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PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

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PLJ

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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.

Allegheny Jury Verdict Reporter

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

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

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

Capsule Summaries

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

Binders

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Carol S. Kroll, et al. v. John J. Ghaznavi, et al.; Carol S. Kroll, et al. v. Ronald Taylor, et al.; Sergiu Sanielevici, et al. v. Ronald Taylor, et al.; Steven Bostard v. Ronald Taylor, et al.; and Richard Clinger v. Peoples Oakland, Inc., et al.

Duty to Control—Duty to Warn—Mental Health Procedures Act—Negligence—Summary Judgment

1. Since no party filed a response to the Summary Judgment Motion of Peoples Oakland and no party raised any opposition to said Motion at oral argument, all the claims against Peoples Oakland were dismissed.

2. For purposes of deciding the motion for summary judgment, the Court assumed that the evidence, if read in a fashion most favorable to the plaintiffs, supported the description of the facts as put forth by the plaintiffs and that the opinions expressed by the plaintiffs' expert were credible.

3. In a negligence claim, common law does not impose a duty extending to third persons to adequately diagnose and treat a voluntary outpatient.

4. The exception to the general rule that there is no duty to control the conduct of a third party to protect another, which exception is a duty to warn when the threat is made against a specifically identified or readily identifiable victim, did not apply to the present situation.

5. A claim based on §319 of the *Restatement (Second) of Torts*, which deals with the duty to control a third person and exercise reasonable care to control him to prevent him from causing bodily harm to others, would not apply because St. Francis had no control over Taylor.

6. Section 7114 of the Mental Health Procedures Act does not apply to voluntary outpatient treatment; it only applies to persons who participate in a decision that meets specific criteria, which were not met in this case.

7. Plaintiffs' claims against St. Francis Medical Center and St. Francis Health System were dismissed because the facts, as described by Plaintiff, do not support the tort actions brought by the victims of Taylor's shooting spree against these Defendants.

(Carol Sikov Gross)

Lawrence P. Lutz for Kroll Plaintiffs.
Romel L. Nicholas for Sanielevici Plaintiffs; Bostard Plaintiff; Clinger Plaintiff.
Stacey F. Vernallis, Jaime N. Fabert for Delta Property Management.
Christopher T. Lee, Andrew T. Tillapaugh for McDonald's Restaurants of Pennsylvania.
Thomas A. Matis for Peoples Oakland, Inc.
Mark R. Hamilton, Rebecca A. Sember for St. Francis.
Ronald Taylor, Shirley Taylor, and Woodside Garden Apartments, *Pro Se*.

GD No. 00-016764, GD No. 01-009576, GD No. 02-004175, GD No. 02-004178, GD No. 02-004283. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION AND ORDER OF COURT

Wettick, J., October 11, 2007—Motions for summary judgment of St. Francis Medical Center and St. Francis Health System ("St. Francis") and Peoples Oakland, Inc. are the subject of this Opinion and Order of Court.

PEOPLES OAKLAND, INC.

No party has filed a response to the motion of Peoples Oakland and at oral argument (at which a court reporter was present) no party raised any opposition to the motion for summary judgment of Peoples Oakland. Consequently, I will enter a court order dismissing all claims against Peoples Oakland.

ST. FRANCIS

Plaintiffs have outstanding claims against St. Francis in each of the five lawsuits that were consolidated pursuant to September 5, 2003 and October 29, 2004 court orders. St. Francis seeks dismissal on the ground that evidence does not support recovery under Pennsylvania tort law.[1]

For purposes of deciding this motion for summary judgment, I will assume that the evidence, if read in a fashion most favorable to plaintiffs, will support the description of the facts, set forth below, in the Brief in Opposition to Motion for Summary Judgment of Defendants, St. Francis Medical Center and St. Francis Health System, filed on behalf of Carol S. Kroll, Administratrix of the Estate of John R. Kroll, and Carol S. Kroll, individually, at 1-6:

INTRODUCTION

On March 1, 2000, Ronald Taylor, an African-American male, went on a racially motivated shooting spree in Wilkinsburg, Pennsylvania. Taylor shot and killed John Kroll, then continued his rampage that led to the eventual death of two others, including Emil Sanielevici, and the serious wounding of Steven Bostard and Richard Clinger. Taylor was convicted of myriad crimes, including three counts of first-degree murder and two counts of attempted murder. (*See The Commonwealth of Pennsylvania v. Ronald Taylor*, CCR 200013804 and 200012463, Allegheny County Court of Common Pleas). Taylor is currently housed on death row at the State Correctional Institution in Graterford, Pennsylvania.

The Defendants herein, St. Francis and St. Francis Medical Center (the "Defendants"), were grossly negligent in their care and treatment of Ronald Taylor. As a result of their acts and omissions, Taylor was callously disregarded as a patient and left to perpetrate his hate and criminal acts upon his innocent victims on that fateful day in 2000.

History of Taylor's Care With Defendants

Taylor had a long history of psychiatric illness and treatment, most of which occurred in facilities owned and controlled by Defendants.

Beginning on September 14, 1990, Taylor was admitted to St. Francis Medical Center through the emergency room pursuant to a 302 violation alleging dangerousness.[2] *See* Exhibit "A," 9/14/1990 Record. Taylor admitted to thoughts of suicide and also to hearing voices and seeing visions. He stated that he couldn't stop thinking of suicide. He also admitted to having threatened to kill his two brothers with a gun and that if he did not receive help, there was a good chance he would kill someone. He stated that he was depressed and that his depression was building every day. He stated that every day, he thought of a suicide plan. *See* Exhibit "A," 9/14/1990 Record. He also admitted to threatening to kill his father.

He was eventually discharged from inpatient care on September 25, 1990 with a diagnosis of situational reaction, mixed personality disorder, and asthma. *See* Exhibit "A," 9/14/1990 Record.

Taylor treated as an outpatient with Western Psych from December 1990 to May 1991. *See* Exhibit "B," 10/15/1991 Record. During this time, he admitted to seeing faces on the

wall, and in fact he punched the wall due to seeing the faces. He also reported to feeling things crawling all over the floor and on his face. *See* Exhibit "C," 1/7/1991 Record.

On October 15, 1991, Taylor contacted Defendants again, after having presented to Western Psych during the prior months, requesting an appointment because of depression, hallucinations, and loneliness. He stated that his most troubling symptom was his violent temper, and he believed he was a risk to harm someone. The staff psychiatrist diagnosed Taylor with schizophrenia, paranoid type, chronic. *See* Exhibit "B," Psychiatric Evaluation of Taylor by Dr. David Muskat. In a May 2, 1997 psychiatric evaluation, the attending doctor from St. Francis diagnosed Taylor with chronic paranoid schizophrenia and noted that Taylor continued to express hatred toward white people. *See* Exhibit "D," Psychiatric Evaluation of Taylor by Dr. Anjaneyulu Karumudi.

On May 19, 1998, Taylor once again presented to St. Francis Medical Center seeking to be admitted for paranoia and suicidal ideation. *See* Exhibit "E," Psychiatric Discharge Summary by Prabir Mullick, M.D., 5/22/1998. He was diagnosed this time with chronic paranoid schizophrenia, acute exacerbation, and admitted for treatment pursuant to Section 201 of the Mental Health Procedures Act, 50 P.S. §7201. *Id.* He was discharged on May 22, 1998. *Id.* Dr. Mullick stated that Taylor may need long-acting antipsychotics based on a social worker's report that Taylor was prone to extreme paranoia and that he gets non-compliant.

On May 16, 1999, Taylor once again presented himself to St. Francis emergency room and requested that he be placed back in treatment with Defendants as he complained that he worried a lot, had angry thoughts, and no way out of his situation. *See* Exhibit "F," Dr. Sarma Evaluation, 6/15/1999. He then presented to St. Francis' Community Mental Health Center on June 15, 1999 and was examined by Dr. Rajkumar Sarma, a psychiatric resident physician. *See* Exhibit "F," Dr. Sarma Evaluation, 6/15/1999. Taylor was diagnosed with depression NOS. As part of the follow-up treatment plan, Dr. Sarma indicated that Defendants needed to obtain records from inpatient for his past admission. *See* Exhibit "F," Dr. Sarma Evaluation, 6/15/1999.

In his deposition testimony, Dr. Sarma stated that although he had in fact requested the prior medical and mental health records of Taylor, he was never provided with those records, and thus, never reviewed them as was stated as a need in the treatment plan. *See* Exhibit "G," Deposition of Dr. Sarma, p. 59-61. *See* also Exhibit "H," Request for Patient Information.

Taylor was next seen by therapist Sarah Hart on July 20, 1999 at the Community Mental Health Center. *See* Exhibit "I," Notes of Sarah Hart, 7/20/1999. It was at this first meeting with Hart that Taylor requested he be able to meet with a "black therapist." *Id.* After that therapy session, Hart consulted with Jerry Smith, Ph.D., who stated that he may choose to assign Taylor to a male therapist after reviewing the file. *Id.* In her deposition, Hart stated that she did not know why Smith had made such a suggestion, save for possibly making Taylor feel more comfortable. *See* Exhibit "J," Deposition of Sarah Hart, p. 189-191.

On July 22, 1999, Hart's notes indicated she conferred with Dr. Sarina, who indicated that Taylor had also mentioned to him that he preferred a black therapist. *See* Exhibit "I," Notes of Sarah Hart, 7/22/1999. On August 2, 1999, Hart received a phone call from People's Oakland (a social services organization that Taylor had visited) indicating that Taylor had requested People's Oakland to secure for him an Individual Case Manager to assist Taylor in his treatment plan. *See* Exhibit "I," Notes of Sarah Hart, 8/2/1999.

