the time the resident was admitted to the nursing home, her husband signed numerous documents at the facility, including an arbitration agreement. The Court rejected the nursing home's argument that the husband acted as his wife's apparent agent at the time of the admission. *Id.* at 433. Apparent authority must be based on the statements or conduct of the alleged principal. *Id.* at 432. The nursing home did not offer any evidence showing that the resident knew about the arbitration agreement, authorized her husband to sign the document, or otherwise agreed to arbitrate claims arising out of her nursing

home stay. *Id.* at 433.

In *Flores v. Evergreen at San Diego*, 148 Cal. App. 4th 581 (Cal. Ct. App. 2007), the resident, who was suffering from dementia and other ailments, was admitted to the nursing home. Her husband signed various documents, including two arbitration agreements. *Id.* at 585. At the time he signed the documents, he did not have a power of attorney to act for his wife, and he had not been declared her conservator or guardian. *Id.*

The Court ruled that a spousal relationship alone is insufficient to confer authority to agree to an arbitration provision in a nursing home admission contract. *Id.* at 587. Furthermore, an agency relationship cannot be created by the conduct of the agent alone; the conduct of the principal is essential to create this relationship. *Id.* at 587-88. The Court stated there was no evidence of conduct by the resident that could support a finding that she had authorized her husband to act as her agent. *Id.* at 588.

In *Raiteri v. NHC Healthcare*, 2003 WL 20394413 (Tenn. Ct. App. 2003), the husband signed the admission and financial contracts even though the resident had not been diagnosed or adjudicated as mentally incompetent. Consent to arbitrate disputes was a condition for admission. *Id.* at *2. The Court permitted the resident's daughter to pursue a wrongful death action in the state courts because nothing in the record showed that the husband had the right to waive his wife's very valuable constitutional right to a jury trial. *Id.* at *9. The Court also said that the alternative dispute resolution provisions, especially the waiver of the right to jury trial, are outside the reasonable expectations of a reasonable consumer and hence unenforceable. *Id.*

Also see *Waverly-Arkansas, Inc. v. Keener*, ___S.W.3d___, 2008 WL 316149 (Ark. Ct. App. 2008) (the daughter lacked authority to bind her mother to an arbitration agreement because an agent's authority cannot be shown by only the agent's declaration); *Bishop v. Medical Facilities of America XLVII (47) LP*, 65 Va. Cir. 187 (Va. Cir. Ct. 2004) (arbitration agreement executed by the patient's son did not cover a wrongful death action because the son, who held a power of attorney, signed the agreement only as a responsible party and there was no evidence that the patient had authorized her son to sign the agreement on her behalf); and *Noland Health Services, Inc. v. Wright*, 971 So.2d 681 (Ala. 2007) (a nursing home arbitration agreement signed by the resident's daughter-in-law as a responsible party does not bind the resident or the administrator of her estate).

The parties have cited two common pleas court rulings in support of their respective positions: *Sullenberger v. HCF, Inc.*, 2007 Pa. Dist. & Cnty. Dec. Lexis 179 (Ct. Comm. Pleas, Westmoreland Cnty., No. 1039 of 2007), and *Chighizola v. Beverly Enterprises, Inc.*, 79 D.&C.4th 416 (Ct. Comm. Pleas, Monroe Cnty. 2006).

In *Sullenberger*, which plaintiff cites, the Court did not enforce the provision of an admissions agreement which contained a clause mandating arbitration of all disputes arising out of the resident's stay at the nursing home. The agreement had been signed by the son acting as decedent's "legal representative"; the son did not possess a power of attorney to act as the legal agent of the decedent. This relationship of mother-son did not authorize him to sign an arbitration agreement on behalf of his mother.

In *Chighizola*, which defendants cite, the resident's daughter signed the resident's name in a place on the admission form reserved for an "authorized agent." She also signed, as an authorized agent, a "Resident Trust Fund Authorization" and a "Resident and Facility Arbitration Agreement." The resident was of sound mind at the time her daughter signed the agreements. The Court enforced the arbitration agreement stating that there is no reason why the decedent could not have rescinded the arbitration agreement if she believed that her daughter had overstepped authority as an agent.

I agree with the result in *Chighizola* if evidence had been introduced which supported a finding that the resident-mother knew that her daughter had signed a separate agreement waiving her right to bring a lawsuit in any court. However, for the reasons set forth in this Opinion, I disagree with the ruling, if the resident did not know that her daughter had signed a writing waiving the resident's right to sue in court.

Because of my finding that Mr. Hickman had no authority to waive his wife's right to litigate claims against defendants in the courts, I do not consider the other reasons plaintiff offered for denying Woodhaven's motion to compel arbitration.

ORDER OF COURT

On this 31st day of March, 2008, it is hereby ORDERED that defendants' preliminary objection in the form of a motion to compel arbitration is overruled.

BY THE COURT:
/s/Wettick, J.

---

[1] In this case, I need not decide whether Mr. Hickman would have had the authority to sign the separate "voluntary" Agreement if he had a power of attorney. The specifications of powers are set forth in 20 P.S. §5602(a). Under (a)(8), a principal may empower an agent to "authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care." See also, Example Health Care Power of Attorney, Part II(3) at 20 P.S. §5471. It is not clear whether the execution of a separate agreement that is not a condition for admission, waiving the principal's right to sue the nursing home, is covered by this provision.

Section 5603(h) governs the power to authorize admission to medical facilities and to authorize medical procedures. Under this provision, an agent is authorized to "execute any consent or admission forms required by such facility…and enter into agreements for the care of the principal by such facility…." It is not clear whether this section authorizes an agent to execute a voluntary agreement to resolve claims or disputes exclusively by binding arbitration. See *Mississippi Care Center of Greenville, LLC v. Hinyub*, ___So.2d ___, 2008 WL 44008 (Miss. 2008); *Flores v. Evergreen at San Diego, LLC*, 148 Cal. App. 4th 581, 592-595 (Cal. Ct. App. 2007); and *Blankfeld v. Richmond Health, Inc.*, 902 So.2d 296, 300 (Fla. Dist. Ct. App. 2005).

[2] The burden of establishing an agency relationship rests with the party asserting a relationship. *Basile v. H&R Block, Inc.*, 761 A.2d 1115, 1120 (Pa. 2000).

## In re: Appeal of Morton and Frances DeBroff, of the Real Estate Tax Assessment Made by the Board of Property Assessment, Appeals and Review for 6847 Juniata Place, 14th Ward, City and School District of Pittsburgh

*Property Assessment Appeal—Tax Rates for Buildings and for Land*

1. Property owners appealed taxes levied by City of

Pittsburgh based on the assessment of fair market value of their property by County of Allegheny's Board of Property Assessment. Property owners claimed that 53 P.S. §25894 requires that the City of Pittsburgh assess buildings at one half of the assessed value of the land.

2. Property owners' appeal was denied because City cannot make assessments; only the County can make assessments. The property owners could not challenge City's actions through proceeding that only permits challenges to assessments of the Office of Property Assessment. Statute relied upon by property owners refers to the assessment of property, not the assessment of taxes.

*(Kenneth M. Argentieri)*

*Mark Clement* for Morton and Frances DeBroff.
*M. Janet Burkardt* for School District of Pittsburgh.
*Ronald H. Pferdehirt* for City of Pittsburgh.
*Michael J. Wojcik* for Allegheny County.

No. BV02-002565. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION AND ORDER OF COURT**

Wettick, J., April 15, 2008—The subject of this Opinion and Order of Court is the property owners' Objections to Master's Report assessing the fair market value of the subject property as follows: Year 2001–$308,200; Years 2002-2004–$325,700.[1]

The Office of Property Assessment of the County of Allegheny assessed the subject property as follows:

| Year | 2001 | 2002 | 2003 | 2004 |
|---|---|---|---|---|
| Land | $100,500 | $ 50,600 | $ 50,600 | $ 50,600 |
| Buildings | $178,600 | $275,100 | $275,100 | $275,100 |
| TOTAL | $308,200 | $325,700 | $325,700 | $325,700 |

The property owners filed an appeal to the Board of Property Assessment Appeals and Review of Allegheny County which sustained the fair market values of $308,200 for 2001 and $325,700 for 2002-2004. The property owners appealed this to court. The court assigned the appeal to Michael F. Marmo, Esquire, Special Master, and Carmen V. DeChellis, Lay Master.

