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Opinions deemed appropriate for publication are not disqualified because of the identity, profession or community status of the litigant. The guide to publication is the helpfulness of the opinion to practitioners in the particular area of law. All opinions submitted to the PLJ are reviewed for publication and will only be disqualified or altered by Order of Court.

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.

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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.

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Michele J. Alexander, individually, and t/d/b/a WinACrown by Lily Entertainment v. Stephen T. Lupinetti, individually, and t/d/b/a Miss Pittsburgh and/or Miss Greater Pittsburgh, and Miss Pittsburgh Scholarship Organization, a Pennsylvania Nonprofit Corporation

Res Judicata—Preliminary Objections—Trademarks

1. The issue raised in preliminary objections was whether *res judicata* bars the present case relating to trademark issues. The Court overruled the preliminary objections, claiming that defenses based upon the doctrine of *res judicata* were to be raised as new matter.

2. Plaintiff asserts that she was assigned the "Miss Pittsburgh" trademark, but that the documentation thereof was not recorded until later.

3. At the time Plaintiff's predecessor, Coronation, attempted to federally register the trademark, it was opposed by a proprietor of a previously registered mark "Miss Pittsburgh U*S*A" on the basis that the mark was likely to cause confusion and may falsely suggest a connection with the opposer. As Coronation failed to answer, the Trademark Trial and Appeal Board (TTAB) of the United States Patent and Trademark Office entered a default judgment against Coronation.

4. Defendant's preliminary objections assert that because Coronation failed to file an answer in the TTAB hearing, Plaintiff's claims are barred in this case by *res judicata.* The Court disagreed, finding that TTAB decisions do not have any preclusive effect in subsequent actions because the Lanham Act provides for "extensive judicial involvement in a trademark infringement action" and because *de novo* appeals are statutorily provided.

5. The Court stated that *res judicata* must be raised as new matter, not in preliminary objections. However, the *Button* case states that if an answer is filed in response to preliminary objections and does not assert error in improperly raising *res judicata,* the answering party waives the right to object to the form of pleading. In other words, if a party fails to file preliminary objections to the "defective preliminary objections" is waived the procedural defect and the trial court may rule on the preliminary objection. Here, Plaintiff addressed the default judgment issue raised by Defendant, which permitted the Court to address and rule upon the *res judicata* issue. The Court found Plaintiff's claims were not barred.

(Angel L. Revelant)

Peter J. King for Plaintiff.
William E. Otto and *Brian W. Ashbaugh* for Defendant.

No. GD 05-011873. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM ORDER OF COURT

Ward, J., January 23, 2008—Presently before the Court is a motion for reconsideration filed by Defendants Stephen Lupinetti and Miss Pittsburgh Scholarship Organization ("MPSO"). Defendants challenge this Court's November 14, 2007 order, which disposed of Defendants' preliminary objections.

This case relates to the business of producing pageants, in which young girls, teenage girls, and unmarried young women who reside in the Greater Pittsburgh area compete for prizes and the title of "Miss Pittsburgh." In January 1996, non-party Coronation, Inc. registered and recorded the Miss Pittsburgh trademark in Pennsylvania. In 1996, Coronation attempted to federally register the mark, but failed, as it defaulted in a United States Patent and Trademark Office ("USPTO") proceeding before the Trademark Trial and Appeal Board ("TTAB") because Coronation did not respond to opposition to her application. Plaintiff Michelle Alexander states that, in 1998, Coronation assigned the Miss Pittsburgh trademark to her. However, according to Plaintiff, a "replacement [registration] document" was not recorded until 2004 because the original registration document had been lost in a flood.

In their preliminary objections, Defendants argued, *inter alia*, that the doctrine of *res judicata* barred the claims set forth in Plaintiff's complaint. In the November 14, 2007 order, this Court overruled this objection, stating that a defense based on the doctrine of *res judicata* is to be raised as new matter, rather than in preliminary objections. Defendants now request reconsideration of this ruling.

Generally, "*res judicata* must be raised as new matter, Pa.R.C.P. 1030, and may not be raised in preliminary objections." *Button v. Button*, 378 Pa.Super. 142, 145, 548 A.2d 316, 318 (1988). In *Button*, the defendant filed preliminary objections, which included a claim of *res judicata*. *Id.* Rather than file preliminary objections to defendant's preliminary objections, the plaintiffs filed an "answer" to the defendant's preliminary objections. In their answer, the plaintiffs set forth "uncertified allegations of fact concerning the earlier adjudication," upon which the defendant's *res judicata* claim was based. *Id.* The Superior Court held that, by filing such an answer, the plaintiffs waived the right to object to the defendant's form of pleading. *Id.*

In a more recent case, the Superior Court, citing *Button*, explained: "Where a party erroneously asserts substantive defenses in preliminary objections rather than to raise these defenses by answer or in new matter, the failure of the opposing party to file preliminary objections to the defective preliminary objections, raising erroneous defenses, waives the procedural defect and *allows* the trial court to rule on the preliminary objections." *Preiser v. Rosenzweig,* 413 Pa.Super. 341, 614 A.2d 303, 305 (1992) (emphasis added).

In the present case, in one of her supplemental responses to Defendants' preliminary objections, Plaintiff briefly addresses the default judgment entered against her predecessor-in-interest in the federal proceeding. *See* Plaintiff's 9/7/07 Supplemental Response at 17-18. The case law cited above suggests that, under these circumstances, this Court is permitted, rather than compelled, to consider Defendants' *res judicata* defense at this point in the proceedings. In the interests of judicial economy, this Court now rules on this asserted defense as follows.

On October 28, 1996, Coronation filed an application in the USPTO to register the mark "Miss Pittsburgh." On January 5, 1998, Christine M. Abbinanti ("Opposer"), d/b/a Celebrity Pageant Productions, filed a Notice of Opposition to the application, arguing, *inter alia*, that: (1) the mark was likely to cause confusion, as Opposer had previously registered the mark "Miss Pittsburgh U*S*A – A Talent Pageant for Youths between ages 3-19 who reside in Pittsburgh + surrounding Counties. The winners (Queens) would be named this title"; (2) due to the similarity of the marks, "Applicant's mark consists of and comprises matter that may disparage and falsely suggest a connection with Opposer"; and (3) Coronation's mark "is merely descriptive and/or pri-

marily geographically descriptive in that said mark is an apt and common term used to describe goods and/or services of the nature involved herein." Because no answer was filed, the TTAB entered a default judgment against Coronation on August 20, 1998.

According to Defendants, because Coronation did not respond to the arguments raised in the TTAB proceeding, the doctrine of *res judicata* bars her from opposing them in the present case. This Court disagrees.

"Pursuant to the doctrine of *res judicata*, a final judgment on the merits by a court of competent jurisdiction will bar any future suit between the parties or their privies in connection with the same cause of action." *Yamulla Trucking & Excavating Co., Inc. v. Justofin*, 771 A.2d 782, 784 (Pa.Super. 2001). The doctrine of *res judicata* does not bar Plaintiff's claims in the present case, as the weight of authority indicates that TTAB decisions do not have any preclusive effect in subsequent actions. *See Freedom Sav. & Loan Ass'n v. Way*, 757 F.2d 1176, 1180 (11th Cir., 1985) (holding that a determination of the TTAB was not preclusive on the court in a trademark infringement action: "Congress limited the *res judicata* or collateral estoppel effect to be given the decisions of the TTAB because the Lanham Act provides for extensive judicial involvement in the registration and protection of trademarks…. [T]he ability of courts to hear appeals [from the TTAB pursuant to 15 U.S.C. §1071(b)] on a *de novo* basis reflects a Congressional intent not to invoke the immunizing doctrines of *res judicata* or collateral estoppel with regard to TTAB proceedings."); *American Heritage Life Ins. v. Heritage Life Inc. Co.*, 494 F.2d 3, 9 (5th Cir., 1974) (same).

AND NOW, this 18th day of January 2008, after argument and consideration of the briefs filed, it is hereby ORDERED, ADJUDGED AND DECREED that Defendants' motion for reconsideration of this Court's November 14, 2007 order is DENIED.

BY THE COURT:
/s/Ward, J.

Jane Doe and John Doe, wife and husband v. J.J. Gumberg Company

Criminal—Constitutional—PA Civil Procedure

1. Victims sued owner of local mall, alleging that owner failed to maintain safe conditions for customers, causing mother and daughter to be kidnapped and mother raped while daughter held at knife point.

2. Victims desired to use pseudonyms in place of their actual names in the pleadings.

3. The Court allowed the use of pseudonyms because the government has an important interest in enabling the identity of a victim of a horrific crime of kidnapping and rape to be protected, outweighing the presumption of openness.

(Danielle D. Rawls)

William Pietragallo II for Plaintiffs.
Thomas V. Gebler, Jr. for Defendant.

GD 07-012788. In the Court of Common Pleas Allegheny County, Pennsylvania, Civil Division.

OPINION

Ward, J., November 15, 2007—Appellant J.J. Gumberg Company appeals an Order of this Court, dated September 17, 2007, denying a preliminary objection challenging Plaintiffs' use of the pseudonyms "Jane Doe" and "John Doe" in place of their actual names in all of their pleadings.

On June 19, 2007, Plaintiffs-Appellees Jane Doe and John Doe, husband and wife, filed a complaint against Defendant-Appellant J.J. Gumberg Company, owner of Waterworks Mall, alleging that, as a result of Appellant's negligent failure to maintain safe conditions for its customers, Jane Doe and her 16-month daughter were kidnapped and Jane Doe was raped and robbed as the perpetrator held a knife to her daughter's throat.

On August 16, 2007, Appellant filed preliminary objections, arguing, *inter alia*, that Appellees' use of pseudonyms violates Pennsylvania Rule of Civil Procedure 1018.[1] In support of its argument, Appellant primarily relied on the Superior Court's decision in *R.W. v. Hampe*, 426 Pa.Super. 305, 626 A.2d 1218 (1993).

In *Hampe*, the plaintiff instituted a malpractice action utilizing her full name on the caption of the complaint, alleging that the defendant negligently rendered psychiatric care. *Id.* at 1219. About a year after she filed her complaint, the plaintiff filed a Petition to Partially Seal the Record. *Id.* The Superior Court framed the issue before it as follows: "In this appeal we decide whether the plaintiff in a malpractice action may be identified in the caption by her initials alone." *Id.* Although the suit involved intimate sexual and emotional matters that the plaintiff had revealed to the defendant, the Superior Court denied her request to partially seal the record, stating that "some degree of embarrassment or revelation of personal matters accompanies every type of medical malpractice action." *Id.* at 1224 n.3.

In *Hampe*, the Superior Court identified several types of proceedings where closure may be appropriate, including divorce cases (due to the private nature of such cases), hearings under the Juvenile Act (for the protection of minors' privacy interests), certain criminal cases (where a fair trial would be impossible due to pre-trial publicity, or where the safety of informants and the integrity of an ongoing investigation are at stake), and certain hearings conducted under the Mental Health Procedures Act (when a person's medical records or other information intruding on one's privacy will be presented). *Id.* at 1222. The Superior Court did not state that this list of exceptions is exclusive, and indicated that the issue before it could be resolved by a common law balancing approach, where a party must show that her personal interest in secrecy outweighs the traditional presumption of openness. *Id.* at 1220 n.3.

A party may overcome the well-established presumption of openness by demonstrating good cause. *See* Goodrich Amram 2d §223(a):7. Good cause will be established where closure is "necessary in order to prevent a clearly defined and serious injury to the party seeking" closure. *Id.*

At least one Pennsylvania court has found that closure is proper under circumstances similar to those present in the instant case. In *Doe v. National Railroad Passenger Corporation (Amtrak)*, 1997 WL 116979 (E.D.Pa.) (unpublished), the United States District Court for the Eastern District of Pennsylvania sealed the record in a civil case in which the plaintiff alleged that the defendant's negligence and existing defective conditions at the Downington Pennsylvania train station led to her being attacked and raped. *See Doe v. National Railroad Passenger Corporation (Amtrak)*, 1995 WL 303707 (E.D.Pa.) (unpublished). After balancing the plaintiff's privacy interests against the interest for public access, the court found that the sealing of the

record was proper, explaining:

> Rape is a serious violation of a person's body as well as dignity; it's an event which stirs many different emotions. One of them certainly could be embarrassment. The trial transcript reveals the true identity of the plaintiff. Therefore, the plaintiff has a strong interest in sealing the transcript to maintain her privacy in this matter. Although the information in the trial transcript may have a bearing on the public safety at Downingtown station, the incident of rape occurring at the station can be discovered from other sources other than the trial transcript, *i.e.* the other documents associated with this matter. Furthermore, the plaintiff is not a public official. Also, the civil case does not appear to involve issues of a public matter.

Amtrak, 1997 WL 116979, at *1.

In the present case, Appellant argues that, unlike a criminal prosecution in which the victim may be compelled to appear, Appellees "have placed themselves and the unfortunate incident into the public arena by filing this action." Defendant's Brief at 7. However, the Superior Court has not gone so far as to say that a plaintiff's request for closure should never be granted unless that plaintiff had been compelled in some way to take part in the suit. Instead, the court acknowledged that a common law balancing approach was appropriate, and that "a trial court's decision to grant or deny closure of the record will be reversed by this Court only upon a determination that the trial court abused its discretion." *Id.* at 1220. Like the District Court for the Eastern District of Pennsylvania, this Court is of the opinion that under the circumstances of this particular case, even in a civil suit initiated by a rape and kidnapping victim involving her child, at least some form of closure is proper in order prevent disclosure of the victim's identity and further injury to the plaintiff.

This Court's ruling is limited to the facts of this case. There may be cases in which a defendant disputes a plaintiff's assertion that she was in fact raped, thus putting the plaintiff's credibility at issue. Additionally, there may be cases in which the concealment of a plaintiff's identity otherwise unfairly hampers a defendant's ability to defend him- or herself, a concern noted by the Superior Court in *Hampe*. However, such concerns were not presented by the Defendant in the present case. Thus, at this time, this Court need not–and does not–rule as to whether closure is proper when such concerns exist.

Although the criminal prosecution of Jimmy Lee Tayse, the man who kidnapped Jane Doe and her daughter and raped Jane Doe, was pending at the time Appellant filed its preliminary objections, Appellant never disputed the fact that Jane Doe had, in fact, been kidnapped by Tayse while Tayse held a knife to the throat of her 16-month-old daughter and then raped by Tayse;[2] nor were any other issues regarding Appellees' credibility raised. Additionally, at argument, Appellant conceded that it was aware of Appellees' actual identities. Thus, there is no indication that Appellant's ability to conduct an investigation in support of its defense has been hampered by Appellees' use of pseudonyms.

In their brief in support of their preliminary objections, Appellant also makes a fleeting reference to its right to free speech. When analyzing the issue of free speech, "the presumption of openness may be rebutted by a claim that the denial of public access 'serves an important governmental interest and there is no less restrictive way to serve that government interest.'" *Hampe*, 426 Pa.Super. at 310 n.3, 626 A.2d at 1220 n.3.

The government has an important interest in enabling a victim of a horrific crime of kidnapping and rape, where the perpetrator held a knife to the throat of the victim's 16-month-old daughter, to pursue claims against those whose alleged negligence may prove to be a cause of the crimes. The prospect of such a suit is likely to deter any such negligent conduct or omissions in the future. If a rape victim such as Jane Doe were not able to pursue such claims without revealing her identity, it is less likely that she would initiate such an action. The use of a pseudonym or initials in place of the victim's actual name is the least restrictive manner in which this interest may be served.

In sum, the Pennsylvania appellate courts have not precluded the possibility of plaintiffs proceeding in a civil suit without disclosing their names to the general public. Instead, absent an abuse of discretion, the decision regarding this issue is left to the trial court employing the balancing test endorsed by the court in *Hampe*. In light of the violent, horrific, intimate and embarrassing nature of the crime of which she was a victim, there exists good cause for permitting Jane Doe (as well as her husband) to use pseudonyms in place of her (and his) actual name(s). This ruling is limited to the facts of the present case, and this Court expresses no opinion as to whether closure is proper in cases where there are concerns regarding a plaintiff's credibility, a defendant's ability to defend him- or herself, and/or improper restrictions on others' right to free speech.

Therefore, the findings and determinations of this Court should be sustained.

BY THE COURT:
/s/Ward, J.

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[1] Pa.R.Civ.P. 1018 provides: "Every pleading shall contain a caption setting forth…the names of all the parties…."

[2] Even if Appellant argued that Jane Doe had not been raped, such argument would fail, as, following this Court's ruling on Appellant's preliminary objections, Tayse was convicted of raping her.

Elizabeth F. Bjerke, Personal Representative of the Estate of Richard Bjerke, deceased v. Laura Bjerke n/k/a Laura Rousseau

Dead Man's Act—Re-Opening of Equitable Distribution

1. Plaintiff is the representative of the estate of her deceased husband, who was previously married to Defendant. At the time of divorce, Defendant and her then-husband entered into a Consent Order for equitable distribution awarding Defendant cash and retirement assets.

2. Although Defendant received the cash portion of the equitable distribution award, a Qualified Domestic Relations Order (QDRO) was not finalized with regard to the retirement benefits. Prior to the finalization of the QDRO, the deceased took his own life. Several weeks later, Defendant presented a motion to effectively cause entry of the QDRO *nunc pro tunc,* which was denied by the Court. The Defendant alternatively requested that equitable distribution be re-opened, for which the Court scheduled a hearing.

3. The first issue was whether the Court could consider testimony of Wife at the hearing as Plaintiff objected pursuant to the Dead Man's Act. The Act applies to matters occurring before death and precludes testimony where a deceased person "has an interest in the matter at issue" and where "a witness will gain or lose as a direct legal effect of the judgment."

4. The Court found that before Wife could re-open equitable distribution, she must show that the agreement between the parties was not fulfilled. Although Wife could testify about her attempts to obtain the QDRO and occurrences after her former husband's death, she was precluded from testifying regarding all other matters occurring before death.

5. The second issue before the Court was whether equitable distribution should be re-opened and whether the Court had authority to do so. Although cases exist enforcing equitable distribution orders when one party dies prior to entry of the divorce decree, the parties were divorced and the husband was remarried. The Court found that the asset had passed to beneficiaries of the estate.

6. The Court found that in appropriate circumstances the equity powers of the court which permit enforcement or compliance with the order may also give it authority to re-open equitable distribution.

7. The Court viewed this issue as a matter of first impression, and found, as a matter of equity, equitable distribution should be re-opened, as Defendant would otherwise be deprived of "almost half of her equitable distribution share solely because Husband committed suicide before distribution could be fully effectuated." The Court found that because the need for relief was through no fault of the requesting party, a hearing should be held on equitable distribution.

(Angel L. Revelant)

Charles Pegher and *Rebecca Morris-Chatta* for Plaintiff.
Daniel H. Glasser for Defendant.

No. FD 04-008125-003. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

OPINION

Wecht, J., October 14, 2008—This Opinion addresses the issues of whether Defendant Laura Rousseau ["Wife"] may testify at a hearing to re-open equitable distribution and whether this Court may re-open equitable distribution after Richard J. Bjerke ["Husband"]'s death.