On August 27, 1999, Taylor phoned Hart and requested a non-white therapist and noted that he was aware that there was an Asian therapist on staff. Hart indicated to Taylor that the Community Mental Health Center worked as teams and it would not be workable to transfer his case to another therapist. Later, Hart conferred with Dr. Sarma and it was agreed that Taylor, if to be treated by St. Francis, would need to follow the clinical protocol to achieve optimum clinical results. On that same day, Taylor again phoned Hart requesting he be placed with a black therapist and Hart indicated that she had discussed Taylor's treatment plan with her supervisor and it was their decision to have Hart continue as Taylor's therapist. Taylor again reiterated that he had seen an Asian therapist on staff. *See* Exhibit "I," Notes of Sarah Hart, 8/27/1999.

The net result of all of this was that nobody at St. Francis did anything for Taylor with respect to treatment, the reason why he came.

On September 8, 1999, Hart took part in what she referred to as "several informational phone calls" with members of the staff at People's Oakland. *See* Exhibit "I," Notes of Sarah Hart, 9/8/1999. People's Oakland related to her that they had a "critical incident" involving the receipt of two letters from an unspecified client of theirs. *Id.* She received a facsimile transmission of these notes, and learned that they came from Taylor. Hart's notes indicate that she spoke about the matter with her supervisor, Jerry Smith, and she also informed Allen Jacobson in her office. *Id.* Hart stated in her deposition that, although she perceived a "critical incident" as an incident of which one pays attention, she did nothing to find out what exactly this "critical incident" was. *See* Exhibit "J," Deposition of Sarah Hart, p. 76-77. Specifically, she stated that she never requested to see the letters and never requested to learn the nature of the letters. *Id.* p. 169. Of course, she still had not seen Taylor's medical records, even though she and Dr. Sarma believed that they were absolutely essential.

On November 1, 1999, Hart and Dr. Sarma signed off on a Discharge Summary, indicating that Taylor was being discharged because Taylor had terminated his treatment due to the fact that a non-white therapist was not available to him. *See* Exhibit "K," Discharge Summary, 11/1/1999. Dr. Sarma states in his deposition that he simply signed papers prepared by Hart. Hart states she relied upon Dr. Sarma, the supervising physician.

The next entry on any of Taylor's medical records at Defendants' facilities appears, curiously, on March 1, 2000 (the same day as the killings) when Hart made a paragraph notation summarizing her prior involvement with Taylor and re-iterating Taylor's desire to be seen by a non-white therapist and his mention of there being an Asian therapist on staff. Hart's note restates that the decision of Defendants was to have Hart remain as Taylor's therapist. *See* Exhibit "I," Notes of Sarah Hart, 3/1/2000. When questioned about this note in her deposition, Hart indicated that, incredibly, she did not recall why exactly she entered the note on March 1, 2000. *See* Exhibit "J," Deposition of Sarah Hart, p. 97-101.

Neither Hart nor Dr. Sarma, or anyone else at St. Francis, ever viewed the prior medical records at St. Francis prior to making a diagnosis and deciding to discharge him to the care of People's Oakland.

For purposes of this motion for summary judgment, I further find the opinions expressed by plaintiffs' expert (Dr. Stefan P. Kruszewski, Board Certified by the American Board of Psychiatry and Neurology) to be credible:

> **Summary**
>
> Within a reasonable degree of medical and psychiatric certainty, I offer the following opinions: St.

> Francis failed to meet the minimum standard of care necessary to diagnose and adequately treat Mr. Ronald Taylor, a person with a protracted history of paranoid schizophrenia, in late 1998-2000. Those failures to diagnose and accurately treat and triage Mr. Taylor culminated in such gross negligence that Mr. Taylor was incorrectly diagnosed, improperly treated, and was mistakenly terminated from his therapeutic engagement with clinical staff. He lacked an individualized treatment plan from May-November of 1999, a plan that could and should have recognized his paranoid thinking, his racial distrust, his episodic non-compliance with treatment, his potential for acting out violently, his previous aggression, his previously directed violence, and his previous substance abuse and dependence. St. Francis failed to provide him with the therapeutic engagement that was necessary to continue to evaluate and monitor him. St. Francis failed to provide any reasonable continuity of care because he had no appropriate referral for ongoing care when he was terminated by St. Francis. Because of St. Francis' grossly negligent diagnosis, treatment and failed oversight, all of which represented a significant deviation from acceptable community standards of psychiatric care, Mr. Taylor was left defenseless against his paranoia and aggressive impulses. By its multiple therapeutic and administrative failures, St. Francis destroyed the mental health precautions that could have deterred predictable violent acting-out, including the killing spree of 01 March 2000.

8/1/05 Kruszewski Report at 9-10, Sanielevici Ex. L.

I am dismissing plaintiffs' claims against St. Francis because the facts, as described by plaintiffs, do not support the tort actions brought by these victims of Taylor's shooting spree against St. Francis.

It is unclear as to the theories of law upon which plaintiffs base their claims against St. Francis.

I.

Plaintiffs may be raising a negligence claim based on the opinion of their expert witness that St. Francis failed to meet minimum standards of care necessary to diagnose and adequately treat Taylor. However, the common law does not impose a duty which extends to third persons to adequately diagnose and treat a voluntary outpatient. Under the common law, as a general rule, there is no duty to control the conduct of a third party to protect another from harm. *Emerich v. Philadelphia Center for Human Development,* 720 A.2d 1032, 1036 (Pa. 1998).

In *F.D.P. v. Ferrara,* 804 A.2d 1221 (Pa.Super. 2002), a resident of a group home, during a home visit, sexually molested a child. The child's parents, individually and on behalf of the child, sued the group home for (1) failing to provide and arrange for appropriate treatment for the resident, (2) failing to house the resident in a more restrictive environment, (3) allowing the resident to be at his parent's home unsupervised, and (4) failing to seek or pursue a civil commitment. The Court ruled that a mental health provider is not liable to third persons for the failure to properly treat a patient.

The Court relied on *Heil v. Brown,* 662 A.2d 669 (Pa.Super. 1995), where a mental health patient began outpatient treatment on a voluntary basis. The patient's condition worsened. When the treating physician and psychiatrist were not available, the patient's social worker drafted a treatment plan and told the patient to return to see a psychiatrist. The patient was not committed even though he appeared very agitated. The following day the patient experienced a psychotic episode causing him to drive his car into a police van. The injured police officer and his wife instituted an action against the mental health providers. The Court granted summary judgment in favor of the mental health providers, stating that mental health professionals do not owe a duty to protect third parties. The Court said:

> While the occurrence of a traffic accident due to a psychotic episode is considerably less foreseeable than the fact that a sexual molester will molest when he consistently has displayed such behavior, *Heil* nevertheless supports the position that a mental health provider owes no duty to protect against actions of his patients in the absence of special circumstances such as those present in *Emerich*. 804 A.2d at 1230.

In *F.D.P.*, the Court also relied on its opinion in *Dunkle v. Food Service East, Inc.*, 582 A.2d 1342 (Pa.Super. 1990), where the Court held that mental health providers were not liable for harm caused by an admittedly dangerous patient since the patient failed to convey a specific threat of harm against his eventual victim.

There is an exception to the general rule that there is no duty to control the conduct of a third party to protect another. In *Emerich v. Philadelphia Center for Human Development, supra,* 720 A.2d at 1043, the Court imposed a duty to warn in the following circumstances:

> [W]hen the patient has communicated to the professional a specific and immediate threat of serious bodily injury against a specifically identified or readily identifiable third party and when the professional, determines, or should determine under the standards of the mental health profession, that his patient presents a serious danger of violence to the third party, then the professional bears a duty to exercise reasonable care to protect by warning the third party against such danger.

The Court stated that strong reasons support the requirement that the duty to warn will only arise when the threat is made against a specifically identified or readily identifiable victim:

> We are cognizant of the fact that the nature of therapy encourages patients to profess threats of violence, few of which are acted upon. Public disclosure of every generalized threat would vitiate the therapist's efforts to build a trusting relationship necessary for progress. Moreover, as a practical matter, a mental health care professional would have great difficulty in warning the public at large of a threat against an unidentified person. Even if possible, warnings to the general public that would 'produce a cacophony of warnings that by reason of their sheer volume would add little to the effective protection of the public.' *Id.* at 1040-41 (citations omitted).

The *Emerich* exception does not apply to the present situation because there is no evidence that Taylor communicated to St. Francis a specific and immediate threat to seriously injure a specifically identified or readily identifiable third party. To the contrary, while Taylor expressed very negative feelings toward white people, there is no evidence that he ever communicated a threat–let alone an immediate threat–to harm anyone other than himself and his family members.

Plaintiffs cite footnote five in *Emerich* where the Court

states that it is addressing only the issue of the protection of third parties in the context of a duty to warn the intended victim of the danger. "We leave for another day the related issue of whether some broader duty to protect should be recognized in this Commonwealth." *Id.* at 1037 n.5. This footnote does not create any case law in plaintiffs' favor.

II.

Plaintiffs may be seeking recovery based on §319 of the *Restatement (Second) of Torts* which provides: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." However, this provision does not apply because St. Francis had no control over Taylor.

The circumstances under which a mental health care facility may take control over a person through an involuntary commitment and the length of time the individual can be subject to such control are governed by the Mental Health Procedures Act, 50 P.S. §7101 *et seq.*

Section 7301(a) of the Act provides that only a person who is "severely mentally disabled and in need of immediate treatment" may be made subject to an involuntary commitment procedure. A person is "severely mentally disabled when, as a result of a mental illness, his capacity to exercise self-control, judgment and discretion in the conduct of his affairs and social relations or to care for his own personal needs is so lessened that he poses a clear and present danger of harm to others or to himself." In order to establish that a person is a clear and present danger to himself or others, evidence must be put forth that "within the past 30 days the person has inflicted or attempted to inflict serious bodily harm on another and that there is reasonable probability that such conduct will be repeated." 50 P.S. §7301(b).

On May 19, 1998, Taylor communicated to his therapists overt plans to commit suicide. He agreed to a voluntary commitment at St. Francis Center. He was an inpatient from May 19, 1998 through May 22, 1998. After three days of treatment, he was discharged. Following his discharge on May 22, 1998, there is no evidence which would allow a jury to find that St. Francis had grounds to commit Taylor.