At a December 7, 2004 hearing before the masters, counsel for the property owners advised the masters that he would not be presenting any witnesses and he was not challenging the Allegheny County official blotter taxing the subject property at $308,200 for 2001 and at $325,700 for 2002-2004.

The property owners have raised the following Objections to Master's Report:

> 2. Appellants object to the Master's Report because the tax assessed upon Appellants' buildings by the City Of Pittsburgh is illegal. Ordinance No. 6 Of 2001, assesses the tax in a manner such that buildings and land are taxed equally. That Ordinance fails to meet the requirements of 53 P.S. 25894. 53 P.S. 25894 specifically names buildings and land as two separate *subjects* of taxation. It requires council to *assess* tax in a specified manner. In particular, the rate for buildings shall be *assessed* at five-tenths of the rate for land. Ordinance No. 6 fails to assess the tax upon Appellant's buildings at five-tenths of the tax assessed upon Appellant's land.
>
> 3. Appellants request that for purposes of the real estate tax imposed by the City Of Pittsburgh upon the subject property, the assessed valuation of their buildings be reduced to one-half of the assessed valuation of their land, so that under the current 10.8 mill tax rate applicable to both buildings and land, the tax assessed upon their buildings is one-half of the tax assessed upon their land.

The legislation which the property owners cited in their Objections (53 P.S. §25894) reads as follows:

> **§25894. Classification of real estate; assessments; rates of taxation**
>
> They shall classify all real estate in the city in such manner, and upon such testimony as may be adduced before them, so as to distinguish between the buildings on land and the land exclusive of the buildings, and to certify to the councils of said city the aggregate valuation of city property subject to taxation. It shall be the duty of said councils, in determining the rate for each year hereafter, to assess a tax upon the buildings equal to five-tenths of the highest rate of tax required to be assessed for each such year respectively, so that upon the said classes of real estate of said city there shall, in any year, be two rates of taxation.

In their Brief, the property owners also refer to 53 P.S. §25891 which reads as follows:

> **§25891. Property to be assessed on basis of county assessments; duties of county assessing authorities; appeals**
>
> All city taxes in cities of the second class to be levied and assessed for the year one thousand nine hundred and forty-three and subsequent years, shall be levied and assessed on the real estate and personal property as contained in the assessments made for county tax purposes for said year. It shall be the duty of the proper county assessing authorities to assess all property in cities of the second class, whether real or personal, taxable under any general, special or local law for city purposes, to designate real property or parts thereof or property thereon not taxable for city purposes and to classify all real property in such cities in such manner and upon such testimony as may be adduced before them so as to distinguish between the buildings on land and the land exclusive of the buildings.

The property owners' objections are limited to taxes imposed by the City of Pittsburgh. Prior to 2001, the City's tax rate for land was higher than the tax rate for buildings as permitted by 53 P.S. §25894. Through Ordinance No. 6 of 2001, the City levied and assessed a real property tax rate of 10.8 mills on the combined valuation of the land and buildings (i.e., buildings and land were taxed at the same rate).

The property owners' Objections to Master's Report are based on the following argument: Section 25894 is assessment legislation. The Home Rule Charter (53 Pa.C.S. §2962(a)(8)) does not allow a municipality to alter legislation addressing the assessment of real property. Consequently, this court is mandated by §25894 to reduce the value of the building to 50% of the value of the land:

| Year | 2001 | 2002 | 2003 | 2004 |
|---|---|---|---|---|
| Land | $100,500 | $50,600 | $50,600 | $50,600 |
| Buildings | $ 50,250 | $25,300 | $25,300 | $25,300 |
| TOTAL | $150,750 | $75,900 | $75,900 | $75,900 |

I am overruling the property owners' Objections.

The property owners' challenges to the legality of Ordinance No. 6 cannot be raised through an appeal to the Board of Property Assessment Appeals and Review of Allegheny County or through an appeal from a decision of this Board. In Allegheny County, the exclusive power to assess real property is allocated to the County. Under Article 209, §5-209.01 of the County's Administrative Code, the Office of Property Assessment makes and supervises the making of all assessments of real property. An appeal of an assessment of this Office may address only complaints as to this assessment. 72 P.S. §§5020-511, 5020-518.1.

In other words, the City has no authority to make assessments. Thus, challenges to actions taken by the City cannot be raised through proceedings that permit only challenges to assessments of the Office of Property Assessment.

In addition, the property owners' claim that the City could not enact legislation which taxes land and buildings at the same rate is without merit. Under the Home Rule Charter legislation governing the City of Pittsburgh, a municipality may establish its own rates of taxation. 53 Pa.C.S. §2962(b); 53 Pa.C.S. §2962(i).

The property owners' claim is that §25894 is assessment legislation. The final sentence of this section provides for council "to assess a tax upon buildings equal to five-tenths of the highest rate of tax required to be assessed…so that upon the said classes of real estate of said city there shall, in any year, be two rates of taxation." According to the property owners, §25894's references to "assess a tax" and "the highest rate of taxes required to be assessed" means that §25894 should be characterized as assessment legislation. This argument has absolutely no merit because there is a difference between legislation referring to the assessment of property and to the assessment of taxes. See the first sentence of 53 Pa.C.S. §25891 which states that City taxes "shall be levied and assessed on the real estate…as contained in the assessments made for county tax purposes…."

For these reasons, I enter the following Order of Court:

ORDER OF COURT

On this 15th day of April, 2008, it is hereby ORDERED that the property owners' Objections to Master's Report are overruled and the property for years 2001-2004 is assessed as follows: Year 2001–$308,200; and Years 2002-2004–$325,700.

BY THE COURT:
/s/Wettick, J.

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[1] The Report of the Special Master was filed on December 21, 2004. However, this matter was not brought to my attention until February 2008.

## Vogel Disposal Service, Inc. v. Clyde Wheeler and Virginia Wheeler, James Parker and Roman Campbell v. Marvin Schoeffel, additional defendant

*Summary Judgment Based on Deposition Testimony*

Wheeler Defendants moved for summary judgment, arguing that testimony given in depositions proved they gave no consent and had no knowledge of the use of their car. At summary judgment stage, oral testimony may not be used to prove the absence of a material fact. Moreover, oral testimony given in depositions indicated imputable knowledge by defendants of use of car by defendants' daughter and her friends. Request for summary judgment denied.

*(William F. Barker)*

*Matthew F. Marshall* for Plaintiff.
*Joseph A. Hudock* for Wheeler Defendants.
*David M. McQuiston* for James Parker.
*Victor J. Sullivan* and *David M. Chmiel* for Roman Campbell.
Marvin Schoeffel, *pro se.*

No. GD 06-013646. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**MEMORANDUM**

Folino, J., April 30, 2008—Defendants Clyde and Virginia Wheeler have filed the current "Motion for Summary Judgment"; as the Defendants argue, they cannot, as a matter of law, "be held liable for the negligence of Defendant Campbell…[because] neither Clyde nor Virginia Wheeler ever gave implied or express permission to Defendant[] Campbell to operate their vehicle." The Wheeler Defendants' "Motion for Summary Judgment," at ¶14. Seemingly, the Defendants are arguing this matter on two fronts: first, the Wheelers cite to deposition testimony and affidavits that, according to the Wheelers, prove they did not give "implied or express consent" to Defendant Campbell; second, the Wheelers argue that there is simply "no evidence that the Wheelers…acquiesced or gave express or implied consent to Defendant Campbell to operate their vehicle." The Wheeler Defendants' "Brief in Support of Motion for Summary Judgment," at 7-8 & 11; Pa.R.Civ.P. 1035.2(1) & 1035.2(2). This Court will examine the arguments in the order stated above.