Background

Husband and Wife married on October 11, 1997. One child was born during the marriage. Husband and Wife separated on September 23, 2004, and divorced on June 5, 2007. Husband married Elizabeth Ferrell ["Ms. Bjerke"] on July 13, 2007.

On May 7, 2007, Husband and Wife executed a Consent Order for equitable distribution. Husband agreed to pay Wife $119,276 in cash and $100,000 in a transfer from his retirement accounts. Wife agreed to a termination of the alimony/alimony *pendente lite* payments that she was receiving. Husband made the $119,276 cash payment. Husband was to inform Wife's counsel which retirement account was to be used for the $100,000 transfer. Husband complied with this requirement as well. However, no QDRO was executed, and the transfer did not occur.

On April 12, 2008, Husband took his own life. On May 23, 2008, Wife presented a Motion for Entry of Qualified Domestic Relations Order. A hearing was scheduled on the matter. On June 25, 2008, this Court denied Wife's request for a *nunc pro tunc* QDRO, but scheduled a hearing on Wife's request to re-open equitable distribution. That hearing occurred on September 29, 2008.

Discussion

The first issue to address is whether this Court may consider testimony Wife gave at the September 29 hearing. Ms. Bjerke objected to Wife's testimony as being precluded by the Dead Man's Act. 42 Pa. C.S.A. §5930. This Court denied Ms. Bjerke's objection without prejudice, allowed Wife to testify, and preserved Ms. Bjerke's objection so that her cross-examination did not constitute a waiver of the objection, and so that this Court could strike the testimony (in whole or in part) if appropriate after taking the matter under advisement.

Under the Dead Man's Act, a witness is disqualified from testifying in circumstances where: the deceased had an interest in the matter at issue; and the interest of the witness is adverse to the decedent's estate; and the right of the deceased has passed to a party of record representing the estate. *In re Rider's Estate*, 409 A.2d 397, 399 (Pa. 1979). The test for interest is whether a witness will gain or lose as a direct legal effect of the judgment. *In re Groome's Estate*, 11 A.2d 271, 273 (Pa. 1940). An interest is adverse when the immediate result of the particular suit would cause a loss or gain to the witness, not when the effect of the particular suit would arise in other possible actions. *Billow v. Billow*, 61 A.2d 817, 819 (Pa.Super. 1948).

Generally, in cases where one spouse has died, testimony about a postnuptial agreement is precluded. *In re Estate of Hartman*, 582 A.2d 648, 652 (Pa.Super. 1990). Where the parties had an agreement to disclaim their elective shares, the husband could not testify about the validity of the agreement after the wife's death. *Id.*[1] In the *Hartman* case, the husband had the burden to show the agreement was invalid before he could attempt to elect against the estate of the wife. But the husband was precluded from testifying about the validity of the agreement, particularly with respect to whether there was full and fair disclosure.

The instant case is similar. Before she can re-open equitable distribution, Wife first must show that the agreement was not fulfilled. The Dead Man's Act applies to "matters occurring before the death." 42 Pa. C.S.A. §5930. Wife's testimony regarding the attempt to obtain the QDRO, and about anything else that occurred after Husband died, is admissible. The other testimony by Wife is excluded, and accordingly stricken from the record.

The second issue is whether equitable distribution should be re-opened. In the *Reese* case, there was an equitable distribution order upon which both parties relied and acted prior to the death of the wife. *Reese v. Reese*, 506 A.2d 471, 472-73 (Pa.Super. 1986). Because the parties willingly agreed to the order and had acted upon it, the wife's death, prior to entry of a divorce decree, did not affect the agreement. *Id.* at 475. Similarly, where the husband died after a marital settlement agreement and consent order had been entered, but prior to the divorce decree, the contract was found to be enforceable. *In re Estate of Bullotta*, 838 A.2d 594, 597 (Pa. 2003). In *Bullotta*, the Supreme Court determined that the action required under the contract was not unique to the individual, and that the estate could complete the contract such that the contract was not voided by the husband's death. *Id.*

These cases are distinguishable from the case at bar. In this case, the divorce decree issued before Husband died.

Husband's estate cannot complete the agreement. The estate cannot enter a QDRO, because the asset already has passed to the beneficiaries.

The crux of the issue–vigorously disputed by Wife and Ms. Bjerke–is whether this Court has the authority to re-open equitable distribution. Most cases indicate that equitable distribution cannot be re-opened beyond the thirty-day limit allowed by the Rules. *See, e.g., Ratarsky v. Ratarsky,* 557 A.2d 23 (Pa.Super. 1989). Other cases, involving assets that were not included in equitable distribution, also have concluded that equitable distribution should not be re-opened. *See, e.g., Major v. Major,* 518 A.2d 1267 (Pa.Super. 1986); *Beamer v. Beamer,* 479 A.2d 485 (Pa.Super. 1984).

Two other cases, however, suggest that a trial court has the power to re-open equitable distribution in appropriate circumstances. Relying on 23 Pa. C.S.A. §3104 (a)(1), which provides continuing jurisdiction over the determination and disposition of property rights between spouses, 23 Pa. C.S.A. §3502(e)(4), which allows for an order for transfer or sale of property when a party does not comply with equitable distribution, and P.R.C.P. 1920.43, which allows the trial court to use equity powers to grant petitions for special relief, appellate courts approved re-opening of equitable distribution in *Wagoner v. Wagoner,* 648 A.2d 299 (Pa. 1994), and *Romeo v. Romeo,* 611 A.2d 1325 (Pa.Super. 1992).

In view of these latter cases, it appears that this court's equity powers properly may be invoked now to modify equitable distribution. There is an issue of equity here. Wife was deprived of almost half her equitable distribution share solely because Husband committed suicide before distribution could be fully effectuated. In *Romeo* and *Wagoner*, there was less than a year between the decree and the request for modification. Here, slightly over a year has passed. In *Romeo* and *Wagoner*, the need for the modification–a change in the housing market and loss of a job, respectively–came through no fault of the requesting party. Here, Wife is requesting the modification because of Husband's death, which occurred through no fault of hers. The cases suggest appellate willingness to effectuate the parties' agreements even after the death of a party.

This appears to be an issue of first impression. As a matter of equity, and absent compelling distinction between the instant case and the *Romeo* and *Wagoner* cases, the equitable distribution order herein may be re-opened.

It bears noting that both options present serious practical difficulties. If equitable distribution is not re-opened, Wife will have to pursue her claim among the other various creditors in what Ms. Bjerke has admitted is an insolvent estate. On the other hand, a new equitable distribution proceeding will be problematic. The Dead Man's Act presumably will preclude Wife from testifying on most issues. It also is not clear that Ms. Bjerke will have necessary or relevant information.

On balance, as discussed, re-opening equitable distribution appears to be the best way (albeit an imperfect one) to try to work some measure of economic justice as between Husband and Wife. In the real world, the practical difficulties mean that neither this option (nor the estate litigation option this Court has declined) will be able to render anything approaching perfect justice.

This Court will grant Wife's motion. An Order follows.

ORDER OF THE COURT

AND NOW, this 14th day of October, 2008, following record hearing on September 29, 2008, and in accordance with the foregoing Opinion, it is hereby ORDERED that:

1. Plaintiff's Dead Man's Act objection to Wife's September 29, 2008 testimony is GRANTED IN PART and DENIED IN PART, *nunc pro tunc,* and Wife's testimony is stricken in part, as set forth in the foregoing Opinion; and

2. Wife's request to re-open equitable distribution is GRANTED; and

3. A full-day hearing on equitable distribution is scheduled on the 4th day of December, 2008, beginning at 9:30 A.M., in Room 4029, 440 Ross Street, Pittsburgh, Pennsylvania 15219; and

4. A Pre-Trial Order will follow.

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

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[1] However, a sister did not have an adverse interest when her testimony would help her brother claim money and the sister would only get a share if the brother chose to give it. *Commonwealth Trust Co. v. Szabo,* 138 A.2d 85, 89 (Pa.Super. 1957).

David A. Eaborn and Michele L. Eaborn, his wife v. Township of Findlay

Jury Trial—Judgment N.O.V.—Expert Testimony—Political Subdivision Tort Claims Act

1. Plaintiffs filed a Complaint for negligence when their property flooded and sustained damages due to a damaged sewer drainage pipe. In dispute was who installed and maintained the pipe and who caused the damage to it. Each party alleged that the other installed and damaged the pipe.

2. The Defendant's Motion for Summary Judgment was denied due to the factual dispute over installation of and damage to the pipe. Following a two-day trial, the jury returned a verdict via Answers to Interrogatories in favor of Plaintiffs in the amount of $40,000 plus delay damages.

3. Defendant's Motion for Post-Trial Relief requesting Judgment Non Obstante Veredicto (N.O.V.) or a new trial was denied and Defendant appealed.

4. Since the jury found that Defendant owned and damaged the pipe and Defendant offered "no credible reasons… to disturb the jury's verdict," the request for judgment notwithstanding the verdict was denied.

5. The Court then addressed Defendant's assertions of error with regard to the expert testimony of the surveyor. The surveyor, with thirty years of experience and previous service as an expert witness, was qualified as an expert.

6. The final error asserted by Defendant was that the Plaintiffs were permitted to introduce evidence of diminished value of their home as a "property loss" under the Political Subdivisions Tort Claims Act. This Act requires a determination of whether the agency had notice of a "dangerous condition which created a reasonably foreseeable risk of the kind of injury that occurred." This determination is a question of fact for a jury.

7. While Defendant agreed that personal property losses

were recoverable, it asserted that damages for loss of future value were not. The Court disagreed, finding that the evidence showed the property was reassessed for a lower value after the flood damage occurred and that damages are meant "to make a plaintiff whole." While the verdict was similar to the reduction in assessment value, it was not equal, and the Plaintiff presented evidence of damages sustained to personal property as well as to the property itself

(Angel L. Revelant)

Daniel L. Sautel for Plaintiffs.
Gretchen K. Love for Defendant.

No. GD 05-24128. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Della Vecchia, J., August 20, 2008—This matter comes before the Commonwealth Court on the appeal of the Township of Findlay from this Court's denial of its Motion for Post-Trial Relief dated April 10, 2008.

I. BACKGROUND

This action was commenced by a complaint filed October 3, 2005 containing a single count of negligence against the Township of Findlay (hereinafter "Defendant"). David A. Eaborn and Michele L. Eaborn (hereinafter "Plaintiffs") alleged that flooding which occurred on or about September 17, 2004 at their home in Findlay Township was caused by the Defendant's negligence in failing to properly maintain a storm sewer located near their home. The line had become obstructed, which resulted in the backup of storm water, which flooded Plaintiffs' home.

Plaintiffs' home, commonly referred to as 93 Rodgers Drive, was built as part of a residential development by J-MAC Real Estate Service, Inc. The storm system was conveyed to the Defendant upon completion of the development and is depicted on "as built" diagrams received by the Defendant on October 19, 1992.

In connection with the purchase of their home, the Eaborns had a survey performed by Robert E. Garlitz & Associates, Professional Surveyors, on November 14, 2000. According to the survey, more than one half (1/2) of the Plaintiffs' lot is subject to a storm water management easement in favor of the Defendant. The survey also depicts the existence and location of an exposed storm pipe within the Defendant's easement. Plaintiffs assert that this storm pipe was open and obvious as of November 14, 2000, more than two (2) weeks before the Plaintiffs closed on their home.

The storm system consisted of a series of underground pipes that stretched 126 feet from the rear of the Plaintiffs' home to the street. The storm sewer ended at a cement wall. The wall contained the open end of the underground pipe and storm water was discharged at that point into an open channel, which flowed into a catch basin behind Plaintiffs' property. A key issue in this case was the ownership of a black pipe attached to the said cement culvert, which extended the sewer drainage to the back of Plaintiffs' property.

Plaintiffs' allege that the Defendant was negligent in the construction and maintenance of its storm water system. Specifically, Plaintiffs claimed that Defendant was negligent for, *inter alia*; "[f]ailing to install the correct diameter storm sewer pipe; [f]ailing to install [a] storm sewer pipe of the correct type and material; causing damage to the storm sewer by driving over it with heavy equipment…" (*See* Pre-Trial Statement, pg. 1 and Complaint).

The Plaintiffs allege that the Defendant installed the disputed black pipe extension and used improper materials, specifically a black corrugated pipe of a smaller diameter than was required to discharge the storm water. The Plaintiffs further allege that the Defendant damaged this pipe, causing damage to their home, personal property, fixtures and equipment located in the garage and basement area of the home.

In addition, the Plaintiffs claimed diminution in the value of their home as a result of the flooding, which must be disclosed to any potential future buyer pursuant to Pennsylvania's Real Estate Seller Disclosure Law.

Defendant denies all allegations of negligence and contends that Plaintiffs themselves are responsible for said damages. The Defendant asserts that sometime in 2001, Plaintiffs, or a contractor hired by Plaintiffs, attached the smaller diameter plastic pipe to the discharge end of the Defendant's storm sewer pipe. Defendant further alleged that the action taken by Plaintiffs or their agents was for the purpose of extending the storm sewer approximately sixty (60) feet and that this action reduced the distance the storm water flowed in the open channel on its way to the catch basin.

The Defendant further contends that the smaller diameter pipe installed by the Plaintiffs was then buried in effort to extend the flat portion of the Plaintiffs' backyard and that it was in fact the Plaintiffs or their contractors that drove over the pipe, crushing it, which caused the subsequent flooding.

Plaintiffs denied all of Defendant's above set forth allegations.

II. PROCEDURAL HISTORY

As previously stated, a Complaint was filed at the above referenced general docket number on or about October 3, 2005. An Answer and New Matter was timely filed by the Defendant on or about October 24, 2005.

On or about April 13, 2007, the parties first appeared before this Court for argument on Defendant's Motion for Summary Judgment. Because there were certain disputed, fundamental facts; i.e. who installed the black corrugated pipe and who later crushed that same pipe causing the damages claimed, this Court denied said motion. (*See* Order of April 13, 2007, *see also*, Brief in Support and Brief in Opposition).

The case was then scheduled for trial on Allegheny County's November 2007 trial list. Just prior to trial this Court entertained argument and issued orders pertaining to several Motions in Limine filed by the Defendant. (*See* Docket Statement).

The case proceeded as a jury trial, which lasted two (2) days, beginning on December 4, 2007 and ending the following day. At the conclusion of testimony, the case was given to the jury to return a verdict via Answers to Interrogatories. The Interrogatories contained six (6) enumerated questions to be answered by the jury. The jury found in favor of the Plaintiffs and against the Defendant on each of the six (6) questions.

On December 5, 2007, this Court entered a Verdict in the above captioned case, pursuant to Answers to Interrogatories authored by the jury foreperson, which found in favor of the Plaintiffs and against the Defendant in the amount of $40,000. (*See* Verdict). Delayed damages were subsequently added to this award pursuant to Pa.R.C.P. 238, bringing the Plaintiffs' total award up to $44,289.87. (Judgment on Verdict, filed April 21, 2008).

A Motion for Post-Trial Relief requesting in the alternative either Judgment Non Obstante Veredicto or a new trial was filed December 13, 2007. On April 3, 2008, said Motion was argued before this Court. This Court subsequently denied the Defendant's prayer for relief. (*See* Order dated

April 10, 2008).

A Notice of Appeal was filed by the Defendants on May 9, 2008. In an Order dated May 22, 2008, this Court ordered counsel for the Defendant to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.C.P. 1925(b). The Defendant's Concise Statement was timely filed on or about June 12, 2008, placing this matter properly before the Commonwealth Court of Pennsylvania.

III. ISSUES RAISED ON APPEAL

> 1. The Court committed error by permitting Plaintiffs' claims to be decided by jury when they failed to present any evidence that Defendant owned the crushed pipe attached to its utility;
>
> 2. The Court erred in denying post-trial relief to Defendant based on Plaintiffs' failure to present evidence of ownership of the crushed pipe attached to its utility;
>
> 3. The Court erred in qualifying a surveyor as an expert when his testimony was no different than a layperson.
>
> 4. The Court erred, after qualifying the expert, in permitting him to testify as to facts not contained in his expert report and not provided in response to appropriate discovery requests;
>
> 5. The Court erred in instructing the jury to consider the testimony of the surveyor as [an] "expert";
>
> 6. The Court erred in permitting Plaintiffs' to present evidence in the decreased value to their home as "property losses" under the Political Subdivisions Tort Claims Act.

IV. DISCUSSION

The Court will address Defendant's Matters complained of *ad seriatim*. As to Defendant's first claim of error; that this case should not have gone to the jury; this Court finds it disingenuous to claim that the question of ownership of the pipe was in any way established prior to jury deliberations. From the date of the filing of the Complaint until the verdict was returned, the question remained, 'who installed the pipe?' The Plaintiffs continue to assert that the Defendant installed and maintained the pipe. The Township alleges that the Plaintiffs, either personally or through the use of private contractors, altered the storm water sewer system by adding the pipe and then crushed the pipe, resulting in the damages claimed.

This issue was highly contested. That is why our system of justice allows the use of jurors to act as fact finders and ultimately decide who altered the storm sewer system. With each party asserting the other installed and maintained the subject pipe, this Court had no choice but to allow the issue to go to the jury.

Plaintiff Husband, David Eaborn, testified that upon examination of the property prior to sale (November of 2000), he identified a piece of plastic pipe that measured eighteen (18) inches. (Tr. at 54). Plaintiff Husband went on to testify as to problems he later experienced with the detention pond located within the Township easement. Husband discussed the elevated level of water the detention pond was holding, which would rise to two to three feet in depth. (Tr. at 60). Husband was concerned with the danger the pond posed to his young children and contacted Township in hopes that they would rectify the problem. (*See Id.*).

The Township attempted to rectify this problem by dumping "rocks and stuff" into the pond to lower the depth of the water accumulating in the detention pond. (Tr. at 61). To accomplish this work the Township used heavy equipment, e.g. bulldozers, and accessed the property through Plaintiffs' yard. (Tr. at 61-62). Husband further testified to accomplish this, the bulldozers needed to back over the subject pipe. (Tr. at 62-63). The bulldozers were driving on or around the pipe in question for approximately one week. (Tr. at 63).

When Husband was asked directly regarding his knowledge of the origin of the subject black pipe, the pipe at issue which is charged with causing the flooding, the following exchange took place:

> Q. Now, just so we're clear for the record, the old black pipe, the 18-inch black pipe that was shown on Mr. Garlitz's survey, did you put that pipe in?
>
> A. No, I did not put that pipe in.
>
> Q. Do you know who put that pipe in?
>
> A. No, I do not know who put that pipe in.
>
> Q. Did you hire anybody to put that pipe in?
>
> A. No, I did not.
>
> Q. Did you ever have any excavation work done on your property since you have owned the property?
>
> A. Other than when they just had to level it a little bit for the swimming pool. That was the only thing that we had.
>
> Q. That was directly behind your house; right?
>
> A. Yes.
>
> Q. That was not in the easement, was it?
>
> A. No. No. That was on my property. (Tr. at 88-89).