In his August 1, 2005 Report ("Report"), Dr. Kruszewski never suggests that St. Francis failed to commit Taylor. His criticism of St. Francis is based on the lack of attention to Taylor's dual diagnosis (mental health and substance abuse). He states that St. Francis "incorrectly diagnosed him, could not prepare or implement a treatment plan that was specific for his clinical presentation, improperly counseled him, forced his disengagement from a therapeutic alliance and did not offer any reasonable outpatient mental health/psychiatric after-care" (Report at 7, Sanielevici Ex. L.). He is critical of St. Francis because its mental health professionals needed to keep him in treatment: "The hospital personnel need to continue open lines of dialogue and request that he return and continue with treatment until such a time that they could or would be more responsive to his requests. He should NEVER have been administratively terminated. Instead, the follow-up letter to him should have indicated that the staff was ready and willing to continue to their therapeutic relationship with him to the best of their ability" (Report at 6, Sanielevici Ex. L.).

III.

Plaintiffs rely on *Goryeb v. Department of Public Welfare,* 575 A.2d 545 (Pa. 1990), which held that an action may be brought against a mental health facility by a third person injured by an inpatient whom the facility discharged upon a showing that (1) the physicians who discharged the patient knew or should have known that the patient was a clear and present danger to others and (2) the plaintiffs could foreseeably be affected by a wrongful discharge.

In *Goryeb*, the hospital admitted Geiger because he met the statutory requirement for involuntary emergency admission that he posed a clear and present danger to others or to himself. In the Involuntary Emergency Examination and Treatment application, the police sergeant noted that Geiger was distraught over the termination of his relationship with his girlfriend. Under the statutory scheme, Geiger was released within 120 hours, as required by law, because the hospital did not file a certification for extended involuntary emergency treatment. Subsequently, he shot his prior girlfriend and two others. *Id.* at 546-47.

Suit was brought against the hospital and the hospital physician alleging that the physician was grossly negligent and committed willful misconduct in discharging Geiger when they knew or should have known that he was a continuing danger to himself and to others. The Court held that the hospital and its physician were responsible for the consequences of discharging a seriously mentally disabled person who was a potential danger to others who could foreseeably be affected by the wrongful discharge. *Id.* at 549.

However, *Goryeb* involved a very different fact situation–the release of a patient whom the hospital had grounds to keep in the hospital for additional involuntary treatment. The duty that the Court recognized was a duty not to release a psychiatric patient when it was known or should have been known that the patient was a danger to himself and to others.

Furthermore, *Goryeb's* ruling that the hospital owed a duty to third parties who could foreseeably be affected by a wrongful discharge was based on §7114 of the Mental Health Procedures Act, 50 P.S. §7114, Immunity from civil and criminal liability. The opinion stated that this section imposes liability on a person "participating in a decision to examine, treat or discharge a mentally ill patient within the purview of the Mental Health Procedures Act who commits willful misconduct or gross negligence." *Id.* at 549. Under the language of §7114, this liability extends to others who could foreseeably be affected by a wrongful discharge.

Section 7114 does not apply to the present case for two reasons. First, the Mental Health Procedures Act does not apply to voluntary outpatient treatment. Section 7103 governs the scope of the Mental Health Procedures Act. It establishes rights and procedures only for all involuntary treatment, whether inpatient or outpatient, and for all voluntary inpatient treatment which is defined as treatment that requires full or part-time residence in a facility. Second, §7114 covers only persons who participate in a decision (1) that a person be examined or treated under the Act, (2) that a person be discharged or the restraint otherwise be reduced, or (3) that a person not be admitted to a facility for voluntary treatment or involuntary treatment.

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

ORDER OF COURT

On this 11th day of October, 2007, it is hereby ORDERED that all claims raised by any party against Peoples Oakland, Inc., St. Francis Medical Center, and St. Francis Health System are dismissed.

BY THE COURT:
/s/Wettick, A.J.

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[1] These summary judgment motions were filed after completion of discovery and the filing of expert reports.

[2] "302" refers to Section 302 of the Mental Health Procedures Act, 50 P.S. §7302.

Health Monitoring Systems, Inc. v. University of Pittsburgh

Existence of Contract—Injunction—
Equitable Estoppel

1. Limited injunction entered against University enjoining it from competing with Plaintiff except with regard to the Pennsylvania Health Department.

2. University was involved in delivering services in connection with Relative Outbreak Disease Surveillance ("RODS"), software that monitored hospital emergency admissions to learn whether a particular increase in illness was being observed in various parts of the country. Monitoring this information was thought to detect subtle bio-terrorism.

3. The court found an agreement, albeit not one reduced to a single writing, whereby University and Plaintiff agreed that continued use of RODS by Plaintiff would exclude the University's use thereof. An exception was made regarding the Pennsylvania Department of Health, which could still receive the services from University.

4. The court relied primarily upon the actions of the parties, including but not limited to, Plaintiff's reliance in moving forward, soliciting contracts, borrowing money, renting space, buying equipment, hiring employees and the like.

(Lynn E. MacBeth)

Daniel Patrick Lynch for Plaintiff.
Alan A. Garfinkel for Defendant.

No. GD 07-6724. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

O'Reilly, J., October 16, 2007—This equity matter came before me in Motions Court on May 2, 2007. I conducted 3 days of hearing after which I entered a limited injunction against the Defendant, University of Pittsburgh ("Pitt") enjoining it from competing with Plaintiff, Health Monitoring Systems, Inc., ("HMS") in the area of certain monitoring of emergency room data, and the delivery of services related thereto, with the exception of the Health Department of the Commonwealth of Pennsylvania, and its agencies. Such Monitoring would be accomplished by the use of new software developed by Dr. Michael Wagner, a Pitt Professor, known as Relative Outbreak Disease Surveillance ("RODS").

Specifically, HMS had been formed by two computer scientists, who were employees in the RODS Lab, Steve De Francesco and Kevin Hutchison, at the urging of Dr. Wagner, the Director of Pitt's RODS lab. Dr. Wagner had urged such formation of that business entity because Pitt was about to reduce its presence in the use and distribution of the ASP services utilizing the RODS software that Dr. Wagner, himself, had developed. His concern was an eleemosynary one because he did not want to see the software, and the services being provided to hospitals and agencies using it decline. Dr. Wagner had no proprietary interest in the software and it was "open" on the Internet, that is, anyone could use it without fee or attribution.

BY use of the RODS software, Pitt had been providing ASP services to a variety of users. ASP was defined as a methodology whereby someone knowledgeable with RODS would use it to provide information to those who want it, but which end users would not need to install or manage the software themselves. (N.T. p.p. 19, 20). The RODS lab was providing the ASP services, but when Pitt announced it would stop doing so, HMS would do it. Dr. Wagner urged them to start their own company to keep up the use of the software, and the on-going ASP services. The software is used to monitor Hospital Emergency Admissions so as to learn whether a particular increase in illness was being observed in various parts of the country. The purpose was to see if subtle bio-terrorism might be taking place, and then take action if it was. The importance of such monitoring is obvious, and Dr. Wagner, when Pitt announced the expiration of the RODS Grant, and its intention to discontinue the ASP program, did not want to see the service provided by it fail. He, therefore, urged De Francesco and Hutchison to step in and keep it going along with providing jobs for other RODS employees.

They did so and formed HMS and developed a writing with Dr. Wagner as to how they would handle their use of the RODS software, and the delivery of ASP services. These documents were received as exhibits. Specifically, HMS's Exhibit 5, a series of e-mails between De Francesco, Dr. Wagner and Pitt's Associate General Counsel, Theresa Colecchia. HMS asserts these e-mails are the contract with Pitt. The documents and e-mails exchanged between HMS and Dr. Wagner were forwarded to one of Pitt's attorneys, Assistant General Counsel, Theresa Colecchia, whose area of responsibility included contracts of the type contemplated between HMS and Pitt. Dr. Wagner, Director the of the RODS Lab had agreed to the conditions outlined by HMS for its continuation of the RODS program, and the ASP services. One condition was exclusivity of use by HMS to the exclusion of Pitt. To this, Dr. Wagner responded "looks good, I approve." (N.T, p.p. 98, 99). De Francesco then forwarded these e-mails to Attorney Colecchia, (N.T. p. 100), and solicited a "more formal agreement," but was told by Colecchia that there "was no need to enter into a memorandum of understanding." (N.T. p. 102, II 3-6). De Francesco and Hutchison then proceeded to borrow money, rent space under a 3-year lease, buy equipment, and hire employees, and secure working capital via home equity loans on their homes.

De Francesco explained that exclusivity of providing ASP services as between Pitt and HMS was essential because Pitt's non-profit status, and ability to get grants would give it a significant bidding advantage in seeking contracts for ASP services. De Francesco opined that without exclusivity, HMS would be out of business in 2 years. (N.T. p. 120).

HMS, therefore, moved forward to solicit and acquire contracts with various entities throughout the nation including contractors in Nevada and Ohio.

Pitt, however, changed its position on discontinuing the program, and its participation in the ASP services. This came at the instance of the Pennsylvania Department of Health, which liked and used the program, and did not want Pitt to withdraw.

It was the foregoing scenario that prompted HMS to seek to enjoin Pitt from "reneging" on what it believed to be a contract with it, and the commitment by Dr. Wagner.

I heard testimony, which established the foregoing facts and advised the parties, at page 301-303 of the official transcript as follows:

> Balancing the equity between the planting of the seed by Dr. Wagner which led these men to, you

> know, jump into something, eager young men, a fine thing, and then when it goes to the lawyer to be told, Oh, we don't need a memorandum of understanding, now, you know, if she at that point had said, Well, wait a minute. You guys are really out of control, but those are equitable considerations, and I will see if–well, plus the university is a state related facility.
>
> Maybe they're not that willing, but I'm willing to limit them to the Commonwealth for a period of time. I think that's a fair disposition of this matter, and we have a lot of legal talent that can work on that.
>
> There are equitable considerations here with respect to the position that the plaintiffs find themselves in, but there are also legal considerations in terms of the university's overall policies, what it is doing, and its relationship to the state and its educational mission.