According to Defendants' first argument, various deposition testimony and affidavits prove that the Wheelers did not give "implied or express permission to Defendant[] Campbell to operate their vehicle." "Motion for Summary Judgment," at ¶14. This evidence is as follows: 1) affidavits, filed by Clyde and Virginia Wheeler, swearing that they were "not aware of any instances in which either Mr. Parker or Mr. Campbell drove [the] vehicle, nor would [either Clyde or Virginia Wheeler] have given them permission to do so"; 2) the deposition testimony of both Wheeler defendants, swearing that they did not know that anyone was taking their car and swearing that they never gave their Daughter Alicia permission to drive their car; 3) the deposition testimony of the Wheelers' daughter, Alicia, swearing that she only let Roman Campbell take the car three or four times prior to the accident and that, on the night of the accident, she did not allow Mr. Campbell to take the car; 4) the deposition testimony of Defendant Campbell, swearing that he had never met the Wheeler parents and 5) the deposition testimony of Defendant Campbell, swearing that he had been "sneaking over" to the Wheeler house (possibly) without the parents' permission.[1]

We are, however, only in the summary judgment stage of the proceedings; and, because of this, the Wheelers cannot rely upon the oral testimony of either themselves or their witnesses to prove the absence of material fact. *Dudley v. USX Corp.*, 606 A.2d 916, 918 (Pa.Super. 1992). As our Supreme Court has stated, "[i]n determining the existence or non-existence of a genuine issue of a material fact, courts are bound to adhere to the rule of *Nanty-Glo v. American Surely Co.*, 163 A. 523 (Pa. 1932), which holds that a court may not summarily enter a judgment where the evidence depends upon oral testimony." *Penn Ctr. House, Inc. v. Hoffman*, 553 A.2d 900, 903 (Pa. 1989). The reason for this rule is clear: deposition testimony and affidavits are simply a witness's oral testimony reduced to writing and it is the

province of a jury, not a court, to determine the credibility of witness testimony. *Nanty-Glo*, 163 A. at 524. Consequently, in ruling upon the Wheelers' Motion for Summary Judgment, this Court cannot consider: the affidavits filed by Clyde and Virginia Wheeler, the deposition testimony of Clyde and Virginia Wheeler or the deposition testimony of the Wheelers' daughter, Alicia; to do otherwise and this Court would usurp the jury's power and role in our judicial system.

The question of whether the Wheelers can use Defendant Roman Campbell's deposition testimony to support their summary judgment motion is a complex one[2]; fortunately, however, the question need not be answered. This is because, even if the Wheelers could use Defendant Campbell's deposition testimony to support their summary judgment motion, the evidence would still not entitle the Wheelers to summary judgment.

Here, the Wheelers have attempted to support their summary judgment motion with co-defendant Roman Campbell's deposition testimony: swearing he had never met the Wheeler parents and swearing that he had been "sneaking over" to the Wheeler house (possibly) without the parents' permission. According to the Wheeler Defendants, such evidence proves that they never gave Defendant Campbell permission to drive their vehicle. However, Plaintiff has alleged that the Wheeler Defendants gave *their daughter* "unfettered privilege[]" to operate the car and that their daughter, in turn, gave Roman Campbell the permission to drive the car. If the Wheeler Defendants did indeed give their daughter "unfettered privileges" to operate the car, one foreseeable result of this "unfettered" access, a jury could find, would be that the Wheelers' immature[3] daughter would, then, give her immature friends permission to drive the car. In other words, if a jury were to find that the Wheeler Defendants "entrusted" their car to their daughter, the jury would then be entitled to find that the Wheeler Defendants impliedly gave Roman Campbell permission to drive the car. *See, e.g., Kuhns v. Brugger*, 135 A.2d 395, 403 (Pa. 1957); *United Gas Pipe Line Co. v. Jones*, 111 So.2d 240 (Miss. 1959); *Atkins v. Churchill*, 194 P.2d 364 (Wash. 1948). As a result, Roman Campbell's deposition testimony does not defeat Plaintiffs claim.

According to the Wheeler Defendants, they are also entitled to summary judgment because "there is no evidence that the Wheelers could and did give Defendant Campbell permission to operate their vehicle on the date of this accident or any time prior." "Motion for Summary Judgment," at ¶12. This assertion is, however, incorrect. As Plaintiff avers, the Wheelers gave their daughter "unfettered privileges" to operate their vehicle and their daughter, in turn, gave Defendant Campbell permission to drive on the night in question. To support this theory, Plaintiff has introduced the following evidence: the deposition testimony of Defendant Campbell, declaring that he had driven the vehicle "[p]retty much every time [he] went over" to the Wheelers' home and that the Wheelers' daughter had given him permission "every time" he asked; the deposition testimony of Defendant Campbell, swearing that the Wheelers' daughter "told [him] she has the keys to the car, that's going to be hers when she's 16, that [he and his friends] could take it"; the deposition testimony of Defendant Campbell, stating that Mrs. Wheeler "basically knew that I was kind of sneaking over" and the deposition testimony of Alicia Wheeler, which could give rise to the inference that Mrs. Wheeler was aware Alicia and her friends were driving the car. Deposition Testimony of Roman Campbell, taken June 7, 2007, at 13, 17, 14 & 10; Deposition Testimony of Alicia Wheeler, taken February 25, 2008, at 31.

Viewing the above evidence in the light most favorable to the non-moving party, this Court is simply unable to say that the case is so "free and clear of doubt" that the Wheelers are entitled to judgment as a matter of law. *Asher v. Pa. Ins. Guar. Ass'n*, 722 A.2d 1078, 1082 (Pa.Super. 1998). Indeed, giving Plaintiff "all favorable inferences that might reasonably be drawn from the [above] evidence," a jury could find that Alicia Wheeler had good reason to act as if the car were hers: her parents had given her "the keys to the car." *Fitzpatrick v. Shay*, 461 A.2d 243, 245 (Pa.Super. 1983); Deposition Testimony of Roman Campbell, taken June 7, 2007, at 14.

Moreover, a separate and independent reason exists as to why the Wheeler Defendants cannot receive summary judgment in this case. According to Plaintiffs Complaint, Plaintiff avers that the Wheeler Defendants were negligent because they gave "Defendant Parker and/or Defendant Campbell" implied permission to operate their vehicle. Plaintiff's Amended Complaint, at ¶18. Yet, the Wheeler Defendants' "Motion for Summary Judgment" takes issue only with the claims resulting from Defendant Campbell's operation. Stated another way, Plaintiff's Complaint avers two reasons why the Wheeler Defendants were negligent: first, because they allowed Defendant Parker to operate their car and, second, because they allowed Defendant Campbell to operate their car. Yet, the current summary judgment motion attacks only one of these factual scenarios. Defendant Parker has not been dismissed as a defendant in this case; thus, it is possible that the Wheeler Defendants could still be found liable for allowing Defendant Parker to operate their vehicle. At summary judgment, the moving party bears the initial burden of proving "that no genuine issue of material fact exists." *Long v. Yingling*, 700 A.2d 508, 512 (Pa.Super. 1997). And, by not moving for summary judgment on the "Defendant Parker" claims, the Wheeler Defendants have assured that a "genuine issue of material fact" would exist in this case. *Weiss v. Keystone Mack Sales, Inc.*, 456 A.2d 1009, 1012 (Pa.Super. 1983).

For the foregoing reasons, I am therefore entering the following Order.

**ORDER OF COURT**

AND NOW, this 30th day of April, 2008, upon consideration of the Motion for Summary Judgment filed on behalf of Defendants Clyde Wheeler and Virginia Wheeler, it is hereby ORDERED, ADJUDGED and DECREED as follows:

Said Motion for Summary Judgment is DENIED.

BY THE COURT:
/s/Folino, J.

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[1] This Court uses the word "possibly" because Defendant Campbell's deposition testimony is not altogether clear as to whether he was "sneaking over" without the parents' permission. Defendant Campbell's testimony regarding his "sneaking over" to the house is as follows:

Q: And when you would go over to Alicia's house, you said you were there about we'll say 25 to 30 times you said?

A: Yes.

Q: To your understanding, was that with her parents' permission?

A: No. Well, her mom worked 9:00 at night till 7:00 in the morning, so she basically knew that I was kind of sneaking over, so it was against her mom's permission.

Deposition Testimony of Roman Campbell, taken June 7, 2007, at 10.

This Court is in the dark as to the meaning of this testimony. According to the Wheelers, this testimony proves" that they did not know Roman Campbell was "sneaking over." Yet, when Mr. Campbell says "so she basically knew that I was kind of sneaking over," it appears as if he is saying that Mrs. Wheeler "knew" Campbell was coming over.