Defendant maintains that the question of ownership is one of law. The property, including the storm system, was located within the Defendant's right of way. The property was maintained by the Township. All work completed on the site was done by the Township. Further, the plastic pipe in question was ultimately replaced by the Defendant with a new similar pipe after the flooding of the Plaintiff's home. The question of who installed the original corrugated pipe was the crux of this litigation and a proper issue to be decided by the jury.

The Defendant's second assignment of error, designated as "b," is covered above. This Court denied post-trial relief based on the testimony and evidence proffered at trial. It is obvious that the jury concluded the Defendant owned and damaged the subject pipe and Defendant offers no credible reasons to the Court to disturb the jury's verdict.

Defendant's next three (3) claims of error focus on the expert testimony of Plaintiffs' surveyor, specifically that his testimony was no different than that of a layperson. The Pennsylvania Rules of Evidence state, "if scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." (Pa.R.E. 702).

Defendant asserts that Mr. Garlitz's testimony lacked the necessary qualities to be considered an expert. At trial, Garlitz testified that he had been employed as a registered Pennsylvania Professional Land Surveyor for more than thirty (30) years and a Pennsylvania DEP certified Sewage Enforcement Officer with multiple professional affiliations. (Tr. at 40-42). Garlitz has also served as an expert witness consultant to the Pa. Department of State since 2002. (*Id.*).

Additionally, Garlitz had previously served as expert witness in prior litigations. (Tr. at 41). It can hardly be disputed that Garlitz is an expert in this field.

Defendant claims that Plaintiffs failed to comply with the Pennsylvania Rules of Civil Procedure, specifically §4003.5, in that, Garlitz failed to provide an expert report prior to testifying at trial, yet Defendant's Matters Complained of are not concerning Garlitz's expert opinion, but rather the fact that his testimony, "was no different than a layperson." (*See* Matters Complained of (c.)).

Garlitz appeared as both an expert witness and a fact witness. Garlitz was called to the residence in November of 2000 to prepare a survey of the property. At trial Garlitz testified to the existence and exact location of the Defendant's storm pipe, which is the subject of this litigation, as well as boundary lines, the demarcation of the easement, etc. (Tr. at 43-46).

Any error that may have occurred concerning Garlitz was harmless and was corrected by the Pennsylvania Standard Jury Instruction concerning expert testimony. The jury was charged that they were, "not bound by an expert's opinion merely because they are an expert. You may accept or reject it. As in the case of any other witness give it the weight, if any, to which you deem it is entitled." (Tr. at 263, see also Pa. SSJI §5.30). To suggest that Garlitz's "opinion testimony" was in any way determinative of the jury's verdict is speculative at best. It may well have been that his factual testimony was of importance to the jury.

It must also be noted that Defendant failed to object during the testimony concerning the site work taking place in November of 2004 and matters concerning same should be deemed waived.

Defendant's last claim of error was this Court's decision to allow Plaintiff to introduce evidence as to the decreased value of their home as "property losses" under the Political Subdivisions Tort Claims Act. Defendant concedes that "property losses" are a recoverable item of damages but objects to the Plaintiffs recovering for any diminution of value due to the flooding.

The Political Subdivision Tort Claims Act (hereinafter "PSTCA") states:

> A dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within rights-of-way, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.
>
> (42 Pa.C.S. §8542(b)(5)).

The evidence at trial satisfies this Court that it is undisputed that this system was owned by the Township and located within the right-of-way. The flooding that occurred is the precise danger associated with a storm sewer system. The Township installed and serviced this system prior to the event, at times using heavy equipment on and around said pipe. The pipe was ultimately replaced by the Defendant with a new similar pipe after the destruction and failure of the old pipe. Notice of the danger or potential danger can reasonably be charged to the Defendant.

Further, "it is well settled that the issue of whether a dangerous condition exists is not a question of law, but rather a question of fact for the jury to resolve." (*Dean v. PennDOT,* 751 A.2d 1130, 1133 (Pa. 2000)).

It is a matter of public record that the Plaintiffs' property was reassessed after this incident. It is also public record that Plaintiffs' fair market value of their home decreased from $185,900 to $142,010. This reduction was a direct result of the flooding that occurred. (*See* Trial Exhibit 11).

Defendant suggests that Plaintiffs are entitled to the value of a washer and dryer, tools, etc., moveable objects destroyed by the flooding, but not the future loss associated with the eventual sale of their property. This Court does not agree. Damages are meant to be compensatory, i.e., 'to make the plaintiff whole.' Defendant's idea of an appropriate item of damages fails to include the effect of disclosing on a future Seller's Disclosure Statement that the property was damaged by sewer water.

Allegheny County saw fit to reduce the assessment after the subject water damages. It is obvious a reduction in value took place and the jury saw fit to ascribe at least some part of the reduction to the conduct of Defendant and to award damages to Plaintiff. The verdict of $40,000 does not equal the total reduction in assessment, i.e. $43,890 ($185,900 – $142,010). Accordingly, it cannot be assumed that the verdict was based solely on the reduction in the assessed value of the property. The Plaintiff introduced other elements of damage, which it can be fairly assumed were also evaluated by the jury in reaching its verdict.

IV. CONCLUSION

For the aforesaid reasons, this Court respectfully requests the Commonwealth Court of Pennsylvania to affirm the Order dated April 10, 2008.

BY THE COURT:
/s/Della Vecchia, J.

Dated: August 20, 2008

Major Mid-Atlantic Distributors, Inc. f/k/a Three Rivers Juice and Soda Company, Inc. v. Jones Soda Company, Inc. f/k/a Urban Juice and Soda Company, Inc. and A.J. Silberman & Company

Arbitration—Venue

1. Case was remanded by Superior Court, directing trial court to conduct two-part test to determine whether a valid agreement to arbitrate existed between the parties and if so, whether the parties' dispute is within the scope of the arbitration provision.

2. The Court sustained Jones Soda's preliminary objection to venue and dismissed the amended complaint without prejudice to Plaintiff's right to pursue arbitration in Seattle, finding that an agreement to arbitrate existed and that the parties' dispute was within the scope of the arbitration agreement.

3. The Court based its finding that an agreement to arbitrate existed on numerous documents exchanged between the parties. Although the parties never formalized the agreement, both parties' documents contained arbitration provisions.

4. Plaintiff's essential complaint was that Jones Soda terminated the agreement without cause, and the court found that dispute to be one arising out of the Agreement.

(Lynn E. MacBeth)

Gerard J. Cipriani for Plaintiff.
Bethann R. Lloyd for Jones Soda Company.
Bruce Fox for A.J. Silberman & Company.

No. GD 06-013708. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Strassburger, A.J., October 17, 2008—This appeal arises from my order of July 25, 2008, sustaining the preliminary objection to venue of Defendant Jones Soda Company [Jones Soda] and dismissing Plaintiff's complaint as to Jones Soda without prejudice to Plaintiff's right to pursue arbitration in Seattle, Washington. The relevant facts of this case are detailed in my first opinion dated February 21, 2007, written pursuant to Defendant Jones Soda's appeal from my order dated December 28, 2006 overruling Jones Soda's preliminary objection to venue.[1]

On November 26, 2007, the Superior Court vacated my order dated December 28, 2006, which overruled Jones Soda's preliminary objection to venue. The Court remanded the case for additional proceedings and directed this court to conduct

> [t]he two-part test to determine: 1) whether a valid agreement to arbitrate exists between the parties; and, 2) if such an agreement exists, whether the parties' dispute is within the scope of the arbitration provision.

On February 13, 2008, I ordered the parties to appear for a conciliation on February 27, 2008. Since the case did not settle at that time, on March 18, 2008, I issued an order for additional stipulations and discovery on the arbitration issue as well as a briefing schedule. On May 21, 2008, at the parties' request, I extended the discovery deadline to June 18, 2008. After I received and reviewed the briefs, I filed the order at issue sustaining Jones Soda's preliminary objection to venue and dismissing the amended complaint without prejudice to Plaintiff's right to pursue arbitration in Seattle, Washington. On August 4, 2008, Plaintiff appealed from that order.

Before addressing the merits of the appeal, I must comment on the appealability of the order. Regardless of whether the order is considered as the sustaining of a preliminary objection to venue, or as the granting of a petition to compel arbitration, it is not appealable. As a general rule, a final order must dispose of all claims and all parties. Pa.R.A.P. 341(b)(1). Because Silberman is still in this case, the order of July 25, 2008 does not dispose of all parties.

In the prior appeal in this case, the Superior Court noted the exception to the general rule, set forth at Pa.R.A.P. 341(b)(2), where an order is expressly defined as a final order by statute. Pointing out that the Uniform Arbitration Act permits an appeal to be taken from an order denying an application to compel arbitration, 42 Pa.C.S.A. §7320(a)(1), the Superior Court found that the prior order was indeed appealable.

However, the converse is not true. "Typically, a trial court's order directing a dispute to arbitration will not be deemed final, as it does not address the merits of the parties' claims but merely transfers their existing dispute to another forum in accordance with the arbitration provision of the underlying contract." *See Schantz v. Dodgeland,* 830 A.2d 1265, 1266-7 (Pa.Super. 2003). The Arbitration Act does not allow an appeal from an order *compelling* arbitration. *See Maleski v. Mutual Fire, Marine and Inland Ins. Co.,* 633 A.2d 1143 (Pa. 1993). Thus, the appeal should be quashed as interlocutory.

Assuming that the Superior Court decides not to quash the appeal, the order should be affirmed. The remainder of this opinion addresses the following issues as directed by the Superior Court: 1) whether there is a valid agreement to arbitrate; and 2) whether the parties' dispute is within the scope of the arbitration provision.

The standard of review in a case where a trial court denies a motion to compel arbitration "is limited to determining whether the trial court's findings are supported by substantial evidence and whether the trial court abused its discretion." *Callan v. Oxford Land Development,* 858 A.2d 1229 (Pa.Super. 2004).[2] If the trial court determines that a valid arbitration agreement exists and the plaintiff's claim is within the scope of the agreement, the controversy must be submitted to arbitration. *Id. Callan* further held that "(1) arbitration agreements are to be strictly construed and not extended by implication; and (2) when parties have agreed to arbitrate in a clear and unmistakable manner, every reasonable effort should be made to favor the agreement unless it may be said with positive assurance that the arbitration clause involved is not susceptible to an interpretation that covers the asserted dispute." *Id.* Furthermore, "[a]n agreement to arbitrate disputes arising from a contract encompasses tort claims where the facts which support a tort action also support a breach of contract action." *Id.*

In this case, numerous letters and drafts were exchanged between the parties, which resulted in a final draft version where both sides agreed to arbitrate disputes in Washington. On September 25, 1998, Jones Soda sent a letter to Plaintiff which included the arbitration provision at issue here. That provision provided for arbitration for any dispute arising out of this agreement to be entertained in Washington. On February 2, 1999, Plaintiff replied by changing the venue of the arbitration to Allegheny County, Pennsylvania. Rather than signing the agreement at this point, Jones Soda then sent the "First Distribution Agreement" or "July Agreement" to Plaintiff which changed the venue for arbitration back to Washington. On August 10, 1999, Plaintiff sent a letter to Jones Soda objecting to arbitration in Washington and suggesting Pennsylvania for dispute resolution purposes.[3] Negotiations continued and on May 22, 2000, Plaintiff sent a new draft agreement to Jones Soda providing for arbitration, but making no reference to venue. On December 13, 2000, Plaintiff sent Jones Soda a revised agreement conceding that disputes should be arbitrated in Seattle, Washington.

Paragraph 48 of Plaintiffs Amended Complaint is dispositive. It states "Finally, after protracted negotiations, Plaintiff forwarded a "Revised Distribution Agreement" to Jones Soda on December 13, 2000 reflecting all of Jones Soda's requested revisions as well as modifications made necessary by the proposed expansion of Jones Soda into other markets. (A true and correct copy of the Proposed Final Distribution Agreement is attached to Plaintiff's original complaint as Exhibit U)."

This averment leaves little question that Plaintiff's own version of the Distribution Agreement contained the following statement in Paragraph 18–"Venue for all arbitration shall lie in Seattle, Washington." Even though Plaintiff and Jones Soda never formalized this agreement, both parties had now agreed to resolve disputes by arbitration with venue being in Washington.

The second issue before me is whether this dispute falls into the scope of that arbitration provision. The arbitration

provision is broad and refers only to "any controversy, dispute or claim arising out of or in connection with the Agreement." See Paragraph 18.1 of Exhibit U to Plaintiff's original complaint. Plaintiff's essential complaint is that Jones Soda terminated the agreement between itself and Jones Soda without cause. *See* paragraph 162 of Plaintiff's Amended Complaint. Certainly, that is a dispute arising out of the Agreement.

Because there was a valid agreement to arbitrate between the parties and the dispute falls into the scope of that agreement to arbitrate, the Superior Court should affirm my order dated July 25, 2008 sustaining Jones Soda's preliminary objections and dismissing the case without prejudice to Plaintiff's right to pursue arbitration in Washington.

BY THE COURT:
/s/Strassburger, J.

Dated: October 17, 2008

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[1] That Superior Court appeal is docketed at 164 WDA 2007. My opinion also addressed the appeal of Defendant A.J. Silberman [Silberman] from my December 28, 2006 order, which overruled Silberman's preliminary objection to venue as well as Jones Soda's. The appeal as to Silberman was docketed at 100 WDA 2007, and my order was affirmed by the Superior Court.

[2] This standard of review is for an order denying a motion to compel arbitration; since this order is not appealable, there is no case law setting forth a standard of review for the appeal of a grant of a motion to compel arbitration. Nonetheless, there does not appear to be any reason why a different standard should apply.

[3] This letter listed numerous problems and deficiencies with Defendant's proposal.

Commonwealth of Pennsylvania v. Robert Lynn Cash

Sentencing—Merger

1. Defendant was found guilty of two counts of involuntary deviate sexual intercourse, one count of robbery, one count of burglary, one count of criminal conspiracy, five counts of terroristic threats, five counts of unlawful restraint, five counts of recklessly endangering another person, and five counts of simple assault. Defendant was sentenced to an aggregate sentence of 36 years.

2. The Court reinstated the Defendant's appellate rights.

3. The Court found that the crimes of robbery, terroristic threats, and simple assault, for which Defendant was sentenced, should have been merged for the purpose of sentencing.

4. Due to the discrepancies regarding merger, case remanded for the purpose of resentencing.

(Danielle D. Rawls)

Michael Streily for the Commonwealth.
David B. Chontos for Defendant.

CC Nos. 200500844. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., September 5, 2008—On February 23, 2007, the appellant, Robert Cash, (hereinafter referred to as "Cash"), was found guilty of two counts of involuntary deviate sexual intercourse, one count of robbery, one count of burglary, one count of criminal conspiracy, five counts of terroristic threats, five counts of unlawful restraint, five counts of recklessly endangering another person, and five counts of simple assault.[1] A presentence report was ordered and after receipt and review of that presentence report, Cash was sentenced on May 17, 2007, to an aggregate sentence of thirty to sixty years to be followed by seventy years probation, during which he was to have no contact with the victims.

Cash did not file any timely post-sentencing motions nor did he file a direct appeal to the Superior Court from the imposition of his sentence. However, on November 29, 2007, Cash filed a petition for post-conviction relief seeking to reinstate his appellate rights and after receipt and review of that petition, this Court granted that petition, thereby reinstating his appellate rights. Cash then filed post-sentencing motions, which motions were denied. From the denial of his post-sentencing motions, Cash has filed a timely appeal and was directed pursuant to Pennsylvania Rule of Appellate Procedure 1925(b) to file a concise statement of matters complained of on appeal. Suffice it to say that while he has complied with the directive contained in Pennsylvania Rule of Appellate Procedure 1925(b), his statement is anything but concise since it consists of thirty-seven pages. The essence of his first claim of error is that this Court erred in giving instructions not only as to each and every crime but, also, with respect to instructions on accomplice liability and co-conspirator liability. Cash also maintained that the evidence was insufficient to support the convictions for the crimes of terroristic threats, recklessly endangering another person, unlawful restraint and simple assault. Cash finally maintains that his sentences are illegal and violate the double jeopardy clause of the United States and Pennsylvania Constitutions since he was sentenced on counts, which should have merged for the purpose of sentencing. In addition, Cash maintains that this Court did not consider the guidelines that were applicable to his case and that his sentences were excessive. Finally, Cash maintains that this Court should have recused itself from sentencing him.

Sometime during the day on November 16, 2004, Cash called his cousin, Joshua Cash, (hereinafter referred to as "Joshua"), and asked him if he wanted to help him rob a house. Cash told his cousin where the house was and that he believed that it was a stash house for a drug dealer and that the house contained some marijuana. Joshua agreed to help his cousin and later that day they met up with William Chaffin, (hereinafter referred to as "Chaffin"), and the three of them agreed that they would participate in this robbery. Cash and Chaffin each had handguns and Chaffin had a sawed-off shotgun. At approximately 1:00 a.m. on November 17, 2004, the three of them went to the home of Terri Matlas, (hereinafter referred to as "Matlas"), located at 2915 Idaho Street, McKeesport, Pennsylvania. The three of them climbed up on the roof and entered the residence through a second floor window and then came down the steps into the living room where they confronted Matlas, her daughter Jennifer Matlas, (hereinafter referred to as "Jennifer"), and her two children, Jatasia and Carytos, and Tianna Williams, (hereinafter referred to as "Tianna"), the girlfriend of Matlas' son, Robert Warren. When these three individuals came into the living room, Matlas screamed and demanded to know how they got into her house. They then pointed their guns at the women and the children, including Cash who

pointed the gun to the head of one of the children. Joshua demanded to know where the money and drugs were and the women indicated that they did not know anything about drugs. Each individual was wearing dark clothing and Joshua and Chaffin had masks on which covered their faces to just below their eyes. Cash had a gray hoodie on which he had up over his head.

When the women did not produce any drugs or money, they were searched and patted them down. Unsure of whether or not they had anything on them, Joshua demanded that Jennifer and Tianna take off their clothes. Once the two women had stripped naked, Matlas took the children from the living room into the dining room but they could still see what was occurring in the other room. Joshua then demanded that Tianna perform oral sex on Jennifer, which Tianna refused to do. At some point Joshua took Tianna into the living room and was attempting to unzip his pants and have her perform oral sex on him, but when Joshua could not undo his pants, he told Tianna to go into the dining room and perform oral sex on Cash. Joshua then began to look around the first floor of the house for the suspected drugs and money. He then ordered Jennifer, at gunpoint, to also perform oral sex on Cash. While the two women were performing oral sex on Cash, his hoodie slipped away and they got a chance to view his face unobstructed.