My conclusion was that Dr. Wagner's urging of, and support for an independent entity to continue RODS, and the ASP services had misled HMS. When they expended funds, and undertook other obligations in reliance thereon, including the assurance by Pitt's counsel that a formal Memorandum of Agreement would not be necessary, equity had to give them some relief when Pitt had a change of heart.

Inasmuch as the impetus for Pitt's change came from the State Department of Health, the fairest way to resolve the matter was to permit Pitt to continue to deal with the Commonwealth of Pennsylvania Department of Health, and its agencies, but to give HMS exclusive rights to perform ASP services utilizing the RODS for all other entities for 2 years, as contemplated in the e-mails to Dr. Wagner.

While Pitt has suggested that no true contract exists here, and a formal "non compete" agreement was not entered, this is belied by terms included in HMS's Exhibit 6, a true formal contract with another entity, entered July 1, 2006. (N.T. p.p. 239-242). There, in the recitals to that formal contract, Pitt acknowledges there to be an existing contract with HMS.

Pitt also alleges that *after* the e-mails in HMS's Exhibit 5 were sent, De Francesco specifically asked Collecchia for a non-compete agreement, which she refused. De Francesco denied this, and I credit him in his denial. (N.T. p.p. 149-150, 181).

Further, the facts here certainly give rise to equitable estoppel.

HMS also explained that the RODS would continue to be an open program, but their business would be the *use* of it to bring about a product that would be available in the market place, i.e. their particular brand of ASP services.

I entered the injunction, the text of which had been drafted by the parties. Pitt, in participating in the drafting did not waive its right to appeal, and I do not so find. However, the injunction is carefully drafted to address the equitable interests of both parties. As I had said, I certainly wanted to avail myself of "the legal talent" assembled in my courtroom.

Thus, the foregoing is what I did and why I did it.

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

Dated: October 16, 2007.

Michael J. Colombari and Roberta L. Colombari v. Port Authority of Allegheny County

Preliminary Objections to Petition for Appointment of a Board of Viewers—Eminent Domain

1. Plaintiffs and Defendant had previously entered into an agreement constituting sale of land in lieu of condemnation resulting from a 2000 condemnation action. Thereafter, Plaintiffs alleged a *de facto* taking as a result of alleged actions by Port Authority causing erosion on land still owned by Plaintiffs.

2. After hearing, the Court sustained Preliminary Objections to Plaintiffs' Petition for Appointment of a Board of Viewers, finding there had been no *de facto* taking. It was further ordered that the matter be referred to a Board of Viewers to determine the extent of consequential damages, if any, sustained by Plaintiffs.

3. A mere injury to the landowner's property does not constitute a *de facto* taking; rather, the condition complained of must rise to the level of a permanent invasion of the land amounting to an appropriation of the land. The court found Section 612 of the Eminent Domain Code suggests that a cause of action is recoverable by Plaintiffs for injury to surface support and that said section provides for a determination of consequential damages by the Board of Viewers in this case. Both parties have appealed the order.

(Lynn E. MacBeth)

David J. Barton for Plaintiffs.
Joel L. Lennen for Defendant.

No. GD 06-13906. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Della Vecchia, J., December 11, 2007—This matter comes before the Commonwealth Court on the appeal of the Port Authority of Allegheny County ("PAT/Port Authority") from this Court's Order of July 11, 2007, wherein this Court sustained PAT's Preliminary Objections to the Petition for the Appointment of a Board of Viewers filed by Plaintiffs, Michael J. and Roberta L. Colombari ("Colombari(s)/Plaintiffs"), but further ordered this matter to the Board of Viewers for a determination of consequential damages pursuant to Section 612 of the Eminent Domain Code.

This matter was initiated by the Colombaris' filing of a Petition for the appointment of a Board of Viewers pursuant to §502(E) of the Eminent Domain Code (hereinafter "the Code"). The Colombaris allege a *de facto* taking by PAT of real property owned by the Plaintiffs. In the alternative, the Colombaris demanded consequential damages pursuant to §612 of the Code. The Colombaris are the owners of certain real property located at 2334 Saw Mill Run Boulevard in the Overbrook section of the City of Pittsburgh, Allegheny County, Pennsylvania, known as Lot and Block 95-N-378.

The property is bound on its front by Saw Mill Run Boulevard and to its rear by a stream known as Saw Mill Run. The property on the opposite side of Saw Mill Run is owned and maintained by Defendant, PAT. PAT is a transportation authority organized and existing under the Second Class County Port Authority Act, 55 P.S. §551, *et seq.*

I. BACKGROUND

The Colombaris leased the subject property from 1996 until 1998 when they purchased the property. Plaintiffs operate a business known as Car Xpress thereon. Car Xpress

sells used cars and provides service to other vehicles. The Plaintiffs, throughout PAT's project and the resulting litigation have continued to use the Property for conducting the business of Car Xpress.

On March 29, 2000, the condemnor, Port Authority filed a condemnation action before the Court of Common Pleas of Allegheny County at GD 00-5515. Port Authority is vested with the power to condemn land pursuant to Pennsylvania law, specifically Section 3 of the Act of April 6, 1956, P.L. (1955) 1414, as amended 55 P.S. §533. As a result of Port Authority's Petition, the parties entered into an "Offer and Agreement of Sale of Land in Lieu of Condemnation" (hereinafter "2000 Agreement").

In 2000, the Port Authority began construction of improvements known as Stage II Light Rail Transit Project (hereinafter "Project"). The Project budget is in excess of $400 million dollars. The Project area consists of the reconstruction of the South Busway between the South Bank bus stop and Glenbury Street (a distance of 1.16 kilometers) and the construction of a new Light Rail Transit Line (a distance of 2.24 kilometers) on the abandoned streetcar line. As part of this Project, one station and five stops were constructed thereon.[1]

Stormwater "runoff" from the north portion of the Project is collected and discharged into Saw Mill Run. (*See Id.* at p.5). For the southern portion of the Project, the runoff from the slopes above the Project area is collected by storm sewers that discharge to Saw Mill Run. (*Id.*). Runoff from the slopes adjacent to Saw Mill Run flows directly into Saw Mill Run. (*Id.*).

Alterations to the area generally consist of construction of a light rail system, with necessary appurtenances, slope reconstruction and stabilization, rehabilitation or replacement of existing retaining walls, construction of new retaining walls, *construction of new* stormwater collection systems, *relocation of a sanitary sewer line* and full depth pavement reconstruction on the Busway. (*Id.*, emphasis added).

The Project included reconstruction of the Busway, including minor changes in alignment, reconstruction of the pavement, drainage facilities and walls and removing the old streetcar tracks. (*Id.*, emphasis added). Based on Port Authority's inspection of the Project area and due to the observation that the hillside had experienced "weathering and deterioration of the soil/rock mass which would require stabilization. (*Id.*). The proposed stabilization included removing slide masses and rock falls, re-grading the slopes where necessary and constructing retaining walls where the proposed cross section cannot be accommodated by *re-grading.* (*Id.*, at pg. 5-6, emphasis added).

In constructing the Project, Port Authority primarily utilized its own property, which included the old Overbrook Street Car Line and a portion of the Library Street Car Line, but in addition acquired certain other parcels and right-of-ways. To assist in the construction of the Project, Port Authority filed a Declaration of Taking for a portion of the subject property.

Port Authority asserts that said taking was to acquire a temporary construction easement across a portion of the property and to acquire a portion of the property in fee for the construction of the project. After the filing of the Declaration of Taking, Port Authority and the Colombaris negotiated a full and complete settlement of the eminent domain proceedings.

Pursuant to the settlement, Port Authority paid Colombari an agreed upon sum for the temporary construction easement (hereinafter "TCE") and the acquired property. In exchange, the Plaintiffs granted and sold to Port Authority the acquired property and granted the TCE to Port Authority per the 2000 agreement.

After completion of the Project, Plaintiffs noticed that the hillside from their property sloping down into Saw Mill Run was being eroded. Plaintiff asserts that previous to the Project, the slope was stable for many years. Upon further examination, Plaintiff noticed that the Port Authority had altered the far bank of the stream, installed gabion baskets, changed the grading of the slope of the far bank and installed a round, slightly elevated concrete pad in the creek where one of the drainage pipes coming from the bus/street car right-of-way directs drainage from the project into the stream. Plaintiffs noticed the presence of gabion baskets on his side of the stream, both upstream and downstream of his property, but at the curve of the stream, which affects his property, his bank was left unprotected.

II. PROCEDURAL HISTORY

The Colombaris (Condemnees) filed a Petition for Appointment of Viewers, alleging a *de facto* taking by the Port Authority. On July 7, 2006, Port Authority filed Preliminary Objections to the Petition raising questions of fact. On March 12, 2007, an Order was entered with the consent of the parties continuing the argument on Port Authority's Preliminary Objections until June 19, 2007, at which time this Court would allow testimony from expert witnesses only. (*See* Order).

The party's Preliminary Objections were heard on June 19, 2007. Following the hearing, this Court sustained the Preliminary Objections of the Port Authority to Plaintiffs' Petition for the Appointment of the Board of Viewers finding there had been no *de facto* taking. (*See* Order, dated July 11, 2007). However, it was further ordered that the matter be referred to the Board of Viewers so that Board may hold a hearing on the extent of consequential damages, if any, sustained by the Plaintiffs. (*See Id.*, see also, §612 of the Code).

Port Authority filed their Notice of Appeal on August 9, 2007. Plaintiffs filed a cross-appeal to this Court's Order on August 17, 2007. On August 31, 2007, both parties were ordered to file their Concise Statement of Matters Complained of on Appeal pursuant to Pa. R.C.P. 1925(b). Those matters were timely filed, placing the issues before the Honorable Commonwealth Court of Pennsylvania.