[2] See, e.g., Askew by Askew v. Zeller, 521 A.2d 459, 464 (Pa.Super. 1987); Johnson v. Johnson, 600 A.2d 965, 969 (Pa.Super. 1991), superseded by rule on other grounds, Pa.R.Civ.P. 1035.2 & 1035.3, as recognized in Harber Phila. Ctr. City Office Ltd. v. LPCI Ltd. P'ship, 764 A.2d 1100, 1104 (Pa.Super. 2000).

[3] Obviously, the word "immature" is being used in its legal (and not its colloquial) sense.

## Stephen Heckman, Executor of the Estate of Andrew Heckman, deceased, and Dena Yeagley, Administratrix of the Estate of Abigail Yeagley, deceased v. Columbia Gas Company of Pennsylvania v. Beverly E. Houtz and Dorsey I. Houtz, individually and Beverly E. Houtz and Dorsey I. Houtz t/d/b/a Houtz Apartments

*Forum Non Conveniens*

1. A house located in Centre County exploded due to a gas leak killing plaintiffs. Plaintiffs' estates brought action in Allegheny County where Columbia Gas Company is located. Columbia Gas Company asked for and was granted a change in venue to Centre County based on forum non conveniens.

2. A motion for change of venue for forum non conveniens may be raised at any time prior to trial. The date of trial is one factor in determining motion for forum non conveniens.

3. Where majority of witnesses are located in Centre County and where location of event at issue is in Centre County, Centre County is proper venue for trial.

*(William F. Barker)*

*James J. Riley* for Plaintiffs.
*Edward A. Yurcon* and *Thomas C. Yorko* for Columbia Gas Company.
*Joseph P. Green* for Additional Defendants Beverly E. Houtz and Dorsey I. Houtz.

No. GD 05-9411. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION**

Strassburger, J., May 6, 2008—On November 30, 2003, Plaintiffs' decedents, Abigail Yeagley and Andrew Heckman, died from carbon monoxide poisoning allegedly caused by the negligence of Defendant Columbia Gas Company of Pennsylvania ("Columbia Gas"). At the time, Plaintiffs' decedents were renting an apartment owned by Additional Defendants Beverly and Dorsey Houtz in Centre County, Pennsylvania.

Stephen Heckman, executor of the estate of Andrew Heckman, and Dena Yeagley, administratrix of the estate of Abigail Yeagley, filed a complaint against Columbia Gas on May 11, 2005. Stephen Heckman is a resident of Montgomery County and Dena Yeagley is a resident of Centre County. Defendant Columbia Gas filed an Answer and New Matter on June 28, 2005.

On July 27, 2005, Columbia Gas filed a Praecipe for Writ to Join Additional Defendants and on April 18, 2007, Additional Defendants ruled Columbia Gas to file a complaint. Columbia Gas did so on May 10, 2007; Additional Defendants filed an Answer and New Matter on June 8, 2007, and Columbia Gas filed a Reply to New Matter on June 20, 2007.

On October 12, 2007, Columbia Gas presented a motion and this court heard argument on whether this case should be transferred on the grounds of *forum non conveniens* pursuant to Pennsylvania Rule of Civil Procedure 1006(d)(1). This court issued a discovery and briefing schedule regarding the motion on October 29, 2007. On February 14, 2008, this court granted the motion of Columbia Gas and transferred the case to Centre County. Plaintiffs appeal from that order.

Columbia Gas asserts that venue in this action, although technically proper in Allegheny County (i.e. Columbia Gas regularly does business in Allegheny County as well as many other counties in Pennsylvania), should be transferred to Centre County. Conversely, Plaintiffs insist that their original choice of venue, Allegheny County, should be sustained. Pennsylvania Rule of Civil Procedure 1006(d)(1) provides that "[f]or the convenience of parties and witnesses the court upon petition of any party may transfer an action to the appropriate court of any other county where the action could originally have been brought." *See Humes v. Eckerd Corp.*, 807 A.2d 290, 291 (Pa.Super. 2002).

The Superior Court applies an abuse of discretion standard in determining whether a trial court properly granted a petition to transfer venue. "[T]he determination of whether to transfer venue in a case is a matter within the sound discretion of the trial court. If there exists any proper basis for the trial court's decision to grant the petition to transfer venue, the decision must stand." *Estate of Werner v. Werner,* 781 A.2d 188, 190 (Pa.Super. 2001).

The intercounty standard, set forth in *Cheeseman v. Lethal Exterminator, Inc.*, 701 A.2d 156 (Pa. 1997), requires a showing by a defendant that a plaintiff's chosen forum is "oppressive or vexatious." The Court in *Cheeseman* restated the test articulated in *Scola v. A.C. & S. Inc.*, 657 A.2d 1234 (1995) holding that "a petition to transfer venue should not be granted unless the defendant meets its burden of demonstrating, with detailed information on the record, that the plaintiff's chosen forum is oppressive or vexatious to the defendant." *Cheeseman*, 701 A.2d at 162.

In *Wood v. E.I. Du Pont de Nemours and Co.*, 829 A.2d 707 (Pa.Super. 2003), the Superior Court affirmed the decision of the Court of Common Pleas of Philadelphia County to transfer the case on the grounds of *forum non conveniens* to Bradford County where the underlying tort actually occurred. In that case, the plaintiff was injured in a slip and fall type accident at one of the defendant's facilities located in Bradford County. Since the defendant regularly did business in Philadelphia County, venue there was proper and the plaintiff filed his complaint there. The defendant argued that litigation in Philadelphia County was oppressive and vexatious. The defendant placed detailed information on the record that witnesses, both the defendant's employees and third-party witnesses, would have to travel over 173 miles to Philadelphia for trial. Also, the defendant argued that a view might be necessary in that case and it would be bur-

densome and costly to transport the jury the 190 miles for that purpose.

The case at bar is factually indistinguishable from *Wood*. In this case, Defendant included detailed information about the locations of witnesses and travel distances. For example, at least 15 witnesses, including both Plaintiffs and both Additional Defendants, reside over 100 miles from Allegheny County (see Exhibit F of Defendant's Motion to Transfer Action for *forum non conveniens).* Potential witnesses include State College and Centre County police officers, firefighters, and housing inspectors. Of the potential witnesses referenced in Plaintiffs' brief, six reside in Centre County, three in Schuylkill County, and only one, Andrew Heckman's daughter, resides in Allegheny County. Plaintiffs' counsel's office is in Schuylkill County.

Furthermore, on January 28, 2004, Plaintiffs filed a writ of summons in Centre County against the Houtzes for negligence arising out of the same incident. Plaintiffs did not sue Columbia Gas in that action, although they certainly could have done so, and that case settled on April 18, 2005. Eighteen depositions were taken in that case, all in Centre County, and many of those deponents would be called to testify in this case as well. As Plaintiff's case was originally litigated in Centre County, that court will likely already have some familiarity with the issues in the case, making Centre County the more appropriate forum for this case as well.

Plaintiff also argues that Defendant waited too long and it is now too late to file this motion. That argument is contrary to established case law, which holds that timeliness is not a decisive factor to consider regarding a petition to transfer venue. The Superior Court found no abuse of discretion by a trial court in transferring a case three days before trial based on a petition filed approximately six weeks before trial. *See Borger v. Murphy,* 797 A.2d 309, 313 (Pa.Super. 2002).

In *Graham v. Laidlaw Transit, Inc.* GD 98-014720 (Feb. 7, 2000), I denied a petition to transfer venue for *forum non conveniens*, even though it was vexatious and oppressive to try the case in Allegheny County. The case was on the trial list when the petition was filed and I determined that was key to the "convenience of the parties" factor.

At the time Defendant here asked this court to transfer this case to Centre County, however, the case had not been listed for trial in Allegheny County. Plaintiffs can hardly claim they would be prejudiced by any delay. While they filed the Allegheny County case in May of 2005, they took no action to move this case along until they placed it at issue in September 2007.

For the foregoing reasons, the Superior Court should affirm the decision of this court to transfer the case to Centre County.

Strassburger, A.J.

Dated: May 6, 2008

## Commonwealth of Pennsylvania v. Terrell Johnson

*Post-Conviction Relief Act Petition—Timeliness of Petition Based on Newly-Discovered Evidence*

1. Post Conviction Relief Act Petition is timely if filed within 60 days of learning of relevant facts that were unknown to the defendant and that could not have been ascertained by the exercise of due diligence.