When Tianna was finished performing oral sex on Cash, Joshua told her to go into the kitchen where she was confronted by Chaffin. Chaffin, at gunpoint, demanded that Tianna perform oral sex on him and after two or three minutes of performing oral sex on him, Chaffin then raped Tianna. While this was occurring in the kitchen, Cash demanded that Jennifer engage in sexual intercourse with him. Cash was seated on the couch and had her sit in his lap while he proceeded to sexually assault her at gunpoint. During this sexual assault Cash's hoodie once again came loose and during the five minutes that she was being assaulted, Jennifer looked directly into Cash's face.

While these sexual assaults were occurring, Joshua went through the house to look for the suspected drugs and money but he was unable to find any drugs. He took what he could find, which was some money, jewelry, a DVD player, a DVD/VCR player, and a pit-bull puppy. In the middle of these sexual assaults, there was a knock on the front door and Tianna knew that was Warren, her boyfriend and son of Matlas, who was coming home. Cash, Joshua and Chaffin grabbed the stolen items and then ran out the back door to escape. When Warren found out what happened, he wanted to chase after these individuals but the women prevailed on him not to since they did not want him to get hurt knowing that all three of the individuals were armed. Everyone then went to Jennifer's boyfriend's house who demanded that they go to the hospital and contact the police. The women went to McKeesport Hospital and rape-screening kits were done on both Tianna and Jennifer. Seminal material was found in Tianna's underwear and a test on that material indicated that it had come from Chaffin. There was no DNA match with respect to Cash since he had used a condom when he was sexually assaulting Jennifer.

The police became involved in the investigation because of the sexual assaults and Jennifer indicated to the investigating officer that she heard on the street the names of some of the people who might be involved, one of whom might be Cash. Several days later a photo array was presented to both Jennifer and to Tianna and they positively identified Cash as the individual who sexually assaulted them. As the investigation continued, Joshua became a suspect and a photo array containing his picture was given to the women but they were unable to identify him. When the police identified Joshua he acknowledged his participation in the burglary and robbery and then agreed that he would become a Commonwealth witness. After he was arrested and a preliminary hearing was scheduled, both Jennifer and Tianna identified Joshua and Chaffin as the other two individuals involved in these crimes.

Cash's initial claim of error is that the instructions with respect to all of the charges and on co-conspirator liability and accomplice liability to the jury were not only incomplete but also incorrect. An appellate review of a Trial Court's charge must involve consideration of the charge as a whole to determine whether or not it was fair, complete and accurate. *Commonwealth v. Saunders*, 529 Pa. 140, 602 A.2d 816 (1992). This review does not consider whether or not certain magic words were used but, rather, it is the effect of the charge in its entirety that is considered. *Commonwealth v. Ohle*, 503 Pa. 566, 470 A.2d 61 (1983). A Trial Court is free to choose its own words in providing instructions to a jury as long as they fairly, adequately and correctly convey the law to that jury. *Commonwealth v. McComb*, 462 Pa. 504, 341 A.2d 496 (1975). As long as the Trial Court's charge fully and adequately explains the relevant legal principles that are at issue, the charge is correct and will be upheld on appeal. *Commonwealth v. Kyle*, 367 Pa.Super. 484, 533 A.2d 120 (1987).

Before a reviewing Court can consider the charge to a jury, it must ensure that the claimed issues have not been waived. Pursuant to Pennsylvania Rule of Criminal Procedure 647, a specific objection must be made to the charge before the jury retires to deliberate. The failure to make a specific objection to a charge prior to a jury commencing deliberations, waives those alleged claims of error. In *Commonwealth v. Garcia*, 585 Pa. 160, 888 A.2d 633, 636 (2005), the Supreme Court acknowledged the need for a timely objection being made in order to preserve that issue for appellate review.

> Turning first to the Commonwealth's contention that the issue in this case was waived when Appellant failed to object to the charge as required by Rule 647(b), the response to this argument is controlled by our recent decision in *Commonwealth v. Pressley*, 584 Pa. 624, 887 A.2d 220, 2005 WL 3203051 (Pa. 2005). In *Pressley*, we clarified the proper procedure to preserve an issue respecting proposed jury instructions under the Pennsylvania Rules of Criminal Procedure. Consistent with the Commonwealth's position, we held that the Rules "require a specific objection to the charge or an exception to the trial court's ruling on a proposed point to preserve an issue involving a jury instruction." *Id.* at *3, 584 Pa. 624, 887 A.2d at 220, 224.

After this Court had instructed the jury as to what the applicable law was with regard to the charges that had been filed against Cash, both the Commonwealth and Cash were asked whether or not they had any additions or corrections to the charge and both sides indicated that they did not. Again, when the jury was recharged, counsel were asked if there were any additions or corrections and, once again, there were no additions or objections made to the additional charge. Since Cash failed to make a timely objection to the charge, these claims of error were waived.

Cash's next assertion of error is that the evidence was insufficient to support the convictions for the charge of terroristic threats, recklessly endangering another person, unlawful restraint and simple assault. In reviewing a claim that the evidence was insufficient to support a conviction,

the evidence must be viewed in the light most favorable to the Commonwealth and the Commonwealth is entitled to all favorable inferences, which may be reasonably drawn from that evidence. *Commonwealth v. Hanes,* 361 Pa.Super. 357, 522 A.2d 622 (1987). If a jury could have reasonably determined from the evidence educed that all of the necessary elements of the crime were established then the evidence would be deemed sufficient to support the verdict. *Commonwealth v. Berkowitz,* 415 Pa.Super. 505, 609 A.2d 1338 (1992).

The evidence presented by the Commonwealth was more than sufficient to demonstrate that the Commonwealth had proven all of the elements of these crimes beyond a reasonable doubt. Three armed men broke into Matlas' house, corralled the five victims and then shuttled them from the living room to the dining room and back while pointing guns at their heads, including the heads of the small children, demanding drugs and money. These intruders informed all of the individuals there that if they did not comply with their demands that they would kill them, each time pointing a gun at one of the individuals' heads. The evidence in this case clearly and unequivocally demonstrates that Cash and his co-conspirators not only raped and sodomized these women, but also engaged in a course of conduct that was designed to terrorize them so that they would comply with their requests.

Cash's final claim of error is that he was sentenced on crimes that should have merged for the purposes of sentencing and, accordingly, his sentences are illegal and in violation of the double jeopardy protection clause in the United States Constitution. In *Commonwealth v. Gatling,* 570 Pa. 34, 807 A.2d 890 (2002), the Pennsylvania Supreme Court did an extensive analysis of the history of the doctrine of merger and announced a new rule in making a determination as to whether or not a merger analysis is necessary at the time of sentencing. In that case, *Gatling* was convicted of indecent assault and corruption of the morals of a minor with respect to an incident that occurred in September of 1996 and also was convicted of statutory sexual assault and corruption of the morals of a minor with respect to an incident that occurred approximately a month later with the same victim. That Court, in defining the standard by which a merger analysis must take place, stated as follows:

> To the extent that our merger jurisprudence is confusing, we now definitively state, for bench and bar, the standard for determining when convictions should merge for the purposes of sentencing. The preliminary consideration is whether the facts on which both offenses are charged constitute one solitary criminal act. If the offenses stem from two different criminal acts, merger analysis is not required. If, however, the event constitutes a single criminal act, a court must then determine whether or not the two convictions should merge. In order for two convictions to merge: (1) the crimes must be greater and lesser-included offenses; and (2) the crimes charged must be based on the same facts.[FN9] If the crimes are greater and lesser-included offenses and are based on the same facts, the court should merge the convictions for sentencing; if either prong is not met, however, merger is inappropriate.
>
> FN9. One crime is a lesser-included offense of another crime if, while considering the underlying factual circumstances, the elements constituting the lesser crime as charged are all included within the elements of the greater crime, and the greater offense includes at least one additional element that is not a requisite for committing the lesser crime. Thus, in a situation where the crimes, as statutorily defined, each have an element not included in the other but the same narrow fact satisfies both of the different elements, the lesser crime merges into the greater-inclusive offense for sentencing. 807 A.2d at 899.

That Court further went on to find the circumstances that would militate against a merger analysis.

> Thus, the rule that we now announce is that an overarching chain of events does not constitute a single criminal act when there is a break in that chain. A break requires both that: (1) the acts constituting commission of the first crime were completed before the defendant began committing the second crime; and (2) proof of the second crime did not in any way rely on the facts necessary to prove the first crime. In addition, the break must be either: (1) a significant temporal lapse; or (2) where applicable, indicated by a change in the criminal intent of the defendant at some point during the sequence. Where a defendant is convicted of two or more crimes and there is no break, the court must then proceed to the merger analysis as above described. If the acts that make-up the first crime are complete before the defendant begins the second crime, if proof of the second crime does not rely on any of the facts supplying proof of the first crime, and if there is either a significant temporal break or a change in the defendant's intent, the defendant will have committed multiple criminal acts. 807 A.2d at 900.

The sentencing code has codified the doctrine of merger and provides as follows:

> No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense. 42 Pa.C.S.A. §9765.

Using the Sentencing Code and the directive of the Supreme Court set forth in *Gatling, supra,* it is clear that some of the crimes for which Cash was sentenced should have merged for the purpose of sentencing.

In *Commonwealth v. Welch,* 291 Pa.Super. 1, 435 A.2d 189 (1981), it was determined that the crimes of robbery and simple assault merge for the purpose of sentencing. With regard to the question as to whether or not the crimes of robbery and unlawful restraint merge for the purpose of sentencing using the analysis set forth in *Gatling, supra* and *Commonwealth v. Williams,* 521 Pa. 556, 559 A.2d 25 (1989), it is clear that those crimes do not merge for the purpose of sentencing. Cash also maintains that the charge of robbery and terroristic threats should have merged for the purpose of sentencing using the *Gatling, supra* analysis since these crimes arise out of the same criminal incident. Accordingly, in light of *Commonwealth v. Walls,* 303 Pa.Super. 284, 449 A.2d 690 (1982), it is clear that those crimes should have merged for the purpose of sentencing. With regard to the claim of recklessly endangering another person and simple assault, these crimes should have merged for the purpose of sentencing. See, *Commonwealth v. Thomas,* 879 A.2d 246 (Pa.Super. 2005).

Finally, with respect to the charges of burglary and simple assault, Cash maintains that these charges should also charge for the purpose of sentencing since the jury could have believed that he entered the Matlas residence for the purpose of committing the crime of simple assault. See, *Commonwealth v. Benchoff*, 700 A.2d 1289 (Pa.Super. 1997). The problem with this contention, however, it clearly ignores the record in this particular case and the testimony of Cash's co-conspirator. Joshua testified at the time of trial that Cash called him and told him he wanted to burglarize the Matlas house because he believed that that is where marijuana was being stored. Obviously the crime that was envisioned in this case was not a simple assault but, rather, a theft. In accordance with *Commonwealth v. Wienckowski*, 371 Pa.Super. 153, 537 A.2d 866 (1988), the crimes of burglary and simple assault do not merge unless the object of the burglary was a simple assault. In this case, the object of the burglary was a theft.

In light of this Court's observation that it was in error when it sentenced Cash for crimes that should have merged for the purpose of sentencing, it is clear that this Court's sentencing scheme will be disturbed by vacating a portion of Cash's sentence. This Court intended that Cash serve a lengthy period of incarceration and that he be under continued supervision once he was paroled from his sentence. Since it is clear that some of Cash's sentences should be vacated thereby disturbing this Court's sentencing schemes, the case should be remanded for the purpose of resentencing Cash. *Commonwealth v. Williams*, 71 A.2d 254 (Pa.Super. 2005).

BY THE COURT:
/s/Cashman, J.

Dated: September 5, 2008

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[1] Cash was found not guilty of two counts of rape and one count of possession of a firearm without a license.

Commonwealth of Pennsylvania v. Martha Bell Fenchak and Alzheimers Disease Alliance of Western Pennsylvania a/k/a Disease Alliance Alzheimer's

Criminal—Constitutional—PA Evidence

1. Throughout the years, the Defendant nursing home administrator, Martha Bell, and her corporate co-conspirator nursing home Atrium had staffing problems and service issues. In particular, complaints ranged from patients having bedsores because they were not being turned regularly, to patients being unclean and allowed to remain in soiled garments and of patients being wanderers.

2. On October 26, 2001, Ms. Mabel Taylor, a resident and patient at the nursing home, was found dead, face-down outside the hospital. Nurses allegedly attempted to cover-up the cause of death, cleaning the body, and placing Ms. Taylor in the bed in her room. Her family was told she died in her sleep.

3. At the request of her family, an autopsy was performed by the coroner. The coroner testified that as a result of the cold temperatures and stress of being outside and unable to get back inside, pressure was exerted on Ms. Taylor's diseased heart, causing an arrhythmia which led to her death to a degree of medical certainty.

4. Both defendants have alleged that this Court erred in permitting the Commonwealth to present medical expert testimony as to the cause of death when that testimony fell below the standard within a reasonable degree of medical certainty.

5. The Commonwealth's expert stated unequivocally and with a degree of medical certainty that Ms. Taylor's death was caused by a cardiac arrhythmia due primarily to stress and previous medical condition. Pennsylvania Rule of Evidence 702 permits the introduction of expert testimony by witnesses qualified by experience, training, knowledge or education to render such an opinion. There is no requirement that certain magical words be used in order to validate an expert opinion. What is necessary, however, is that an expert witness may not guess or offer an opinion based merely on conjecture. The requirement that an expert opinion be based upon a reasonable degree of certainty applies only to the substance of that individual's testimony and not to the use of magic or descriptive words.

6. The Court also found that some prior bad act testimony regarding the nurses and staff involved was admissible. Evidence of these bad acts can be admitted as long as it is relevant to the subject matter under review and is not designed solely for the purpose of punishing or prejudicing a defendant. The court found that some of the testimony was offered to demonstrate Bell's continual neglect of her patients.

7. Applying the standard from *Commonwealth v. Howard*, 265 Pa.Super. 535, 402 A.2d 674 (1979), the Court also found that the Commonwealth clearly met its burden of proving each and every one of the elements of the offenses charged beyond a reasonable doubt. The Defendants' conduct demonstrated a conscious disregard for the safety of its residents and that they were aware of the staffing problems.

8. The Court also specifically addressed the assertion by Bell regarding hearsay statements of Galati and other nurses who testified regarding the occurrences which led to the death of Ms. Taylor. Statements by Ms. Galati were admissible under Pennsylvania Rule of Evidence 803 (25) (a)-(e) because they were made in furtherance of a conspiracy, and functioned as an admission of an employee of a party. Pennsylvania Rule of Evidence 803 (25) (a)-(e).

(Danielle D. Rawls)

Michael Streily for the Commonwealth.
Kenneth A. Snarey for Defendants.

CC Nos. 200405045; 200405047. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Cashman, J., September 5, 2008—After five and one-half weeks of testimony given by sixty-eight witnesses, which testimony encompasses three thousand, five hundred fifty-five pages of transcript, the appellant, Martha Bell, (hereinafter referred to as "Bell"), and her corporate co-conspirator, (hereinafter referred to as "Atrium"), were convicted of the crimes of involuntary manslaughter, neglect of the care of a dependent person, recklessly endangering another person and criminal conspiracy. Both Bell and Atrium filed timely appeals from the imposition of the judgment of sentence and were directed to file a concise statement of matters complained of on appeal, with which both appellants have complied.

In their statements of matters complained of on appeal, both Bell and Atrium have alleged that this Court erred in permitting the Commonwealth to present medical expert testimony as to the cause of death when that testimony fell below the standard of within a reasonable degree of medical certainty. Both appellants next maintain that this Court erred in permitting testimony with respect to the attendance at a vitamin seminar by Bell and two employees of Atrium when that information had no relevance to the victim's death and that the seminar was a pyramid scam. The appellants also maintain that the evidence was insufficient to support the verdicts that were rendered in these cases and as a corollary to that argument, have also suggested that the verdicts were against the weight of the evidence.

Bell has also suggested in her original and supplemental concise statements of matters complained of on appeal that this Court erred in admitting the hearsay statements of Bell's co-conspirator, Kathleen Galati, (hereinafter referred to as "Galati"), since those testimonial statements were permitted despite the fact that the nursing home industry is highly regulated and requires written reports. In addition, Bell maintains that Galati's statements were inadmissible under Pennsylvania Rule of Evidence 803(25). Bell next maintains that the introduction of her salary, not only from Atrium but also from the Alzheimers Disease Alliance, and the use of corporate credit cards, was irrelevant and prejudicial to the charges that were filed in this matter. Finally, Bell has suggested that she was denied due process of law under Article I, Section 9 of the Pennsylvania Constitution and the Fourteenth Amendment of the United States Constitution, when the United States government seized the corporate records, therefore depriving her of the opportunity to use these records to present her defense.

In order to understand these claims, it is necessary that a review of the facts be made in this case. Bell and her business partner, Warren Mason, (hereinafter referred to as "Mason"), had an interest in the treatment and care of Alzheimer's patients which eventually blossomed into the concept of a nursing home/personal care facility specializing in the care and treatment for individuals diagnosed as having dementia. They formed the Alzheimers Disease Alliance of Western Pennsylvania, (hereinafter referred to as "Alzheimers Disease Alliance"), which ultimately operated the nursing facility known as Atrium, which opened in 1995. The Alzheimers Disease Alliance was set up to be a holding company for Atrium and future facilities that might be built like Atrium. The revenues funding the salaries paid to Bell and Mason came from Atrium in the form of rent. This facility had two separate units, the first being the section of the facility designed for personal care patients, having a total of fifty beds, and another section of the building having one hundred twenty beds devoted to nursing care. The nursing care beds were divided into four sections, each having thirty beds apiece and, pursuant to the Pennsylvania Department of Health regulations, there was to be one staff person for every twenty residents. During the early years of its operation, Atrium met that regulation providing care for its residents.

Sometime in 1994, Mabel Taylor, (hereinafter referred to as "Taylor"), was diagnosed with Alzheimer's disease. At the time of her diagnosis, she was living in Florida with one of her daughters and over the next several years as the disease began to progress, it became clear to not only the daughter with whom she resided but to Taylor's other children, that she needed to be placed in a nursing facility that could care for her increasing demands. One of her other daughters, Jane Baczewski, (hereinafter referred to as "Baczewski"), who lived in Aliquippa, Pennsylvania, began a search for an acceptable nursing facility. Baczewski received information that Atrium was holding itself as a facility that specialized in the treatment of Alzheimer's patients. Baczewski, in addition to receiving information about that facility, toured the facility. In March of 1996, Taylor moved into the personal care unit of Atrium and remained there until December of 1998, when it became apparent that the progression of her disease demanded more care than she was going to receive in the personal care unit. In December of 1998, Taylor moved into the nursing care section and remained there until her death in October of 2001.

In its early years, Atrium had a number of nursing administrators who all ultimately complained of the management style of Bell and Mason. In light of the conflicts that existed between these administrators and Bell and Mason, it was decided that Bell, who was a registered nurse, would become the nursing home administrator at Atrium in 1997. Bell believed that she was eminently qualified to run this type of facility because she had a keen interest in Alzheimer's disease since a number of her relatives had suffered and died from that disease and she made it her life's work to provide passionate care to the victims of this disease. In addition to running this facility, Bell also ran the Alzheimers Disease Alliance, whose sole objective was to put out information to the public about Alzheimer's disease and the care and treatment of patients suffering from that disease. This Alliance had one employee who worked out of the basement of her home in West Mifflin and her sole responsibility consisted of sending out videotapes of Bell and others talking about Alzheimer's disease and the proper care and treatment of Alzheimer's patients. Bell and Mason were officers of this foundation and starting in 1997, and they received significant salaries from this foundation despite the fact that it had limited revenues from the sale of these videotapes.