III. ISSUES RAISED ON APPEAL

Plaintiffs raise the following claims of error:

> 1. The trial court erred as a matter of law in sustaining the Port Authority's preliminary objection and determining that a *de facto* taking had not occurred.
>
> 2. The trial court erred as a matter of law in sustaining the Port Authority's preliminary objection and determining that a *de facto* taking had not occurred, where the Court found as a fact that the cause of the physical removal of land was due to the actions of Port Authority and the uncontroverted testimony established Petitioners' use of land had thereby been impaired and diminished.
>
> 3. The trial court erred as a matter of law in sustaining the Port Authority's preliminary objection and determining that a *de facto* taking had not occurred where the court found as a fact that the Port Authority had interfered with Petitioners' right of surface support, and the uncontroverted testimony established that the Petitioners' land was thereby washed away and their use then impaired and diminished.

Defendant raises the following claims of error:

1. Whether the Trial Court erred in overruling, in part, Port Authority's Preliminary Objection to the Petition for Appointment of Viewers, raising Questions of Fact and ordering that the matter of consequential damages be referred to the Board of Viewers.

2. Whether the Trial Court erred in granting Michael J. Colombari's and Roberta L. Colombari's (the "Colombaris") Petition for the Appointment of a Board of Viewers, at least in part, so that the Board of Viewers may hold a hearing on consequential damages, if any, allegedly suffered by the Colombaris.

3. Whether the Trial Court erred in apparently finding that the Colombaris had properly pled and/or stated a cause of action for, and legally and factually supported a claim for, consequential damages pursuant to 26 P.S. §1-612, now Pa.C.S.A. §714.

4. Whether the Trial Court erred in apparently finding that the Colombaris had proven and/or shown recoverable, consequential damages pursuant to 26 P.S. §612, now 26 Pa.C.S.A. §714 and otherwise met the requirements of 26 P.S. §612, now 26 Pa.C.S.A. §714.

5. Whether the Trial Court properly, apparently found that the consequential damages alleged by the Colombaris arose from the exercise of eminent domain and/or a *de facto* taking by Port Authority.

6. Whether the Trial Court erred in failing to consider other potential causes of the consequential damages allegedly incurred by the Colombaris.

IV. DISCUSSION

Preliminary Objections, under Section 406 of the Eminent Domain Code are intended as a procedure to expeditiously resolve all legal and factual challenges to the taking before the parties move to the second distinct proceeding of quantifying damages.[2]

It is well established that the Eminent Domain Code provides the exclusive method and practice governing Eminent Domain proceedings.[3] 26 Pa.C.S.A. §1612, entitled Consequential Damages, finds liability on the part of the condemnor for damages to property abutting the area of an improvement resulting from change of grade of a road or highway, permanent interference with access thereto, or injury to surface support, whether or not any property is taken. Consequential damages arise when property is not actually taken but injury to it occurs as a natural result of the condemnor's lawful act.[4]

To prove a *de facto* taking, a landowner must establish that the entity which allegedly took the property has the power of eminent domain, that exceptional circumstances have substantially deprived the landowner of the beneficial use and enjoyment of his property and that the damages sustained were an immediate, necessary and unavoidable consequence of the exercise of eminent domain powers.

A mere injury to the landowner's property does not constitute a *de facto* taking, rather, the condition complained of must rise to the level of a permanent invasion of the land amounting to an appropriation of the land.

Plaintiffs allege interference with their property rights by Port Authority by redirecting the grading of the land included in the 2000 Agreement in a manner that causes overflowing, flooding and submerging, or causing or exacerbating same, thereby causing harm to the land of the Plaintiffs.

Plaintiffs charge that Port Authority, by removing the surface support of the land of Plaintiffs, has caused an increase of erosion that has caused land to fall into Saw Mill Run. As evidence of this, Plaintiffs contend that previous to the Project, Plaintiffs were able to park approximately eighty (80) motor vehicles on their property and that said erosion has caused the Plaintiffs' loss of their ability to park eight (8) to ten (10) motor vehicles on said property. Plaintiffs fear that future erosion will cause additional loss.

In support of these assertions, Plaintiffs relied on the expert testimony proffered by Victor Dozzi (hereinafter "Dozzi"). Dozzi opined that the Project changed the grading of the land and the character of the stream flow resulting in the erosion of Plaintiffs' property, constituting a taking by the Port Authority.

It was Dozzi's conclusion that, "the structures built by the Port Authority are infringing on the stream forcing the flow towards the Colombari property aggravating the erosion condition along the bank of the stream on the Colombari side where there is no erosion protection." (Tr. at 37-38).

Said erosion is the result of the change in water flow due to the actions of Port Authority, specifically the installation of gabion baskets and an energy dissipating structure used to prevent erosion on its side of the creek, which have caused the flow of water to be directed towards the Colombari property rather than evenly throughout the stream. (*See* Tr. at 38-40).

The Port Authority countered this testimony by calling their expert, Robert Yauger (hereinafter "Yauger"). Yauger testified that evaluations conducted during the design phase of the Project indicated, "that the hydrology in the stream would not cause any worse conditions that existed in that stream bank in the Saw Mill Run Valley. So, therefore, the Port Authority elected not to construct any other facilities other than to protect their own, which was new construction." (Tr. at 117).

Contrary to the testimony proffered by Dozzi, Yauger testified that the Project in no way changed the direction of the flow of water as it relates to the Colombari property or Saw Mill Run generally. (*See* Tr. at 124-130).

In addition, Yauger testified that the erosion and slide experienced by the Colombaris was a direct result of surface water gathered on the Colombaris' parking lot which added weight to an already unstable condition, thus causing the slide. (*See* Tr. at 144-150). Yauger further testified that the property, particularly the slide area, displayed signs of instability prior to the project; the property showed signs of scour,[5] depicted in the photographs introduced into evidenced by exposed tree roots and the absence of earth. (Tr. at 144).

Yauger further testified that a drainage pipe located in close proximity to the slide mass caused additional water drainage to accumulate with the parking lot runoff and create additional weight and pressure to the slide area. (Tr. at 150). Compounding the instability in this area was eight (8) feet of excavation necessary to install a sewer interceptor pipe within the streambed of Saw Mill Run. Said installation was done concurrent with the beginning of the Project but was not done by the Port Authority. (Tr. at 157-58).

Yauger, using data compiled by the United States Geological Survey (hereinafter "USGS") testified that the historic rate of flow of Saw Mill Run which was typically 32.6 cubic feet per second increased to over 150 cubic feet per second during the storm event known as Hurricane Ivan in September of 2004. (Tr. at 162-64).

Yauger offered the aforementioned conditions, i.e., natural scour, the eight feet of excavation, the drainage from the parking lot and the effects of Hurricane Ivan as combining as the likely cause of the instability, resulting in the slide on the Colombari Property. (Tr. at 166-67).

On cross-examination, Yauger was asked to consider whether the rock energy dissipater installed in Saw Mill Run during the Port Authority's Project could have contributed to the damage experienced by the Colombaris. Yauger maintains that it did not.

This Court has trouble reconciling how Colombaris' property remained fairly stable (although experiencing scour) for a period of years dating back to the 1930's without a slide incident as significant as the one experienced by the Colombaris' property after Port Authority worked on the other side of the creek. Although the impact of Hurricane Ivan was no doubt significant, this region has experienced similar acts of nature periodically throughout its history.

The Port Authority's Project, specifically, the rock energy dissipater was found to play a part in the damage sustained by the Colombaris. The location of the dissipater, the gabion baskets and all other feature of the Project were all located on the property of the Port Authority. This Court found that although the existence of said features failed to establish a *de facto* taking, they did cause damage to the Colombaris' property.

The Port Authority's actions created a change in the configuration of its property, which in turn caused consequential damages to Colombaris' property, the damages contemplated by §612. Port Authority argues that the consequential damages are inapplicable because they fail to meet the three (3) instances suggested by the statute: property abutting the area of an improvement resulting from change of grade of a road or highway, permanent interference with access thereto, or injury to surface support. (*See* §612). Both the Eminent Domain Code and case law interpreting same have suggested that a cause of action is recoverable under §612 for injury to surface support.[6]

The Colombaris, as abutting property owners, suffered loss of surface support through the change of grade and reconstruction incident to PAT's project. Although this Court found that there was no *de facto* taking, Section 612 provides for a determination of consequential damages by the Board of Viewers when an entity vested with eminent domain powers causes injury to surface support of abutting property owners.[7]

V. CONCLUSION

Accordingly, for the above set forth reasons, this Court respectfully requests the Commonwealth Court to affirm its Order of July 11, 2007.

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

Date: December 11, 2007.

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[1] *See* Stage II Light Rail Transit Program Erosion and Sedimentation Control Plan Overbrook Line, Segment 2.

[2] *See Mazur v. Trinity Area School Dist.*, 926 A.2d 1260 (Pa.Cmlth., 2007).

[3] *Linde Enterprises Inc. v. Lackawanna River Basin Sewer Authority*, 911 A.2d 658, 661 (Pa.Cmwlth. 2006).

[4] *In Re Mitchell*, 228 A.2d 53, 55 (Pa.Super. 1967).

[5] "Scour is the removal of earth or soil by the action of moving water based on the flow of water across soil or earth mass." (Tr. at 119)

[6] *See Borough of Dickson City v. Malley*, 503 A.2d 1035 (1986).

[7] *See Capece v. City of Philadelphia*, 552 A.2d 1147 (Pa.Cmwlth., 1989).

Commonwealth of Pennsylvania v. Amir Allen

Waiver of Objection to Testimony—Jury Instructions—Alibi Instruction—Adverse Inferences—Eyewitness Testimony

1. Failure to object to testimony at the time given constitutes waiver of objection.

2. Even if made timely, objection on the basis that Commonwealth failed to disclose inculpatory statement of third party witness prior to trial was without merit, where statement at trial was made for the first time at trial and prosecution had never heard it before.