2. After defendant's conviction, a person approached defendant's wife and told her that Mr. Robinson could testify that the Commonwealth's primary eyewitness was not near the scene of the shooting crime because the same eyewitness was with Mr. Robinson. Mr. Robinson confirmed this information.

3. Court granted PCRA Petition because this information was not available to defendant prior to conviction and it is unlikely that reasonable diligence would have uncovered this information because Mr. Robinson was in hiding due to outstanding arrest warrants and police never interviewed Mr. Robinson even though eyewitness said she was with him after the crime.

*(Kenneth M. Argentieri)*

*Michael W. Streily* for the Commonwealth.
*J. Richard Narvin* for Defendant.

CC Nos. 199502676 and 199504707. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

**OPINION**

O'Toole, J., April 2, 2008—The Defendant, Terrell Johnson, was charged with Criminal Homicide, 18 Pa.C.S.A. §2501, Retaliation Against A Witness, 18 Pa.C.S.A. §4953, and Criminal Conspiracy, 18 Pa.C.S.A. §903, with the Commonwealth seeking the death penalty.[1] At the conclusion of the trial before this Court on June 30, 1995, the jury found the Defendant guilty of Murder in the First Degree and both other charges. The Court denied the Commonwealth's Motion to Amend the Notice of Mandatory Sentence, which would have changed the aggravating circumstance for the death penalty from (d)(5) to (d)(15), and discharged the jury. On September 13, 1995, the Defendant was sentenced to life imprisonment.

A direct appeal was filed on behalf of the Defendant. On January 30, 1997, the Superior Court, in a Memorandum Opinion and Order, affirmed the judgment of sentence. A subsequent Petition for Allowance of Appeal was denied by the Supreme Court on June 19, 1997.

On May 5, 1998, the Defendant filed a Petition under the Post Conviction Relief Act. Counsel was appointed and an Amended Petition was filed alleging ineffective assistance of trial counsel. The Commonwealth filed an Answer and a hearing was held. On January 24, 2000, the PCRA Petition was granted and the Defendant was awarded a new trial. The Commonwealth filed an appeal to the Pennsylvania Superior Court. On March 15, 2001, the Superior Court reversed this Court's Order granting a new trial and reinstated the Defendant's sentence. A Petition for Allowance of Appeal, filed on behalf of the Defendant, was denied on October 10, 2001.

On January 4, 2006, the Defendant filed his second Petition under the Post Conviction Relief Act. This Court reviewed the court record and determined that the Defendant's Petition was time-barred and/or the allegations in the Petition were previously litigated or waived for failure to raise them in his prior direct appeal or his prior PCRA Petition. As such, the Defendant's second Petition was dismissed without a hearing on January 26, 2006.

The Defendant appealed the dismissal Order to the Superior Court. In a Memorandum Opinion dated April 18, 2007, the Superior Court reversed the dismissal Order and remanded the case for appointment of counsel and a hearing on the Defendant's claim of after-discovered evidence, "particularly on whether the evidence could have been discovered before trial by reasonable diligence."

Counsel was appointed to represent the Defendant and

the evidentiary hearing was held on November 19, 2007. At the hearing, the Defendant's wife, Sandra Cole, testified that an unnamed person approached her in December 2005 and told her to find a man named Kenneth Robinson because he could provide testimony about where the Commonwealth's primary eyewitness, Evelyn McBryde, was at the time of the shooting in this case. Based upon this information, she immediately began to look for Kenneth Robinson. She found him a short time later and he told her that Evelyn McBryde was with him at the time of the homicide. Mr. Robinson also informed her that he would testify to that fact. Ms. Cole wrote a letter to her husband (the Defendant) and provided him with this information. (N.T. 11/19/07, pp. 10-13)

Kenneth Robinson also testified at the evidentiary hearing. He stated that Evelyn McBryde was with him at the time that he received a telephone call from his mother indicating that there had been a shooting. He also indicated that he was never interviewed by the police. (N.T. 11/19/07, pp, 25-30)

After reviewing the transcript of the evidentiary hearing, along with the post-hearing submissions of counsel, the Court issued an Order on January 29, 2008 granting the Defendant a new trial. This appeal by the Commonwealth follows.

On appeal, the Commonwealth claims that this Court erred in granting the Defendant PCRA relief; in finding that the second Petition was filed within the sixty (60) day time limit set forth in 42 Pa.C.S.A. §9545(b) and that it qualifies under one of the enumerated exceptions in that section; in finding that the testimony of Kenneth Robinson constituted after-discovered evidence under 42 Pa.C.S.A. §9543 (a)(2)(vi); in finding that the testimony of Kenneth Robinson could not have been obtained prior to trial through due diligence; and, in finding that the testimony of Kenneth Robinson would have changed the outcome of the trial if it had been introduced.

With regard to the timeliness of the filing of the Defendant's second PCRA Petition, the Court finds that the Defendant met the requirements of 42 Pa.C.S.A. §9545(b), which provides, in pertinent part, as follows:

> (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:
>
> (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
>
> (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.

Specifically, the Defendant testified at the evidentiary hearing that at the time of his trial in 1995, he had no idea that Kenneth Robinson could have testified that Evelyn McBryde was with him at the time of the shooting. He indicated that the first time that he learned this information was from his wife in December 2005. (N.T. 11/19/07, pp. 37-38) Upon learning the information, he filed his second PCRA Petition on January 4, 2006, which was within sixty (60) days of the date when he ascertained the information. As for whether the Defendant could have ascertained this information prior to his trial had he acted with due diligence, the Court finds that it was highly unlikely that the Defendant would have discovered this information for the following reasons: (1) The witness, Kenneth Robinson, was in hiding because of outstanding arrest warrants; (2) Evelyn McBryde's statement indicates that she was with Mr. Robinson after she witnessed the shooting, which would not have given the Defendant's counsel any indication that Mr. Robinson would have exculpatory information; and (3) the police never bothered to interview Mr. Robinson, which indicates that they did not believe that he had any pertinent information. Thus, based upon the testimony provided at the evidentiary hearing, the Defendant's second Petition must be considered to have been timely filed.

With regard to the issues raised about the testimony provided by Mr. Robinson, the Court finds that his testimony qualifies as after-discovered exculpatory evidence and the testimony clearly could have changed the outcome of the trial; and therefore, he is entitled to relief pursuant to 42 Pa.C.S.A. §9543(a)(2)(vi). A new trial will be granted on the basis of after-discovered evidence only when the evidence: (1) could not have been discovered through due diligence before the conclusion of trial; (2) it is not cumulative; (3) it is not solely impeaching in nature; and (4) it is such that a different verdict would be likely if a new trial is granted. *Commonwealth v. Brosnick*, 607 A.2d 725 (Pa. 1992). The Defendant has met each of these criteria. First, as indicated above, Mr. Robinson's testimony could not have been discovered before trial because be was secreting his whereabouts and there was no reason to believe that he would have exculpatory evidence. Second, the evidence is clearly not cumulative; rather, it is in direct contradiction to the testimony of the Commonwealth's only eyewitness, Evelyn McBryde, who testified that while hiding in nearby bushes, she saw the Defendant and two other men shoot the victim. Kenneth Robinson would testify that Ms. McBryde could not have observed the shooting because she was with him at the time of the incident. Third, the evidence is not only impeaching in nature; rather, as stated by the Superior Court in its opinion dated April 18, 2007 remanding this matter, the evidence tends to establish the Defendant's innocence. Fourth, again as found by the Superior Court, if the evidence had been presented to the jury, it is likely that their verdict would have been different due to the fact that Mr. Robinson's testimony is directly contradictory to the testimony of the only eyewitness. Accordingly, as the Defendant has met the requirements for the granting of a new trial based upon after-discovered evidence, the Court's ruling was proper.

For the foregoing reasons, the Court finds that it properly granted the Defendant a new trial.

BY THE COURT:
/s/O'Toole, J.

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[1] The latter two charges were filed at CC199502676.

## Commonwealth of Pennsylvania v. Anthony Fitzgerald

*Petition for Post Conviction Relief*

Post Conviction Relief Hearing Act, 42 Pa.C.S.A. Section 9541 *et seq.* requires that petition be filed within one year of the date judgment of sentence becomes final. This limitation is jurisdictional in nature. Petition filed well after one year period expired. Defendant needed to allege one of three exceptions to one year limit set forth in 42 Pa.C.S.A. Section 9545(b)(1)(I)–(iii). Defendant failed to raise any of the exceptions. Court had no jurisdiction as petition not timely filed and dismissed petition.