When Bell became the administrator of Atrium, things began to change. Although there had been complaints with respect to patient care in the past, they became increasingly more common. The complaints would range from patients having bedsores because they were not being turned regularly, to patients being unclean and allowed to remain in soiled garments and of patients being wanderers. Taylor's daughter had spoken to Bell on numerous occasions with respect to the deficiencies in care and her concern about staffing. The staffing problems became more and more disconcerting since the facility which normally would employ two hundred people and the turnover rate showed that anywhere between one thousand and twelve hundred people were employed by this facility during the years of 1997, 1998 and 1999.

Atrium staffing problems were underscored by the dealings that Atrium had with two services that provided support staff. Margaret Erb, (hereinafter referred to as "Erb"), of NurseFinders, entered into a contractual arrangement with Atrium to provide nursing personnel to the facility. Initially, invoices that were submitted to Atrium were paid on a timely basis; however, in the first part of 1999, Atrium stopped paying its bills and the company terminated its services for Atrium in July of 1999 since it was owed sixty-eight thousand dollars for the services that it had previously provided. Similarly, Paul Wilson, (hereinafter referred to as "Wilson"), of American Medical Staffing, testified that he began doing business with Atrium in 1997 and although they had an ongoing business relationship, he did not supply a significant number of individuals for Atrium during that period. However, beginning in 2000, business with Atrium began to pick up to the extent that by March of 2001, Atrium owed his company thirty-four thousand four

hundred ninety dollars and ninety-four cents. Wilson contacted Bell in an effort to resolve the outstanding indebtedness and initially their discussions were very pleasant; however, when Atrium continued to refuse to pay its bill, Wilson pressed Bell only to receive the response that it would be a cold day in hell before he was ever paid. During their final discussions, Wilson attempted to find out why Bell was seeking to hire his employees away from him, but received no answer from her.

In addition to the increase in patient problems and the staffing shortages, there were financial changes that were occurring in Atrium. In 1999, Atrium paid Bell the salary of seventy-nine thousand dollars in her capacity as the administrator of the facility and also paid a salary of seventy-nine thousand dollars to Mason. In addition, the Alzheimer Disease Alliance paid Bell one hundred forty-five thousand dollars and Mason one hundred thirty thousand dollars. In 2000, Bell received a salary from Atrium of ninety-four thousand, six hundred forty-one dollars and one hundred forty-nine thousand dollars from the Alzheimers Disease Alliance. Similarly, Mason received seventy-eight thousand, four hundred eighty-eight dollars in salary from Atrium and one hundred thirty-three thousand seven hundred, twenty-nine dollars from Alzheimers Disease Alliance. In the year 2001, Bell received a salary of one hundred eighteen thousand, four hundred eighty-seven dollars from Atrium and her Alzheimers Disease Alliance salary was one hundred fifty-six thousand, fifty-six dollars, plus benefits of nine thousand, three hundred eighty-seven dollars. Mason in the year 2001, received a salary from Atrium in the amount of seventy-eight thousand, four hundred eighty-eight dollars and a salary from the Alzheimers Disease Alliance of one hundred thirty-nine thousand, nine hundred thirteen dollars, and a similar benefit package of nine thousand, three hundred eighty-seven dollars.

The payment of these salaries and benefits was remarkable when, outside of the Atrium rental income, the primary source of revenues for the Alzheimers Disease Alliance was the sale of videotapes. The ability of the Alzheimers Disease Alliance to pay these salaries and benefits resulted from the infusion of significant amounts of money from Atrium into the foundation. It is estimated that over a five-year period, that more than one million dollars had been transferred from Atrium to the Alzheimers Disease Alliance. As a result of the transfer of this money, Atrium was unable to pay its staffing providers, NurseFinders and American Medical Staffing, and was unable to keep and to maintain staffers on premises to provide care for its residents. These staffing problems became so acute that in January of 2001, the Pennsylvania Health Department threatened to shut the Atrium facility down. Atrium reached an agreement with the Pennsylvania Health Department to remedy its deficiencies and maintain the staffing levels that it was required pursuant to the Department of Health regulations. As a result of this agreement, Atrium continued to operate throughout the remainder of 2001.

Atrium, throughout its existence, took in private paid patients and patients whose expenses were covered by Medicare and Medicaid. As a result of the payments being made by the Medicare/Medicaid Program, Atrium was required to submit staffing sheets in support of its request for reimbursement of expenses that it had incurred. These staffing sheets detailed the number of individuals who worked on each shift and the number of hours that they worked. The Commonwealth presented numerous witnesses who indicated that they did not work the times and dates that were submitted on the staffing sheets or, if they did work on that particular date, they did not work all of the hours that were submitted. Illustrative of this fraudulent billing practice, was the evidence educed about Harold Whipkey's, (hereinafter referred to as "Whipkey"), 11:00 p.m. to 7:00 a.m. on the night Taylor died. Whipkey's time was billed for the entire shift despite the fact that at 11:30 p.m., he left Atrium to go to the Corner Table Bar for karaoke night and did not return to Atrium until 4:30 a.m., where he went to the day room and went to sleep. (Trial Transcript, Volume IV, pp. 6-75, 94-102). As a result of the submission of these staffing sheets and reimbursement requests by Atrium, Medicare and Medicaid Programs paid Atrium the amount of their claimed reimbursement. When the staffing insufficiencies and fraudulent reimbursement requests were eventually discovered, Bell and Atrium were indicted in Federal Court on twenty-two counts of health care fraud and on August 23, 2004, they were convicted on twenty of the twenty-two counts. Bell subsequently was sentenced to a period of incarceration of five years and ordered to pay restitution to the government.

In October of 2001, the understaffing problems at Atrium were becoming more severe. On October 25, 2001, two LPNs/nurses' aides were hired only minutes before they were to start their shifts and their instruction as to the policies of the facility and the needs of their particular patients were minimal, at best. The nursing care portion of this facility rarely had a full compliment of staff personnel as required by the Department of Health and often people worked double shifts and people were borrowed from other parts of the facility. On October 25, 2001, Chevelle Vincent, (hereinafter referred to as "Vincent"), and Dolores Humphries, (hereinafter referred to as "Humphries"), went to the Atrium facility seeking employment and were in the process of filling out their job applications when they were hired for the three to eleven shift that day. It was Atrium's policy to check every two hours to make sure where the residents were. These two individuals were assigned to the unit where Taylor resided. In making their check at approximately 10:00 p.m., they determined that Taylor was in her room. When the 11:00 p.m. to 7:00 p.m. shifts started, nurse Cynthia Osborne, (hereinafter referred to as "Osborne"), was working in the unit where Taylor resided alone. Since she only had the report that Taylor was in her room at 10:00 p.m., she assumed that she was there the entire night because she did not make any rounds to check on the twenty-nine patients in the unit which she was supervising since she did not have enough staff.

At approximately 4:30 a.m. on October 26, 2001, Jane Holawaty, (hereinafter referred to as "Holawaty"), was working her shift as the nurse/supervisor for the D Unit which was located on the second floor of Atrium, which is directly above the B Unit where Taylor resided. Holawaty was making her rounds to insure that all of the residents of her unit were in her rooms when she felt a chill and walked to the end of the hall to close a window, and she saw a body laying on the ground with feet bracing the door and no shoes on. This body was dressed in a housedress and had circulatory stockings on. Although Holawaty came to learn that the body was that of Taylor, she was unable to identify her when she first saw it. Holawaty then called the nurses' station in the B Unit to advise them that there was a body outside of the door at the end of the B Unit. This door was equipped with a lock and alarm system that required any individual who wished to leave the building through that door to punch in a code to unlock the door and deactivate the alarm. Once that individual was on the outside of the building and the door closed, it was locked and they could not gain access again to the building by way of that door.

Holawaty continued to look at the area where Taylor's

body was lying and when Holawaty called Osborne to report that one of the residents was lying outside, Osborne thought she was kidding. Holawaty assured her that she was not and then Osborne said that she was going to get a nurses' aide, Rose Beasley, (hereinafter referred to as "Beasley"), to help her. Several moments later Beasley came into the courtyard, called out Taylor's name, and getting no response, she then attempted to get a pulse and then she motioned to Holawaty that Taylor was dead. Osborne asked whether or not they should bring the body inside and Holawaty said no since this was Coroner's case, it should be notified so that office could do its investigation of the circumstances of this unusual death. At that point, Holawaty returned to check on her residents.

Galati[1], who was the nurse/supervisor for the entire Atrium facility for the 11:00 p.m. to 7:00 a.m. shift, was notified that Taylor's body had been found outside and she then instructed the staff, including Beasley, to move the body inside, clean it up, change her clothes, place her in bed and then turn up the heat in an attempt to warm up her corpse, which was done. Galati further instructed her staff that they should call Taylor's family and tell them that Taylor had died in her sleep, in her bed.

Candis Mason, (hereinafter referred to as "Candis"), was working the 11:00 p.m. to 7:00 a.m. shift that day, walked by Taylor's room, and saw Galati, Osborne and Beasley in that room changing Taylor's clothes, cleaning her up and placing her in bed. Galati asked her to contact Holawaty to see if Holawaty had contacted the coroner. Candis went to the nurses' station and was about to call Holawaty when Galati took the phone from her and then asked Holawaty if she had called the coroner. When Galati was advised that Holawaty had not done that yet but that she intended to do it, Galati said that she would take care of that. Candis was curious as to what happened to Taylor and went back to Taylor's room to touch the body to determine how cold she was. After doing that, she returned to the nurses' station and overheard Galati make another phone call. Galati addressed the person she was talking to as Martha and told her that she had a situation at the Atrium and she was not sure how to deal with it. She told the individual she identified as Martha that Taylor had been found outside and had ceased to breathe. She then informed this individual that Taylor was now back in bed but she was not sure what else to do. At this point Galati then appeared to be repeating what she was being told. Galati then stated that she was to tell the family that Taylor died peacefully in her sleep, she was to clean up the body, make sure there were no signs of blood, and she was to give her a clean gown and make it look like she died peacefully in her sleep and there were to be no incident reports. Galati then called the family and advised Baczewski that Taylor had died in her sleep and that she should make the necessary arrangements with the funeral home to obtain the body. Baczewski arrived later in the morning with instructions as to which funeral home the body was to be delivered and met with the staff in place at the time. She was told that her mother had died peacefully in her sleep; however, she noticed that she was in a hospital gown, which she never wore since she wore her own nightgown and that the room she was in appeared to be extremely warm.

Beasley was very uncomfortable with the way things were being handled and told Baczewski that Taylor did not die in her sleep but, rather, was found outside dead and that a cover-up was in place. Baczewski then called the funeral home and had them call the coroner's office so that an autopsy could be done on the body. Between 10:00 a.m. and 11:00 a.m. on October 26, deputies from the Allegheny County Coroner's Office obtained a core temperature reading of Taylor's body, which was seventy point five degrees. An autopsy was subsequently performed under the supervision of Dr. Shawn Latham and he testified to the autopsy findings and testified that as a result of the cold temperatures and stress of being outside and unable to get back inside, pressure was exerted on Mabel Taylor's diseased heart to cause an arrhythmia which led to her death and that he held that belief to a degree of medical certainty.

BELL AND ATRIUM

Bell's and Atrium's first claim of error is that the Commonwealth was permitted to present medical evidence as to the cause of Taylor's death which did not meet the standard of proving the cause of death within a degree of reasonable medical certainty. When examining this claim, all of Dr. Latham's testimony has to be reviewed. Dr. Latham reviewed and supervised the autopsy that was being performed on Taylor's body and was suspicious that she might have died from hypothermia as a result of the seventy point five degree body core temperature that registered on October 26, 2001. His external examination of the body could not confirm or disprove the effects of hypothermia since there were relatively minor abrasions and contusions on the body. He believed that an internal examination would be more dispositive of the question of hypothermia since there would be significant findings of tissue damage as a result of that hypothermia.

The internal examination of Taylor's organs did not reveal signs that would be consistent with her death being caused by hypothermia but, rather, the examination of her heart revealed that she suffered from advanced atherosclerosis and that her circulatory system was mildly occluded. Dr. Latham went on to explain the significance of her body core temperature and that it could not have reached the seventy point five degree level in a period of time of two hours and it had to be considerably longer than that period.

In performing the autopsy, Dr. Latham was focusing on two possible causes of death: the first being hypothermia and, the second being coronary artery disease. In examining the body and using information that he acquired during his autopsy, Dr. Latham came to the conclusion that if an individual would be locked outside a building with no way to get in, they would be exposed to a stressful situation which, in turn, would cause the heart to beat more rapidly than normal. This, coupled with the cold temperatures, would also cause an increase in an individual's heartbeat, which could result in an arrhythmia in light of the significant degree of atherosclerosis from which Taylor suffered. Dr. Latham was asked whether or not he had an opinion that he held to a reasonable degree of medical and scientific certainty as to the cause of death of Taylor. (Trial Transcript, Volume V, page 94, lines 5-7.) His explanation of his opinion then took nine pages of trial transcript. (Trial Transcript, Volume V, pp. 294-302). In response to the question of whether or not it was his opinion that he held to a degree of reasonable medical certainty that Taylor's death was caused as a result of cardiac arrhythmia or through hypothermia, whether the cold was a significant contributing factor in her death, Dr. Latham answered as follows:

> A. Yes and no. I can't answer the hypothermia because I can't say that to any reasonable degree of medical certainty. My opinion is it was the cold and outside environment on an already diseased heart that lead this heart with atherosclerosis that caused her heart to an arrhythmia which lead to her death and I hold that with a reasonable degree of medical certainty. (Trial Transcript, Volume V, pp. 301-302,

lines 25-8).

Pennsylvania Rule of Evidence 702 permits the introduction of expert testimony once it has determined that witnesses qualified by his or her experience, training, knowledge or education, can render such an opinion. That Rule provides as follows:

> **Rule 702. Testimony by experts**
>
> If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

When Dr. Latham was called to testify he was asked about his medical training and the experience that he had received while he was working as a pathologist in the Allegheny County Crime Lab. He informed the jury that he was board-certified in anatomic pathology and forensic pathology, that he had worked for the Allegheny County Crime Lab from 1997 to 2005, during which he annually performed anywhere from three hundred fifty to four hundred autopsies. In 2005, he became the chief forensic pathologist for the province of Saskatchewan, Canada. When he was offered as an expert in the field of pathology, there was no objection interposed by either Bell or Atrium.

There is no requirement that certain magical words must be used in order to validate the expression of an expert opinion. What is necessary, however, is that an expert witness may not guess or offer an opinion based merely on conjecture. *Collins v. Hand*, 431 Pa. 378, 246 A.2d 398 (1968). In establishing the issue of causation, an expert must testify that his opinion is based upon reasonable scientific certainty when he opines that the result came from a certain causation. *Cohen v. Albert Einstein Medical Center,* 405 Pa.Super. 392, 592 A.2d 720 (1991). The requirement of an expert opinion be based upon a reasonable degree of certainty applies only to the substance of that individual's testimony and not to the use of magic or descriptive words. *Commonwealth v. Davido*, 582 Pa. 52, 868 A.2d 431 (2005). In considering whether to accept an expert witness' opinion, this testimony in its entirety must be reviewed so as to determine that it is not speculative but based upon reasonable certainty. *Carrozza v. Greenbaum,* 886 A.2d 369 (Pa.Super. 2004); *aff'd.* 591 Pa. 196, 916 A.2d 553 (2007).

In analyzing Dr. Latham's testimony it is clear that all parties to this proceeding recognized him as an expert and that his testimony went unchallenged. While Dr. Latham identified two potential causes for the death, he did state unequivocally and with a degree of reasonable medical certainty, that Taylor's death was caused by a cardiac arrhythmia caused by the stress of her atherosclerosis, the cold to which she was exposed to and the stress of knowing that she could not reenter the Atrium facility since she was locked out.

Bell and Atrium next maintain that this Court erred in permitting testimony concerning the vitamin seminar that Bell and two of her employees attended hours before Taylor's death since evidence had no relation to the offenses charged and had no probative value and was designed to do nothing more than prejudice the jury against Bell. Pennsylvania Rule of Evidence 404(b) provides as follows:

> **(b) Other crimes, wrongs, or acts.**
>
> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.
>
> (2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.
>
> (3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.
>
> (4) In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The Commonwealth presented the testimony of Nicole Taylor, (hereinafter referred to as "Nicole"), who was a licensed practical nurse employed at Atrium. She testified that at approximately 7:00 p.m. on October 25, 2001, Bell had persuaded her and Crystal Alessi, who was a registered nurse also employed at Atrium, to leave their shifts and attend a vitamin seminar with her at a nearby hotel. The purpose of this seminar was to explain the use and benefits of these vitamin plans and to encourage the attendees to attempt to sell these plans to other individuals. The more individuals that they could sign up for these plans, the more money that they could make. Crystal Alessi also testified that she was asked to go to this vitamin seminar and that it was a "chain event" which was explained as if you had people signed up below you, you would earn more money.

In addition to Nicole and Alessi testifying, the Commonwealth also presented the testimony of Mary Catherine Klee, (hereinafter referred to as "Klee"), who testified that on October 25, 2001, she was not scheduled to work at Atrium but because of the overwhelming workload being faced by the staff, that she had agreed to come in and help out with the preparing and filing of some of the reports that were required to be filed. While she was completing these reports, she was told by Nicole and Alessi that they were going to the vitamin seminar and that they would be back when the seminar was over despite the fact that they were leaving their respective shifts. Klee testified that she was invited by Alessi and Nicole to join them and attend this seminar but she declined as she had done previously when she had been invited by Bell. She also testified that she knew what this seminar was about and that it was a pyramid scheme. (Trial Transcript Volume V, pp. 168-170). She went on to explain how she understood this pyramid scheme to work.

In light of the numerous pre-trial meetings that took place in this case, it is clear that the Commonwealth's desire to use this testimony was well known to Bell and Atrium. The obvious thrust of this testimony was to demonstrate that this vitamin seminar was not an educational experience but, rather, the recruitment of individuals to form a "Ponzi" or pyramid scheme to make money. The reason that the Commonwealth sought to introduce this testimony is obvious since it took great pains to picture Bell as an individual who was not concerned about caring for Alzheimer patients but, rather, was out to increase the amount of money that she could make from her business enterprises. In this regard, the Commonwealth presented the testimony of numerous witnesses who indicated that at the time staffing sheets were being prepared and submitted by Atrium for reimbursement were incorrect and that they did not either work the days

that were listed, or the hours that were listed when they did in fact work. In addition, there was continuous funding of the Alzheimers Disease Alliance by revenues generated by Atrium so that that entity could pay the exorbitant salaries of Bell and Mason. The evidence further supports the contention that Bell did not care for her patients since she would deprive them of sufficient staffing to ensure their safety while pocketing money that was intended for vendors, which she refused to pay.