3. Even if admission of inculpatory statement had been error, it was harmless, as other evidence of Defendant's guilt was overwhelming.

4. Instruction to jury on Murder in the Third Degree was proper, where facts adduced at trial could reasonably have led the jury to conclude that Defendant was guilty of that offense.

5. Even if instruction had been improper, it is impossible for Defendant to have been harmed by it as he was convicted of Murder in the First Degree.

6. In alibi instruction to the jury, omission of "even if not wholly believed" language does not render the instruction error.

7. Where witness is available to both parties, failure to call him/her at trial does not warrant an adverse inference charge to jury.

8. Failure to instruct jury to view eyewitness's account "with caution" was not error, where eyewitness knew Defendant very well and had clear and unobstructed, close-up view of Defendant when shooting occurred.

(Margaret P. Joy)

Christopher T. Avetta, Sr. for the Commonwealth.
David B. Chontos for Defendant.

No. CC No. 200507576. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Manning, J., October 10, 2007—The defendant, Amir Allen, was charged by criminal information with one count of Criminal Homicide (18 Pa. C.S.A. §2502). It was alleged in the information that on Friday, April 8, 2005, the defendant shot Robert Yetts, causing his death. The defendant was tried by a jury between October 5 and October 10, 2006. At the conclusion of the trial, the jury found the defendant guilty of Murder of the First Degree. On November 3, 2006, the Court imposed the mandatory sentence of life imprisonment. The defendant filed Post Sentence Motions which were denied by this Court. Thereafter, the defendant filed a timely Notice of Appeal and, pursuant to this Court's Order, a Statement of Matters Complained of an Appeal Pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure. In this, he identified the following seven claims of error:

> 1. The Trial Court erred in denying the defendant's request for mistrial based upon the Commonwealth's introduction into their case in chief a confession that had not been disclosed to the defendant prior to its introduction and when the defendant's

counsel stated in his opening that the defendant had not confessed;

2. The Court erred in instructing the jury on the charge of Third Degree Murder when the defendant specifically asked the Court not to do so;

3. The Court erred in providing instructions to the jury on the defendant's alibi defense;

4. The Court erred in denying the defendant's request for judgment of acquittal based upon the Commonwealth's failure to disprove the defense of alibi;

5. The Trial Court erred when it refused the defendant's request that the jury be given an adverse inference charge based upon the alleged failure of the Commonwealth to present a witness;

6. The Trial Court erred in limiting the cross-examination of detective James McGee; and

7. The Trial Court erred in instructing the jury as to the eyewitness identification of the defendant.

Before addressing the defendant's claims, it is necessary to briefly summarize the facts adduced at trial. The Commonwealth's evidence established that on April 8, 2005, the victim, Robert Yetts, was walking with his wife, Melissa, his seven (7) year old son and was carrying his one (1) year old son. The defendant approached the victim and his family, told the victim to step away from his family, and then shot the victim in the chest. The defendant fled and the victim eventually died from his wounds. Evidence as to motive established that the victim and his wife had separated in May of 2004.

Approximately six (6) months later, she began a relationship with the defendant. On the night of April 7, 2005 the defendant and Melissa were at her house waiting for pizza to be delivered. When the defendant went down to answer a knock at the door, believing it was the pizza being delivered, the victim was there demanding to speak to his estranged wife. A physical confrontation between the victim and the defendant ensued at the conclusion of which the defendant ran from the house. The defendant claimed that the victim had taken a weapon from him during this altercation. The victim then stayed in the apartment with his wife and an argument between them ensued.

After the defendant left the scene, he called the police and indicated there was a domestic disturbance going on at Melissa's apartment. The police went there and asked if her husband was there. She said no, and the police left. The victim eventually left his wife's residence with the understanding that he would return in the morning so they could continue to discuss the future of their relationship. The victim returned the next day at approximately 8:00 a.m. He and his family were walking towards his car when the defendant pulled up, exited his car and shot the victim.

As the victim lay bleeding in the street, Pittsburgh Detective Jill McCoy, happened to drive by and stopped to investigate when she saw the victim fall to the ground. She approached the victim and could not detect a pulse. She summoned other officers and a medic unit. She also spoke with Melissa Yetts who told her that she knew who did this. Yetts provided a description of the vehicle the defendant fled in, but did not immediately identify the defendant by name to Detective McCoy. Neither Detective McCoy nor an off duty firefighter who provided first aid to the victim noticed a weapon on or about the victim. The first uniformed officers on the scene interviewed Melissa Yetts. She told them that the defendant shot her husband, gave a description of the defendant and of the vehicle he was driving, a large, gray Buick.

The Commonwealth also introduced two 911 calls made by the defendant during the early morning hours of April 9 in which he reported that the victim had entered Melissa Yetts house and that he believed that she was in danger. The patrolman who responded to that call also testified. He related that he spoke with Melissa Yetts at around 4:00 a.m. and she reported that her husband was no longer there. The officer did not see any evidence that she had been harmed or that her husband remained in the home. He communicated this information to the defendant, who remained in the area.

The defendant claimed at trial that Melissa Yetts was mistaken in her identification of him as the person she saw shoot her husband. He denied that he shot the victim.

The defendant's first claim concerns Melissa Yetts testimony during direct examination by the Commonwealth when she stated that after he had been incarcerated the defendant called her from the jail. Ms. Yetts recounted that conversation at trial:

> MELISSA YETTS: He told me he was sorry; he didn't mean to hurt anybody. He just meant to scare him.

(N.T. p. 32). The defendant did not object to the admission of this statement at the time it was made. Defense counsel proceeded to cross-examine Ms. Yetts without making any motions or objections concerning this testimony. In addition, two other witnesses testified, both on direct and cross, before defense counsel, upon returning from lunch, moved for a mistrial based on this testimony from Ms. Yetts. In support of this request, defense counsel claimed that the Commonwealth failed to disclose the substance of this telephone call in discovery. Counsel also argued that the defendant's right to a fair trial was also violated because counsel advised the jury in his opening that there was no confession in this matter and that this mid-trial disclosure of this admission prejudiced the defendant.

The Court denied the request for mistrial both because it was untimely, having been made well after the challenged evidence was offered, and because the record established that the Commonwealth had no knowledge of this inculpatory statement before the witness disclosed it while testifying. The assistant district attorney, when asked by this Court why that statement was not included in the discovery, stated "That was the first that I heard of that." (N.T. p. 59) In addition, counsel for the defendant confirmed during argument on the mistrial request that this statement was not referred to in any police reports provided in discovery.

The defendant's failure to make a timely objection and request for mistrial results in waiver of this claim. Pennsylvania Rule of Criminal Procedure 605 (B) provides: "When an event prejudicial to the defendant occurs during trial, only the defendant may move for a mistrial; the motion shall be made *when the event is disclosed.*" (Emphasis added.) Defense counsel argued that the failure to make objection at the time this testimony was offered should be excused because he needed time to review the discovery materials to determine if the statement was, in fact, disclosed. That argument is disingenuous given that counsel, in his opening statement, told the jury that no inculpatory statement had been made. Counsel obviously believed that no inculpatory statement had been made and therefore should have objected when, several minutes later, this witness testified that such a statement was made by the defendant.

Setting aside counsel's failure to timely object, this claim is also substantively without merit. Counsel's reliance on *Commonwealth v. Metzler,* 634 A.2d 228 (Pa.Super. 1993) is completely misplaced. In *Metzler*, the trial judge excluded certain evidence prior to defense counsel opening to the jury. After defense counsel opened to the jury and referred to the

absence of the particular type of evidence excluded by the Court's pre-trial order, the Court changed its mind and admitted the evidence. The facts here are different.

Neither defense counsel nor the Commonwealth knew that Melissa Yetts was going to testify that she had a telephone conversation with the defendant in which he expressed remorse for shooting her husband and stated he only wanted to frighten him. Accordingly, counsel's decision to tell this jury that there was no confession was not the result of anything that the Commonwealth failed to disclose nor was it the result of any pre-trial ruling by this Court. In *Metzler* the parties and the Court knew of the existence of the challenged evidence. They addressed its admissibility before trial and defense counsel had a right to rely on that Court's pre-trial determination that the evidence would not be admitted when he made his opening statement to the jury. The prejudice that accrued to the defendant when the Court reversed itself and admitted evidence that defense counsel told the jury did not exist is obvious.

Here, this Court accepted the prosecutor's representation that he did not know that Ms. Yetts was going to say that the defendant had confessed to her. The absence of such a statement in the police reports provided during discovery corroborates that representation. There was simply no reason to believe that the Commonwealth had prior knowledge that Ms. Yetts was going to testify that the defendant made a statement to her which was tantamount to a confession.

The Commonwealth does not violate the rules of discovery when it fails to disclose evidence of which it has no knowledge. Where the record fails to disclose that the Commonwealth possessed the evidence disclosed for the first time at trial, there is no discovery violation and sanctions are inappropriate. *Commonwealth v. York*, 465 A.2d 1028, 1031 (Pa.Super. 1983). Finally, the Court would note that the evidence in this matter, separate and apart from this inculpatory statement, overwhelmingly established the defendant's guilt beyond a reasonable doubt. The defendant was identified by Melissa Yetts, a woman with whom he had an intimate relationship for a period over six months, as the man she saw shoot her husband in the chest. There was simply no basis to question or doubt her identification of the defendant. The shooting took place during broad daylight and she was no more than a few feet from her husband and the defendant when it took place. The events of the previous evening, which were documented in calls to 911 and not disputed by the defendant, certainly established the defendant's motive for shooting the defendant. The suggestion by the defense that this was a case of mistaken identity is simply riot credible given that the identification was made by someone who knew the defendant well. To the extent that the admission of the inculpatory statement was error, it was harmless beyond a reasonable doubt.