(*William F. Barker*)

*Michael Streily* for the Commonwealth.
*Christy P. Foreman* for Defendant.

No. CC 1999-10943. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

**OPINION**

Todd, J., April 30, 2008—This is an appeal from an order of August 21, 2007 dismissing Petitioner, Anthony Fitzgerald's, Pro Se PCRA petition filed on March 15, 2007. By order of March 20, 2007, Patrick K. Nightengale, Esq. was appointed as counsel to represent Petitioner in this first PCRA petition. On April 13, 2007 counsel for Petitioner filed a Petition to Withdraw and a No Merit letter on various bases, including that the petition was untimely as it was filed more than four (4) years after Petitioner's judgment of sentence became final without alleging any facts to support one of the three exceptions to the one (1) year time limitation to file a PCRA Petition pursuant to 42 Pa.C.S.A. §9545 (b)(1).

On July 30, 2007, an order was entered granting the Petition to Withdraw and placing Petitioner on notice that the Court intended to dismiss the petition without a hearing. On August 21, 2007, an order was entered dismissing Petitioner's PCRA petition and notifying him of his right to appeal to the Superior Court. On October 3, 2007, Petitioner filed a Notice of Appeal to the Superior Court, a Petition to Proceed *In Forma Pauperis* and an Application for Relief in the Nature of a Request for Appointment of Counsel. On December 6, 2007, orders were entered granting the Petition to Proceed *In Forma Pauperis* and appointing Christy P. Foreman, Esq. as counsel for Petitioner during his appeal. On February 13, 2008 an order was entered directing Petitioner to file his Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b) within twenty-one (21) days of receipt of all necessary transcripts.

On March 14, 2008, Petitioner, through counsel filed his Concise Statement of Matters Complained of on Appeal which states as follows:

> 1. Whether the trial court erred in dismissing the Appellant's PCRA Petition without a hearing on the claim that there was a violation of the Appellant's constitutional rights, which in the circumstances of this case, so undermined the truth determining process that there could be no reliable adjudication of Appellant's guilt or innocence.
>
> 2. Whether the trial court erred in dismissing the Appellant's PCRA Petition without a hearing on the claim that Appellant was deprived of his constitutional right to effective assistance of counsel when Appellant's trial counsels:
>
> a. Failed to subpoena exculpatory defense witnesses from the ARC House that if called to testify could have established Appellant's innocence.
>
> b. Failed to file a post-sentence motion requesting a modification of sentence and/or a motion for a new trial.
>
> c. Attorney Bruce Carsia appointed to represent the Appellant but was also retained to represent the victim's son with regard to a separate criminal matter. Attorney Carsia subsequently informed Appellant that he would have Attorney William Manion take over Appellant's case. Attorney Manion subsequently represented Appellant at trial and sentencing but was inadequately prepared to represent the appellant in this case and said ineffectiveness directly resulted in the Appellant's conviction in this matter.
>
> 3. Whether the trial court erred in dismissing the Appellant's PCRA Petition without a hearing on the claim that there was an improper obstruction by Commonwealth officials of the Appellant's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
>
> 4. Whether the trial court erred in dismissing the Appellant's PCRA Petition without a hearing on the claim that at the time of trial there was unavailable exculpatory evidence that has subsequently become available and that it would have affected the outcome of the trial if it had been introduced.

BACKGROUND

On August 4, 1999, Petitioner, Anthony Fitzgerald, was charged with Theft by Deception in violation of 18 Pa.C.S.A. §3922(a)(1); Theft by Failure to Make Required Disposition of Funds in violation of 18 Pa.C.S.A. §3927(a); and, Terroristic Threats in violation of 18 Pa.C.S.A. §2706. These charges arose out of the alleged failure of Petitioner to perform remodeling work after obtaining $3,000.00 from the victim and threatening the victim if she reported him to the authorities.

On December 6, 2000, after a non-jury trial, the trial court announced its verdict and found Petitioner guilty of Theft by Deception, not guilty of Terroristic Threats and granted a demurrer to the charge of Theft by Failure to Make Required Disposition of Funds. (T. p. 2-3). After waiving a pre-sentence report, Petitioner was sentenced on December 6, 2000 to 21 to 42 months of incarceration followed by a period of 1 year of probation with an order for restitution in the amount of $3,000.00. (T. p. 5). Petitioner was given permission to serve the sentence in alternative housing so that he could work and begin to make restitution. On February 22, 2001, Petitioner filed a Motion for the Modification and/or Reduction of Sentence pursuant to Pa.R.Crim.P. 1410[1] and a Petition to Credit Time Served, both of which appear to be denied by an undated order of the trial court.[2] Petitioner has alleged, as set forth below, that the Motion to Modify Sentence was denied by operation of law.

Appellant began serving his sentence in alternative housing on March 21, 2001. By a letter of June 25, 2001 the trial court was advised that Petitioner left the alternative housing for work on June 23, 2001 and never returned in violation of his sentence. As a result, a warrant was issued for Appellant's arrest on June 29, 2001. Pursuant to the warrant, Appellant was apparently arrested on October 31, 2006. Appellant filed the instant PCRA petition on March 15, 2007.

DISCUSSION

In order to be eligible for relief under the Post Conviction Relief Hearing Act, 42 Pa.C.S.A. §9541 *et seq.*, the Petitioner must allege and prove that he is entitled to relief upon one of the grounds set forth in §9543(a)(2). In the present case, Petitioner has alleged that he is entitled to relief based on the following grounds:

> 1. A violation of the constitution of Pennsylvania or laws of this Commonwealth or the constitution of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt of innocence could have taken place.

> 2. Ineffective assistance of counsel which, in the circumstance of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
>
> 3. The improper obstruction by Commonwealth officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
>
> 4. The unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of trial if it had been introduced. (PCRA Petition, ¶¶1-4)

Petitioner's factual basis for relief was that trial counsel was ineffective in failing to provide a meaningful defense as a result of the failure to subpoena witnesses and documents that would have established that he was prevented from providing the services to the victim by the staff of the alternative housing facility he was in and that he had in fact refunded the victim her money. (PCRA Petition, ¶5)

It is clear, however, that before the merits of the petition may be addressed a determination must be made that the petition was timely filed. Pursuant to the PCRA, any petitions, including second and subsequent petitions, must be filed within one year of the date the judgment of sentence became final. 42 Pa.C.S.A. §9545(b). This limitation is jurisdictional in nature and goes to the court's competency to adjudicate or pass upon the merits of the petition. *Commonwealth v. Bennett*, 930 A.2d 1264, 1265 (2007).

As Petitioner alleged in his PCRA petition, he was found guilty and sentenced on December 6, 2000 to a period of incarceration of 21 to 42 months. Petitioner further acknowledged that no direct appeal was taken and the only post-trial motion was a motion to modify/reduce sentence filed on February 22, 2001 and "denied by operation of law." (PCRA Petitioner, ¶7(D) II.)[3] Therefore, based on the allegations of his present PCRA petition, it was clearly filed beyond the one-year time period pursuant to 42 Pa.C.S.A. §9545(b)(1).

The PCRA does, however, recognize in §9545(b)(1)(i)-(iii) three exceptions to the one year time limitation for filing a PCRA petition. These exceptions are as follows:

> (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.
>
> (iii)The right asserted as 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. 42 Pa.C.S.A. §9545(b)(1)(i)-(iii)

However, in order to utilize any of the exceptions, the PCRA petitioner must allege and prove facts to support their applicability. Petitioner does not even allege, nor does a review of the petition or record establish, any facts which would support one of the above enumerated exceptions to the one year time limitation and, therefore, the petition is untimely.

Although not referenced in Petitioner's PCRA petition, the Petition to Withdraw and No Merit Letter refer to the fact that subsequent to Petitioner's sentencing, he left his alternative housing on June 23, 2001 and never returned.[4] It is clear that Petitioner's status as a fugitive or otherwise for the time period between June 23, 2001 and the filing of the instant petition does not in any way extend the time period for filing a PCRA petition. *Commonwealth v. Deemer,* 705 A.2d 827 (1997), *Commonwealth v. Judge,* 797 A.2d 250 (2002). Petitioner has made absolutely no allegations which support the position that his PCRA petition was filed within one of the exceptions set forth in §9545(b)(1)(i)-(iii) and, therefore, the PCRA petition was untimely and appropriately dismissed.