This evidence was sought to be introduced by the Commonwealth for the purpose of showing the motive and plan of Bell as she operated and manipulated Atrium and the Alzheimer Disease Alliance. Evidence of these other bad acts can be admitted as long as it is relevant to the subject matter under review and is not designed solely for the purpose of punishing or prejudicing a defendant. *Commonwealth v. Horvath*, 781 A.2d 1243 (Pa.Super. 2001). This evidence further underscored Bell's willingness to sacrifice the safety of the residents of Atrium when she took two staff members from their assigned shifts to go to a money-making seminar, thereby leaving the already understaffed facility with a group of individuals who were incapable of handling the demands that were imposed upon them. The fact that there was some degree of prejudice does not render the evidence inadmissible. *Commonwealth v. Counterman*, 553 Pa. 370, 719 A.2d 284 (1998). In determining its admissibility, the probative value will often outweigh the prejudice where the other act is less disturbing than the one for which the defendant is on trial. *Commonwealth v. Williams*, 541 Pa. 85, 660 A.2d 1316 (1995). In reviewing the testimony of these two witnesses in light of all of the testimony that the jury heard over five and one-half weeks, it is clear that approximately six pages of the testimony out of three thousand, five hundred fifty-five pages of testimony was not designed to prejudice the defendant but, rather, was to demonstrate Bell's continual neglect of her patients in her seemingly unending quest for more money.

Bell and Atrium next contend that not only was the evidence insufficient to support these verdicts but that the verdicts were against the weight of the evidence. While these two claims may appear to be similar, the distinction between the two is significant. A claim that the verdict was against the weight of the evidence must be raised in post-sentencing motions pursuant to Pennsylvania Rule of Criminal Procedure 607.2 Failure to raise that claim with the Trial Judge in a post-sentencing motion, waives that claim on appeal. *Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177 (1994).

In *Commonwealth v. Widmer*, 550 Pa. 308, 744 A.2d 751-752 (2000), the Pennsylvania Supreme Court defined the different standards that have to be reviewed in assessing a claim that the evidence was insufficient to support the verdict as opposed to a claim that the verdict was against the weight of the evidence. The standards are different since the results that would occur in those claims are different. If the reviewing court would make the determination that the evidence was insufficient, a retrial would be precluded, whereas, if a determination was made that the verdict was against the weight of the evidence, a new trial must be granted. The Supreme Court set forth the standards that must be employed in reviewing those claims as follows:

> Appellant's remaining claim of error is that the Superior Court misstated the standard of review for a weight of the evidence claim. The standard of review refers to how the reviewing court examines the question presented. *Morrison*, 646 A.2d at 570. Appellant asserts that the Superior Court improperly interjected sufficiency of the evidence principles into its analysis and thus adjudicated the trial court's exercise of discretion by an incorrect measure.
>
> In order to address this claim we find it necessary to delineate the distinctions between a claim challenging the sufficiency of the evidence and a claim that challenges the weight of the evidence. The distinction between these two challenges is critical. A claim challenging the sufficiency of the evidence, if granted, would preclude retrial under the double jeopardy provisions of the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Pennsylvania Constitution, *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982); *Commonwealth v. Vogel*, 501 Pa. 314, 461 A.2d 604 (1983), whereas a claim challenging the weight of the evidence if granted would permit a second trial. *Id.*
>
> 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. *Commonwealth v. Karkaria*, 533 Pa. 412, 625 A.2d 1167 (1993). Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. *Commonwealth v. Santana*, 460 Pa. 482, 333 A.2d 876 (1975). 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. Chambers*, 528 Pa. 558, 599 A.2d 630 (1991).
>
> A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. *Commonwealth v. Whiteman*, 336 Pa.Super. 120, 485 A.2d 459 (1984). Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. *Tibbs*, 457 U.S. at 38 n. 11, 102 S.Ct. 2211.[FN3] An allegation that **752 the verdict is against the weight of the evidence is addressed to the discretion of the trial court. *Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177 (1994). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. *Thompson, supra.* A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that "notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." *Id.*
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> FN3. In *Tibbs*, the United States Supreme Court found the following explanation of the critical distinction between a weight and sufficiency review noteworthy: When a motion for new trial is made on the ground that the verdict is con-

> trary to the weight of the evidence, the issues are far different…. The [trial] court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses. If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

In evaluating a claim that the verdict was against the weight the weight of the evidence one must review the entire record in the light most favorable to the Commonwealth with all reasonable inferences drawn therefrom to determine whether or not there was sufficient evidence to enable a fact-finder to find every element of the crimes charged beyond a reasonable doubt. *Commonwealth v. Pronkoskie,* 498 Pa. 245, 445 A.2d 1203 (1982). Moreover, while a criminal conviction may not be based on conjecture or surmise, the Commonwealth's burden of proving its case beyond a reasonable doubt may be sustained by using circumstantial evidence. *Commonwealth v. Berrios,* 495 Pa. 444, 434 A.2d 1173 (1981).

Bell and Atrium were convicted of the crimes of involuntary manslaughter, neglect of a care dependent person, recklessly endangering another person and criminal conspiracy. The elements of involuntary manslaughter are set forth in 18 Pa.C.S.A. §2504 as follows:

> **§2504. Involuntary manslaughter**
> **(a) General rule.—**A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person.
>
> **(b) Grading.—**Involuntary manslaughter is a misdemeanor of the first degree. Where the victim is under 12 years of age and is in the care, custody or control of the person who caused the death, involuntary manslaughter is a felony of the second degree.

In order to sustain a conviction on the charge of involuntary manslaughter, the Commonwealth must show that a defendant's conduct was directly and substantially linked to the victim's death. *Commonwealth v. Moyer,* 436 Pa.Super. 442, 648 A.2d 42 (1994). That does not mean, however, that a defendant's conduct need be the sole cause of a victim's death to establish the causal connection required for an involuntary manslaughter conviction. Criminal responsibility may be properly assessed against an individual whose conduct was a direct and substantial factor producing the death, even though other factors combined with that conduct to achieve the result. *Commonwealth v. Long,* 425 Pa.Super. 170, 624 A.2d 200 (1993).

In *Commonwealth v. Youngkin,* 285 Pa.Super. 417, 427 A.2d 1356, 1360 (1981), the Pennsylvania Supreme Court set forth the standard to be viewed when making a determination as to whether or not the Commonwealth has proved that the defendant's actions or inactions constituted the recklessness or criminal negligence required to support a conviction for involuntary manslaughter.

> The recklessness or criminal negligence required to sustain an involuntary manslaughter conviction may be found if the accused consciously disregarded or, in gross departure from a standard of reasonable care, failed to perceive a substantial and unjustifiable risk that his action might cause death or serious bodily harm.

In *Commonwealth v. Howard,* 265 Pa.Super. 535, 402 A.2d 674 (1979), the Court determined that the evidence was sufficient to support a conviction for involuntary manslaughter where a mother witnessed and had full knowledge of a continued pattern of severe beatings and abuse inflicted upon her child by her boyfriend over a period of several days and did nothing to protect that child. The Court determined that the mother consciously disregarded a manifestly apparent risk to the health and safety of the child and that such neglect was a gross deviation from the standard of conduct a reasonable parent would have observed under similar circumstances. Accordingly, under such circumstances a mother's failure to protect her child was reckless and grossly negligent. The facts of the instant case are no different than those set forth in the *Commonwealth v. Howard, supra.*

Both Bell and Atrium knew that Taylor was a severely debilitated individual suffering from Alzheimer's disease. She was known to be a wanderer by the personnel of Atrium and she needed almost constant attention as evidenced by the fact that she was moved from the personal care portion of Atrium to the nursing care portion. Bell, as the administrator and chief operating officer of Atrium, engaged in a course of conduct, which caused administrators and staff personnel to quit the facility. In a three-year period almost twelve hundred people were hired to fill the two hundred positions that were necessary to adequately maintain Atrium. Despite the need for two hundred individuals, Atrium was continuously understaffed although it was billing for staffing at the two hundred level and submitting requests for reimbursement for hours that people never worked. All of this was done so that Bell could divert funds from Atrium to the Alzheimers Disease Alliance which, in turn, paid her and Mason exorbitant salaries, which had no relationship to the work which they did for that foundation.

The record clearly demonstrates that the staff was aware of the staffing problems and that numerous individuals would be required to work double shifts to have someone at the facility. Individuals were hired moments before their shifts were to start and given little if any instruction as to the care needs for the various patients that they were to supervise. The rules and regulations of Atrium were routinely ignored as evidenced by the fact that rounds were to take place every two hours and that was done only if they had sufficient personnel on staff at the time that the rounds were required. In addition, Atrium was a non-smoking facility where staff members routinely smoked in the lunchroom and used the various exits of this facility to go outside and smoke, thereby disengaging the alarm system for the facility. In addition, Bell sanctioned staffers leaving their shifts to go and attend personal meetings for enterprises in which she was involved, thereby adding to the problem of the grossly understaffed facility. The employees of Atrium became transient in nature since Atrium, which was controlled and directed by Bell, refused to pay its suppliers and sought out individuals to be hired on a daily or temporary basis. The record in this case clearly demonstrates that Bell and Atrium's conduct demonstrated a conscious disregard for the safety of its residents and, in particular, for its dependent person, Taylor.

The elements of the offense of neglect of a care dependent person are set forth in 18 Pa.C.S.A. §2713 as follows:

§2713. Neglect of care-dependent person

(a) Offense defined.—A caretaker is guilty of neglect of a care-dependent person if he:

(1) Intentionally, knowingly or recklessly causes bodily injury or serious bodily injury by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare of a care-dependent person for whom he is responsible to provide care.

(2) Intentionally or knowingly uses a physical restraint or chemical restraint or medication on a care-dependent person, or isolates a care-dependent person contrary to law or regulation, such that bodily injury or serious bodily injury results.

It is unquestioned that Taylor was a care dependent person and that Bell and Atrium were caretakers as defined by the statute. What is also unquestioned in reviewing the record in this case is that Bell and Atrium intentionally, knowingly or recklessly caused the death of Taylor by failing to provide the proper care and protection to her in violation of their obligations to her. Similarly, the record in this case demonstrates that convictions for the crime of recklessly endangering another person[3] were clearly warranted.

Bell and Atrium were also convicted of criminal conspiracy with respect to the death of Taylor. To establish a criminal conspiracy, the Commonwealth must demonstrate that two or more individuals agreed to commit a criminal act and one or more of those individuals committed an overt act in furtherance of that particular conspiracy. 18 Pa.C.S.A. §903.[4] The theory of the Commonwealth's case with regard to the conspiracy was that Bell, as the administrator of Atrium and Galati, Osborne and Beasley, as employees of Atrium, agreed to tamper with the evidence as it pertained to the death of Taylor and also to impede any investigation made by law enforcement officials into her death. In this regard, the Commonwealth suggested that the actions undertaken by the Atrium employees from removing the body from where it was originally found, changing her clothes, cleaning up the body and then attempting to elevate the body temperature, all demonstrated a conscious pattern by these individuals to tamper with the evidence as to the real cause of death. The Commonwealth also maintained that these actions were undertaken at the specific direction and insistence of Bell and that she attempted to aid in those activities by virtue of her statements to the police and testimony at the open inquest. The record in this case clearly supported those contentions and, accordingly, the convictions for criminal conspiracy were properly entered.

Bell and Atrium also suggested that the verdicts in this case were against the weight of the evidence. In *Commonwealth v. La*, 433 Pa.Super. 432, 640 A.2d 1336 (1994), the Court set forth the standard for reviewing a claim that the verdict was against the weight of the evidence as follows:

> The decision to grant or deny a motion for a new trial on the ground that the verdict is against the weight of the evidence is committed to the trial court's sound discretion. *Commonwealth v. Pronkoskie,* 498 Pa. 245, 251, 445 A.2d 1203, 1206 (1982); *Commonwealth v. Taylor,* 324 Pa.Super. 420, 425, 471 A.2d 1228, 1230 (1984). The test is not whether this Court would have made the same decision but whether the verdict is so contrary to the evidence that justice compels a new trial. *Id.* For a new trial to be awarded on this challenge, the evidence must be "so tenuous, vague and uncertain that the verdict shocks the conscience of the court." *Commonwealth v. Edwards,* 399 Pa.Super. 545, 554, 582 A.2d 1078, 1083 (1990, *appeal denied,* 529 Pa. 640, 600 A.2d 1258 (1991). Where the credibility of a witness is at issue, the trial court's judgment will remain undisturbed on appeal. *Commonwealth v. Rochon,* 398 Pa.Super. 494, 504, 581 A.2d 239, 244 (1990). If the source of the evidence is, however, so unreliable or contradictory that it renders a verdict thereon pure conjecture, this Court will overturn the conviction. *Commonwealth v. Whack,* 482 Pa. 137, 140, 393 A.2d 417, 419 (1978); *Commonwealth v. Trudell,* 371 Pa.Super. 353, 538 A.2d 53 (1988), *appeal denied,* 519 Pa. 665, 548 A.2d 255 (1988).

As previously observed, the record in this case clearly demonstrates the Commonwealth met its burden of proving each and every one of the elements of the offenses charged beyond a reasonable doubt. The verdicts in this case do not shock one's sense of justice nor are the verdicts based on tenuous, vague and uncertain evidence but, rather, a clear pattern of neglect fueled by Bell's greed.

MARTHA BELL

Bell has filed two additional claims of error in connection with her appeal and those are that the hearsay statements of Galati were erroneous admitted, thereby depriving her of her right of confrontation as guaranteed by the Sixth Amendment of the United States Constitution and that they were in violation of Pennsylvania Rule of Evidence §803(25). The confrontation clause of the Sixth Amendment of the United States Constitution provides: "In all the criminal prosecutions, the accused shall enjoy the right…to be confronted with the witness against him." In *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354 (2004), the United States Supreme Court reviewed those circumstances where the confrontation clause becomes applicable to testimonial statements and the sworn statements.

> First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.
>
> Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." 3 Wigmore §1397, at 101; accord, *Dutton v. Evans*, 400 U.S. 74, 94, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) (Harlan, J., concurring in result). Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.
>
> This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns.

An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused-in other words, those who "bear testimony." 2 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pre-trial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements…contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois,* 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition-for example, *ex parte* testimony at a preliminary hearing.

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive. Cobham's examination was unsworn, see 1 Jardine, Criminal Trials, at 430, yet Raleigh's trial has long been thought a paradigmatic confrontation violation, see, *e.g., Campbell,* 30 S.C.L., at 130. Under the Marian statutes, witnesses were typically put on oath, but suspects were not. See 2 Hale, Pleas of the Crown, at 52. Yet Hawkins and others went out of their way to caution that such unsworn confessions were not admissible against anyone but the confessor. See *supra*, at 1360.[3]

These sources-especially Raleigh's trial-refute THE CHIEF JUSTICE's assertion, *post*, at 1375 (opinion concurring in judgment), that the right of confrontation was not particularly concerned with unsworn testimonial statements. But even if, as he claims, a general bar on unsworn hearsay made application of the Confrontation Clause to unsworn testimonial statements a moot point, that would merely change our focus from direct evidence of original meaning of the Sixth Amendment to reasonable inference. We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK. (The claim that unsworn testimony was self-regulating because jurors would disbelieve it, cf. *post*, at 1374, n. 1, is belied by the very existence of a general bar on unsworn testimony.) Any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption (here, allegedly, admissible unsworn testimony) involves some degree of estimation-what THE CHIEF JUSTICE calls use of a "proxy," *post*, at 1375-but that is hardly a reason not to make the estimation as accurate as possible. Even if, as THE CHIEF JUSTICE mistakenly asserts, there were no direct evidence of how the Sixth Amendment originally applied to unsworn testimony, there is no doubt what its application would have been.

That Court, in making the distinction between testimony and non-testimonial hearsay also acknowledged that the rule established in *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d. 597 (1980), remains in place. In *Ohio v. Roberts, supra.* 448 U.S. at 65-66, the Supreme Court analyzed the interaction between the confrontation clause and admissible hearsay as follows:

> The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. See, *Mancusi v. Stubbs,* 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); *Barber v. Page,* 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968. See also *Motes v. United States,* 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900); *California v. Green,* 399 U.S., at 161-162, 165, 167, n. 16, 90 S.Ct., at 1936-1937, 1938, 1939, n. 16.[7]
>
> [7] A demonstration of unavailability, however, is not always required. In *Dutton v. Evans,* 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), for example, the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness. Cf. Read, The New Confrontation-Hearsay Dilemma, 45 S.Cal.L.Rev. 1, 43, 49 (1972); The Supreme Court, 1970 Term, 85 Harv.L.Rev. 3, 194-195, 197-198 (1971).
>
> The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying

purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule." *Snyder v. Massachusetts,* 291 U.S., at 107, 54 S.Ct., at 333. The principle recently was formulated in *Mancusi v. Stubbs*:

"The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant,' *Dutton v. Evans, supra,* at 89, 91 S.Ct., at 220 and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement,' *California v. Green, supra,* 399 U.S., at 161, 90 S.Ct., at 1936. It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these 'indicia of reliability.' " 408 U.S., at 213, 92 S.Ct., at 2313.

The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." *Mattox v. United States,* 156 U.S., at 244, 15 S.Ct., at 340.[8] This reflects the truism that "hearsay rules and the Confrontation Clause are generally designed to protect similar values." *California v. Green,* 399 U.S., at 155, 90 S.Ct., 15 933, and "stem from the same roots," *Dutton v. Evans,* 400 U.S. 74, 86, 91 S.Ct. 210, 218, 27 L.Ed.2d 213 (1970). It also responds to the need for certainty in the workaday world of conducting criminal trials.

[8] See, *e.g., Pointer v. Texas,* 380 U.S., at 407, 85 S.Ct., at 1069 (dying declarations); *Mattox v. United States,* 156 U.S., at 243-244, 15 S.Ct., at 339-340 (same); *Mancusi v. Stubbs,* 408 U.S. 204, 213-216, d 293 (1972) (cross-examined prior-trial testimony); Comment, 30 La.L.Rev. 651, 668 (1970) ("Properly administered the business and public records exceptions would seem to be among the safest of the hearsay exceptions").

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[9] ([9]Footnote omitted.)

Bell has suggested that since Atrium, as a nursing facility, is subject to Federal, State and County laws and regulations which mandate certain reporting requirements, that means that any statements made by an employee of Atrium became testimonial in nature. In particular, Bell points out that Galati testified at the time of an open inquest when a determination was being made as to the cause and manner of Taylor's death. Accordingly, any of Galati's statements should not have been admitted as part of the Commonwealth's evidence to establish the charge of conspiracy. The problem with this particular contention is the statements made by Galati which the Commonwealth used to establish the conspiracy to tamper with evidence and to hinder the investigation into the death of Taylor, were not those made at the open inquest but, rather, were the statements described by Candis when she overheard Galati speaking to Bell and heard Galati repeat the instructions that she was receiving. Since these statements were nontestimonial, they fell within the purview of *Ohio v. Roberts, supra,* and accordingly, the question then becomes whether or not they should have been admitted pursuant to an exception of the hearsay rule.