Next, the defendant complains that the Court erred in providing the jury instruction on Murder of the Third Degree. First, the Court would note that it is impossible for the defendant to have been prejudiced by this instruction given that the jury found him guilty of Murder of the First Degree. Moreover, it is well settled that a Court should only instruct a jury on legal principles for which evidence has been presented. *Commonwealth v. Taylor,* 876 A.2d 916, 925 (Pa.Super. 2005) Accordingly, this Court would only have erred in instructing the jury on the charge of third degree murder if there were *no facts* present in this case that could reasonably have led the jury to conclude that the defendant was guilty of Murder of the Third Degree. The record reveals clearly that such a verdict was a reasonable possibility based upon the evidence presented. The element that distinguishes first degree murder from third degree murder is the presence of a specific intent to kill. This jury may well have concluded that the Commonwealth failed to prove that the defendant intended to kill the victim when he shot him. Because malice can be inferred from the use of a deadly weapon on a vital part of the body, there clearly was sufficient evidence of malice here. As the evidence warranted an instruction of Third Degree Murder, it was properly given.

The defendant also challenges the alibi instruction given by the Court. The Court instructed the jury as follows:

> "Now, a defendant cannot be guilty of a crime unless he was at the scene of the alleged crime. The defendant has testified and offered evidence that he was not present at the scene. You should consider this evidence along with all other evidence in the case in determining whether or not the Commonwealth has met its burden of proving beyond a reasonable doubt that a crime was committed and that the defendant himself committed it.
>
> The defendant's evidence that he was not present, either by itself or together with other evidence, may be sufficient to raise a reasonable doubt of guilt in your minds. Keeping in mind that the defendant is not required to prove anything in a criminal case, the burden is solely upon the Commonwealth, and the failure to establish an alibi or that he was in another place, is not necessarily evidence of his guilt."

(N.T. pp. 281, 282). The defendant contends that this instruction was inadequate because it did not include the following language: "Alibi evidence, even if not wholly believed by you may contribute to your finding of reasonable doubt." It is well settled in Pennsylvania that the "not wholly believed" language defendant claims should have been included is not necessary for an alibi instruction to be deemed appropriate. *Commonwealth v. Weinder,* 577 A.2d 1364 (Pa.Super. 1990)

In *Commonwealth v. Saunders,* 602 A.2d 816 (Pa.Super. 1992), the Supreme Court rejected a defense argument that an alibi instruction was erroneous because it did not include the words "even if not wholly believed." The Court in *Saunders* plainly held that those words need not be included in an alibi instruction. The Supreme Court emphasized that an inquiry into the adequacy of a jury charge must not focus on the presence of magic words, but, rather, on the instruction in its entirety. This Court's instruction correctly advised the jury as to the legal principles governing an alibi defense.

Next, the defendant contends that the Court erred in failing to grant a Motion for Judgment of Acquittal. The defendant contends that he was entitled to a judgment of acquittal because the Commonwealth's case relied solely on the jury's disbelief of the defendant. This is not supported by the record in this matter. An eyewitness who was intimately familiar with the defendant testified that she saw him shoot the victim. The jury's verdict was more likely based on their belief of this compelling and credible witness than of their disbelief of the defendant's alibi. Moreover, the evidence was clearly sufficient to support the conclusion that the Commonwealth did disprove the defendant's alibi. This alibi was disproved by the testimony of the eyewitness who saw the defendant shoot her husband. The evidence was clearly sufficient in this matter and the verdict should stand.

The defendant also complains that the Court erred when it denied the defendant's request to give the jury an adverse inference charge based upon the Commonwealth's failure to call, as a witness, the son of the victim who was present when his father was shot. This instruction was clearly not warranted because this witness was available to either party. This defendant was involved in a relationship with Melissa Yetts

and lived with her for a period of time. He clearly knew the identity of this witness as it was her son. Had he wanted this witness to testify, he could have issued a subpoena to bring the witness to Court. As the defendant correctly points out in his Concise Statement, the adverse inference rule can only be invoked when the witness is available only to one party. That was not the case here. This witness was available to any party who chose to call him as a witness.

The defendant's next claim of error alleges that the Court improperly limited the presentation of evidence in the defense case and through the testimony of Detective James McGee. The defendant contended that he wanted to present Detective McGee to establish three facts. First, he wanted to establish that the officer did not obtain a search warrant prior to the search of Mr. Allen's car. Second, he wanted to establish that the detective had knowledge that the defendant was properly licensed to carry a firearm. Third, he wanted to establish that the defendant was initially charged with carrying a firearm without a license but that that charge was later withdrawn. The Court permitted inquiry into the first area but would not permit inquiry into the second and third.

The Court did not permit the defendant to question Detective McGee as to what he knew about the status of defendant's license to carry a firearm. That information would not have been from the detective's personal knowledge but would have been inadmissible hearsay. Moreover, the fact that the defendant did have a license to carry a firearm was established through the defendant's direct testimony. The Commonwealth did not attempt to rebut that testimony and did not argue in the closing arguments that defendant did not have a license to carry a firearm. Frankly, whether the defendant had a license to carry a firearm was irrelevant. The fact that a charge was filed and later withdrawn was also irrelevant. The Court did not err in limiting examination of Detective McGee as it did.

The defendant's final claim of error is that the Court erred in not telling the jury to consider the testimony of Melissa Yetts with caution. In *Commonwealth v. Upsher,* 764 A.2d 69 (Pa.Super. 2000) the Superior Court stated:

> A *Kloiber* charge instructs the jury that an eyewitnesses' identification should be reviewed with caution where the eyewitness: 1) did not have an opportunity to clearly view the defendant, 2) equivocated on the identification of the defendant; 3) had a problem making an identification in the past. *Commonwealth v. Rollins,* 558 Pa. 532, 555 n. 14, 738 A.2d 435, 448 n. 14 (1999). However, identification testimony need not be received with caution where it is positive, unshaken and not weakened by a prior failure to identify.

At 764 A.2d at 77. The evidence at this trial revealed that the victim had a clear and unobstructed view of the defendant during daylight. She was no more than a few feet or yard from the defendant. Most importantly, the defendant was someone *she knew very well.* She had been dating him and was with him the previous evening. She immediately identified the defendant as the man who shot her husband and never wavered in that identification. There was absolutely no basis for the Court to instruct the jury that they should consider Ms. Yetts testimony with caution.

For the reasons set forth above, judgment of sentence should be affirmed.

BY THE COURT:
/s/Manning, J.

Date: October 10, 2007.

Commonwealth of Pennsylvania v. Kevin King

Acquittal of Greater Offense—Meaning of "Consent"—Prosecutorial Misconduct in Non-Jury Trial

1. Acquittal on involuntary deviate sexual intercourse (IDSI) does not preclude finding of guilt on charge of sexual assault, because sexual assault is considered a lesser offense of IDSI, and acquittal of greater offense does not bar retrial (or conviction) on lesser included offense.

2. Evidence was sufficient to support verdict of sexual assault, unlawful restraint and indecent assault.

3. Since meaning of "consent" is known to all persons, statutory definition of sexual assault as sexual activity without the complainant's consent is sufficiently clear to support conviction.

4. Prosecutorial statement that Defendant was "high on crack" in a non-jury trial is not a violation of Defendant's due process rights.

5. Request for recusal was waived (based on trial judge at non-jury trial having also presided at the bail reduction hearing), where issue was not raised at trial.

(Margaret P. Joy)

Stephie-Anna Kapourales for the Commonwealth.
Alan R. Patterson, III for Defendant.

No. CC No. 200507009. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Zottola, J., October 31, 2007—Following a non-jury trial on October 10, 2006, the Defendant, Kevin King, was convicted of sexual assault, unlawful restraint and indecent assault. On January 8, 2007, he was then sentenced to a period of incarceration of not less than forty-eight (48) and not more than ninety-six (96) months. On February 5, 2007, a timely Notice of Appeal was filed on the Defendant's behalf. A Motion for Enlargement of Time Within Which to File An Appeal was filed on May 21, 2007 and granted on May 22, 2007. A timely appeal was then taken. Pursuant to Rule Pa.R.A.P. 1925(b), the Defendant filed a Statement of Matters Complained of on Appeal from which the following is taken verbatim:

> a. The court erred as a matter of law in finding defendant "not guilty" of Involuntary Deviate Sexual Intercourse and finding defendant "guilty" of Sexual Assault.
>
> b. The evidence was insufficient to support the verdict of "guilty" by the Court as to Sexual Assault.
>
> c. The Court erred as a matter of law, disregarding the legislative intent explicitly set forth, noting that penal statutes must be strictly construed to provide fair warning to the defendant of the nature of the prescribed conduct.
>
> d. The Court erred as a matter of law ignoring the statutory presumption that legislature "does not intend a result that is absurd, and impossible of execution or unreasonable."
>
> e. The Court erred as a matter of law in failing to observe recent distinction of terminology within the sexual assault statute where the courts may not

through judicial gloss attempt to either enhance or diminish the consequences of legislature that has expressly been established for that factor.

f. The Court failed by error in finding defendant "guilty" of Sexual Assault by ignoring *Commonwealth v. Rhodes.*

g. The Court erred when it allowed prosecutorial misconduct, defendant's due process of law.

h. The court failed in providing due process where the trier of fact did not recuse himself of pretrial prejudice.

i. The Court erred in due process of law in permitting the absence of Officer Blake, who was "testifying in City Court."

j. The evidence was insufficient to support a verdict of guilty of unlawful restraint.

k. The evidence was insufficient to support the verdict of guilty as to indecent assault where sexual contact was rendered by "accused" and respecting the finding of not guilty of the forcible compulsion element, the act becomes consensual.

l. The Court erred in law where the defendant was acquitted of IDSI with forcible compulsion and the essential element of sexual assault; consent, service as a bar to acquittal of sexual assault where no other exclusive element exist.

To the extent the Defendant presents a cognizable claim for appeal, this Court addresses them below.

DEFENDANT IS NOT GUILTY OF IDSI;
DEFENDANT IS GUILTY OF SEXUAL ASSAULT

On October 11, 2006, a non-jury trial was held before the Honorable John A. Zottola. The Defendant was found guilty of sexual assault, unlawful restraint, and indecent assault. The Defendant was found not guilty of involuntary deviate sexual assault.