In the Concise Statement of Matters Complained of on Appeal, Petitioner's counsel has set forth the alleged errors of the PCRA Court in dismissing the petition without a hearing on Petitioner's substantive claims pursuant to §9543(a)(2)(i), (ii), (iv), (vi). Each of the alleged statements of error goes to the merits of Petitioner's claims for relief, which must be plead and proved by a preponderance of the evidence. However, as previously noted, the time limitation set forth in §9545(b)(1) is jurisdictional in nature and, absent jurisdiction, the court is not permitted to address the merits of the claims. As stated in *Commonwealth v. Wilson*, 824 A.2d 331, 334 (Pa.Super. 2003);

> It is imperative to note that the timeliness requirements of the PCRA are jurisdictional in nature. *Commonwealth v. Pursell*, 561 Pa. 214, 219, 749 A.2d. 911, 913 (2000). 'As such, when a PCRA petition is not filed within one year of the expiration of direct review, or not eligible for one of the three limited exceptions, or entitled to one of the exceptions, but not filed within 60 days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims.' *Commonwealth v. Gamboa-Taylor*, 562 Pa. 70, 77, 753 A.2d. 780, 783 (2000). The substantive merits of a PCRA petition are irrelevant to the timeliness of the PCRA petition. *Commonwealth v. Murray*, 562 Pa. 1, 5, 753 A.2d. 201, 203 (2000) (citation omitted). *Commonwealth v. Wilson, supra*, at 334.

Petitioner's appellate counsel was appointed pursuant to Pa.R.Crim.P. 904(f)(2) governing PCRA procedures which provides that:

> the appointment of counsel shall be effective throughout the post conviction collateral proceedings, including any appeal from disposition of the petition for post-conviction collateral relief. Pa.R.Crim.P. 904(f)(2)

Therefore, as this was Petitioner's first PCRA petition and original counsel had been permitted to withdrawal, appellate counsel was appointed pursuant to Pa. R.C.P. 904(f)(2). *Commonwealth v. Evans*, 866 A.2d 442 (Pa.Super. 2005). As there were no facts alleged in the PCRA petition to support any exception to the one year time limit for filing the PCRA petition, appellate counsel was limited to raising the merits of the PCRA petition, which this Court is precluded from addressing for the reasons set forth above.

BY THE COURT:
/s/Todd, J.

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[1] Pa.R.Cr.P. 1410 was renumbered to Rule 720 and amended March 1, 2000, effective April 1, 2001

[2] There appear in the record two "Motions for Modification

and/or Reduction of Sentence Pursuant to Rule 1410 Pa.R.Cr.P.," both dated February 22, 2001. The first motion is on a preprinted form and incorrectly states that Appellant entered a guilty plea to the charge of Theft by Deception. This motion does not allege any error but simply requests the trial court to reconsider its sentence. A second hand-printed Motion for Modification and/or Reduction of Sentence Pursuant to Rule 1410 Pa.R.Cr.P. requests credit for 13 months for time served from August 1999 to September 2000 to allow Appellant to "leave the Allegheny County Jail and enter an alternative housing facility." A third motion, a Petition to Credit Time Served, was also filed and denied. The orders by the trial court denying the Petitions for Modification and the Petition to Credit Time Served are not dated.

[3] If the motion to modify sentence filed on February 22, 2001 was denied by operation of law pursuant to Pa.R.Cr.P. 1410(B)(3), it would have been deemed denied in 120 days, that is, on June 22, 2001 and Petitioner would have had until July 22, 2001 to file a direct appeal to the Superior Court pursuant to Rule 1410 (A)(2)(b). Since Petitioner did not file a direct appeal to the Superior Court, Petitioner was required pursuant to §9545 to file his PCRA petition no later than July 22, 2002. It should be noted, however, Rule 1410 (A)(2)(b) only applies if a "timely" post-sentence motion is filed. Petitioner's post-sentence motion, filed on February 22, 2001, was not filed within ten days of the imposition of sentence as required by 1410 (A)(1) and, therefore, Petitioner was required to file his direct appeal within thirty days of the imposition of sentence. In either event, the present PCRA petition is filed well beyond the one-year time limitation imposed by the PCRA. In *Commonwealth v. Brown*, 943 A.2d 264 (2008), the Supreme Court recently held that when a timely direct appeal is not filed relative to a judgment of sentence and direct appeal is not therefore available, the one-year period for filing of PCRA petition commences upon the actual expiration of the time period allowed for seeking direct review, confirming the language of the PCRA, §9545 (b)(3). *Commonwealth v. Brown, supra*, at 268.

[4] This statement in the No Merit Letter is confirmed by the correspondence of June 25, 2001 in the record from the alternative housing facility, The Alcoholic Recovery Center. In addition, the warrant for his arrest issued on June 29, 2001, as a result of Petitioner's failure to return to the A.R.C., is part of the record.

## Commonwealth of Pennsylvania v. Sameania Lyn Carey

*Juror Misconduct—Demand for New Trial*

1. On second day of trial, Court learned that Juror #10 had talked with outside person about trial in contravention of Court's instructions. Upon investigation by Court, Juror #10 admitted calling her sister-in-law, an attorney with the District Attorney's Office, and asking about how cases are handled as Juror #10 felt Court's instructions were given too quickly for her to understand.

2. Sister-in-law ended conversation as soon as possible without answering any questions posed by Juror #10. Sister-in-law confirmed Juror #10's recollection of events and reiterated that no legal issues were discussed.

3. There is no *per se* rule which mandates mistrial for juror misconduct. Defendant must prove that misconduct resulted in prejudice in order to justify mistrial.

*(William F. Barker)*

*Michael Streily* for the Commonwealth.
*Victoria H. Vidt* for Defendant.

No. CC 2005-08209. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

**OPINION**

Cashman, J., May 8, 2008—On October 4, 2007, the appellant, Sameania Carey, (hereinafter referred to as "Carey"), was convicted of first degree murder following a jury trial. Carey subsequently was sentenced to life without the possibility of parole on December 27, 2007, and she has filed the instant appeal from the imposition of that sentence.

Carey was directed pursuant to Pennsylvania Rule of Appellate Procedure 1925(b) to file a concise statement of matters complained of on appeal and in that statement she has asserted one error, that being that this Court erred in failing to declare a mistrial once it was learned that one of the jurors on her case ignored the Court's instructions not to talk to anyone about Carey's case during the course of trial.

On the second day of trial this Court was advised that Juror No. 10 had called her sister-in-law, Ann Steiner, (hereinafter referred to as "Steiner"), an assistant district attorney with the District Attorney's Office of Allegheny County. Juror No. 10 was brought into chambers in the presence of the trial counsel for the District Attorney's Office, Carey and her counsel, and she was asked as to the nature and extent of the conversation that she had with Steiner. Juror No. 10 indicated that Steiner was her sister-in-law and that she had called her that evening not to talk about Carey's case, but rather, to talk generally about how cases are handled. She indicated that she did not completely follow this Court's preliminary instructions because she thought that they were being given too fast for her to digest. She asked Steiner whether or not the verdict had to be unanimous and whether or not she could take notes during the course of trial. She also asked Steiner to define first degree murder, second degree murder, third degree murder, voluntary manslaughter and involuntary manslaughter so she would be aware of what the elements of those particular offenses were. She stated that Steiner did not provide her with any information with respect to this specific request. Juror No. 10 acknowledged that she understood that she could not talk about the specific facts of Carey's case and indicated that the questions that she was posing to her sister-in-law were designed to illicit information as to procedural matters. She was emphatic that she did not discuss Carey's case with Steiner or asked Steiner about Carey's case. When Carey's counsel decided to ask Juror No. 10 some questions, they had nothing to do with her conversation with Steiner, but rather with comments that she made during the jury selection process about her being uneasy that the defendant knew her name and what her husband's business was. (See Trial Transcript, pp. 139-144).