In this regard, Bell suggests that Pennsylvania Rule of Evidence 803(25), would have precluded the introduction of Galati's statements. That Rule provides as follows:

> **(25) Admission by party-opponent.** The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement may be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Bell maintains that there was insufficient evidence in the record to establish the authority of Galati to make such statements and the existence of a conspiracy to tamper with evidence and Bell's participation in that conspiracy. The problem with Bell's current contentions is that the record clearly establishes that the statements made by Galati were statements made by an agent of Atrium acting within the course and scope of her employment. The Commonwealth is required to show that the declarant was an agent or employee of Atrium, and that the declarant made the statement while employed by Atrium and that the statement concerned a matter within the scope of the agency or employment of the declarant. *Sehl v. Vista Linen Rental Service, Inc.,* 763 A.2d 858 (Pa.Super. 2000). The record is replete with testimony from the various employees of Atrium that not only was Galati an employee of that facility but, for the 11:00 p.m. to 7:00 a.m. shift on October 25-26, 2001, Galati was the supervisor for the entire facility and was the person in charge all of the employees whether they worked in the personal care section or the skilled nursing section of that facility.[5] In addition, the record demonstrates statements made by Galati were in the course of her employment because she was inquiring what to do since Galati had advised of the discovery of a body of a resident of that facility and after returning the body to the bed, sought instructions from her superior, Bell, the administrator of the facility, as to what further actions she should take.[6] Finally, it is undeniable that the

statements made by Galati concerning the handling of Taylor's body were within the scope of her employment or authority since she was the supervisor of the facility and the individual responsible for the care of all of the patients at that facility.

Similarly, Galati's statements were also admissible under Pennsylvania Rule of Evidence 803(25)(d) since prior to the telephone call to Bell, the conspiracy began to take place. Holawaty had called Galati to inform her that there was a body in the courtyard and Galati then instructed Beasley and Osborne to go to that area. When Beasley saw Taylor lying prone on the ground, she attempted to get a pulse and when she was unable to, she indicated to Holawaty that Taylor was dead. Holawaty indicated that she wanted the coroner called and that no one should be moving the body. Despite Holawaty's desire to contact the coroner, Galati decided not to let the body remain where it was found but, rather, to bring it into the facility, clean up the body, change the clothes on the body, place the body in bed and then turn up the heat in the room in an attempt to elevate the body's core temperature. Even after Taylor's body was placed, she wanted to ensure that Holawaty had not called the coroner and advised her that Galati would make that phone call. Galati then makes the phone call to Bell, which is overheard by Candis.

In that phone call, Candis overhears Galati address the person to whom she is talking as Martha, tell her that Taylor was dead and that she was found outside, and then repeats the instructions that she received from Bell, those being to clean the body up, make sure it is in bed, call the physician and then call Taylor's family to advise them that Taylor had died peacefully in bed. The fact that the conspiracy to tamper with evidence and to hinder the investigation into the death of Taylor had begun prior Galati making the phone call, does not mean that Bell was not part of the conspiracy. Concealment of the information with regard to the underlying crime becomes a central part of the conspiracy and anyone who participates in that concealment becomes a co-conspirator. In *Commonwealth v. Evans*, 489 Pa. 85, 413 A.2d 1025, 1029 (1980), the Supreme Court determined that:

> As we have often stated:
>
> "The declarations or acts of one conspirator made to third parties in the absence of his co-conspirator are admissible in evidence against both provided that such declarations or acts were made during the conspiracy and in furtherance of the common design."
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> *Commonwealth v. Porter*, 449 Pa. 153, 161, 295 A.2d 311, 314 (1972); *Commonwealth v. Ellsworth*, 409 Pa. 505, 509, 187 A.2d 640, 642 (1963).
>
> In *Commonwealth v. Pass*, 468 Pa. 36, 360 A.2d 167 (1976), this Court specifically addressed the question of whether attempts by a co-conspirator to conceal evidence after the commission of a crime come within the scope of the conspiracy to commit the crime. Therein we adopted the following passage from *United States v. Hickey*, 360 F.2d 127, 141 (7th Cir. 1966) *cert. denied*, 385 U.S. 928, 87 S.Ct. 284, 17 L.Ed.2d 210 (1966), which interpreted the decision of the United States Supreme Court in *Grunewald v. United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957):
>
> "The duration of a conspiracy depends upon the facts of the particular case, that is, it depends upon the scope of the agreement entered into by its members. Generally, the conspiracy ends when its principal objective is accomplished because no agreement to retain secrecy after the achievement of the unlawful end can be shown or implied by mere 'acts of covering up.' Thus in *Grunewald v. United States, supra,* 353 U.S. at 402, 77 S.Ct. at 972, the Supreme Court stated, 'Acts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators.' But the fact that the 'central objective' of the conspiracy has been nominally attained does not preclude the continuance of the conspiracy. Where there is evidence that the conspirators originally agreed to take certain steps after the principal objective of the conspiracy was reached, or evidence from which such an agreement may reasonably be inferred, the conspiracy may be found to continue. *Atkins v. United States,* 307 F.2d 937, 940 (9th Cir. 1962); *cf., United States v. Allegretti*, 340 F.2d 254, 256 (7th Cir. 1964), *cert. denied,* 381 U.S. 911, 85 S.Ct. 1531, 14 L.Ed.2d 433 (1965)…. The crucial factor is the necessity for some showing that the later activities were part of the original plan." [FN7]
>
> FN7. The Federal standard was promulgated in order to prevent a great widening of the scope of conspiracy prosecutions due to the indefinite extension of the life of conspiracies. See *Commonwealth v. Grunewald, supra.* It was felt that allowing a conspiracy to conceal to be inferred from mere overt acts of concealment would effectively "wipe out the Statute of Limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators." *United States v. Grunewald*, *supra*, 353 U.S. at 402, 77 S.Ct. at 972. Although this is not a constitutional standard binding the states, *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed. 213 (1970), we will continue to follow it for the reasons expressed.

Similarly, in *Commonwealth v. Mayhue*, 536 Pa. 271, 639 A.2d 421, 431, 433 (1994), the Supreme Court discussed the admission of out-of-court statements made under the co-conspiracy exception to the hearsay rule.

> Appellant initially raises five claims of error regarding the admission of evidence at trial. In reviewing the trial court's rulings, we are guided by the rule of law that the admissibility of evidence is a matter addressed to the sound discretion of the trial court, which may only be reversed upon a showing that the court abused its discretion. *Commonwealth v. Claypool,* 508 Pa. 198, 203-204, 495 A.2d 176, 178 (1985). After reviewing appellant's claims in light of this standard, we find them to be meritless.
>
> We begin our review of appellant's evidentiary claims by addressing appellant's three contentions regarding the admission of out of court statements under the co-conspirator's exception to the hearsay rule.FN9 Under this exception, the out of court declarations of a co-conspirator may be introduced against another co-conspirator provided three requirements are satisfied. The prosecution must

prove the existence of a conspiracy between the declarant and the defendant against whom the evidence is being offered. Once this requirement is satisfied the Commonwealth must show that the statements were made during the course of the conspiracy, and finally that the statements were made in furtherance of the common design. *Commonwealth v. Zdrale,* 530 Pa. 313, 317, 608 A.2d 1037, 1039 (1992).

> FN9. These claims were raised in issues one, three, and four of appellant's brief. However, for the sake of convenience we will address them seriatim…

With respect to the introduction of evidence under the co-conspirator exception, the Commonwealth is only required to prove the existence of a conspiracy by a fair preponderance of the evidence. *Commonwealth v. Pinkins,* 514 Pa. 418, 424, 525 A.2d 1189, 1191 (1987). In addition, the Commonwealth need not establish such a preponderance through direct evidence. Rather, a conspiracy, for purposes of the co-conspirator exception, may be inferentially established by showing the relation, conduct or circumstances of the parties. *Commonwealth v. Dreibelbis,* 493 Pa. 466, 475, 426 A.2d 1111, 1115 (1981); *Commonwealth v. Roux,* 465 Pa. 482, 350 A.2d 867 (1976).

We have previously held on several occasions that the fulfillment of the main objective of a conspiracy does not necessarily result in its termination. Where there is evidence that the conspirators originally agreed to take certain steps after the principal objective of the conspiracy was reached, or evidence from which such an agreement might reasonably be inferred, the conspiracy may be found to continue. *Commonwealth v. Pass,* 468 Pa. 36, 46, 360 A.2d 167, 171 (1976). Thus, statements made by conspirators in an attempt to conceal a completed crime may be admissible against other co-conspirators under the co-conspirator exception when the concealment of the crime was an integral part of the common design to which the conspirators agreed. *Pass*, 468 Pa. at 46, 360 A.2d at 171; *Commonwealth v. Haag,* 522 Pa. 388, 562 A.2d 289 (1989). We have held, however, that the hearsay rule no longer applies once the object of the conspiracy has been completed, and one or more of the conspirators is under arrest or in custody. *Commonwealth v. Ransom,* 446 Pa. 457, 288 A.2d 762 (1972).

Parenthetically, it should be noted that Galati's statements were admissible under Pennsylvania Rule of Evidence 803(25)(e) since the statements made by her were made in furtherance of the conspiracy. In *Commonwealth v. Johnson,* 576 Pa. 23, 838 A.2d 663, 675 (2004), in ruling on the admissibility of hearsay statements made by co-conspirators stated:

> Application of the co-conspirator exception to the hearsay rule is predicated on agency principles-when the elements of the exception are established, each conspirator is considered an agent of the other, and therefore, a statement by one represents an admission by all.FN4 As Johnson acknowledges, to meet the first requirement of the exception (existence of a conspiracy), the Commonwealth's burden is gauged according to a preponderance standard, and conspiracy may be inferentially established, for example, by relation, conduct, or circumstances of the parties. See *Commonwealth v. Mayhue,* 536 Pa. 271, 293, 639 A.2d 421, 432 (1994); *Commonwealth v. Pinkins,* 514 Pa. 418, 424, 525 A.2d 1189, 1191 (1987). No formal charge of conspiracy is necessary. See *Commonwealth v. Coccioletti,* 493 Pa. 103, 113, 425 A.2d 387, 392 (1981); *Commonwealth v. Dreibelbis,* 493 Pa. 466, 426 A.2d 1111 (1981).
>
> > FN4. In *Anderson v. United States,* 417 U.S. 211, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974), the United States Supreme Court explained: The rationale for both the hearsay-conspiracy exception and its limitations is the notion that conspirators are partners in crime. As such, the law deems them agents of one another. And just as the declarations of an agent bind the principal only when the agent acts within the scope of his authority, so the declaration of a conspirator must be made in furtherance of the conspiracy charged in order to be admissible against his partner.
>
> *Id.* at 218 n. 6, 94 S.Ct. at 2259 n. 6 (citations omitted); accord *Commonwealth v. Sullivan,* 472 Pa. 129, 159-60, 371 A.2d 468, 482-83 (1977) (plurality); *Commonwealth v. Timer,* 415 Pa.Super. 376, 384, 609 A.2d 572, 575 (1992). See generally Pa.R.E. 803(25) (including statements of co-conspirators under admissions of party-opponents).

Galati's statements and her reiteration of Bell's statements were done in furtherance of the conspiracy since Taylor's family had not yet been advised of her death. A conspiracy formulated to hide the cause of that death from Taylor's family began with the removal of her body from the courtyard and continued through the statement to the family that she had died in her bed at Atrium.

ATRIUM

In addition to the errors jointly claimed with Bell, Atrium has also suggested that this Court erred when it allowed testimony with respect to Bell's credit card use and that Atrium was denied due process of law when the corporate and/or medical records maintained by the defendants were seized and stored by the government and its agents intentionally destroyed those records.

Throughout the course of the five and one-half weeks of trial, the Commonwealth presented certain witnesses who made reference to the fact that Bell and Mason used credit cards of Atrium to pay for their personal expenses. Testimony ranged from the fact that Bell and Mason went out to lunch every day and charged that back to Atrium, to trips to Atlantic City and Las Vegas to allegedly attend seminars for Alzheimer's disease. The introduction of this testimony was for the limited purpose of demonstrating Bell's cavalier disregard to the welfare and safety of her patients and if that information prejudiced anybody, it prejudiced Bell since it portrayed her not in the light of a caring and sympathetic nursing home administrator but, rather, a money-greedy individual who would charge all of her personal expenses to her corporate employer, to the detriment of the corporation's patients. In reviewing a Trial Court's evidentiary rulings, an Appellate Court is guided by the rule of law that the admissibility of evidence is a matter addressed to the sound discretion of the Trial Court, which may be reversed only upon a showing that the Court abused

that discretion. *Commonwealth v. Claypool,* 508 Pa. 198, 495 A.2d 176 (1985). In the instant case there was no abuse of discretion nor did any prejudice befall Atrium since the actions that were described were not actions of the corporation but, rather, actions of its controlling agent, Bell.

Atrium's final contention of error is that when the United States federal government ceased Atrium's records, one of its agents intentionally destroyed those records. The problem with this contention is that the record in this case is totally devoid of that information and, in particular, information that it was an intentional act by a member of federal government. While this Court was aware that the federal prosecution was taking place in the United States District Court for the Western District of Pennsylvania at Docket No. 02:04cr212, which resulted in Bell and Atrium being convicted on twenty of twenty-two counts of health care fraud, it was never made aware of the fact that a representative of the United States government had intentionally destroyed records of Atrium. As with all of the claims of error asserted by both Bell and Atrium, this current contention is also without merit.

Cashman, J.

Dated: September 5, 2008

[1] Galati was originally charged with four counts of perjury, four counts of false swearing, two counts of tampering with evidence and one count of criminal conspiracy. Her case was not tried with Bell and Atrium but, rather, following their convictions, Galati entered a plea to one count of perjury, one count of false swearing and one count of criminal conspiracy on March 6, 2007, and subsequently was sentenced to a period of probation of five years.

[2] Pa.R.Crim.P. Rule 607

> (A) A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial:
>
> (1) orally, on the record, at any time before sentencing;
>
> (2) by written motion at any time before sentencing; or
>
> (3) in a post-sentence motion.
>
> (B)(1) If the claim is raised before sentencing, the judge shall decide the motion before imposing sentence, and shall not extend the date for sentencing or otherwise delay the sentencing proceeding in order to dispose of the motion.
>
> (2) An appeal from a disposition pursuant to this paragraph shall be governed by the timing requirements of Rule 720(A)(2) or (3), whichever applies.

[3] **§2705. Recklessly endangering another person**
A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

[4] **§903. Criminal conspiracy**
(a) Definition of conspiracy.—A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

> (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

[5] Trial Transcript, Volume II, p. 142; Volume II, p. 240; Volume III, p. 20.

[6] Trial Transcript, Volume III, pp. 47-53.

Commonwealth of Pennsylvania v. Alexander Steven Clark

Probation Violation—Sentencing Guidelines—Excessive Sentence

1. Defendant was charged with two counts of Retail Theft, entered a guilty plea and, in July 2006, was sentenced to five years' probation.

2. At a hearing several months later, the Court determined that Defendant violated probation and revoked the probation sentence. Defendant was sentenced to nine to eighteen months of house arrest and consecutive two years of probation.

3. In January 2007, the Court granted Defendant parole to travel to South Carolina. Again, several months later, a hearing was held on a probation violation, following which the Court sentenced him to two and one-half to five years incarceration, with credit for time served.

4. The Court denied post-sentence motions after hearing and Defendant appealed, raising six errors, all of which assert that the sentence imposed was unreasonable and excessive. Defendant alleged that the Court abused its discretion in imposing the sentence as it ignored the statutory factors and failed to consider an individualized or rehabilitative sentence.

5. The Court cited the statutory authority permitting it to revoke probation upon violations of same and found that all sentences imposed were within the statutory limits prescribed by the Guidelines.

6. The Court also stated that appeals for excessive sentence were permitted, only for violation of sentencing guidelines or when the sentence is contrary to the norms of the sentencing process, neither of which apply to this case. The Court weighed the statutory factors and determined that the Defendant has a "long-standing drug addiction," violated probation twice in less than a year, and was likely to repeat crimes, finding the sentences imposed proper.

(Angel L. Revelant)

Dan Regan for the Commonwealth.
Aaron D. Sontz for Defendant.

No. CC200415370. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Machen, J., September 9, 2008—Defendant, Alexander Steven Clark, was charged at CC: 200415370 Counts 1 and 2–Retail Theft. On July 11, 2006 this court accepted defendant's guilty plea and sentenced defendant to five (5) years probation on Count 1 and No Further Penalty on Count 2. At a hearing on October 17, 2006, this court determined that

defendant had violated his probation. As a result, defendant's probation was revoked and he was sentenced to nine (9) to eighteen (18) months of house arrest and a consecutive two (2) years of probation. On or about January 11, 2007, this court granted defendant parole to travel to Duncan, South Carolina. On May 29, 2007, this court again found that defendant had violated his probation and sentenced defendant to two and one-half (2 1/2) to five (5) years incarceration with credit for time served. Post-Sentence Motions Nunc Pro Tunc were filed on May 23, 2008 and were denied after a hearing held on July 8, 2008. It is that Order which defendant filed his timely appeal.

Defendant raises six (6) errors on appeal. First, that this court abused its discretion when it sentenced defendant to a period of total confinement for the statutory maximum period of time as the result of technical violations of his probation and parole. Second, the sentence imposed is unreasonable insofar as it ignores the statutory factors listed in 42 Pa.C.S. §9721(b). Third, that the sentence imposed is unreasonable because this court did not consider the factors listed in 42 Pa.C.S. §9771(c). Fourth, that the sentence is unreasonable as it confines defendant for the statutory maximum where the maximum guideline range is twelve (12) to eighteen (18) months. Fifth, the sentence imposed is unreasonable insofar as this court never considered the sentencing guidelines for the original sentence or for the subsequent probation and parole violation. Finally, that the sentence imposed is unreasonable insofar as the court did not impose an individualized sentence with respect to defendant.

Matters One (1), Four (4), Five (5), and Six (6) complain that the sentence was unreasonable as the court did not individualize the sentence and consider all the factors required to rehabilitate defendant.

> "The court may revoke an order of probation upon proof of the violation of specified conditions of the probation. Upon revocation the sentencing alternatives available to the court shall be the same as were available at the time of initial sentencing, due consideration being given to the time spent serving the order of probation."
>
> 42 Pa.C.S.A. §9771(f)

Pursuant to §9771(f), this court was proper in revoking probation upon defendant's violation of his probation. The Pennsylvania Commission on Sentencing supplied guidelines during the initial trial which this court used to sentence defendant after violation. The sentences were all within the statutory limits as proscribed by the Commission's guideline.