The Defendant alleges the court erred as a matter of law in finding defendant 'not guilty' of IDSI, yet 'guilty' of Sexual assault. Pennsylvania defines Sexual Assault under 18 Pa.C.S. §3124.1; it occurs when a person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent. *Id.* Pennsylvania defines Involuntary Deviate Sexual Intercourse under 18 Pa.C.S. §3123; it occurs when a person engages in deviate sexual intercourse with a complainant by forcible compulsion and/or by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution. *Id.*

While the force required for 'forcible compulsion' under IDSI encompasses a lack of consent, courts interpret it as requiring something more. *Commonwealth v. Buffington*, 828 A.2d 1024, 1031 (Pa. 2003). Guilt of IDSI requires an extra element of forcible compulsion. *Buffington*, 828 A.2d at 1031. The Sexual Assault statute was enacted to fill a loophole left by the IDSA statute; it criminalizes non-consensual sex where the perpetrator employs little or no force. *Commonwealth v. Pasley*, 743 A.2d 521, 523 (Pa.Super. 1999). Though Sexual Assault is considered a lesser offense of IDSI, as a general rule, the acquittal of a greater offense does not bar retrial [and therefore conviction] on lesser included offense. *Buffington*, 828 A.2d at 1032.

A finding of the Defendant's lack of guilt under IDSI does not preclude a finding of Defendant's guilt under Sexual Assault. Therefore, Defendant's claim must fail.

SUFFICIENCY OF THE EVIDENCE

Connie Coleman testified to the following facts: on April 9, 2005, she was with the Defendant in his private home. (N.T. pp 14, 28)[1] The Defendant had been drinking early in the morning and smoking marijuana. (N.T. pp 23) After spending a period of time together, the Defendant told Ms. Coleman he wanted her to smoke crack cocaine while he performed oral sex on her. (N.T. pp 27) He also wanted Ms. Coleman to learn to smoke crack cocaine with him. (N.T. pp 28) He moved closer in physical proximity to Ms. Coleman. She told him to 'talk to the hand.' He responded by calling her obscene names. Ms. Coleman began to cry; the Defendant told her she had three strikes, on the third strike he would kill her. He began touching her body, and asked her to remove her clothes. Ms. Coleman stated she did not wish to remove clothing. (N.T. pp 30). The Defendant demanded Ms. Coleman perform oral sex on him. (N.T. pp 31) When she refused, the Defendant told her that was her second strike. The Defendant continued to smoke crack cocaine; he yelled obscene names at Ms. Coleman. (N.T. pp 32) After informing Ms. Coleman that she improperly performed the oral sex, the Defendant told her she was going to die. Ms. Coleman responded by saying she did not come to the Defendant's residence to touch penis. Ms. Coleman never consented to touching his penis. (N.T. pp 33) The Defendant blocked Ms. Coleman's exit attempts by standing in front of his apartment door. (N.T. pp 38) Wherever Ms. Coleman moved in the Defendant's home, he followed her at a near distance. (N.T. pp 40) He refused to allow her to use this door numerous times. (N.T. pp 38 to 40)

The Defendant challenges the sufficiency of the evidence to support the convictions of Sexual Assault, Unlawful Restraint, and Indecent Assault. A challenge to the sufficiency of the evidence must be reviewed in light of the following standard: "In determining if the evidence is sufficient to sustain a criminal conviction, [the test is] whether accepting as true all of the evidence of the Commonwealth, and all reasonable inferences arising therefrom, upon which the jury could properly have reached its verdict, was it sufficient in law to prove beyond a reasonable doubt that the appellant was guilty of the crime of which he stands convicted." *Commonwealth v. Burton*, 301 A.2d 599, 600 (Pa. 1973).

Pennsylvania defines Sexual Assault under 18 Pa.C.S. §3124.1 (2007); the offense occurs when a person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent. *Id.* Pennsylvania defines Unlawful Restraint at 18 Pa.C.S. §2902 (2007); the offense occurs when an actor knowingly and unlawfully restrains another in circumstances exposing her to the risk of serious bodily injury, or knowingly held another person in a condition of involuntary servitude. *Id.* Pennsylvania defines Indecent Assault under 18 Pa.C.S. §3126(a)(1) (2007); the offense occurs when an actor has indecent contact with the complainant or causes the complainant to have indecent contact with the actor without the complainant's consent, through the threat of forcible compulsion, or through forcible compulsion. *Id.*

Ms. Coleman testified that the Defendant told her that a failure to perform oral sex on him would result in her death. She testified that she never consented to sexual activity with the Defendant; the Defendant forced Ms. Coleman to perform oral sex on him numerous times through threats against her life. (N.T. pp 31 to 33)

It is within the discretion of the finder of fact to believe all, part, or none of the evidence. *Commonwealth v. Lyons*, 833 A.2d 245, 258 (Pa.Super. 2003). The finder of fact was free to believe Ms. Coleman's testimony and determine she never consented to sexual activity with the Defendant, sexu-

al activity with the Defendant occurred after the Defendant threatened Ms. Coleman's life, and that the Defendant prevented Ms. Coleman's exit from his apartment. The evidence presented by the Commonwealth was sufficient to sustain Defendant's convictions for Sexual Assault, Unlawful Restraint, and Indecent Assault.

Therefore, the Defendant's claim must fail.

LEGISLATIVE INTENT

The Defendant alleges that he cannot be found guilty of Sexual Assault under 18 Pa.C.S. §3124.1 because the statute fails to give fair warning of the conduct it exists to prevent. An element of §3124.1 is sexual activity without the complainant's consent. *Id.* The Defendant argues that this lack of consent is inadequately defined; it is impossible to ascertain the type of conduct the statute proscribes.

Ms. Coleman testified that when the Defendant initiated sexual activity, she initially refused to participate and cried. (N.T. pp 30, 33) The meaning of 'consent' is known to all persons. In the context of sexual activity, consent assumes a willingness to engage in intimate relations. The statute is clear; fair warning of the proscribed conduct is given.

Therefore, the Defendant's claim must fail.

STATUTORY PRESUMPTION

The Defendant fails to put forth a discernable argument or cognizable claim under appeal item 'd.' Therefore, the Defendant's claim must fail.

JUDICIAL GLOSS

The Defendant fails to put forth a discernible argument or cognizable claim under appeal item 'e.'

Therefore, the Defendant's claim must fail.

COMMONWEALTH V. RHODES

The Defendant alleges the court erred in finding him 'guilty' of Sexual Assault despite *Commonwealth v. Rhodes,* 510 A.2d 1217 (Pa. 1986).

In *Rhodes*, the trial court found the defendant guilty of rape, statutory rape, IDSI, indecent assault, indecent exposure, and corruption of minors. *Id.* at 1219. The Superior Court found the evidence insufficient to uphold the conviction of rape. It remanded the case for new sentencing; it was uncertain whether the trial court's sentences for IDSI and corruption of minors would have been the same had the rape conviction been set aside. *Id.* at 1220. The Supreme Court found the evidence sufficient to establish the rape conviction. *Id.* The Court then reinstated the trial court's judgments of sentence. *Id.* at 1231.

Rhodes has no bearing upon the present case. Thus, Defendant's claim must fail.

PROSECUTORIAL MISCONDUCT

On October 11, 2006, a non-jury trial was held before the Honorable John A. Zottola. During trial, the attorney representing the Commonwealth stated that the Defendant was 'high on crack.' (N.T. pp 131 to 132) The defendant alleges prosecutorial misconduct violated his rights under Due Process guaranteed by the 14th Amendment.

A non-jury trial conducts direct examination of the Defendant only in front of the trial judge. During questioning, the Court specifically stated the advantage of a non-jury trial is that the judge can filter out any information that has no legal relevance and not attribute any significance to it. (N.T. pp 118 to 119) The same principle applies to any potentially prejudicial statements made by counsel in front of the trial court. As the factfinder, the judge is presumed to disregard any inadmissible evidence or statements. *Commonwealth v. Brown*, 476 A.2d 969, 971 (Pa.Super. 1984).

Therefore, the Defendant's claim must fail.

RECUSAL

On October 11, 2006, a bail reduction hearing was held before the Honorable John. A. Zottola. Following this hearing, the Defendant's non-jury trial was held also before Judge Zottola. The Defendant alleges that because the trial court was subjected to certain photos at the bail reduction hearing, the trial court was unavoidably biased and unable to weigh the evidence in a neutral manner during his trial.

The Defendant's trial finished; a verdict and judgment were handed down. The issue of recusal was not raised at trial. The Defendant waived his right to have a judge be disqualified. The only exception to this rule occurs if the Defendant shows that the alleged prejudicial evidence incurred a different result in his case. *Commonwealth v. Tharp,* 830 A.2d 519, 534 (Pa. 2003).

Because the Defendant fails to meet this burden, his claim must fail.

DUE PROCESS

During his trial, the Defendant stated he was going to call Officer Blake to testify. At the time, Officer Blake was testifying in City Court in a different matter. No issue regarding Officer Blake's absence was preserved in the trial record. (N.T. pp 137 to 138)

The Defendant instead had Melissa Coleman re-called, in an effort to show whether or not the victim, Connie Coleman, was intoxicated or showed signs of intoxication after the alleged sexual incidents with the Defendant. (N.T. pp 137 to 138) Melissa Coleman testified she met the victim at a gas station, where the Defendant had let Connie Coleman finally out of his car. (N.T. pp 138 to 139) Melissa Coleman was in contact with the victim before Officer Blake, and had the ability to notice any signs of intoxication the victim possessed at an earlier time than the Officer.

Because the Defendant procured testimony on the substantive issues he intended Officer Blake's testimony for, his claim must fail.

Based on the aforementioned reasons, the Defendant's Matters Complained of on Appeal must fail.

BY THE COURT
/s/Zottola, J.

[1] N.T. refers to notes of Non-Jury Trial dated October 10, 2006.