This Court requested that Steiner also participate in this in camera discussion and she appeared later in the day. During that conversation Steiner corroborated the statements made by Juror No. 10 and was emphatic in the fact that she did not discuss the facts of Carey's case and that Juror No. 10 never broached that matter. Juror No. 10's questions were designed to go to procedural issues that Steiner was unsure of and because of her uneasiness about this particular call; she ended the call at the earliest oppor-

tunity. (See Trial Transcript, pp. 271-277).

There is no per se rule that improper conduct by a juror mandates the granting of a mistrial, but rather a defendant must demonstrate that the improper conduct on behalf of the juror resulted in prejudice to the defendant. In *Commonwealth v. Tharp*, 574 Pa. 202, 830 A.2d 519, 532-533 (2003), the Pennsylvania Supreme Court set forth the basis for making a determination as to when the granting of a mistrial would be appropriate.

> A defendant has the right to have his or her case heard by a fair, impartial, and unbiased jury and *ex parte* contact between jurors and witnesses is viewed with disfavor. *Commonwealth v. Brown*, 567 Pa. 272, 786 A.2d 961, 972 (2001). There is, however, no *per se* rule in this Commonwealth requiring a mistrial anytime there is improper or inadvertent contact between a juror and a witness. *See Commonwealth v. Mosley*, 535 Pa. 549, 637 A.2d 246, 249 (1993) (declining to adopt *per se* rule which would require disqualification of juror anytime there is *ex parte* contact between that juror and witness). Whether such contact warrants a mistrial is a matter addressed primarily to the discretion of the trial court. *Brown*, 786 A.2d at 972 (citation omitted). A trial court need only grant a mistrial where the alleged prejudicial event may reasonably be said to have deprived the moving party of a fair and impartial trial. *Commonwealth v. Fletcher*, 561 Pa. 266, 750 A.2d 261, 282 (2000) (citation omitted).

In *Commonwealth v. Jones*, 314 Pa.Super. 497, 461 A.2d 267 (1983), the Court determined that the Trial Court did not abuse its discretion in failing to grant a mistrial when one of the jurors allegedly fell asleep during the Court's charge. Similarly, in *Commonwealth v. Box*, 481 Pa. 62, 391 A.2d 1316 (1978), the Court determined that the denial of a motion for a mistrial because of incompetent testimony and the unusual conduct by a juror was not error.

In order for a defendant to be entitled to the granting of a request for a mistrial, the conduct or misconduct of a juror must result in prejudice to the defendant. *Commonwealth v. Neff*, 860 A.2d 1070 (Pa.Super. 2004). It is clear from a review of the testimony of Juror No. 10 and Steiner that Carey was unable to demonstrate how she was prejudiced by the alleged misconduct of Juror No. 10. Juror No. 10 and Steiner neither were unequivocal in the fact that Juror No. 10 never discussed Carey's case with Steiner nor asked any questions of Steiner about Carey's case. Both Juror No. 10 and Steiner indicated that the substance of their conversation dealt with generic procedural questions to which Steiner did not provide Juror No. 10 with any definitive answers. Having failed to demonstrate how she could have been prejudiced, there was no basis upon which a mistrial could have been granted. However, a more fundamental flaw in Carey's claim of error is that no request for a mistrial was ever made.

Pursuant to Pennsylvania Rule of Criminal Procedure 605,[1] only a defendant can move for a mistrial and that must occur when a prejudicial event has occurred. Absent that request, a Trial Court can only declare a mistrial on the basis of manifest injustice. Here, no request for a mistrial was ever made and therefore there was no basis for this Court to have erred in failing to grant that request. Since Carey was unable to demonstrate how she was prejudiced, it is difficult, if not impossible, to understand how Juror No. 10's actions would be equivalent to manifest injustice. Since Carey never made a request for a mistrial pursuant to Pennsylvania Rule of Criminal Procedure 605, this claim of error is waived. *Commonwealth v. Ables*, 404 Pa. Super. 169, 590 A.2d 334 (1991).

Cashman, J.

Dated: May 8, 2008

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[1] Rule 605. Mistrial

(A) Motions to withdraw a juror are abolished.

(B) When an event prejudicial to the defendant occurs during trial only the defendant may move for a mistrial; the motion shall be made when the event is disclosed. Otherwise, the trial judge may declare a mistrial only for reasons of manifest necessity.

# CAPSULE SUMMARIES

## Michele Siciliano v. Vincent J. Siciliano

*Support—Earning Capacity and Special Needs Children—Income from Family Owned Business—Deviation for Medical Expenses*

1. The support hearing was designated complex due to issues regarding Wife's earning capacity, Husband's income from family businesses and expenses for ongoing medical care of the children, one with Asperger's Syndrome and the other with Pervasive Development Disorder.

2. The Court affirmed the Hearing Officer's decision, finding that Wife had an earning capacity of $11,907.00 annually–one-half of a full time wage. Wife was a high school graduate with two years of college and had worked as a waitress and in insurance sales.

3. The Hearing Officer correctly established Wife's earning capacity at a half time position because she is primarily responsible for meeting the children's special needs that include supervision with homework and "extraordinary time" required for shopping and meal preparation and house cleaning due to the children's allergies and sensitivities. Prior to separation, the parties had a cook and housekeeper to assist with the children's needs.

4. Husband's earned income from his salaried employment as a construction manager was not disputed and the Hearing Officer set his net monthly income at $3,864. The Court, granting Wife's exceptions, determined that Husband's income from multiple family owned businesses in the form of distributions, advances and loans constituted income available for support and established his net income at $8,448 per month. *See: Blaisure v. Blaisure*, 577 A.2d 640 (Pa.Super. 1990); Pa. R.C.P. 1910.16-2 (a).

5. The Court considered that Husband had $90,000 in consulting and real estate management fees in the year prior to separation and $320,000 in various loans from a family partnership. Husband had not attempted to repay the loans and there was no schedule of repayment. The Court also noted that Husband paid rent to his father of $3,800 per month.

6. A guideline deviation to cover the children's predictable and reasonable unreimbursed medical expenses was appropriate where the parties' incomes could sustain the payment and the parties consented to the treatments during the marriage.

7. Husband's application to the trial court for a supersedeas was denied. Husband's relief was a petition to the Superior Court. Pa.R.A.P. 1732(h)

*(Hilary A. Spatz)*

*Robb D. Bunde* for Plaintiff.
Vincent J. Siciliano, *Pro Se.*
No. FD 06-00935 (002). In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.
Hens-Greco, J., May 15, 2008.

## Michael Faber v. Kythryn Cyphert

*Modification of Partial Custody to Shared Physical Custody—Requirements of Shared Custody Met—Parents' Ability to Communicate and Status Quo Considered—Teenager's Preference*

1. Unmarried separated parents entered into a consent order in 2001 providing Mother with primary physical custody and Father with partial custody of their son. In 2005 when child was 13, Father sought modification of the order and the matter was tried after court-mandated mediation and conciliation when the "child" was 15 years of age.

2. Court entered order of alternating weekly custody and co-parent counseling, denying Father's request to become primary custodian during the school year. Mother appealed, raising two issues: that parties' inability to communicate and her 15-year role as primary custodian did not support a shared physical custody arrangement.

3. Shared custody order was supported by evidence that the four prong standard had been met. *See: Wiseman v. Wiseman*, 718 A.2d 844 (Pa.Super. 1998).

4. Despite difficulties caused in large part by Mother's hostility, arising when Father married and requested additional custodial time, the parties' history of effective communication, with the safeguard of co-parent counseling, provided sufficient basis to support finding that parents had ability to communicate. Mother cannot be the cause of communication problems and then raise the issue as a defense against the appropriateness of shared custody.

5. The status quo is not dispositive of a modification request when altering the custody schedule is in the child's best interest. Modification of the long-standing status quo was warranted as it will promote child's best academic and emotional well-being; fewer custody exchanges will reduce opportunities for conflict and the teenager preferred to spend more time with his father, so long as he was not required to change school districts.

6. The court did consider the status quo and Mother's role as primary caregiver and the positive traits she instilled in child. Despite the evidence that Mother's actions were in part harming the child's academic performance, at the root of the parties' inability to communicate creating open hostilities witnessed by the child, the status quo was considered in denying Father's request for primary school year custody.

*(Hilary A. Spatz)*

*Elizabeth A. Beroes* for Plaintiff.
*Donna Allen Rosemond* for Defendant.
No. FD 97-002421 (005). In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.
Mulligan, J., March 5, 2008.