Allowance of appeal complaining of excessive sentencing is only permitted when there is a substantial question regarding the appropriateness of the sentence. *Com. v. Boyer*, 856 A.2d 149 (Pa.Super. 2004). "A substantial question exists where an appellant sets forth a plausible argument that the sentence violates a particular provision of the Sentencing Code or is contrary to the fundamental norms underlying the sentencing process," *Id.* Neither occurred here. Defendant merely states that his sentence was excessive without providing any question regarding its appropriateness. As such, defendant's claims are without merit.

Matter Two (2) alleges that this court ignored statutory factors listed in 42 Pa.C.S. §9721(b). Based upon this statute, the court's sentence "should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on...the community, and the rehabilitative needs of the defendant." 42 Pa.C.S. §9271(b). This court weighed these factors and found that the sentence imposed with credit for time served was required to protect the public and satisfy the rehabilitative needs of defendant thus satisfying the statutory requirements. As such, defendant's claim is without merit.

Matter Three (3) on appeal alleges that this court did not consider factors listed in §9771. Pursuant to 42 Pa.C.S.A. §9771(c)(2), total imprisonment is an appropriate sentence where additional crimes are likely to be committed. Defendant has a longstanding drug addiction. (Probation Violation Hearing Transcript of May 29, 2008, hereinafter "PVT 5/29/2007," p. 6). More importantly, defendant had violated terms of his probation two times in less than one year. (PVT, p. 6). This court found that defendant was likely to repeat such crimes in the near future.

As such, defendant's claim of excessive sentencing is without merit.

BY THE COURT:
/s/Machen, J.

Dated: September 9, 2008

Commonwealth of Pennsylvania v. David Charles Burke

Child Abuse—Aggravated Assault

1. Defendant caused the victim to suffer from "Shaken Baby Syndrome" and pled guilty to aggravated assault, endangering the welfare of child and recklessly endangering another person.

2. Defendant asserted that the Court abused its discretion in sentencing him to a "manifestly excessive" sentence, due to history of nonviolence.

3. Defendant also suggested that the court abused its discretion when it indicated that the Defendant demonstrated a lack of remorse for his actions.

4. The Court found the sentence neither an abuse of discretion nor manifestly excessive. Defendant appeared to lack remorse, the ability to take responsibility for his actions, and first denied and later admitted responsibility to the investigating officer. This behavior displays that the abuse of discretion claim is without merit.

(Danielle D. Rawls)

Michael Streily for the Commonwealth.
Jeffery M. Murray, Jr. for Defendant.

CC No. 200518280. In the Court of Common Pleas of Allegheny County, Pennsylvania.

OPINION

Cashman, J., September 12, 2008—The appellant, David Charles Burke, (hereinafter referred to as "Burke"), has filed the instant appeal as a result of the imposition of a sentence of a period of incarceration of not less than ten nor more than twenty years to be followed by a period of probation of seven years, as a result of his plea of guilty to the charges of aggravated assault, endangering the welfare of a child and recklessly endangering another person. In his statement of matters complained of on appeal, Burke maintains that this Court abused its sentencing discretion by giv-

ing him a manifestly excessive sentence.[1]

In order to understand Burke's claim of error, a brief review of the facts must be made. On August 26, 2005, Burke was living with Dana Roney, (hereinafter referred to as "Roney"), and their two children, who were three years old and seven weeks old. Burke acted as the primary custodial parent, thereby allowing Roney to work. On August 26, 2005, she went to work leaving the children in the custody of Burke. Roney received a telephone call from Burke around noon and he advised her that everything was fine with the children. At approximately 3:00 p.m., he once again called her and told her that the seven week old, Nicholas, was acting goofy.

Roney left work early and came home to find that Nicholas was giving out a shrill cry but was basically unresponsive. Roney immediately took Nicholas to Children's Hospital for examination and treatment.

At Children's Hospital, Nicholas was examined and treated by Dr. Janet Squires, who is the head of the Child Abuse Unit. Dr. Squires found that Nicholas had three left lateral rib fractures, two right lateral rib fractures, bi-lateral retinal hemorrhages, a subdural hematoma, and other injuries that were consistent with Shaken Baby Syndrome. Also of note was the fact that there were healing fractures of the mid-shaft of the left femur and of the right mid-shaft tibia. As a result of Dr. Squires' examination, it was determined that normal neurological function had ceased and that the retinal hemorrhages were an indication of the shaken baby injury and she diagnosed this a non-accidental physical abuse causing long-term neurological damage. Nicholas spent twenty days in the hospital where he was on a full ventilator support and life care support in the pediatric intensive care unit. Nicholas is currently treating with a team of nine doctors and attends weekly physical therapy, occupational therapy, and vision therapy.

The police interviewed Burke and he initially denied shaking or causing any injuries to Nicholas. Approximately a month after his first interview, Burke was reinterviewed by the police and after being given his Miranda warnings, voluntarily gave a statement to the police. In that statement Burke said that he became frustrated with Nicholas' continuous crying and that he did something he had seen Roney do once before to get Nicholas to stop crying, and, that is, to pull the blanket out from underneath Nicholas, which caused him to spin out of the blanket. When he did that, Nicholas stopped crying. Approximately one hour later, Burke tried to wake him up and change him. Nicholas did not cry, nor did he respond when Burke tried to feed him. When he got no response from Nicholas, he decided to call Roney.

As a result of the injuries that this child sustained, he now suffers from cerebral palsy, sleep apnea, seizures that his physicians believe resulted from Shaken Baby Syndrome. Nicholas has an inability to swallow, thereby requiring that he have a permanent feeding tube. He cannot sit, crawl, walk, talk and he is totally wheelchair bound. He takes seven different medications as a result of the injuries that he sustained. His long-term prognosis is bleak since his treating physicians believe that it is unlikely that he would live to adulthood and they would expect that he would die before he is thirteen years old.

Burke has suggested that this Court abused its discretion in sentencing him to an manifestly excessive sentence. In this regard he has suggested that since the sentence was outside of the aggravated range of the guidelines, it was manifestly unreasonable. He has also indicated that this Court failed to consider Burke's history of non-violence. Burke has also maintained that the sentence was an abuse of discretion when the Court failed to accurately assess the nature and circumstances of his offense. Burke further maintains that the sentence was not consistent with the protection of the public or his rehabilitative needs. Finally, he has suggested that this Court abused its discretion when it indicated that Burke demonstrated a lack of remorse for his actions.

In *Commonwealth v. Walls,* 592 Pa. 557, 926 A.2d 957, 961-962 (2007), the Pennsylvania Supreme Court set forth the standard for reviewing a claim that a sentencing Court abused its discretion when imposing an allegedly manifestly excessive sentence.

> The standard of review typically refers to the level of deference to be accorded a lower tribunal's decision. Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking,* 2 J. Appellate Prac. & Process 47 (2000). Our Court has stated that the proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion. *Commonwealth v. Smith,* 543 Pa. 566, 673 A.2d 893, 895 (1996)("Imposition of a sentence is vested in the discretion of the sentencing court and will not be disturbed absent a manifest abuse of discretion."). As stated in *Smith*, an abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless "the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." *Id.*[FN2] In more expansive terms, our Court recently offered: "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." *Grady v. Frito-Lay, Inc.,* 576 Pa. 546, 839 A.2d 1038, 1046 (2003).
>
> FN2. As supported by both our case law mandating review of the record, *Smith*, 673 A.2d at 895, and the Sentencing Code requiring an appellate court to review the "record" in making the reasonableness determination described below, 42 Pa.C.S. §9781(d), our scope of review on appeal is plenary, in other words, we may review the entire record.
>
> The rationale behind such broad discretion and the concomitantly deferential standard of appellate review is that the sentencing court is "in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it." *Commonwealth v. Ward,* 524 Pa. 48, 568 A.2d 1242, 1243 (1990); *see also Commonwealth v. Jones,* 418 Pa.Super. 93, 613 A.2d 587, 591 (1992)(en banc) (offering that the sentencing court is in a superior position to "view the defendant's character, displays of remorse, defiance or indifference and the overall effect and nature of the crime."). Simply stated, the sentencing court sentences flesh-and-blood defendants and the nuances of sentencing decisions are difficult to gauge from the cold transcript used upon appellate review. Moreover, the sentencing court enjoys an institutional advantage to appellate review, bringing to its decisions an expertise, experience, and judgment that should not be lightly disturbed. Even with the advent of the sentencing guidelines,[FN3] the power of sentenc-

ing is a function to be performed by the sentencing court. *Ward*, 568 A.2d at 1243. Thus, rather than cabin the exercise of a sentencing court's discretion, the guidelines merely inform the sentencing decision. *See also United States v. Salinas*, 365 F.3d 582, 588 (7th Cir. 2004).

The Supreme Court also observed in *Commonwealth v. Yuhasz*, 592 Pa. 120, 923 A.2d 1111, 1118-1119 (2007), that the sentencing guidelines promulgated by the legislature are advisory in nature and while they must be considered by a sentencing Court, they are not mandatory.

> Pennsylvania has a guided sentencing system, requiring a judge to consider the guidelines promulgated by the Pennsylvania Commission of Sentencing in choosing a minimum sentence. The Legislature has provided that:
>
> The court shall also consider any guidelines for sentencing adopted by the Pennsylvania Commission of Sentencing and taking effect pursuant to section 2155 (relating to publication of guidelines for sentencing). In every case in which the court imposes a sentence for a felony or misdemeanor, the court shall make as part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed. In every case where the court imposes a sentence outside the sentencing guidelines adopted by the Pennsylvania Commission on Sentencing pursuant to section 2154 (relating to adoption of guidelines for sentencing) and made effective pursuant to section 2155, the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines. Failure to comply shall be grounds for vacating the sentence and resentencing the defendant. 42 Pa.C.S. §9721(b) [in relevant part].
>
> The Sentencing Guidelines, located at 204 Pa.Code §303 *et seq.*, recommend ranges of minimum sentences based on the type of offense, the defendant's prior criminal history, and a variety of aggravating and mitigating factors. The standard recommended minimum sentence is determined by the intersection of the defendant's prior record score and the offense gravity score on the Basic Sentencing Matrix. 204 Pa.Code §303.16. The Guidelines further recommend that if the court determines that aggravating or mitigating circumstances are present, it may impose a sentence that is a specified amount of time greater than the upper limit of the standard range or less than the lower limit of the standard range. 204 Pa.Code §303.13.
>
> It is well established that the Sentencing Guidelines are purely advisory in nature. As this Court explained in *Commonwealth v. Sessoms*, 516 Pa. 365, 532 A.2d 775, 780-81 (1987), the Guidelines do not alter the legal rights or duties of the defendant, the prosecutor or the sentencing court. The guidelines are merely one factor among many that the court must consider in imposing a sentence. *Sessoms*, 532 A.2d at 781. Consequently, this Court explained:
>
> The defendant has no "right" to have other factors take pre-eminence or be exclusive; therefore, to have the guidelines considered, whatever they may provide does not change his rights. Likewise, the prosecutor has no "right" to have a particular sentence imposed. Most important, the court has no "duty" to impose a sentence considered appropriate by the Commission. The guidelines must only be "considered" and, to ensure that such consideration is more than mere fluff, the court must explain its reasons for departure from them.
>
> *Id.* Likewise, we explained in *Commonwealth v. Mouzon*, 571 Pa. 419, 812 A.2d 617, 621 (2002)(plurality), that despite the recommendations of the Sentencing Guidelines, "the trial courts retain broad discretion in sentencing matters, and therefore, may sentence defendants outside the Guidelines." The only line that a sentence may not cross is the statutory maximum sentence. See *Mouzon*, 812 A.2d at 621 n. 4., *Commonwealth v. Saranchak*, 544 Pa. 158, 675 A.2d 268, 277 n.17.

42 Pa.C.S.A. §9782, sets forth the criteria which a reviewing Court must consider in making a determination as to whether or not a sentence should be vacated.

> **(c) Determination on appeal.—**The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:
>
> (1) the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;
>
> (2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or
>
> (3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.
>
> In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.
>
> **(d) Review of record.—**In reviewing the record the appellate court shall have regard for:
>
> (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
>
> (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.
>
> (3) The findings upon which the sentence was based.
>
> (4) The guidelines promulgated by the commission.

Using these criteria and the standards directed by the Supreme Court to be employed in reviewing a sentence where it is claimed that it arises as a result of the abuse of discretion, it is clear that the sentence imposed on Burke was neither an abuse of discretion nor manifestly excessive.

This Court had the benefit of the guidelines for the charge of aggravated assault, which revealed that the mitigated range was ten months; the standard range, twenty-two to thirty-six months; and, the aggravated range, forty-eight months. In addition to the guidelines, this Court also had the benefit of the psychiatric reports that were done by the Behavior Clinic and the presentence report that was prepared for Judge Sasinoski. As previously noted, the guidelines are advisory in nature and the sentencing Court is not

required to impose a guideline sentence when the facts of the case clearly militate against such a sentence. In the instant case even an aggravated range sentence would not be appropriate for the nature of the offense charge and the character of the defendant. In this case Burke took an otherwise healthy, seven-week old and turned that child into an individual who is totally dependent on others for his care. The child cannot walk, talk or eat and is required on a weekly basis to attend occupational, physical and vision therapy. These injuries have so devastated this child that he is confined to a wheelchair and his long-term prognosis is poor since his treating physicians do not expect that he will live to the age of thirteen.

Further underscoring the need for a departure from the guidelines, was the fact that upon examination of Nicholas, Dr. Squires found not only current injuries but also, other injuries, which were consistent with prior child abuse. Dr. Squires noted healing fractures of his right femur and left tibia. The presence of healing fractures connotes only one thing and that is, a prior injury sustained by this child. In addition, this Court had the opportunity to consider Burke and his statements regarding the injuries that Nicholas sustained. Based upon the psychiatric reports, presentence report and Burke's own statements, it is clear that he showed no remorse for the commission of this particular crime. His acknowledgement of guilt resulted not from a wish to take responsibility for his actions but, rather, the fact that his lawyer was not providing him with any likelihood of success if he proceeded to trial.[2]

Burke also maintains that his sentence was excessive since it did not take into consideration the fact that he had a history as a non-violent individual. This statement ignores the fact that in June of 2003, Roney filed a protection from abuse action against the defendant; however, the order was vacated approximately one month later. While it is true that he has no criminal record for violence, the actions that he took in the effort to hide what he did, demonstrate an individual who is capable of causing great harm. In addition, his denial of responsibility for these actions culminating in the assertion that he was being set up by his former girlfriend, underscores Burke's callous and self-serving personality.

Burke next maintains that this Court failed to properly assess the circumstances of this particular crime. In this regard, Burke maintains that the actions that he took were minimal yet these actions caused extensive, life-threatening injuries to Nicholas. This Court was fully aware of the actions that Burke took and those that he might possibly have taken since Nicholas was already suffering from preexisting injuries as evidenced by the healing fractures of both of his legs. Burke's explanation of how Nicholas sustained these injuries was an attempt to diminish his responsibility since these injuries were consistent not with a baby being spun out of a towel, but with the Shaken Baby Syndrome as evidenced by the petecheal hemorrhaging of Nicholas' eyes and the trauma sustained to his brain. The statements that Burke made to the investigating police officer, to the psychiatrist at the Behavior Clinic and to the presentence investigator, all show an attempt to avoid or at least minimize his responsibility for the commission of these crimes.

When he was initially interviewed, Burke denied any responsibility for Nicholas' injuries. When he was confronted by the police a month later, he attempted to minimize his role by suggesting that he only did what he had seen his paramour do on a prior occasion to have the baby, Nicholas, stop crying. He acknowledged that Nicholas cried all of the time and that it was hard for him to sleep. In fact, when he discussed the nature of Nicholas' injuries with the investigating officer, he indicated that because of the injuries sustained by this child, Burke's life was now over. In speaking to Shakeel A. Khan, M.D. a psychiatrist who examined him from the Allegheny County Behavior Clinic, he detailed the circumstances of his arrest as follows:

> CIRCUMSTANCES OF THIS ARREST:
>
> The defendant reports that he is a victim of telling the truth to the judge. He was asked if he smoked marijuana over a period of time and the defendant admitted it to him. He stated that his original arrest was on July 25th for charges of shaking a baby. He denies that he was ever involved in abusing his children. He reports that it was the mother of his children who had several problems and wanted to frame him.

Finally, in speaking with the presentence investigator, he told him that he was surprised when the doctors informed him that Nicholas had been diagnosed with Shaken Baby Syndrome and he denied ever hurting the child and suggested that his injuries occurred when one of Roney's friends was babysitting him. In addition to insinuating that Roney was a non-caring mother, he stated that maybe she or one of her friends caused the injury to him. He has also suggested that Roney wanted to frame him. All of these factors were considered when imposing the sentence on Burke.

Burke also maintains that his sentence was not consistent with the objective of the Sentencing Code in that this Court did not consider the need to protect the public and Burke's rehabilitative needs. In fashioning any sentence, this Court is guided by the Sentencing Code and the sentencing guidelines that are applicable to each individual's case. In this regard, this Court carefully considered Burke's rehabilitative needs since he sustained significant injuries in a motorcycle accident in March of 2006, which left him disabled and unable to work. This Court wanted to ensure that Burke would never have the opportunity or the ability to subject a helpless infant to the injuries that his son sustained. Burke's lack of remorse and his inability to accept responsibility for his actions and his attempt at minimizing his involvement in this catastrophic incident, dictated the sentence that was imposed upon him.

Finally, Burke maintains that this Court erred when it observed that Burke showed no remorse for his actions. It is replete throughout the record that this Court has examined that Burke felt that he was the true victim of this crime. Burke's told the presentence investigator that as a result Nicholas' injuries, that Burke's life was over and that the only reason that he plead guilty was not to accept responsibility but that his lawyer was giving him no hope. Similarly, Burke denied responsibility to the investigating police office, the physicians at Children's Hospital and his paramour and attempted to deflect responsibility to others by suggesting that Roney wanted to set him up and either Roney or one of her girlfriends had, in fact, caused Nicholas' injuries. In observing him at the time of the entry of his plea and the imposition of his sentence, his attitude and demeanor were consistent with what he had demonstrated to others throughout the investigation of these particular crimes and that he did not want to accept responsibility for these crimes and placed the blame for Nicholas' injuries on others. The only person about whom he was concerned was himself as underscored by his statement that his life was over. As with all of Burke's claims of error, this claim of an abuse of discretion by this Court finding that he had no remorse, was without merit.

BY THE COURT:
/s/Cashman, J.

Dated: September 12, 2008

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[1] Burke originally entered a plea of guilty on September 25, 2007 in front of the Honorable Kevin G. Sasinoski. Judge Sasinoski ordered a presentence report in aid of sentencing, which was scheduled for December 13, 2007. On that date, Burke's sentence was vacated and Judge Sasinoski recused himself and the case was assigned to the undersigned.

[2] In the presentence report, Burke told the presentence investigator the reason why he was pleading guilty.

"Regarding his sentencing, he said, 'This ain't me,' and stated he pled guilty on his attorney's advice. 'She [his attorney] gave me no hope,' he said.